



# **CORRUPTION AND CRIME COMMISSION**

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

**THE HON ANTHONY DAVID MCRAE MLA  
AND MR REWI EDWARD LYALL**

**21 November 2008**

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Dear Mr President  
Dear Mr Speaker

In accordance with sections 84 and 93(1) of the *Corruption and Crime Commission Act 2003*, the Commission presents the *Corruption and Crime Commission Report on the Investigation of Alleged Public Sector Misconduct in Connection with the Activities of Lobbyists and Other Persons: The Hon Anthony David McRae MLA and Mr Rewi Edward Lyall*.

Yours faithfully

*Len Roberts-Smith*

The Hon L W Roberts-Smith RFD QC  
**COMMISSIONER**

21 November 2008



## ABBREVIATIONS AND ACRONYMS

ABC	Australian Broadcasting Commission
“the Act”	<i>Corruption and Crime Commission Act 2003</i>
ALP	Australian Labor Party
“Canal Rocks”	Canal Rocks Pty Ltd
“the Commission” or CCC	Corruption and Crime Commission
CPSS	Commissioner of Public Sector Standards
(Cth)	Commonwealth
DPI	Department for Planning and Infrastructure
EISC	Economics and Industry Standing Committee
“the FOI Act”	<i>Freedom of Information Act 1992</i>
LPS	Local Planning Scheme (Previously known as Town Planning Scheme (TPS).]
MLA	Member of the Legislative Assembly of the Parliament of Western Australia
MLC	Member of the Legislative Council of the Parliament of Western Australia
ODP	Outline Development Plan
OPSSC	Office of the Public Sector Standards Commissioner
PMA	Precious Metals Australia
“the Privileges Committee”	Procedure and Privileges Committee of the Legislative Assembly of the Parliament of Western Australia
“the PSM Act”	<i>Public Sector Management Act 1994</i>
“the Shire”	Shire of Gingin
“the SD Act”	<i>Surveillance Devices Act 1998 (WA)</i>
SD	Surveillance Device(s)
TI	Telecommunications Intercept (or Interception)
“the TI Act”	Commonwealth <i>Telecommunications (Interception and Access) Act 1979</i>
TPS	Town Planning Scheme (Now known as Local Planning Scheme (LPS).]
WAPC	Western Australian Planning Commission
WMC	Western Mining Corporation



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# EXECUTIVE SUMMARY

## Background

- [1] During 2005 and 2006 the Corruption and Crime Commission (“the Commission”) was investigating allegations of misconduct by public officers in connection with the proposed Smiths Beach<sup>1</sup> Development at Yallingup. The investigation touched on the role of Mr Brian Thomas Burke and Mr Julian Fletcher Grill as lobbyists and consultants acting for the developer, Canal Rocks Pty Ltd (“Canal Rocks”), and their influence or attempts to influence public officers involved in the Smiths Beach Development.
- [2] That had itself evolved out of (and remained part of) an original investigation 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.
- [3] As the Smiths Beach investigation progressed, information which became available to the Commission revealed possible misconduct on the part of a number of public officers in respect of a widening range of other matters. In February 2006, under section 26 of the *Corruption and Crime Commission Act 2003* (“the Act”), Commissioner Hammond had authorised the investigation to cover all further matters arising out of the proposed Smiths Beach Development. One of these concerned Mr Anthony David McRae, who between 26 May 2006 and 26 February 2007 was a member of State Cabinet, Between 26 May and 13 December 2006, the period relevant to this report, Mr McRae was the:
- Minister for Disability Services;
  - Minister for Citizenship and Multicultural Interests; and
  - Minister Assisting the Minister for Planning and Infrastructure.

It is with Mr McRae’s conduct as Minister Assisting the Minister for Planning and Infrastructure that this report is concerned.

## Mr Anthony David McRae

### Alleged Misconduct

- [4] On 11 October 2006 the Commission intercepted a telephone call to Mr Grill by Mr McRae. That gave rise to a reasonable suspicion that misconduct may have occurred in relation to the exercise of Mr McRae’s Ministerial authority concerning a proposed development at Moore River. That was accordingly made a specific proposition for investigation under section 26 of the Act.<sup>2</sup> The general scope and purpose of that investigation was to enable the Commission to make an assessment and form an opinion as to whether misconduct by Mr McRae had or may have occurred in regard to his

relationship with Mr Grill. That investigation thus also evolved out (and remained part) of the original investigation 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.

- [5] The investigation concerning Mr McRae was prompted by one intercepted telephone conversation. The question ultimately was whether or not Mr McRae had engaged in misconduct (within the meaning of section 4 of the Act) in that conversation.
- [6] The Commission has jurisdiction only to investigate possible misconduct by public officers. It, therefore, has no jurisdiction to investigate whether or not non-public officers, such as Mr Burke and Mr Grill, have engaged in misconduct. However, the conduct of persons who are not public officers, and matters concerning them, may require examination and consideration by the Commission to ascertain whether, and if so, to what extent, those have a bearing on the conduct of public officers. Also, to understand the purpose of, and what was said in the telephone conversation of 11 October 2006, it is necessary to understand the context in which it occurred including the political connections, activities and personalities of those involved, their objectives or interests and the pressures operating upon them.

#### **Mr Burke and Mr Grill: Activities as Lobbyists**

- [7] Mr Burke and Mr Grill each have a long association with the Australian Labor Party (ALP) (Western Australian Branch) and have both claimed to have continuing influence within it. They have utilised their extensive political contacts in their work as lobbyists and consultants.
- [8] “Lobbying” is the process by which individuals or groups seek to represent their views to government representatives, and to influence or persuade government decision-making.
- [9] Lobbying is a recognised and accepted part of Australia’s political decision-making. The Commission acknowledges that it is an important aspect of the democratic process. The influences or pressures which may be brought to bear upon public officers who are lobbied in particular matters, are diverse. They are often innocuous. Sometimes they can be inappropriate, or even criminal. In the final analysis, it is how public officers respond to lobbying of whatever kind, that is important.
- [10] Throughout the Commission public hearings in February 2007 the intra-party influence of Mr Burke and Mr Grill was revealed to be of significance. Both had considerable networks of friends, former colleagues and factional allies within their own Party.
- [11] Mr Burke has been described as a “power-broker” and a significant player in factional ALP politics.<sup>3</sup> As a senior figure within the “Old Right” faction of the

ALP (Western Australian Branch), Mr Burke boasted of his control over their voting power in Caucus.<sup>4</sup>

- [12] Mr Burke has openly claimed to several politicians that he had been instrumental in them securing a seat in Parliament. Mr Grill too, was regarded as wielding considerable influence within the ALP.
- [13] The Commission emphasises that it expresses no opinion about the truthfulness or otherwise of these and other such claims by Mr Burke and Mr Grill. Their relevance for present purposes is simply that they were made and so fed into the perceptions of others about their capacity to influence. Nor does the Commission infer or suggest in this report any misconduct or impropriety on the part of those persons named by Mr Grill or Mr Burke.
- [14] Mr Burke and Mr Grill also maintained links with government representatives independent of the needs of their lobbying clients. They were both active in party political decision-making, and used these political links to benefit their business where they could.
- [15] Assisting Parliamentarians and candidates with fund-raising was doubly rewarding for Mr Burke and Mr Grill as lobbyists and consultants. Not only might the recipient of the funds be inspired to feel gratitude towards them, it was one of the most effective methods Mr Burke and Mr Grill had for introducing their clients to decision-makers.
- [16] One common way for Members of Parliament and candidates to raise electoral funds is through events such as dinners, breakfasts or “drinks”. Such events promise informal access to a Minister or similar personage as an incentive for members of the public to purchase often expensive tickets. Money raised from ticket sales goes to a selected cause, usually the host’s electoral “war chest”.
- [17] For clients with potentially millions of dollars riding on a government decision, parting with a few thousand to spend an evening in the company of government representatives and Ministers can be seen as money well spent.

### **Mr McRae and Fund-Raising**

- [18] Mr McRae was elected to the Legislative Assembly of the Parliament of Western Australia as the Member for the electorate of Riverton in February 2001 and re-elected in February 2005. Mr Grill has been a “warm acquaintance”<sup>5</sup> of his over the last 20 years. He and Mr Grill had various discussions over time, after Mr McRae’s election to Parliament, about his possible candidacy for Ministerial appointments.
- [19] During the relevant period Mr McRae’s electorate of Riverton was a marginal ALP seat. The requirement to pursue funding for election campaigns was always a priority.

- [20] One fund-raising strategy employed by Mr McRae was the selling of tickets to dinner events at which the Premier and other senior Parliamentarians would appear. In September 2004 Mr McRae held a successful dinner of this kind at Friends Restaurant.
- [21] Mr McRae had scheduled another of these dinners to take place on 19 October 2006 and had hoped to sell at least 50 tickets priced at \$275 each. After costs had been deducted, the dinner would have generated in excess of \$10,000 for the Riverton campaign account. Unfortunately for Mr McRae, the timing of this dinner coincided with a number of other ALP fund-raising events.<sup>6</sup> This resulted in a lack of interest and a low number of ticket purchases.

### **The Gingin Matter**

- [22] In 2006 Mr David Lombardo and his family company, Terana Holdings Pty Ltd, owned a large parcel of land located in the Shire of Gingin ("the Shire") which, since 2001, had been intended for subdivision and development under the name Millbank on Moore. Stage 1 of the development had been approved by the Shire Council, and Stages 2 and 3 had received resolutions of support from the Shire.<sup>7</sup>
- [23] The draft Outline Development Plan (ODP) for Millbank on Moore was advertised for a 28-day period in May and June 2006, including a notice in the local papers, letters to adjoining property owners and relevant agencies. The ODP showed site-specific detail and a subdivision layout consistent with the Shire's proposed zoning of "General Rural". "Only one response was received, by the Department of Environment, providing advice on a lot boundary that was subsequently rectified".<sup>8</sup>
- [24] In early August 2006 the Western Australian Planning Commission (WAPC) recommended modifications to the Shire's draft Local Planning Scheme 9 (LPS9). Among the recommendations, the land at Millbank on Moore was to be zoned "General Rural 20" and "General Rural 30" rather than just "General Rural". Zoning designations like these control the lot sizes that are allowed within a development or subdivision plan. As the Millbank on Moore ODP lot sizes were consistent with the local planning strategy, the WAPC had not considered this to be a substantial modification.<sup>9</sup>
- [25] The Hon Adele Farina MLC, Parliamentary Secretary to the Minister for Planning and Infrastructure during the relevant period, was asked by the Minister to review the WAPC submission. Ms Farina did so and, with few exceptions, supported the WAPC recommendations. One of the exceptions related to Millbank on Moore. Ms Farina's advice was that the modifications were substantial and required readvertising.<sup>10</sup>
- [26] The Hon Alannah MacTiernan MLA, during the relevant period, was the Minister for Planning and Infrastructure. Due to a perceived conflict of interest, the Minister had devolved all responsibility for the Shire of Gingin's LPS9 to the Acting Minister.

- [27] On this basis, all matters relating to LPS9, including that of Millbank on Moore, would be the responsibility of the Acting Minister for Planning and Infrastructure, Mr McRae.
- [28] On 9 August 2006 Mr McRae was briefed by officers from the Department for Planning and Infrastructure (DPI) on the amendments to LPS9. Mr McRae signed off his acceptance of the WAPC changes the same day, incorporating Ms Farina's advised amendments.<sup>11</sup>
- [29] The requirement to readvertise was a set-back for the Millbank on Moore development. If readvertising were to take place, the resultant delays would necessitate the termination of existing contracts at considerable inconvenience to the developer and purchasers of land. Mr Lombardo was of the view that the previous advertising for the proposal had been sufficient.<sup>12</sup>
- [30] In August 2006 Mr Lombardo retained the lobbying services of Mr Grill and Mr Burke to seek reversal of Mr McRae's decision.
- [31] Mr Grill and Mr Burke assisted Mr Lombardo in writing a letter of appeal to the Minister. Mr Grill followed this up with telephone calls to Mr Rewi Edward Lyall, Chief of Staff to Minister McRae. Mr Lyall agreed to meet with Mr Grill and Mr Lombardo on 8 September 2006. In the month that followed the meeting, Mr Grill and Mr Lyall spoke several more times about the Lombardo matter. Mr Lyall was agreeable, during these calls, to keeping Mr Grill informed of the progress of the matter through the Minister's office.
- [32] Mr Philip Woodward, a DPI officer, also participated in the meeting with Messrs Grill, Lombardo and Lyall on 8 September 2006. Mr Burke made telephone calls to Mr Woodward, both before and after the meeting, in which Mr Burke spoke in favour of Mr Lombardo's case. Mr Woodward agreed to receive a further submission from Mr Lombardo during a call with Mr Burke on 12 September 2006.<sup>13</sup>
- [33] Ultimately, a Ministerial briefing note recommending reversal of the previous decision was prepared by DPI and sent to Mr McRae. On 9 October 2006 Mr McRae accepted that advice and reversed his earlier decision – which was the outcome sought by Mr Lombardo. That decision was made by Mr McRae entirely properly.
- [34] On 10 October 2006 Mr Lyall telephoned Mr Grill to advise him that Mr McRae had considered the issue and that the relevant correspondence to Mr Lombardo was being drafted. Mr Lyall went on to say that Mr Lombardo would be "relatively satisfied" but he could not go into further detail as the Minister "hasn't actually signed the letter yet".<sup>14</sup>
- [35] The following morning, 11 October 2006, independently of the Acting Minister's office, DPI sent a fax to the Shire containing a letter dated 10 October 2006. Addressed to the Chief Executive Officer, the letter informed the Shire that Mr McRae had reconsidered his decision regarding the

modifications to LPS9 relating to Millbank on Moore and that further advertising would not be required.<sup>15</sup>

### **Mr McRae and Mr Grill**

- [36] Mr McRae's fund-raising dinner was to be held on 19 October 2006. He and his staff were hoping that about 65 to 70 people would attend the dinner at \$275 each. But there had been few acceptances. By the morning of 11 October 2006 they had only about 10 people – including staff and a couple of Ministers, who would be non-paying guests. Members of his electorate office staff were concerned. They raised their concerns with Mr McRae when he came in that morning. They wanted to talk about it with someone who knew something about fund-raising, but none of them knew anyone who did. Mr McRae then said he would telephone Mr Grill. He went into his office and had the following telephone conversation.

**GRILL:** *Hello?*

**MCRAE:** *Julian, it's Tony McRae, can you talk?*

**GRILL:** *Yes, Tony, I can.*

**MCRAE:** *Oh, how are ya?*

**GRILL:** *Yeah, good mate, good.*

**MCRAE:** *Er, did we make any progress with your request?*

**GRILL:** *Uhm, I understand from Rewi that, uhm, there was, ah, a, ah, a brief came up to up to you and you were going to sign off on it which would, ah, probably make our client reasonably happy.*

**MCRAE:** *Okay.*

**GRILL:** *Now, Rewi couldn't go ah, into anymore detail than that so I'm not too sure what that meant but ah.*

**MCRAE:** *I haven't seen it as yet so.*

**GRILL:** *You haven't, right, uhm.*

**MCRAE:** *But I, I didn't expect it for, you know within, I'd, I guess within next week or two I'd see it.*

**GRILL:** *I, I'm sorry. You didn't expect it?*



**MCRAE:** I didn't expect immediately. I thought I'd see it you know some time within the next week or two.

**GRILL:** Oh right, yeah, well.

**MCRAE:** But I'll, I'll

**GRILL:** Rewi thought.

**MCRAE:** Look, I'll track that down. I'll, now that I've had this conversation I'll ask.

**GRILL:** Yeah.

**MCRAE:** I'll ask where it is.

**GRILL:** Rewi thought something might disturb you this week and you, you'd sign it next week, you know go ahead early next week, but anyhow uhm, if you could track it down that'd be excellent.

**MCRAE:** Alright.

**GRILL:** Yeah. So ah, look thanks for the concern on that ah, I hadn't spoken to you directly but uhm

**MCRAE:** Oh no I thought it was important to get the process done first, you know

**GRILL:** Yeah.

**MCRAE:** and, and get, get all the sort of nuts and bolts sorted so that I could actually, 'cos with the, the State Administrative Tribunal in place now that procedural stuff is absolutely essential to get right.

**GRILL:** Yes.

**MCRAE:** Yeah.

**GRILL:** Yeah, I think that's true. Ah, we ah, I mean we, we, we wouldn't try and advocate to anything that would ah, embarrass you or

**MCRAE:** No I know that mate.

**GRILL:** *ah endeavour to uhm, uhm downgrade uhm, you know your authority or position.*

**MCRAE:** *No, no I understand that.*

**GRILL:** *Yeah. Okay. Now I've got the invitation to your show and*

**MCRAE:** *Now, I was just ringing, I*

**GRILL:** *Lesley and I will go along.*

**MCRAE:** *Yeah.*

**GRILL:** *Yeah.*

**MCRAE:** *Yeah. Well I just was, I was just ringing about that as, as another thing on my list of things I was interested to ask you about. I, I just wanted your opinion. I've got uhm, we've got ah, well at a, at a, at a personal level I've got to make a decision as to whether I can still do it. I've got a pressing ah, request that I think is nearly going to be, well its going to be very difficult to push back, ah, that, that conflicts with that day. That's running on one side of my thinking and on the other side is what I would say, Julian, was a, a sort of light to moderate take-up of that invitation. Now I know some, it's, it's normal for these invitations to be sorted out the week before so you know I'm not kind of surprised that we've only got a light to moderate take-up at the moment.*

**GRILL:** *Mm hm.*

**MCRAE:** *But I've got to make a decision probably today as to whether to, to go with this Ministerial, uhm, pressure which means it'll be, I'll be out of town.*

**GRILL:** *Oh, I see, right.*

**MCRAE:** *Ah, ah, or to persist in, in you know a moderately attended uhm, event.*

**GRILL:** *What about then, if you've got a few doubts about it what about if uhm, ah, ah, you postpone this one*

**MCRAE:** *Mm.*

**GRILL:** *and ah, you and I get together with Brian*

**MCRAE:** *Mm.*

**GRILL:** *and we'll try and arrange something, ah, that's, ah, a bit better attended. How many do you want along?*

**MCRAE:** *Mate if I, I, I think quite frankly that if you're doing something with the Premier, ah, and, and with the range of things that intersect either with the Premier or with my Portfolio interests or a range of other Ministers who've I've got coming that you really should be able to get eighty people there.*

**GRILL:** *Well you can do it that way or you can, what, what're charging?*

**MCRAE:** *Two seventy-five.*

**GRILL:** *Two seventy-five. You can do it the other way like we're doing it with ah, ah, ah, Di Guise who came to see us. We just have sixteen people, ah, and we charge them all two grand.*

**MCRAE:** *Mm. Yep.*

**GRILL:** *So that's another way of doing it and that's easier in many ways for*

**MCRAE:** *Corporates.*

**GRILL:** *Brian and I for*

**MCRAE:** *Yeah.*

**GRILL:** *corporate stuff, yeah.*

**MCRAE:** *Yep.*

**GRILL:** *So it's because it's*

**MCRAE:** *And who was the*

**GRILL:** *What, what would be my problem*

**MCRAE:** *Who was the headline act there, mate?*

**GRILL:** *That's the Premier and Alannah will be along.*

**MCRAE:** *Mm.*

**GRILL:** *So what we've done is we've just sort of, a sort of a northern, Di's a northern corridor woman.*

**MCRAE:** *Mm.*

**GRILL:** *We've invited essentially our clients in the planning arena that're in that north west corridor. Did I say north east? I meant north west.*

**MCRAE:** *Mm.*

**GRILL:** *So that's what we've done there. Now I mean I haven't spoken to Brian so I don't know what he would be prepared, to what degree he'd be prepared to cooperate but I think he would probably cooperate and we could do something.*

**MCRAE:** *You see I've tradit, I've, I reckon I've got a, I've got ah, probably some people who are already committed to turning up next week who would probably convert to a smaller, higher-cost thing anyway.*

**GRILL:** *Yeah. Well I, you see what people, when they ask us they say well look, will I actually get a chance to talk to the, to the Premier or*

**MCRAE:** *Mm.*

**GRILL:** *can I sit next to Alannah or*

**MCRAE:** *Mm.*

**GRILL:** *You know whatever. Ah, I think if you can actually offer that sort of access*

**MCRAE:** *Mm.*

**GRILL:** *It's not like going to one of these big shows where, you know there's ah, three hundred people there and no one gets a chance to talk to Alan.*

**MCRAE:** *What*

**GRILL:** *So where the*

**MCRAE:** *What I do mate, what we, I have done with these in the past is ah, is a typically about ten tables of about eight people each.*

**GRILL:** *Yeah, I've been to a couple of them and they're excellent.*

**MCRAE:** *And, and you rotate the Ministers.*

**GRILL:** *Yeah. No, they work very well*

**MCRAE:** *Ah and, and I just, you sort of, you sort of get underneath that two thousand dollar corporate level and you get to people who'll, anyway, I mean I, I take your point I think that's a, a very good option actually.*

**GRILL:** *So uhm, I'll ah, I'll mention it to Brian, so when've you got to make the decision?*

**MCRAE:** *Oh, on the basis of the conversation that you and I are having, I, I've gotta say I was a fifty-fifty today because I've got this pressing, ah thing in disabilities that I've gotta do.*

**GRILL:** *Yeah.*

**MCRAE:** *And it's either I do it next Thursday or it's going to jam up against ah, another, another Parliamentary sitting week later on in two, in two weeks hence, uhm*

**GRILL:** *Okay then. Well I'll ah*

**MCRAE:** *Er and, and it, and it includes, you know I've gotta go east and it, and it's, the, the negotiation of the Commonwealth State Agreement that's swinging on a lot of this*

*so its, it's a fairly high priority thing for me in terms of getting the Portfolio performance right. Do you know what I mean? It's, it's the, it's one of the benchmarks that I've set myself in the next two years. If I get this right I'll be able to say yeah I did my job n [sic] that Portfolio. So it's, it's pretty high order in terms of Portfolio priority.*

**GRILL:** *Alright. Well I think you've pretty much decided to postpone it so let's work on that basis.*

**MCRAE:** *Well, mate, here's the alternative. Let me put the positive view. Uhm I could, I'm, I'm pretty confident I can get er, er forty-five, fifty people without trying too hard, uhm, to next Thursday. I'd have to defer this other thing which would cause me some problems but I could you know, that's, I could do it. Ah, my anxiety is that if you get the Premier to the kind of formula event that I'm talking about you really should have seventy people plus. At two seventy-five a head you really gotta go for you know, well fifty'd be a minimum. I think I can get the minimum but I, I'm*

**GRILL:** *Sure.*

**MCRAE:** *I'm just anxious that it will look a little bit light.*

**GRILL:** *Yeah, well*

**MCRAE:** *What's your view about that?*

**GRILL:** *Well I'd, I mean I'd need to speak to Brian just to make sure we could work together on it but*

**MCRAE:** *Oh no, no, no mate. I'm not talking about the alternative just*

**GRILL:** *Yeah.*

**MCRAE:** *Just put your alternative to one side for a moment.*

**GRILL:** Yeah.

**MCRAE:** *Ah, the judgement I am making is that I, at two seventy-five a head er, given the other pressing things that I've got if I'm only going to do fifty people, it's still you know it's still six or seven thousand dollars in the, in the campaign. It's not, it's not er*

**GRILL:** No.

**MCRAE:** Not to be sneezed at.

**GRILL:** Oh, well I think it's, yeah but it's not a big sum of money. Ah, I'd, I mean I, I'd tend to postpone it and go for a better one.

**MCRAE:** Yeah okay. I, I, I just wanted to bounce it off somebody I, I knew I can trust in terms of that kind of

**GRILL:** Oh good.

**MCRAE:** assessment.

**GRILL:** *Alright. Well it's nice that you think of me in those terms. I'll uhm, okay then, so I'll probably get a notice from you it's not on. That'll be fine.*

**MCRAE:** Mm.

**GRILL:** And then we'll work on the other side of it.

**MCRAE:** Yeah, good on ya.

**GRILL:** Right.

**MCRAE:** Ah, look Julian. take it that it's not on. Take it from me now

**GRILL:** Okay then.

**MCRAE:** as a result of this conversation and I'll only term, I'll only tell people now who contact me to say that we would like to come to say, oh look we've had to postpone it, I won't actually do a general broadcast.

**GRILL:** Okay Tony. Alright.

**MCRAE:** *Thanks mate, I appreciate that.*

**GRILL:** *See ya, great.*

**MCRAE:** *Good on ya.*

**GRILL:** *Thanks a lot.*

**MCRAE:** *Thanks.*

**GRILL:** *Bye bye.*<sup>16</sup>

### **Mr McRae's Impropriety as Minister**

[37] Mr McRae was well aware of the impropriety of a Minister linking the potential exercise of Ministerial power to the seeking of a benefit. From his very first interview with Commission investigators, and subsequently in his evidence in a formal hearing, he sought to portray his conversation with Mr Grill in a false light. He claimed variously that:

- the discussion about progress of the Lombardo development and about his fund-raising problem occurred in separate conversations;
- and
- he told Mr Grill he had already dealt with the Lombardo proposal.

[38] Both of these claims were false. The Commission is satisfied these were not simply inaccurate recollections, but a deliberate attempt by Mr McRae to conceal what he well knew to have been the purpose of his call on 11 October 2006.

[39] Mr McRae had made his decision on the Lombardo development on 9 October 2006. He called Mr Grill on the morning of 11 October. At the very outset of the conversation he asked Mr Grill whether “we” had made any progress with “your” request. Mr Grill’s response and his subsequent conversation with Mr Burke makes it clear he understood them to be talking about the Lombardo development. The Commission is satisfied that was what Mr McRae was talking about. There was no confusion or misunderstanding in his mind. It follows that when he then went on to tell Mr Grill he had not seen it, he was being deliberately deceitful. The question then is what motive he could possibly have had to deceive Mr Grill about that. As the Parliamentary Inspector puts it: “The crucial question is, if he did deliberately conceal that he had made his decision, why did he do it?”<sup>17</sup>

[40] There then followed a brief discussion about the “request”. Mr McRae undertook to track it down. Mr Grill then said he had received the invitation to Mr McRae’s (fund-raising) show, and that he and his wife would go along. Mr McRae explained that was what he was ringing about. Mr Grill certainly understood that to have been the real purpose of the telephone call. He told



Mr Burke so immediately afterwards. The Commission is satisfied Mr McRae's purpose for the call was to discuss his fund-raising plans with Mr Grill and secure his assistance and that of Mr Burke for them.

- [41] Mr McRae could offer no reasonable explanation for lying to Mr Grill about the Lombardo development proposal (noting, of course, that he maintained he did not do so, but was merely confused).
- [42] Mr McRae needed to raise funds for his re-election campaign. His planned fund-raising dinner was not going well. There had been a low acceptance-rate. He was considering cancelling it. Fund-raising assistance from Messrs Burke and Grill would have been invaluable to him. However, past experience showed they would not necessarily have been as helpful to him as he would have wished if it did not serve their purposes. Anything that would persuade them they needed to keep in favour with him would help. That he was able to help them in relation to the Lombardo development placed them in a position of obligation to him.<sup>18</sup>
- [43] Mr McRae had linked the use of his political position to approaches for funds previously. He had sought (and possibly received) a financial contribution from Mr Roderick Smith, founding Managing Director of Precious Metals Australia, for his political campaign in 2005, deliberately using his role as Chair of the Economics and Industry Standing Committee inquiry. He had also been forced to apologise to Parliament over the attendance by Mr Smith at his fund-raising dinner whilst he was dealing with a matter in which Mr Smith had a commercial interest. The telephone call of 11 October 2006 was not "clumsy" and "an error" (as Mr McRae described it to the media), but it was deliberate, advertent and purposeful, and in the Commission's opinion reflected the imperatives of fund-raising felt by Mr McRae as the holder of a marginal seat.
- [44] The Commission is unable to accept the proposition that the suggestion by Mr Grill, that he and Mr Burke could organise an alternative fund-raising event for him, was neither solicited by Mr McRae nor adopted by him.
- [45] In the Commission's opinion Mr McRae called Mr Grill specifically to solicit assistance from him and Mr Burke in fund-raising.
- [46] What is uncontrovertibly clear is that:
- when Mr Grill pointed out that the amount Mr McRae could anticipate from his proposed fund-raiser was not a big sum of money and suggested he postpone it and go for a better one, Mr McRae agreed;
  - Mr Grill acknowledged that by saying he would probably get a notice from Mr McRae that the planned dinner was not on, to which Mr McRae indicated agreement;
  - Mr Grill said they would work on "the other side of it";

- to which Mr McRae agreed and told Mr Grill to take it from him now, that his planned fund-raiser was not on, and said he would tell other people who might contact him that they had to postpone it.

- [47] In short, by the end of the conversation Mr Grill had offered to talk to Mr Burke and work on an alternative type of fund-raising dinner for Mr McRae, similar to that they were doing for Ms Dianne Guise, which would bring in a lot more money and Mr McRae had accepted that offer and told Mr Grill he would cancel his own function. It is, therefore, simply not correct to say that the suggestion by Mr Grill, that he and Mr Burke could organise an alternative fund-raising event for Mr McRae, was neither solicited by Mr McRae nor adopted. In the Commission's opinion, it was both solicited and adopted – although for other reasons it did not eventuate.
- [48] It is apparent to the Commission that Mr Grill's offer of assistance and Mr McRae's acceptance occurred in the context of Mr McRae's representations to Mr Grill, at the start of the telephone conversation, that he had yet to make a decision on the Lombardo matter, but that he would call for the file and do so immediately.
- [49] The Commission was aware that no fund-raising assistance by Messrs Burke and Grill in fact eventuated as a result of the telephone conversation of 11 October 2006. However, the reasons for that are, in the Commission's opinion, self-evident.
- [50] That the fund-raiser to be organised by Mr Grill and Mr Burke never eventuated can be attributed solely to timing. Two very relevant events occurred later that month. On Monday 23 October 2006 the Commission's public hearings into the "Smiths Beach" matter commenced and there was considerable negative publicity that followed with respect to Mr Burke and Mr Grill. The second relevant event also occurred in that week on Thursday evening, 26 October 2006. That was the evening of Ms Guise's fund-raising dinner at Perugino's Restaurant which had been organised by Mr Burke and Mr Grill. As mentioned above Minister MacTiernan and the Premier were supposed to be the "special guests". However, when the Premier arrived he was asked by the proprietor's wife at the restaurant's reception desk whether he was attending the "Burke function". Upon being asked that, the Premier spoke briefly with Ms Guise, explained why he wouldn't stay and left. The Premier later telephoned Ms Guise and informed her that he would not be returning to the dinner. This evidence regarding the Premier's actions was obtained from an intercepted telephone between Mr Burke, the proprietor of the restaurant and Ms Guise on the evening of the dinner.
- [51] There is no doubt once word had got around within the Government of the Premier's actions it would have been politically dangerous to have Mr Burke and/or Mr Grill arrange any fund-raising events for Members of Parliament. Indeed all the evidence at the Commission's disposal indicated that the "Di Guise function" was the last fund-raising event organised by Mr Burke and Mr Grill for a Member of Parliament.

## **Mr McRae's Misconduct**

- [52] The essential elements of misconduct under section 4(b) of the Act are:
- (1) the person is a public officer;
  - (2) the person takes advantage of their office or employment as a public officer;
  - (3) corruptly; and
  - (4) to obtain a benefit for themselves or some other person, or to cause a detriment to any person.
- [53] Mr McRae was at all relevant times, when referred to in this report, a member of the Legislative Assembly of the Parliament of Western Australia, and, hence, a “public officer” for the purposes of the Act.
- [54] By deliberately linking the exercise of his Ministerial power to approve the Lombardo development to gaining assistance from Mr Grill for his political fund-raising, Mr McRae took advantage of his public office.
- [55] The next question is whether that could be said to have been done “corruptly”.
- [56] Ordinary dictionary definitions support the conclusion that in section 4 of the Act, “corruptly” connotes dereliction or breach of duty, or acting contrary to one’s duty; being perverted from fidelity or integrity. “Corruption” is the perversion of a person’s integrity in the performance of official or public duty or work.<sup>19</sup> It involves the concept of a prohibited act undertaken with a wrongful intention.<sup>20</sup> The Commission accepts that the notion of “corruptly” in section 4(a) and (b) of the Act requires that the conduct contrary to the duties incumbent upon the public officer by virtue of their office 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;<sup>21</sup> an improper purpose;<sup>22</sup> in circumstances in which there is some conflict between the public officer’s interests and their duty; or in some other relevant factor.<sup>23</sup>
- [57] 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 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.
- [58] The implication, which the Commission is satisfied Mr McRae was deliberately conveying to Mr Grill in their telephone conversation of 11 October 2006, was that he could, and would, assist Mr Grill’s client by reversing his earlier decision, because that was what Mr Grill wanted. His purpose was to secure the assistance of Mr Grill and Mr Burke in organising his fund-raising. A Ministerial decision made on that basis would not be “impartial, aimed at the common good (or) uninfluenced by personal interest ...”, and nor would it be

honest. It would be a breach of clause (2) of the Legislative Assembly Code of Conduct, in that it would be a failure to perform his duty in an objective manner and without consideration of his personal and financial interests. It would, accordingly, be done “corruptly”. The Commission emphasises there is no suggestion that Mr McRae actually made his decision about the rezoning on any improper basis. The conduct with which the Commission is here concerned is him deliberately conveying the impression he would act in that way – whereas in fact he had already made the decision (on proper grounds). The “corrupt” conduct was in seeking to get Mr Grill to believe he would act that way, so as to obtain a personal benefit. That was a breach of his duty to act with integrity and his purpose was improper. He was soliciting a benefit for himself in respect of the exercise of his Ministerial discretion. His conduct was attended by moral turpitude in the sense described, and so fell within the meaning of “corruptly” in section 4(b) of the Act. In the Commission’s opinion this element has been established.

- [59] The fourth element, in section 4(b), “to obtain a benefit ...”, is purposive. It does not connote that a benefit must in fact be obtained (although of course it would include that situation). Rather it speaks of the purpose with which the public officer engages in the relevant conduct. Here the evidence establishes that in what he said to Mr Grill at the outset of the conversation Mr McRae was seeking to create the impression he was still to make the decision on the Lombardo development. The Commission is satisfied that his purpose was to secure the assistance of Mr Grill and Mr Burke in organising a fund-raising dinner for him, by creating the impression he would immediately call for, and deal favourably with, the Lombardo application (knowing that in fact he had already done so). In short, his purpose was to obtain a personal or financial benefit for himself out of the purported exercise of his Ministerial power. It is hardly surprising he did not expressly put it in those terms – the process was much more subtle than that.

### **Serious Misconduct Opinion**

- [60] To summarise, in the Commission’s opinion –

- Mr Mc Rae was a public officer at all relevant times.
- By deliberately (albeit subtly) linking the exercise of his Ministerial power to approve the Lombardo development, to gaining assistance from Mr Grill for his political fund-raising, Mr McRae took advantage of his public office.
- He deliberately sought to convey the impression to Mr Grill that he could, and would, assist Mr Grill’s client by reversing his earlier decision, because that was what Mr Grill wanted. His purpose was to secure the assistance of Mr Grill and Mr Burke in organising his fund-raising. That was a breach of his duty to act with integrity and his purpose was improper. His conduct accordingly fell within the meaning of “corruptly” in section 4(b) of the Act.

- His purpose was to obtain a personal or financial benefit for himself out of the purported exercise of his Ministerial power.

The necessary four elements having been established on the balance of probabilities, it is the Commission's opinion that Mr McRae's conduct constitutes serious misconduct under sections 3 and 4(b) of the Act.

- [61] The Commission points out that an opinion by it that misconduct has occurred is not, and is not to be taken as, finding or opinion that Mr McRae has committed a criminal or disciplinary offence.<sup>24</sup>

### **Recommendation**

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

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

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

*(a) ...*

*(b) ...*

*(c) acts corruptly in the performance or discharge of the functions of his office ...,*

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

- [64] The Commission recommends consideration should not be given to the prosecution of Mr McRae. That is because the only potentially relevant offence would be one under section 83(c) of *The Criminal Code*. The elements of misconduct under section 4(b) of the Act are not the same as those required to establish an offence under section 83(c) of *The Criminal Code*. One of the essential elements which the prosecution would have to prove under the latter would be that Mr McRae acted corruptly “in the performance or discharge of the functions of his office”. The gravamen of his (mis)conduct here was his linking of his potential Ministerial approval of a development proposal, with his solicitation of fund-raising assistance. In fact, he had already discharged that particular function of his office – and it had been done entirely properly, based, as it was, on Departmental advice. Although in his telephone conversation with Mr Grill he deliberately conveyed the impression he still had to act in the performance or discharge of the functions of his office in relation to the Lombardo development application, in

fact Mr McRae had already done so. There is, therefore, no sufficient prospect this element of an offence under section 83(c) could be established.

- [65] In other circumstances the Commission would have recommended to the Premier that he consider what, if any, action should be taken in respect of Mr McRae. However, Mr McRae, is no longer a public officer, having lost his seat in Parliament as a result of the State General Election on 6 September 2008, at which the ALP also lost Government. The Commission, accordingly, makes no recommendation in respect of Mr McRae.

## **Mr Rewi Edward Lyall**

### **Background**

- [66] Upon Mr McRae's promotion to the role of Minister on 26 May 2006, he selected Mr Lyall to fill the position of Chief of Staff. Prior to this, Mr Lyall had worked as a Senior Policy Advisor in the Department of the Premier and Cabinet, and in a similar role with the Aboriginal and Torres Strait Islander Services.<sup>25</sup>
- [67] During the time relevant to the Commission's inquiry, Mr Lyall was a "term of government" employee, but resigned following his appearance at a Commission public hearing on 22 February 2007.
- [68] With regard to all matters featured in this report, Mr Lyall's only relevant contact was with Mr Grill. The Commission holds no evidence that would suggest Mr Lyall had any form of relationship with Mr Burke.
- [69] In April 2006 Mr Grill sent Mr Lyall, prior to Mr Lyall's appointment as Chief of Staff to Minister McRae, an email seeking his assistance in relation to "extreme difficulties" one of his clients was having with a project in the Pilbara. Unlike some other public officers in other matters, Mr Lyall was quite able to refuse that request and suggested to Mr Grill that if he was dissatisfied with his response he could take it up with Mr Lyall's manager, the Deputy Premier's Chief of Staff.<sup>26</sup>
- [70] There was no further approach by Mr Grill to Mr Lyall until he approached Mr Lyall about arranging a meeting with Mr McRae to discuss Canal Rocks, as Mr McRae had told him to do in their telephone conversation of 27 June 2006.
- [71] Mr McRae's evidence to the Commission in a private hearing on 6 July 2007, was that, upon reflection, he had decided not to meet with Mr Grill; instead he told Mr Lyall to do it.
- [72] Mr Lyall has told Commission investigators that he met with Mr Grill on the instruction of Minister McRae and, after doing so, reported back to the Minister that there was no further action required.<sup>27</sup> This version of events is substantiated by evidence given to the Commission by Mr McRae.<sup>28</sup>

- [73] The Commission concludes that Mr Lyall's conduct in relation to this meeting was entirely appropriate; it was conducted in an open manner, in the presence of other Ministerial staff, at the direction of the Minister. Mr Grill does not appear to have been treated in a preferential manner and it does not seem likely that the information supplied to him in the meeting was confidential or commercially sensitive.
- [74] On 29 August 2007 Mr Lombardo hand-delivered a letter to Mr McRae's office in Dumas House. The letter, which Mr Burke and Mr Grill had assisted in writing, was an appeal to Mr McRae to reconsider the decision he'd previously made that the LPS9 amendments affecting Millbank on Moore were substantial.<sup>29</sup>
- [75] Retainer negotiations between Mr Grill and Mr Lombardo were finalised on the evening of 29 August 2007.<sup>30</sup> The following day Mr Grill sent an email to Mr Burke outlining his lobbying strategy with respect to contacting the Minister's office. It was Mr Grill's plan to speak with Mr Lyall before making any approach to Mr McRae.<sup>31</sup>
- [76] On 6 September 2006 Mr Grill telephoned Mr Lyall to advise that he represented Mr Lombardo for Millbank on Moore. In this conversation Mr Grill explained his client's position and requested an appointment for himself and Mr Lombardo. Mr Lyall agreed and a meeting was scheduled for 8 September 2006.
- [77] The Commission understands that, in agreeing to the meeting, Mr Lyall was carrying out one of the duties of Chief of Staff to a Minister.

#### **Mr Lyall's Meeting with Mr Grill and Mr Lombardo on 8 September 2006**

- [78] The meeting that took place at the Dumas House Ministerial Office was also attended by an officer from DPI, Mr Woodward.
- [79] As with the Canal Rocks meeting in June 2006, Mr Lyall's inclusion of a DPI officer impresses upon the Commission the likelihood that the meeting was conducted in a proper and official manner. Mr Woodward's presence supports that the meeting had not been convened by Mr Lyall for any reason other than to consider the Ministerial appeal lodged by Mr Lombardo on 29 August 2006.
- [80] On 12 September 2006 Mr Burke telephoned Mr Woodward. During their conversation, Mr Woodward confirmed that it was his intention to supply formal advice to Mr McRae with respect to the Millbank on Moore matter. Mr Woodward intended to prepare the advice that very afternoon but quite properly refused Mr Burke's request for a copy of it. Mr Burke stated that he would leave it until the end of that week before following up with the Minister's office.<sup>32</sup>
- [81] It was with the understanding that such advice was imminent that Mr Grill next contacted Mr Lyall on 15 September 2006. During this conversation, Mr Lyall

made the suggestion that Mr Lombardo delay relisting with the State Administrative Tribunal until October, when Mr McRae would again be Acting Minister for Planning and Infrastructure.

- [82] When questioned about the telephone conversation of 15 September 2006, at a public hearing on 22 February 2007, Mr Lyall admitted that he provided more information to Mr Grill than he would ordinarily have done.
- [83] Mr Grill telephoned Mr Lyall on 4 October 2006 enquiring about the status of the Lombardo matter. Mr Lyall told him he was “waiting for something to come up from the Department”<sup>33</sup> and the Minister would then have to look at it. Mr Lyall said he expected the file to come up that week and said he would give Mr Grill a call.
- [84] Mr Lyall’s disclosure of the status of the matter is not considered to be improper. His offer of a telephone call when the documents were eventually received was a courtesy rather than a specific favour to Mr Grill for some improper purpose.
- [85] Two days later, Mr Grill contacted Mr Lyall again. In this conversation Mr Lyall instructed Mr Grill not to panic about delays as Mr McRae’s role as Acting Minister was to continue for a further week.
- [86] Mr Lyall’s next telephone contact with Mr Grill was on 10 October 2006, the day after Mr McRae had signed the DPI briefing note. In this conversation, Mr Lyall stated that the outcome was satisfactory to Mr Lombardo but wasn’t prepared to elaborate further as the Minister had yet to sign correspondence that was being drafted.
- [87] Mr Lyall exhibited uncertainty about whether communicating Mr McRae’s decision to Mr Grill was appropriate but then proceeded to do so anyway. Mr Lyall has admitted to the Commission that he gave more information to Mr Grill than he would have otherwise done for others.<sup>34</sup>
- [88] The Commission can attribute Mr Lyall’s uncertainty to his relative inexperience, having only been a Chief of Staff to a Minister for four months, but he should have sought guidance from the Minister if he had been in doubt.

### **Millbank on Moore: No Misconduct**

- [89] There is no evidence of misconduct by Mr Lyall in his dealings with Mr Grill concerning the Millbank on Moore development.

### **Mr Lyall’s Contact with Mr Grill in Relation to Artrage**

- [90] Between 27 October and 5 November 2006 Artrage, a not-for-profit support organisation for contemporary artists, held a festival in Northbridge entitled “Ten Days on Artrage” which consisted of exhibitions, live music, theatre performances, cinematic presentations and comedy routines.<sup>35</sup>



- [91] Mr Lyall had been a board member of Artrage since November 2004<sup>36</sup> and had advised Mr McRae of his involvement with that organisation.<sup>37</sup>
- [92] In a written submission made to the Commission, Mr Lyall detailed the financial difficulties faced by Artrage approximately three weeks prior to the 2006 festival.<sup>38</sup>
- [93] On 16 October 2006 Mr Lyall telephoned Mr Grill to ask for his “assistance” in the form of an introduction to “businesses that might be interested in a commercial sponsorship arrangement”.<sup>39</sup>
- [94] Mr Grill attempted to call Mr Lyall on the evening of 26 October 2006 but was unsuccessful. Mr Lyall phoned back the following morning. In this conversation, Mr Lyall asked if Mr Grill could email him the names of six people to invite to an Artrage “VIP” event.
- [95] Shortly after his conversation with Mr Lyall, Mr Grill raised the possibility of a donation to Artrage with Mr Burke. Mr Burke agreed to Mr Grill’s suggestion of a \$5,000 donation.
- [96] Mr Grill telephoned Mr Lyall back and made the offer of \$5,000, which was refused by Mr Lyall.
- [97] Despite having refused Mr Grill’s offer of a donation, Mr Lyall reissued his earlier invitation for Mr Grill to attend the “VIP” event. On 31 October 2006, from his personal email account, Mr Lyall sent an email to Mr Grill.
- [98] Mr Lyall argued during a public hearing on 22 February 2007 that he had never sought a donation from Mr Grill and had only wished to be introduced to potential sponsors. When Mr Grill made the donation offer, Mr Lyall said that “alarm bells went off” in relation to the propriety of such an arrangement.
- [99] In assessing Mr Lyall’s conduct in relation to his contacts with Mr Grill, the Commission must take into account a different regulatory framework to the one which applied to Mr McRae. Mr Lyall was bound to act in accordance with the *Department of the Premier and Cabinet Code of Conduct* and the *Western Australian Public Sector Code of Ethics*.<sup>40</sup>
- [100] At the outset of his first telephone call to Mr Grill about Artrage, Mr Lyall announced that he was “ringing ... in a different capacity”. Mr Lyall’s subsequent email contact with Mr Grill was conducted from his personal email account. This shows Mr Lyall adhering to the *Department of the Premier and Cabinet Code of Conduct* which applies to Ministerial officers as well as employees within that Department:

*The Department recognises its employees’ rights to be involved in public life, including participation in groups such as trade unions, interest groups or political parties. However, the exercise of this right should not interfere with an officer’s ability to properly carry out their duties, and no government resources should be used to these ends.*<sup>41</sup>

[101] It would appear that Mr Lyall had made a deliberate effort to separate his fund-raising for Artrage from his official position. However, by contacting Mr Grill, with whom he had established a relationship through his employment, some link between the two is inevitable. The timing of the request to Mr Grill, coming less than a week after the Lombardo issue was resolved, could potentially create the perception that Mr Lyall sought the assistance of Mr Grill because Mr Grill might have felt an obligation to assist him. In the weeks immediately preceding the request Mr Lyall had been helpful to Mr Grill and on two separate occasions had arguably given Mr Grill the impression of preferential treatment.

[102] That Mr Grill was the only person from whom Mr Lyall sought assistance might strengthen this perception. Had Mr Lyall utilised some of his other ALP contacts to seek out sponsors, and not just Mr Grill, the approach would have appeared more benign. Mr Lyall said, in his written submission to the Commission, that Mr Grill was the only person he knew with significant business contacts:

*Knowing personally only one person with significant business contacts, I telephoned Mr Grill and sought his assistance.*<sup>42</sup>

(emphasis added)

[103] Although Mr Lyall had known Mr Grill prior to his employment with Mr McRae, it would be difficult for Mr Lyall to argue that he would have approached Mr Grill regardless of their recent contact. Mr Lyall had stated in evidence at a public hearing on 22 February 2007 that they had only met on a couple of occasions.

*... I met Mr Grill on a couple of occasions through the Australian Labor Party of which I'm a member.*<sup>43</sup>

[104] It is apparent it was Mr Lyall's recent contacts with Mr Grill in his capacity as Chief of Staff to Minister McRae that prompted him to approach Mr Grill and seek assistance for Artrage.

[105] The Commission accepts that the timing of the Lombardo decision and the Artrage festival were largely coincidental. Mr Lyall should, however, have recognised that his request for assistance, coming so soon after having discussions with Mr Grill as Chief of Staff to Minister McRae was potentially problematical.

[106] In determining whether Mr Lyall has engaged in misconduct, the Commission must first identify whether he has breached the applicable codes of conduct that apply to his public position. The *Department of the Premier and Cabinet Code of Conduct* is not definitive in dealing with a scenario such as this. Its only reference to the seeking or accepting of a benefit comes under the heading of "Acceptance of Gifts".

*Officers should not seek or receive rewards, gratuities or remuneration in connection with their official duties, either in or out of the hours of duty, without the permission of the Director General.*<sup>44</sup>

- [107] The *Western Australian Public Sector Code of Ethics* that applied in 2006 (current version introduced in February 2008) appears to have only one relevant reference, under the section entitled “Justice”.

*Refrain from using any circumstance or information connected to official duties for personal profit or gain.*<sup>45</sup>

- [108] The Explanatory Notes accompanying this state:

*Apart from their remuneration and conditions of employment, public sector employees should not benefit from their position in any manner.*<sup>46</sup>

- [109] Unlike the *Ministerial Code of Conduct* that prohibits seeking or accepting a benefit for themselves or others, both of the documents that applied to Mr Lyall deal specifically with benefits to the individual employee only. That Mr Lyall had sought the benefit for Artrage is irrefutable. Other than the personal satisfaction and possible prestige of assisting the organisation that he was associated with, it is not possible for the Commission to identify a direct benefit to Mr Lyall.

### **Artrage: No Misconduct**

- [110] In any event, and more particularly, the evidence does not establish that Mr Lyall sought a benefit “in connection with” or “from” the use of his position. He neither stated nor implied any link between his official duties or position, and his request for assistance from Mr Grill. He took positive steps to separate the two. The evidence does not establish any misconduct on the part of Mr Lyall in this regard.



## EXECUTIVE SUMMARY: ENDNOTES

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

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- <sup>1</sup> The term “Smiths Beach” does not have a possessive apostrophe.
- <sup>2</sup> *Corruption and Crime Commission Act 2003*, p28.
- <sup>3</sup> See, for example, Transcript of Proceedings, Public Examination of Ms Adele Farina on 6 December 2006.
- <sup>4</sup> Telecommunications Intercept, T 1281, 27 January 2006.
- <sup>5</sup> Transcript of Proceedings, Public Examination of Mr Anthony David McRae on 22 February 2007, p.576.
- <sup>6</sup> ALP State Secretary’s Newsletter October 2006, p.3, 2006 *Event Calendar*.
- <sup>7</sup> Department for Planning and Infrastructure, Closed Off File, letter to the Hon Tony McRae MLA of 29 August 2006 from Mr David Lombardo [E 11628].
- <sup>8</sup> Briefing Note to the Hon Tony McRae MLA, Acting Minister for Planning and Infrastructure, entitled *Draft Shire of Gingin Local Planning Scheme No. 9 – Millbank Estate* [E 11622].
- <sup>9</sup> *Ibid.*
- <sup>10</sup> Memo to the Hon Alannah MacTiernan MLA, Minister for Planning and Infrastructure, from the Hon Adele Farina MLC, Parliamentary Secretary to the Minister for Planning and Infrastructure [E 12498].
- <sup>11</sup> Email to the Hon Adele Farina MLC of 9 August 2006, 6:08:58 p.m., from Mr Ian Patterson [E 12499].
- <sup>12</sup> Department for Planning and Infrastructure, Closed Off File, letter to the Hon Tony McRae MLA of 29 August 2006 from Mr David Lombardo [E 11628], *op cit.*
- <sup>13</sup> Telecommunications Intercept, T 0802, 12 September 2006.
- <sup>14</sup> Telecommunications Intercept, T 0781, 10 October 2006.
- <sup>15</sup> Letter to Chief Executive Officer, Shire of Gingin, of 10 October 2006, from Ms Robyn Watts on behalf of Mr Moshe Gilovitz, Secretary, Western Australian Planning Commission [E 11619].
- <sup>16</sup> Telecommunications Intercept, T 1114, 11 October 2006.
- <sup>17</sup> See Appendix 1 at paragraph [31].
- <sup>18</sup> This is an example of the psychological theory known as the rule for reciprocation, which says that we should try to repay, in kind, what another person has provided us. One aspect of the rule is that a person can trigger a feeling of indebtedness in another by doing that other an uninvited favour. For a useful discussion of the rule, see “Influence – The Psychology of Persuasion”, by Robert V Cialdini, The Business Library, 1984, Chapter 2.
- <sup>19</sup> Shorter Oxford English Dictionary, Sixth Edition, p.529; Macquarie Dictionary, 2<sup>nd</sup> Revised Edition, p.417.
- <sup>20</sup> R v Gallagher (1987) 29 A Crim R 33.
- <sup>21</sup> Willers v R (1995) 81 A Crim R 219 per Malcolm CJ at 224.
- <sup>22</sup> Willers v R, supra, per Malcolm CJ at 225; Rowland J at 231; Application by DPP (C’t’h) for a Superannuation Order in Respect of Hogarth (1995) 93 A Crim R 452 per Higgins J at 454-5.
- <sup>23</sup> Williams v R (1979) 23 ALR 369 per Franki J at 381.
- <sup>24</sup> Section 23(2) of the *Corruption and Crime Commission Act 2003*, *op cit.*

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- <sup>25</sup> Section 94 response from Mr Rewi Edward Lyall, 30 January 2007.
- <sup>26</sup> Email to Mr Julian Grill of 4 April 2006, 8:20:05 a.m., from Mr Rewi Lyall.
- <sup>27</sup> Record of Interview of Mr Rewi Edward Lyall at the Corruption and Crime Commission, 186 St Georges Terrace, Perth WA 6000, on 10 July 2007, p.3.
- <sup>28</sup> Transcript of Proceedings, Private Examination of Mr Anthony David McRae on 6 July 2007, p.19.
- <sup>29</sup> Email to Mr Julian Grill of 29 August 2006, 8:08 p.m., from Mr David Lombardo.
- <sup>30</sup> Email Chain of 29 August 2006 between Mr David Lombardo and Mr Julian Grill, entitled *Fees*.
- <sup>31</sup> Email to Mr Brian Burke of 30 August 2006, 11:23 p.m., from Mr Julian Grill.
- <sup>32</sup> Telecommunications Intercept, T 0802, 12 September 2006, *op cit*.
- <sup>33</sup> Telecommunications Intercept, T 0771, 4 October 2006.
- <sup>34</sup> Transcript of Proceedings, Public Examination of Mr Rewi Edward Lyall on 22 February 2007, *op cit*, p.634.
- <sup>35</sup> Attached to email to Mr Julian Grill of 18 October 2006, 11:42:04 a.m., from Mr Rewi Lyall.
- <sup>36</sup> Artrage Website: <http://www.artrage.com.au>.
- <sup>37</sup> Section 94 response from Mr Rewi Edward Lyall, 30 January 2007, *op cit*.
- <sup>38</sup> *Ibid*.
- <sup>39</sup> *Ibid*.
- <sup>40</sup> Ministerial Office Manual [E 12568].
- <sup>41</sup> *Department of the Premier and Cabinet Code of Conduct*, p.10 [E 11645].
- <sup>42</sup> Section 94 response from Mr Rewi Edward Lyall, 30 January 2007, *op cit*.
- <sup>43</sup> Transcript of Proceedings, Public Examination of Mr Rewi Edward Lyall on 22 February 2007, *op cit*, p.624.
- <sup>44</sup> *Department of the Premier and Cabinet Code of Conduct*, loc cit [E 11645].
- <sup>45</sup> <http://www.opssc.wa.gov.au/documents/ethicsintegrity/codeofethicsbooklet.pdf>, viewed 14 November 2008.
- <sup>46</sup> *Ibid*.

# CHAPTER ONE

## FOREWORD

### 1.1 Commission Investigation

- [1] During 2005 and 2006 the Corruption and Crime Commission (“the Commission”) investigated allegations of misconduct by public officers in connection with the proposed Smiths Beach<sup>1</sup> development at Yallingup. That investigation examined the efforts of Canal Rocks Pty Ltd (“Canal Rocks”) and its consultants, including Mr Brian Thomas Burke and Mr Julian Fletcher Grill, in seeking to influence the Busselton Shire Council, public service officers and politicians to take actions beneficial to the development.
- [2] That had itself evolved out of (and remained part of) an original investigation 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.
- [3] 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 senior public officers, received widespread media attention in Western Australia and nationally.
- [4] 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.<sup>2</sup>
- [5] As the Smiths Beach investigation progressed, information which became available to the Commission revealed possible misconduct on the part of a number of public officers in respect of a widening range of other matters. In February 2006, under section 26 of the *Corruption and Crime Commission Act 2003* (“the Act”), Commissioner Hammond had authorised the investigation to cover all further matters arising out of the proposed Smiths Beach Development.
- [6] Hence, 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. Additional investigations were conducted by the Commission into these matters before, at the time of, and following these hearings.
- [7] 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.<sup>3</sup> The Commission considered that it was in the public interest to hold public hearings. The hearings were conducted publicly in order to expose and make the public aware of matters that could represent

serious abuse of power by senior public officers, and in order to ensure that good governance within the Western Australian public sector was not compromised. The Commissioner was of the view that hearings conducted in this way would allow public sector agencies to take any expeditious action they thought appropriate.

[8] 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.

[9] 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.<sup>4</sup>*

[10] 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".<sup>5</sup>

[11] 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.<sup>6</sup>*

[12] One of these concerned Mr Anthony David McRae, who between 26 May 2006 and 26 February 2007 was a member of State Cabinet. Between 26 May and 13 December 2006, the period relevant to this report, Mr McRae was the:

- Minister for Disability Services;
- Minister for Citizenship and Multicultural Interests; and
- Minister Assisting the Minister for Planning and Infrastructure.



It is with Mr McRae's conduct as Minister Assisting the Minister for Planning and Infrastructure that this report is concerned.

- [13] On 11 October 2006 the Commission intercepted a telephone call to Mr Grill by Mr McRae. That gave rise to a reasonable suspicion that misconduct may have occurred in relation to the exercise of Mr McRae's Ministerial authority concerning a proposed development at Moore River. That was accordingly made a specific proposition for investigation under section 26 of the Act.<sup>7</sup> The general scope and purpose of that investigation was to enable the Commission to make an assessment and form an opinion as to whether misconduct by Mr McRae had or may have occurred in regard to his relationship with Mr Grill. That investigation thus also evolved out (and remained part) of the original investigation 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.
- [14] The investigation which has resulted in this report was prompted by one intercepted telephone conversation. The purpose of, and what was said in, that telephone conversation will, ultimately, answer the question whether or not there was misconduct by a public officer. The Commission has jurisdiction only to investigate possible misconduct by public officers. It, therefore, has no jurisdiction to investigate whether or not non-public officers, such as Mr Burke and Mr Grill, have engaged in misconduct. However, the conduct of persons who are not public officers, and matters concerning them, may require examination and consideration by the Commission to ascertain whether, and if so, to what extent, those have a bearing on the conduct of public officers. Also, to understand the purpose of, and what was said in the telephone conversation of 11 October 2006, it is necessary to understand the context in which it occurred including the political connections, activities and personalities of those involved, their objectives or interests and the pressures operating upon them.

## **1.2 Commission Jurisdiction**

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

## 1.3 Definitions

### 1.3.1 Public Officer

- [17] The term “public officer” is defined in section 3 of the Act by reference to the definition in section 1 of *The Criminal Code*. The term “public officer” includes any of the following: police officers; Ministers of the Crown; members of either House of Parliament; members, officers or employees of any authority, board, local government or council of a local government; and public service officers and employees within the meaning of the *Public Sector Management Act 1994* (“the PSM Act”).
- [18] In the case of Mr McRae, he was at all times when referred to in this report a member of the Legislative Assembly of the Parliament of Western Australia, and, hence, a “public officer” for the purposes of the Act.
- [19] For the period 26 May 2006 to 26 February 2007, Mr McRae was a Minister of State. A holder of such a position is a “public officer” for the purposes of the Act.
- [20] This report also makes reference to the actions of Mr Rewi Edward Lyall, as Chief of Staff to Minister McRae. During the 2006 period relevant to this report, Mr Lyall was a “government contractor”<sup>8</sup> on the basis of his term-of-government appointment. Therefore, for the purposes of the Act he was a “public officer”.
- [21] Mr Philip Woodward, an officer of the Department for Planning and Infrastructure (DPI) during the relevant period, and a “public service officer”, as defined in the PSM Act.

### 1.3.2 Misconduct

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

*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**

[23] Under section 84(1) of the Act the Commission may at any time prepare a report on any matter that has been the subject of an investigation or other action in respect of misconduct.<sup>10</sup> 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.*<sup>11</sup>

- [24] Section 84(4) of the Act states that “the Commission may cause a report prepared under this section to be laid before each House of Parliament ...”.<sup>12</sup>
- [25] Section 86 of the Act requires that: “Before reporting any matters adverse to a person or body in a report under section 84 ..., the Commission must give the person or body a reasonable opportunity to make representations to the Commission concerning those matters”.<sup>13</sup>
- [26] In compliance with section 86 of the Act, Mr McRae was notified by letter dated 3 June 2008 of possible adverse matters which it was proposed to include in the Commission’s report on this particular investigation. He was invited to make representations about them by 1 July 2008. He subsequently requested an extension to 4 July 2008 which was granted. On that date, the Commission received from him a 44-page document containing his representations, under cover of a five-page letter dated 4 July 2008.
- [27] The Commission has given careful consideration to those representations. Also, as a result of some of the matters raised in them, the Commission undertook further inquiries.
- [28] Despite the investigation being confined to the conduct of public officers, and the Commission making no assessment of, nor expressing any opinion about, Mr Burke or Mr Grill in its report, the Commission accepts that the words “any matters adverse to a person” in section 86 of the Act have a meaning wider than merely the Commission’s assessments and opinions.
- [29] As it was possible that the matters considered in this report may be regarded as matters adverse to Mr Burke and Mr Grill, the Commission has notified them of those matters, pursuant to section 86 of the Act, and afforded them an opportunity to make representations if they wished.
- [30] The Commission wrote to Mr Burke’s solicitors and to Mr Grill’s solicitors on 3 June 2008 giving them notification of possible adverse matters it was proposed to include in this report, inviting their responses by 2 July 2008. Both Mr Burke and Mr Grill were advised that they or their legal advisers could inspect the transcript of the hearings before the Commission and evidentiary material going to the matters identified and any other matters about which they might wish to make representations.
- [31] On 16 June 2008 Fairweather and Lemonis, on behalf of Mr Burke, requested a seven-day extension. The Commission granted an extension to 9 July 2008.
- [32] The section 86 representations from Mr Grill were received on 30 June 2008. Those made on behalf of Mr Burke were received on 9 July 2008.
- [33] In each instance, they asserted that (amongst other things) some of the matters raised had not been put to their clients in examinations conducted under the Act, and so the Commission did “not have the benefit” of material from them. Whilst not necessarily agreeing that those were matters which

had to be put to Messrs Burke and Grill, in a hearing (as opposed to by way of a notification under section 86, to which they could then respond), the Commission took the view that the best course would be to give them that opportunity.

[34] Arrangements were therefore made for further private hearings for that purpose.

[35] On 18 July 2008 Messrs Burke and Grill were summonsed to attend private hearings on 29 and 30 July 2008 respectively.

[36] It was anticipated that the Commission report would be finalised shortly thereafter.

[37] As it happened, Mr Burke's lawyers advised the Commission that he was about to go to Ireland for some six weeks, and requested that his examination be conducted on his return. The Commission felt obliged to agree to that in the circumstances.

[38] Having regard to the availability of the parties and counsel, arrangements were made to have Mr Burke's examination on 6 October 2008 and Mr Grill's on 7 October 2008.

[39] Although when served on 21 July with his summons to attend on 7 October 2008, Mr Grill told the investigators he would be in Perth for the next two months, the Commission subsequently received a letter from his solicitor, Mr Penglis, on 20 August, requesting the examination listed for 6 October be relisted for 13 October 2008 or some date thereafter because his client would be "out of the State ..... on a long-planned holiday".

[40] The Commission was reluctant to delay further and sought a statutory declaration from Mr Grill in support of the request, including details of travel and accommodation bookings.

[41] His solicitor, Mr Penglis, initially objected to that, but eventually provided a statutory declaration from Mr Grill on 4 September 2008. In that Mr Grill said that arrangements had been in place for some time for his and other families to go on an interstate camping trip by car during the school holidays.

[42] The Commission agreed to defer the examinations.

[43] They were rescheduled for 13 and 14 October, and were in fact held on these days with an additional day on 15 October, after consultation with Mr Penglis and Mr Grill.

## **1.5 Disclosure**

[44] 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.

[45] Section 151 of the Act controls the disclosure of a “restricted matter”. A “restricted matter” means any of the following:

- (a) *any evidence given before the Commission;*
- (b) *the contents of any statement of information or document, or a description of any thing, produced to the Commission;*
- (c) *the contents of any document, or a description of any thing, seized under this Act*
- (d) *any information that might enable a person who has been, or is about to be, examined before the Commission to be identified or located; or*
- (e) *the fact that any person has been or may be about to be examined before the Commission.*<sup>14</sup>

[46] Restricted matters cannot be disclosed unless particular criteria are met. Section 151(4)(a) of the Act states that: “A restricted matter may be disclosed in accordance with a direction of the Commission”.<sup>15</sup> Further, pursuant to section 152(4), “official information” (that is, “in relation to a relevant person, means information acquired by the person by reason of, or in the course of, the performance of the person’s functions under this Act”<sup>16</sup>) may be disclosed by a relevant person (that is, “a person who is or was ... an officer of the Commission ... or a Commission lawyer<sup>17</sup>) if it is disclosed:

- (a) *under or for the purposes of this Act;*
- (b) *for the purposes of a prosecution or disciplinary action instituted as a result of an investigation conducted by the Commission ... under this Act or any other prosecutions or disciplinary action in relation to misconduct;*
- (c) *when the Commission has certified that disclosure is necessary in the public interest;*
- (d) *to either House of Parliament ...;*
- (e) *to any prescribed authority or person; or*
- (f) *otherwise in connection with the performance of the person’s functions under this Act.*<sup>18</sup>

[47] Section 151(4)(a) of the Act states that a restricted matter may be disclosed in accordance with a direction of the Commission. Pursuant to section 152(4)

official information may be disclosed in various instances including: for the purposes of the Act; for the purposes of prosecution or disciplinary action; when the Commission has certified that disclosure is necessary in the public interest; or to either House of Parliament.

- [48] 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**

- [49] 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.
- [50] Section 67(1) of the TI Act allows certain intercepting agencies, including the Commission,<sup>19</sup> 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 the 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”.<sup>20</sup>

## **1.7 Privacy Considerations**

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

- [53] 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.

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

[55] 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.

[56] 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 ....*<sup>21</sup>

[57] 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 Rejtek 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 ...*

[58] 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 ...*



- [59] 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 ...*

- [60] 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 ...".

- [61] 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.<sup>22</sup>

- [62] 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

### A DEVELOPMENT PROPOSAL AND A MINISTERIAL CONVERSATION

#### 2.1 Millbank on Moore Development

- [63] In 2006 Mr David Lombardo and his family company, Terana Holdings Pty Ltd, owned a large parcel of land located in the Shire of Gingin (“the Shire”) which, since 2001, had been intended for subdivision and development under the name Millbank on Moore. Stage 1 of the development had been approved by the Shire Council, and Stages 2 and 3 had received resolutions of support from the Shire.<sup>23</sup>
- [64] The draft Outline Development Plan (ODP) for Millbank on Moore was advertised for a 28-day period in May and June 2006, including a notice in the local papers, letters to adjoining property owners and relevant agencies. The ODP showed site-specific detail and a subdivision layout consistent with the Shire’s proposed zoning of “General Rural”. “Only one response was received, by the Department of Environment, providing advice on a lot boundary that was subsequently rectified”.<sup>24</sup>
- [65] In early August 2006 the Western Australian Planning Commission (WAPC) recommended modifications to the Shire’s draft Local Planning Scheme 9 (LPS9). Among the recommendations, the land at Millbank on Moore was to be zoned “General Rural 20” and “General Rural 30” rather than just “General Rural”. Zoning designations like these control the lot sizes that are allowed within a development or subdivision plan. As the Millbank on Moore ODP lot sizes were consistent with the local planning strategy, the WAPC had not considered this to be a substantial modification.<sup>25</sup>
- [66] The Hon Adele Farina MLC, Parliamentary Secretary to the Minister for Planning and Infrastructure during the relevant period, was asked by the Minister to review the WAPC submission. Ms Farina did so and, with few exceptions, supported the WAPC recommendations. One of the exceptions related to Millbank on Moore. Ms Farina’s advice was that the modifications were substantial and required readvertising.<sup>26</sup>
- [67] The Hon Alannah MacTiernan MLA, during the relevant period, was the Minister for Planning and Infrastructure. Due to a perceived conflict of interest, the Minister had devolved all responsibility for the Shire of Gingin’s LPS9 to the Acting Minister. Minister MacTiernan explained the details of this in Parliament:

**Ms A.J.G. MacTIERNAN:** *The opposition raised this absolutely fanciful issue of a conflict of interest on behalf of one of the donors to the Liberal Party, Mr Marcus Plunkett. To ensure that there could be no question about the decision that was to be made, I immediately said that if that was the perception, I would stand aside from making a determination*

*on that town planning scheme. As members can imagine, a number of different issues are covered by an entire town planning scheme. Therefore, we took advice from the State Solicitor on whether it was possible to sever the issue that related to Moore River and the land of Mr Plunkett, the Liberal Party donor, from the rest of the consideration of the town planning scheme and for me to make a decision on the rest of the town planning scheme, and to transfer the decision in relation to Moore River. The advice that came back was that it was not possible; the document had to be considered as a whole.*<sup>27</sup>

[68] On this basis, all matters relating to LPS9, including that of Millbank on Moore, would be the responsibility of the Acting Minister for Planning and Infrastructure, Mr McRae.

[69] On 9 August 2006 Mr McRae was briefed by DPI officers on the amendments to LPS9. Mr McRae signed off his acceptance of the WAPC changes the same day, incorporating Ms Farina's advised amendments.<sup>28</sup>

[70] The requirement to readvertise was a set-back for the Millbank on Moore development. If readvertising were to take place, the resultant delays would necessitate the termination of existing contracts at considerable inconvenience to the developer and purchasers of land. Mr Lombardo was of the view that the previous advertising for the proposal had been sufficient.<sup>29</sup>

## **2.2 Mr Burke**

[71] Mr Burke began his career in Western Australia as a journalist. The son of a family with significant links to the Australian Labor Party (ALP) (Western Australian Branch), Mr Burke entered the Legislative Assembly in 1973 as the Labor Member for Balga. Mr Burke was Leader of the Parliamentary Labor Party from 1981 to 1988, and was State Premier from 1983 until his resignation in 1988.<sup>30</sup>

[72] Mr Burke has worked as a lobbyist and consultant for at least the last 9 or 10 years, utilising his extensive contacts in politics, journalism and the public service to advance the interests of numerous clients.<sup>31</sup> He has also been extremely adept in manoeuvring within the ALP to assist political affiliates. Mr Burke's partnership with a former Minister in his Cabinet, Mr Grill (see below) and association with former Liberal Senator Mr Noel Crichton-Browne have allowed him to access both sides of State politics.<sup>32</sup>

[73] Due to his political notoriety and public profile, Mr Burke's activities have been a matter of some sensitivity within the ALP. In April 2003, a perception that Mr Burke had an unseemly measure of influence over Government decision-making and the preselection of candidates led then Labor Premier, the Hon Dr Geoff Gallop MLA, to ban Cabinet Ministers from contacting either Mr Burke or Mr Grill.<sup>33</sup>

[74] Following the resignation of Dr Gallop, the Hon Alan Carpenter MLA was elected unopposed to the position of Premier of Western Australia by the ALP

Caucus on 24 January 2006.<sup>34</sup> Later the same day, Mr Carpenter spoke to the media. He announced his wish to move away from the shadows of “WA Inc” and was reported to have lifted the ban on his Ministers dealing with Mr Burke.<sup>35</sup> Mr Carpenter said:

*Given that it's 18 years since Brian Burke retired, isn't it time we moved on? Isn't it time that we moved on with this notion that somehow he would be pulling the strings of a person like me?*

*Brian Burke is not a bogeyman... He's a citizen of the state... We know the history. I know the history. But let's move on.*<sup>36</sup>

## **2.3 Mr Grill**

[75] Mr Grill, who began his career as a lawyer before moving into politics, was a member of the Legislative Assembly from 1977 to 2001. He represented several regional seats, most recently that of Eyre. Mr Grill was a Cabinet Minister from 1983 to 1990 and held senior Portfolios including Transport, the North-West, Regional Development, Economic Development and Trade, and Tourism.

[76] Since leaving politics, Mr Grill has achieved a high profile in the mining and resources sector and has been involved with several mining companies, as well as working as a lobbyist and consultant. Like Mr Burke, Mr Grill has been able to utilise an extensive network of friends and ex-colleagues in his lobbying work. Mr Grill was expelled from the ALP in 2007, after he was found to have made a donation to the National Party of Australia in 2005.<sup>37</sup>

## **2.4 Lobbying by Mr Grill and Mr Burke**

[77] Mr Lombardo was introduced to Mr Grill on 19 August 2006 and shortly afterward retained his lobbying services. They negotiated a consultancy on the terms of a \$3,000 retainer plus a success fee of \$10,000.<sup>38</sup>

[78] The lobbyist's sole objective was to have Mr McRae reverse his decision and remove the readvertising requirement.

[79] Mr Grill and his partner Mr Burke shared their lobbying fees equally. The work was divided on the basis of which of them had the greater interest, knowledge, skills or contacts practical to achieving the desired outcome. Although Mr Burke had attended the meetings with Mr Lombardo, and also dealt with him by telephone, it was Mr Grill who took the lead for this particular client. This can be attributed to Mr Grill's pre-existing relationships with both Minister McRae and his Chief of Staff, Mr Lyall.

[80] Mr Grill and Mr Burke assisted Mr Lombardo in writing a letter of appeal to the Minister. Mr Grill followed this up with telephone calls to Mr Lyall. Mr Lyall agreed to meet with Mr Grill and Mr Lombardo on 8 September 2006. In the

month that followed the meeting, Mr Grill and Mr Lyall spoke several more times about the Lombardo matter. Mr Lyall was agreeable, during these calls, to keeping Mr Grill informed of the progress of the matter through the Minister's office.

[81] Mr Woodward, a DPI officer, also participated in the meeting with Messrs Grill, Lombardo and Lyall on 8 September 2006. Mr Burke made telephone calls to Mr Woodward, both before and after the meeting, in which Mr Burke spoke in favour of Mr Lombardo's case. Mr Woodward agreed to receive a further submission from Mr Lombardo during a call with Mr Burke on 12 September 2006.<sup>39</sup>

[82] Ultimately, a Ministerial briefing note was prepared by DPI and sent to Mr McRae on 4 October 2006. It contained the following recommendation:

*That you reconsider your previous decision with respect to this land, determine that the proposed modifications are not substantial in view of the reasons set out in this briefing note and give in principle support to these modifications.*<sup>40</sup>

## **2.5 Mr McRae's Reversal of the Millbank on Moore Decision**

[83] On 9 October 2006 Mr McRae, as Acting Minister for Planning and Infrastructure, approved and signed the briefing note reversing his earlier decision. He had determined that the proposed modifications were non-substantial and therefore did not warrant further advertising.

[84] In arriving at his decision Mr McRae gave consideration to the fact that the proposal had already been advertised as an ODP, public comment had already been sought, and the WAPC had recommended the zoning changes as not being substantial.<sup>41</sup>

[85] Mr McRae's reversal of his earlier decision meant that Mr Lombardo did not have to incur the delays associated with repeating the public consultation process.

[86] On 10 October 2006 Mr Lyall telephoned Mr Grill to advise him that Mr McRae had considered the issue and that the relevant correspondence to Mr Lombardo was being drafted. Mr Lyall went on to say that Mr Lombardo would be "relatively satisfied" but he could not go into further detail as the Minister "hasn't actually signed the letter yet".<sup>42</sup>

[87] The following morning, 11 October 2006, independently of the Acting Minister's office, DPI sent a fax to the Shire containing a letter dated 10 October 2006. Addressed to the Chief Executive Officer, the letter informed the Shire that Mr McRae had reconsidered his decision regarding the modifications to LPS9 relating to Millbank on Moore and that further advertising would not be required.<sup>43</sup>

## 2.6 Mr McRae's Telephone Call to Mr Grill on 11 October 2006

[88] On the morning of 11 October 2006 Mr McRae telephoned Mr Grill. A full transcript of their 10 minute conversation appears below.

**GRILL:** *Hello?*

**MCRAE:** *Julian, it's Tony McRae, can you talk?*

**GRILL:** *Yes, Tony, I can.*

**MCRAE:** *Oh, how are ya?*

**GRILL:** *Yeah, good mate, good.*

**MCRAE:** *Er, did we make any progress with your request?*

**GRILL:** *Uhm, I understand from Rewi that, uhm, there was, ah, a, ah, a brief came up to up to you and you were going to sign off on it which would, ah, probably make our client reasonably happy.*

**MCRAE:** *Okay.*

**GRILL:** *Now, Rewi couldn't go ah, into anymore detail than that so I'm not too sure what that meant but ah.*

**MCRAE:** *I haven't seen it as yet so.*

**GRILL:** *You haven't, right, uhm.*

**MCRAE:** *But I, I didn't expect it for, you know within, I'd, I guess within next week or two I'd see it.*

**GRILL:** *I, I'm sorry. You didn't expect it?*

**MCRAE:** *I didn't expect immediately. I thought I'd see it you know some time within the next week or two.*

**GRILL:** *Oh right, yeah, well.*

**MCRAE:** *But I'll, I'll*

**GRILL:** *Rewi thought.*

**MCRAE:** Look, I'll track that down. I'll, now that I've had this conversation I'll ask.

**GRILL:** Yeah.

**MCRAE:** I'll ask where it is.

**GRILL:** Rewi thought something might disturb you this week and you, you'd sign it next week, you know go ahead early next week, but anyhow uhm, if you could track it down that'd be excellent.

**MCRAE:** Alright.

**GRILL:** Yeah. So ah, look thanks for the concern on that ah, I hadn't spoken to you directly but uhm

**MCRAE:** Oh no I thought it was important to get the process done first, you know

**GRILL:** Yeah.

**MCRAE:** and, and get, get all the sort of nuts and bolts sorted so that I could actually, 'cos with the, the State Administrative Tribunal in place now that procedural stuff is absolutely essential to get right.

**GRILL:** Yes.

**MCRAE:** Yeah.

**GRILL:** Yeah, I think that's true. Ah, we ah, I mean we, we, we wouldn't try and advocate to anything that would ah, embarrass you or

**MCRAE:** No I know that mate.

**GRILL:** ah endeavour to uhm, uhm downgrade uhm, you know your authority or position.

**MCRAE:** No, no I understand that.

**GRILL:** Yeah. Okay. Now I've got the invitation to your show and

**MCRAE:** Now, I was just ringing, I



**GRILL:** *Lesley and I will go along.*

**MCRAE:** *Yeah.*

**GRILL:** *Yeah.*

**MCRAE:** *Yeah. Well I just was, I was just ringing about that as, as another thing on my list of things I was interested to ask you about. I, I just wanted your opinion. I've got uhm, we've got ah, well at a, at a, at a personal level I've got to make a decision as to whether I can still do it. I've got a pressing ah, request that I think is nearly going to be, well its going to be very difficult to push back, ah, that, that conflicts with that day. That's running on one side of my thinking and on the other side is what I would say, Julian, was a, a sort of light to moderate take-up of that invitation. Now I know some, it's, it's normal for these invitations to be sorted out the week before so you know I'm not kind of surprised that we've only got a light to moderate take-up at the moment.*

**GRILL:** *Mm hm.*

**MCRAE:** *But I've got to make a decision probably today as to whether to, to go with this Ministerial, uhm, pressure which means it'll be, I'll be out of town.*

**GRILL:** *Oh, I see, right.*

**MCRAE:** *Ah, ah, or to persist in, in you know a moderately attended uhm, event.*

**GRILL:** *What about then, if you've got a few doubts about it what about if uhm, ah, ah, you postpone this one*

**MCRAE:** *Mm.*

**GRILL:** *and ah, you and I get together with Brian*

**MCRAE:** *Mm.*

**GRILL:** *and we'll try and arrange something, ah, that's, ah, a bit better attended. How many do you want along?*

**MCRAE:** *Mate if I, I, I think quite frankly that if you're doing something with the Premier, ah, and, and with the range of things that intersect either with the Premier or with my Portfolio interests or a range of other Ministers who've I've got coming that you really should be able to get eighty people there.*

**GRILL:** *Well you can do it that way or you can, what, what're charging?*

**MCRAE:** *Two seventy-five.*

**GRILL:** *Two seventy-five. You can do it the other way like we're doing it with ah, ah, ah, Di Guise who came to see us. We just have sixteen people, ah, and we charge them all two grand.*

**MCRAE:** *Mm. Yep.*

**GRILL:** *So that's another way of doing it and that's easier in many ways for*

**MCRAE:** *Corporates.*

**GRILL:** *Brian and I for*

**MCRAE:** *Yeah.*

**GRILL:** *corporate stuff, yeah.*

**MCRAE:** *Yep.*

**GRILL:** *So it's because it's*

**MCRAE:** *And who was the*

**GRILL:** *What, what would be my problem*

**MCRAE:** *Who was the headline act there, mate?*

**GRILL:** *That's the Premier and Alannah will be along.*

**MCRAE:** Mm.

**GRILL:** *So what we've done is we've just sort of, a sort of a northern, Di's a northern corridor woman.*

**MCRAE:** Mm.

**GRILL:** *We've invited essentially our clients in the planning arena that're in that north west corridor. Did I say north east? I meant north west.*

**MCRAE:** Mm.

**GRILL:** *So that's what we've done there. Now I mean I haven't spoken to Brian so I don't know what he would be prepared, to what degree he'd be prepared to cooperate but I think he would probably cooperate and we could do something.*

**MCRAE:** *You see I've tradit, I've, I reckon I've got a, I've got ah, probably some people who are already committed to turning up next week who would probably convert to a smaller, higher-cost thing anyway.*

**GRILL:** *Yeah. Well I, you see what people, when they ask us they say well look, will I actually get a chance to talk to the, to the Premier or*

**MCRAE:** Mm.

**GRILL:** *can I sit next to Alannah or*

**MCRAE:** Mm.

**GRILL:** *You know whatever. Ah, I think if you can actually offer that sort of access*

**MCRAE:** Mm.

**GRILL:** *It's not like going to one of these big shows where, you know there's ah, three hundred people there and no one gets a chance to talk to Alan.*

**MCRAE:** What

**GRILL:** So where the

**MCRAE:** *What I do mate, what we, I have done with these in the past is ah, is a typically about ten tables of about eight people each.*

**GRILL:** *Yeah, I've been to a couple of them and they're excellent.*

**MCRAE:** *And, and you rotate the Ministers.*

**GRILL:** *Yeah. No, they work very well*

**MCRAE:** *Ah and, and I just, you sort of, you sort of get underneath that two thousand dollar corporate level and you get to people who'll, anyway, I mean I, I take your point I think that's a, a very good option actually.*

**GRILL:** *So uhm, I'll ah, I'll mention it to Brian, so when've you got to make the decision?*

**MCRAE:** *Oh, on the basis of the conversation that you and I are having, I, I've gotta say I was a fifty-fifty today because I've got this pressing, ah thing in disabilities that I've gotta do.*

**GRILL:** *Yeah.*

**MCRAE:** *And it's either I do it next Thursday or it's going to jam up against ah, another, another Parliamentary sitting week later on in two, in two weeks hence, uhm*

**GRILL:** *Okay then. Well I'll ah*

**MCRAE:** *Er and, and it, and it includes, you know I've gotta go east and it, and it's, the, the negotiation of the Commonwealth State Agreement that's swinging on a lot of this so its, it's a fairly high priority thing for me in terms of getting the Portfolio performance right. Do you know what I mean? It's, it's the, it's one of the benchmarks that I've set myself in the next two years. If I get this right I'll be able to say yeah I did my job n [sic] that Portfolio. So it's, it's pretty high order in terms of Portfolio priority.*

**GRILL:** *Alright. Well I think you've pretty much decided to postpone it so let's work on that basis.*

**MCRAE:** *Well, mate, here's the alternative. Let me put the positive view. Uhm I could, I'm, I'm pretty confident I can get er, er forty-five, fifty people without trying too hard, uhm, to next Thursday. I'd have to defer this other thing which would cause me some problems but I could you know, that's, I could do it. Ah, my anxiety is that if you get the Premier to the kind of formula event that I'm talking about you really should have seventy people plus. At two seventy-five a head you really gotta go for you know, well fifty'd be a minimum. I think I can get the minimum but I, I'm*

**GRILL:** *Sure.*

**MCRAE:** *I'm just anxious that it will look a little bit light.*

**GRILL:** *Yeah, well*

**MCRAE:** *What's your view about that?*

**GRILL:** *Well I'd, I mean I'd need to speak to Brian just to make sure we could work together on it but*

**MCRAE:** *Oh no, no, no mate. I'm not talking about the alternative just*

**GRILL:** *Yeah.*

**MCRAE:** *Just put your alternative to one side for a moment.*

**GRILL:** *Yeah.*

**MCRAE:** *Ah, the judgement I am making is that I, at two seventy-five a head er, given the other pressing things that I've got if I'm only going to do fifty people, it's still you know it's still six or seven thousand dollars in the, in the campaign. It's not, it's not er*

**GRILL:** *No.*

**MCRAE:** Not to be sneezed at.

**GRILL:** Oh, well I think it's, yeah but it's not a big sum of money. Ah, I'd, I mean I, I'd tend to postpone it and go for a better one.

**MCRAE:** Yeah okay. I, I, I just wanted to bounce it off somebody I, I knew I can trust in terms of that kind of

**GRILL:** Oh good.

**MCRAE:** assessment.

**GRILL:** Alright. Well it's nice that you think of me in those terms. I'll uhm, okay then, so I'll probably get a notice from you it's not on. That'll be fine.

**MCRAE:** Mm.

**GRILL:** And then we'll work on the other side of it.

**MCRAE:** Yeah, good on ya.

**GRILL:** Right.

**MCRAE:** Ah, look Julian, take it that it's not on. Take it from me now

**GRILL:** Okay then.

**MCRAE:** as a result of this conversation and I'll only term, I'll only tell people now who contact me to say that we would like to come to say, oh look we've had to postpone it, I won't actually do a general broadcast.

**GRILL:** Okay Tony. Alright.

**MCRAE:** Thanks mate, I appreciate that.

**GRILL:** See ya, great.

**MCRAE:** Good on ya.

**GRILL:** Thanks a lot.

**MCRAE:** Thanks.

**GRILL:**

*Bye bye.*<sup>44</sup>

(emphasis added)

## **2.7 Investigation Sparked by the Telephone Call of 11 October 2006**

- [89] The *Government of Western Australia Ministerial Code of Conduct March 2005* prohibits Ministers from seeking or accepting a benefit in connection with Ministerial decision-making:

*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.*<sup>45</sup>

- [90] The telephone conversation that Mr McRae initiated saw him discussing fund-raising for his re-election, and procuring an offer of assistance from Mr Grill, after intimating that he had yet to exercise his Ministerial power over a matter affecting Mr Grill's client.
- [91] That Mr McRae was seeking assistance from Mr Grill and Mr Burke with his fund-raising was clear enough to Mr Grill. Upon terminating the call with Mr McRae Mr Grill telephoned Mr Burke:

**GRILL:**

*Right Uhm. Now uhm, oh, I, the reason I'm ringing is that ah, Tony McRae rang. He didn't seem to know a hell of a lot about what was happening in relation to Lombardo although seemed to have a, a background of us on it and just said that he didn't think there was anything coming to him this week but it, there could be and ah, ah, he was ah, he'd try and do the right thing. So, I ah, was reasonably happy with that. But I think the real reason he rang me was he sent an invitation. He has a show every year to raise funds. The shows in the past have been quite good, ah, but this one was at two hundred and seventy five dollars a head and he needs to get at least fifty along to make it go well and there've been light acceptances to date. The Premier etcetera were going to be there. And he was thinking about cancelling it and he wondered what I thought about it and I said well, you know, even if you get fifty you really need more*

*than that. Even if you get fifty your only gonna raise about six thousand. You might be better just to do something a bit more along the lines of Di Guise. I said now I don't know whether Brian ah, I can't connect Brian but we might be able to help you with a show, a smaller show. Uh, if you can provide some people we can probably provide some people and you can raise a sum in excess of that at a later date as long as you can get the Premier and six significant Ministers along, and he said he thought he could do that. So I, I think he's gonna cancel the show that he's got. Now, I haven't made any commitment on the other side of it but I just want to run it past you.*

**BURKE:**

*Yeah, I'm happy to help, mate. If you, if he cancels then we can have a meeting with him and find out what he's got in mind. We just have to be, make sure that we have different targets that's all but we could easy get him ah, you know, ten or fifteen people at a grand or more.*

**GRILL:**

*Yeah. Well, I think that's what, we should aim at ten at two or fifteen at one or something.*

**BURKE:**

*Yeah.*<sup>46</sup>

[92] The telecommunications interception, which captured Mr McRae's call to Mr Grill, had been put in place to investigate other matters, which had not involved Mr McRae. The Commission had, in the course of monitoring its interceptions, made observations about Mr Grill and Mr Burke lobbying for Mr Lombardo but there had been no indication of impropriety on Mr McRae's part until the telephone call of 11 October 2006.

[93] Section 26 of the Act allows the Commission to make a proposition that misconduct is occurring, or has or may be likely to occur, based on the Commission's "own experience and knowledge". The Commission may then use its powers to investigate such a proposition.

[94] In February 2006 Commissioner Hammond had authorised such an investigation, to cover all further matters emanating from the Smiths Beach inquiry. It was on this basis that Mr McRae's possible breach of the Ministerial Code of Conduct was examined.



[95] It appeared to the Commission that Mr McRae may have potentially engaged in misconduct by approaching Mr Grill and asking for fund-raising assistance while a matter of interest to Mr Grill was before him as Acting Minister for Planning and Infrastructure.

[96] In investigating Mr McRae's conduct in relation to Millbank on Moore, the Commission required the production of associated documents from DPI, utilising section 95 of the Act. One of these was the briefing note that Mr McRae had signed, finalising Mr Lombardo's matter. Mr McRae's signature was dated 9 October 2006. This appeared to conflict with Mr McRae's statements to Mr Grill, on 11 October 2006, that he had not yet seen the briefing note. The Commission determined that Mr McRae should be questioned about this apparent conflict.

## **2.8 Mr McRae's Interview with Commission Investigators on 6 February 2007**

[97] On 25 January 2007 Mr McRae was served with a summons to appear at a public hearing. During the service of the summons Mr McRae requested that any hearing involving him be conducted in private. After some discussion, and in order for the Commission to consider his request, Mr McRae consented to participate in an interview with investigators. It took place on the morning of 6 February 2007.

[98] During the interview Mr McRae outlined his contacts with Mr Grill. Some of the information he provided in this interview was incorrect. Of the telephone call on 11 October 2006, Mr McRae said the following:

*... I said something like, we've resolved that other planning matter, there's nothing else to be done there; I've I've signed off on that or something like that. He said no, no there's nothing else we need to do and then we talked about the fund-raising.*<sup>47</sup>

What he was saying here clearly was that he told Mr Grill that he had already dealt with the planning matter that concerned Mr Grill, and that Mr Grill had agreed there was nothing else they needed to do about that.

[99] Mr McRae's account of the call was substantially different to what had actually occurred. He had, however, correctly anticipated the Commission's concerns about the telephone call:

*... and this is the thing that, the only thing that concerned me, that in one telephone conversation we talked about fund-raising and the previous decision uhm but in my mind there was no connection uhm of you know a quid pro quo or one being in, in, in favour or recognition of ah, ah of the other.*<sup>48</sup>

- [100] For Mr McRae to identify that that inference could be drawn shows he had an understanding that if he had engaged in this conduct, it could be regarded as less than proper.
- [101] Following the interview, the Commission was concerned at the apparent discrepancies between Mr McRae's account and the other evidence available to it. The Commission formed the view that Mr McRae should be required to give evidence on oath at a hearing.

## **2.9 Decision to Hold Mr McRae's Hearing in Public**

- [102] In reaching the decision to hold any hearing in public, the Commissioner must weigh up a number of factors, in accordance with section 140 of the Act. This test considers the benefit of public exposure and public awareness, and balances it with the negative aspects of possible damage to reputation and privacy infringements.
- [103] The Commission's primary responsibility is to act in the public interest. Its legislative obligation is to improve the integrity of, and reduce the incidence of misconduct in, the public sector. Some of the benefits of conducting a hearing in public include: enhancing public confidence in the Commission's work; allowing the public to become more aware of the range of matters concerning the Commission; promoting awareness of public sector misconduct and thereby encouraging the public sector to bring matters to the attention of the Commission; and the educational benefit of public examinations of alleged serious misconduct.
- [104] If, after taking the statutory considerations into account, it determines to conduct a public hearing, the Commission is obliged to take reasonable steps to protect the reputations and privacy of individuals and groups from unfair damage. Some have claimed that damage to a person's reputation may result simply from the public revelation of his or her conduct. In that circumstance, the Commission considers that it was really the person's conduct, rather than the Commission's revelation of it, that damaged their reputation. If it assesses that unfair damage could occur, the Commission can employ a number of protective measures, such as, conducting part of the hearing in private, deciding not to adduce certain material during the public hearing, using code names or non-publication notices (also called Suppression Orders) and other measures in order to protect the identity of some persons (e.g., privacy screens).
- [105] With respect to Commission hearings conducted in February and March 2007, which covered a range of matters, Commissioner Hammond ultimately determined that they should be conducted in public, and decided who would be summonsed, as was his responsibility in accordance with the Act. In doing so he had regard to sections 139 and 140 of the Act.
- [106] Consideration was given to Mr McRae's request for a private hearing. The position he had put forward in his voluntary interview was reviewed and taken

into account. Following discussions with Commission investigators and Counsel Assisting, and having weighed the benefits of public exposure and public awareness against the potential for prejudice or privacy infringements, Commissioner Hammond considered it was in the public interest to open the Commission's examination of Mr McRae to the public.

## **2.10 Commission Public Hearings in February 2007**

[107] Commencing on 12 February 2007, the Commission held public hearings into a series of matters concerned with lobbying and alleged public sector misconduct. Commissioner Hammond identified the scope and purpose of those hearings as being:

*... to enable the Commission to make an assessment and form an opinion as to whether misconduct by public officers arising in connection with activities of other persons, including but not limited to lobbyists, has or may have occurred or is occurring.*<sup>49</sup>

[108] More than 65 matters were considered by investigators during the course of the investigation but only 18 of these were examined during the public hearings. Mr McRae's conduct was one of the matters dealt with in the course of the hearings.

## **2.11 Mr McRae's Appearance at a Commission Public Hearing**

[109] Through the initial stages of a public hearing on 22 February 2007 Mr McRae was asked about his relationships with Mr Burke and Mr Grill and was shown exhibits relating to their political donations to Mr McRae's 2005 election campaign. He was then taken through the Millbank on Moore decisions he had made in his capacity as the Acting Minister for Planning and Infrastructure, and was played telephone intercepts of Mr Grill lobbying Mr Lyall on behalf of Mr Lombardo.

[110] When shown the briefing note that had been signed by him on 9 October 2006, Mr McRae was asked if there were any other matters involving Mr Grill that were devolved to him during October 2006.

*... As I understand it this was the only matter you needed to make a decision on as Acting Minister for Planning and Infrastructure that involved Mr Grill? --- As far as I remember, yes.*

*Yes? --- I don't remember any others.*

*No. Certainly not around this time of October? --- I don't remember any others.*<sup>50</sup>

[111] In relation to the timing of the decision and his call to Mr Grill about fund-raising, Mr McRae answered that his recollection was that the decision had been finalised beforehand.

*... After making your decision to reverse the earlier one you did actually contact Mr Grill, didn't you? --- Yes, I rang him about another matter.*

*Now what was that other matter? --- I was holding a fund-raising dinner and he'd been invited and I wanted to talk to him about how that was going.*

*And had you been planning to make that call to him for some time? --- No, it - I made it from my - as I recall, from my electorate office when I went to my electorate office and checked the response rate to the fund-raising dinner that I was proposing.*

*Right, when did you do that? --- I can't remember a precise date. It would've been October or November.*

*Right, I see. Now this was after you had made the decision which was to reverse your earlier decision? --- I can't remember the sequence.*

*But as I understand from your interview with investigators, that you felt comfortable about contacting Mr Grill because in fact this was after everything had been decided in relation to the Lombardo matter? --- Well, that would - that would be consistent with my general thinking, yes.*

*Yes, and why, why do you think that way? --- Because, as I said to you earlier, I think you need to separate out decision-making processes from policymaking processes and political processes.*

*I see, so you ensured that you had completely finalised the matter involving Mr Lombardo? --- I believe so, yes.<sup>51</sup>*

[112] Mr McRae gave evidence that he would generally try to keep his political activities, such as fund-raising, completely separate from his official duties. He said that this was as much for the purpose of keeping the issues separate in his mind as to avoid allegations over his conduct.

*... I mean, I would generally - I would generally try and separate those - those activities.*

*Is that so that there couldn't be any later allegation that Mr Grill has organised a fund-raising event for you and in return you have reversed a decision in favour of his client? --- That would be a very coarse mechanism I would have thought, but I - look, I just think that as a general rule - it's not always possible to separate conversations but as a general rule one should attempt to separate the political processes that we're all involved with from policymaking and determination-making.*

*Well, of course allegations are made from time to time in politics but that would be one? --- It wasn't the - yeah, no, they could be made absolutely.*

*Yeah and you would want to avoid that situation at all costs, wouldn't you? --- Well, not just because of the allegation, just to keep the matter separate in my own mind as much as possible.*

*Yes, because if Mr Grill had believed, had believed that a decision had not been made regarding your reconsideration of this matter and then offered*

to organise a fund-raising event, there could be a perception that he was doing that in order to have you later decide in his client's favour? --- He might have that perception. I, again, say that I would, at all times, as much as possible, work to separate out those things in my own mind.

*You would in no way attempt to convey anything but the truth to Mr Grill regarding that separation? --- I think that's an accurate proposition, yes.*<sup>52</sup>

(emphasis added)

- [113] Mr McRae was shown the section of the Ministerial Code of Conduct which refers to seeking or accepting a benefit in respect of the exercise of Ministerial discretion (see paragraph [89]).

*Did you have that in mind when you adopt this stance of ensuring that you keep everything as separate as possible? --- No. I didn't have this particular clause in mind.*

*Do you see that it's quite relevant to the stance that you are taking? --- It's very close to my own views about what I must attempt to do at all times.*<sup>53</sup>

- [114] When asked about his knowledge of the fund-raising dinners hosted by Mr Burke and Mr Grill, Mr McRae denied knowing about such events at the time of his 11 October 2006 call to Mr Grill. Further, he stated that he was unaware of the fund-raising dinner being hosted for Ms Dianne Guise that would yield her campaign approximately \$30,000.

*Had you heard about the successful fund-raising dinners that Mr Grill and Mr Burke had organised in the past for other politicians? --- I don't recall those but I've subsequently become - become aware of them.*

*Yes. Well were you aware of an event for Dianne Guise, a fellow Labor Parliamentarian, that was coming up at Perugino's in October? --- No.*

*On 26 October? --- No.*

*You weren't aware that was going to raise somewhere in the vicinity of \$30,000? --- No.*<sup>54</sup>

- [115] At that stage in the hearing, the 11 October 2006 telephone call between Mr McRae and Mr Grill was played. Mr McRae was then questioned about his meaning and intent, at the beginning of the call, in telling Mr Grill he had not seen the Lombardo brief.

*Why did you pretend to Mr Grill that you hadn't actually seen the brief for this matter? --- I don't know that I did pretend. I just don't remember.*

*Go to page 1. This is you ringing Mr Grill and, apart from the normal pleasantries, "How are ya?" and "Can you talk?" the very first question you ask is, "Did we make any progress with your request?" Why were you saying that when the request had been finalised? --- Look, I don't - I don't know.*

*What do you mean, you don't know? --- Well, I don't, I don't. I can't answer your question. I don't know.*

*You have said it. This was four months ago. Why on earth would you say something like that? --- I don't know.*

*Were you trying to find out if Mr Grill was aware that you had already actually made a decision to reverse your earlier one? --- No, not that I recall.*

*And when you realised he hadn't, you strung him along with this idea that you hadn't considered the matter because, you agree, that is exactly what you did? --- No, I don't agree with your proposition that I strung him along.*

*You don't? Down the bottom of that page there, "I haven't seen it as yet, so - but, I, I didn't expect it for, you know, within - I guess, within the next week or two, I'd see it." You had already seen it, Mr McRae? --- Indeed, yes.*

*Just two days earlier, hadn't you? --- In fact, I think I signed it off two days earlier.*

*Yeah, and you're saying here - next page, Mr Grill asks, "Um, I'm sorry, you didn't expect it?" "I didn't expect it immediately. I thought I'd see it, you know, some time within the next week or two," and then a little bit further down to, "Look, I'll track that down. I'll - now that I've had this conversation, I'll ask. I'll ask where it is." You were stringing him along, weren't you? --- No. I've already suggested to you - no, I've said to you that I don't accept that proposition.*

*Now that I have raised what you have said to him there, that's my explanation. Can you offer another one? --- No.*

*You see, Mr McRae, what I want to suggest to you is that you did that deliberately before you raised the question of your fund-raising?*

*Would you like to answer that? Do you agree with that? --- I didn't hear a question.*

*I said to you that you deliberately did that before you raised the question of the fund-raising. Do you accept that you deliberately indicated to Mr Grill that this matter was actually still outstanding? --- I accept that I've indicated to him that it was outstanding.*

*Right? --- But to suggest that I deliberately did it to mislead him, no, I don't accept that.*

*All right, would you like to put forward an alternative explanation as to why you did it? --- No, I've already said to you I can't explain why I did it.<sup>55</sup>*

*(emphasis added)*

- [116] Although Mr McRae denied that he intentionally deceived Mr Grill, he was unable to offer an alternative. He was unable to explain the discrepancy in the timing of his decision to the content of the conversation. Also of note in the passage above is that Mr McRae readily accepted and acknowledged that the matter being discussed was that of Mr Lombardo.

## CHAPTER THREE

### EVENTS FOLLOWING THE PUBLIC HEARING

#### 3.1 Mr McRae's Statements to the Media

[117] Following Mr McRae's appearance at a Commission public hearing on 22 February 2007, the Premier, the Hon Alan Carpenter MLA, cut short an overseas trip and returned to Perth in order to examine Mr McRae's evidence and decide upon a course of action. On the morning of 25 February 2007 the Premier sought Mr McRae's resignation from Cabinet.

[118] Subsequent to this, Mr McRae gave a press conference at Dumas House, the location of his Ministerial Office. Mr McRae also placed a Statement on his Website, [www.tonymcrae.com](http://www.tonymcrae.com). In the Statement Mr McRae publicly announced his resignation and denied any wrongdoing, but acknowledged that that perception could be drawn from his "clumsy" conversation with Mr Grill.

[119] Mr McRae made allegations about the Commission in the Statement.

*The function of the CCC is also a matter that demands full discussion. The CCC at its hearings involving me, either wilfully withheld information that would clear my name or was incompetent in the conduct of its inquiry.*<sup>56</sup>

(emphasis added)

[120] Mr McRae claimed that the Commission withheld a call between himself and Mr Grill in which, he was certain, he had refused to accede to Mr Grill's request for a meeting in relation to a planning matter. Mr McRae asserted that this would show he was "acting absolutely properly at all times".<sup>57</sup>

[121] Mr McRae made statements about this to the media.

[122] Mr McRae took part in an interview with Geoff Hutchinson on ABC Radio on 26 February 2007.

*... because when Grill rang me three months before, and the CCC has this on transcript, I'm sure, I refused to meet with Grill or to discuss this matter. I said no, you're going to have to meet with departmental officers.*<sup>58</sup>

(emphasis added)

[123] Mr McRae then appeared with Mr Peter Kennedy on ABC News on 29 March 2007. Mr McRae criticised the Commission, stating that "the triple-C has ... [been] reckless, unprofessional and legally wrong".

**KENNEDY:**

*Tony McRae's Ministerial career ended abruptly last month after evidence at the triple-C, that he discussed both a planning decision, affecting a client of Lobbyist, Julian Grill, and campaign fundraising in a phone conversation with Mister Grill. Now Tony McRae wants the Commission to release another taped call, which he says shows he refused to meet Mister Grill on another planning matter.*

**MCRAE:**

*And I think that that's an important, uh, piece of evidence that the triple-C should release to me, uh, because that shows that I was acting absolutely properly at all times.*

**KENNEDY:**

*The former Minister describes the telephone call that got him in to trouble as clumsy, and an error, but denies he was corruptly seeking financial benefit.*

**MCRAE:**

*I think the triple-C has made, uh, reckless, unprofessional and legally wrong, uh, processes, put legally wrong processes in place in the conduct of its own hearings.<sup>59</sup>*

### **3.2 Restrictions of the Commonwealth Telecommunications (Interception and Access) Act 1979**

- [124] In early March 2007 the legal representatives of Mr McRae made a formal approach to the Commission seeking access to other intercepted material in its possession which had not been aired at the public hearing on 22 February 2007.
- [125] The TI Act limits the way in which an intercepting agency can use information obtained under a TI warrant. The Commission was not in a position to grant Mr McRae ready access.
- [126] Section 67 of the TI Act allows the Commission to use intercepted material only for a "permitted purpose" (see paragraph [50]).
- [127] Mr McRae and his legal representatives could only be given access to intercepted material in the course of legal proceedings or in the course of the Commission's investigation.
- [128] Mr McRae had made vigorous assertions that there was another telephone call that was relevant to the subject under investigation. Mr McRae had also



had opportunity to review files and reflect upon his evidence given at a Commission public hearing on 22 February 2007.

[129] In order for the Commission to play the other telephone conversation to which Mr McRae had referred, and to consider additional evidence being offered by him, he was summonsed to a Commission private hearing, conducted on 6 July 2007.

### **3.3 Private Hearing on 6 July 2007**

[130] During this private hearing Mr McRae was questioned about the contents of the “Statement from Tony McRae” of 25 February 2007 and his public allegations about the conduct of the Commission.

[131] Mr McRae explained that there were three separate issues which he considered the Commission had failed to properly present or consider. These were:

- (1) a second telephone conversation which Mr McRae believed to be relevant in demonstrating his relationship with Mr Grill;
- (2) that the decision Mr McRae had made in relation to the “Lombardo request” had been communicated to the State Solicitor’s Office and Mr Lombardo’s lawyer a full 24 hours prior to Mr McRae’s telephone call to Mr Grill on 11 October 2006; and
- (3) that the advice from the WAPC had been sent to the Shire of Gingin no later than at 8:30 a.m. on 11 October 2006, again before the call to Mr Grill.<sup>60</sup>

#### **3.3.1 Mr Grill’s State of Knowledge**

[132] Mr McRae considered that the latter two points were relevant in showing that he could not intentionally have misled Mr Grill about the status of the “Lombardo request”. Mr McRae argued that the timing of the correspondence was proof that a deception could not have been possible as his decision was already “in the public domain”.<sup>61</sup>

[133] The Commission does not accept this argument. Only Mr Grill’s state of knowledge was significant. Mr Grill’s ignorance was all that was necessary for him to believe that Mr McRae still held power over the outcome.

[134] Mr Grill clearly had not been informed of the outcome and his lack of awareness would have been immediately obvious to Mr McRae in the course of their telephone conversation on 11 October 2006.

[135] In this call it was Mr McRae who raised the subject of Mr Grill’s matter, not the other way around. When it was put to him in a private hearing on 6 July 2007

that he might have been testing Mr Grill's awareness, Mr McRae denied that this was the case.

*Mr McRae, it's perfectly clear from that, isn't it, that Mr Grill did not know what your decision was on Gingin? --- Yes, that's - I accept that that's true, absolutely.*

*In fact you were able to confirm that that was so, that he did not know by the conversation that you had with him at the beginning of this call? --- I wasn't seeking to confirm whether he knew or not.*<sup>62</sup>

In fact the content of the telephone conversation plainly shows Mr Grill was not then aware the decision had already been made.

- [136] Mr McRae certainly made no effort to correct Mr Grill's state of knowledge even though it was within his power to do so. Mr McRae then exacerbated the misunderstanding by stating that he had not seen the briefing note and did not expect it for another week or two.<sup>63</sup>

### **3.3.2 Mr McRae's State of Knowledge**

- [137] When questioned at a public hearing on 22 February 2007 about why he had pretended he hadn't seen the Lombardo briefing note, Mr McRae had only been able to answer that he did not know or did not remember.<sup>64</sup>

- [138] In the public hearing Mr McRae did not dispute that he had been speaking of Mr Lombardo in the telephone call on 11 October 2006. However, with time to consider in the months following his first appearance at the Commission, Mr McRae stated in a private hearing on 6 July 2007 that he had not been speaking of the Lombardo briefing note as, in his mind, there was no connection between Mr Grill and Mr Lombardo:

*... I don't - first of all I don't know that I - I still don't believe that I connected in my mind Grill to the Lombardo matter, so I still say that I don't have a memory of direct association of Grill with Lombardo. I accept that there's some later suggestion by me in comments that I've made that that might've been an association that I had but - and particularly during the hearing on 22 February this year, but I don't remember having that association with Grill ...*<sup>65</sup>

- [139] In denying that he had made the connection between Mr Grill and Mr Lombardo, Mr McRae's evidence was in contrast to that which he gave to the Commission at a public hearing on 22 February 2007.

*... I remember being told by my Chief of Staff that he had met with Mr Lombardo and Julian Grill.*<sup>66</sup>

- [140] Mr McRae's Chief of Staff, Mr Lyall, met with Mr Grill and Mr Lombardo on 8 September 2006. In an interview with Commission investigators, Mr Lyall confirmed that Mr McRae had been kept informed:

**CCC INVESTIGATOR:** ... that meeting with Lombardo and Grill, I take it you told Tony McRae that you were meeting them?

**LYALL:** Yeah.<sup>67</sup>

[141] And later in the same interview:

**CCC INVESTIGATOR:** ... the Minister was aware that you, you know, were dealing with Julian Grill, is that right?

**LYALL:** Yes.<sup>68</sup>

[142] It is the Commission's opinion that Mr McRae was well aware of the connection between Mr Grill and Mr Lombardo when he telephoned Mr Grill on 11 October 2006.

[143] Similarly, it is not accepted that Mr McRae could have forgotten about the existence of the Lombardo briefing note less than 48 hours after having decided upon it. It was not a routine matter; it fell outside Mr McRae's normal Ministerial duties and involved the reversal of his previous decision. It is inconceivable that he did not realise that that was the matter being referred to during the call. It was, of course, Mr McRae who raised it.

### **3.3.3 Alternatives put forward by Mr McRae**

[144] When asked which other matter, if not the "Lombardo request", he might have been referring to in the telephone call, Mr McRae said he was unsure but made two suggestions.

[145] Mr McRae said he believed it possible that he was asking Mr Grill about Canal Rocks, developer of the proposed Smiths Beach Development at Yallingup. Canal Rocks had been the client for whom Mr Grill had sought a meeting in June 2006. It was this meeting request that Mr McRae was referring to when he told the media that he had refused to accede to Mr Grill's request in relation to a planning matter and that the telephone call had been withheld by the Commission.

[146] In fact, it is impossible for the 11 October 2006 conversation to have been about Canal Rocks. Mr Grill stated in the call "a brief came up to up to you and you were going to sign off on it".<sup>69</sup> Mr McRae could not have believed this related to Canal Rocks for he had never officiated over any Canal Rocks matters.

[147] Alternatively, Mr McRae suggested he could have been referring to the development by Plunkett which was also in the Shire of Gingin. The Plunkett matter had nothing to do with Mr Grill but had come before Mr McRae, in his capacity as Acting Minister for Planning and Infrastructure, at roughly the same time as the "Lombardo request".

[148] The Commission does not accept that Mr McRae could have mistakenly believed Mr Grill was connected to the development by Plunkett. Mr Grill did not represent Plunkett and there could not have been a “request” from him which Mr McRae’s office needed to progress. Mr McRae had no reason to think there was.

[149] Further to this, Mr McRae informed Commission Investigators in an interview on 6 February 2007 that he had met with the lobbyist representing Plunkett in a meeting at Parliament House.<sup>70</sup> The lobbyist had not been Mr Grill.

[150] Mr McRae in effect conceded during a private hearing on 6 July 2007 that his proposed alternatives were less than plausible.

*Let me just, firstly, deal with - are you now accepting that it couldn't be Canal Rocks because there was nothing ever for you to sign off on on Canal Rocks? --- Well, it could well have been a mental reflex association with the last conversation that we'd had. Without Canal Rocks being in my mind as a subject matter, without it being a matter that I had any detailed knowledge of, it could still be a reflex inquiry as to, "How did you go with that planning matter?" which would be the last thing that he and I spoke about. Now, at the time of that phone call I couldn't have had in my mind that it was Canal Rocks because I didn't have a - you know, I would've said, "How did you go with Canal Rocks?"*

*Sure, and what he said about it then, about signing off on it, couldn't have caused you to be under any misapprehension that he was talking about Canal Rocks. What things did you have to sign off on? --- There was only the Shire of Gingin.*

*Which had happened two days previously? --- Well, one - no; one element of the Shire of Gingin had happened two days previously. There were appeals or requests for review in relation to the Plunkett matter, in relation to Cervantes and to the total of the Town Planning Scheme.*

*Did Mr Grill have anything to do with the Plunkett matter? --- No.<sup>71</sup>*

[151] When questioned further on Mr Grill’s reference to a brief that needed signing, Mr McRae could only remember the Lombardo briefing note having been received at approximately that time.

*Can you tell us of any other brief that had come up to you for signing in your capacity as Acting Planning Minister as at that date? --- I can't remember any, no.<sup>72</sup>*

### **3.3.4 Mr McRae’s Conduct**

[152] Another possibility raised by Mr McRae at a private hearing on 6 July 2007 was that he might have confused elements from all three planning matters and had them “swirling around” in his mind.<sup>73</sup> If this was the case, it calls into question why he simply didn’t ask Mr Grill for clarification.

**THE COMMISSIONER:** *Even notwithstanding his response to your question, "Did we make any progress with your request?" which you say when he responded - on what you're telling us - you would not have understood what he was talking about? --- I think that's true, Commissioner.*

*You didn't ask him what he was talking about? --- No, I didn't because I didn't want to reveal confusion or ignorance and I wanted to skip past it, quite frankly.*

*And indeed you responded in terms which suggested you did know what he was talking about and, "You would get it shortly"? --- When he suggested, "Rewi said that there's something coming up to you," and I said, "Well, I'll look for it. Now that you've raised it with me I'll find out where it's up to."*

*Well, you went on to say you hadn't expected to get it for another couple of weeks? --- I don't know why I said that. I mean, I don't have a memory of attempting to manipulate him. I have this kind of vague memory of I'm not quite sure what we're talking about here so be vague and I understand that on one level that that could be constructed as a manipulation, I say it couldn't be if you accept that it was an automatic association with the previous conversation some months before and that I couldn't know that Grill didn't know already.<sup>74</sup>*

- [153] It is difficult to understand why Mr McRae would not have felt comfortable asking Mr Grill to explain. In considering their long-standing relationship and the ease with which the pair spoke on many other occasions, Mr McRae's unwillingness to admit his confusion seems highly unusual. If Mr McRae had not known what Mr Grill was talking about, he was able to bluff with remarkable adeptness. The obvious conclusion is that no clarification was sought because none was needed.
- [154] Despite the rationale put forward by Mr McRae at a private hearing on 6 July 2007, the Commission is of the opinion that Mr McRae deliberately acted to deceive Mr Grill during their conversation of 11 October 2006.
- [155] Had Mr McRae been speaking about the "Lombardo request", then he blatantly lied to Mr Grill about its status. Mr McRae contended that he had confused Lombardo with other issues; he had pretended to know of what Mr Grill was speaking; he feigned understanding and then made a false commitment to look into it further, to "track that down".<sup>75</sup> The Commission is unable to accept that.
- [156] In the Commission's opinion Mr McRae intentionally created the perception that he had yet to finalise a matter affecting one of Mr Grill's clients. Whatever his motive, it was a deception.

### **3.3.5 Omitted Telephone Conversation**

- [157] The other main focus of a Commission private hearing on 6 July 2007 was the telephone call which Mr McRae had described to the media as showing that he acted "absolutely properly at all times" as he had refused to meet with Mr Grill on "another planning matter".<sup>76</sup>

*All right now I want to deal with each of those things that you've raised, those three things. The first of them was the second telephone call. So that was one thing that was in your mind at that stage?---Yes.*

**COUNSEL ASSISTING:** *As a piece of evidence that you considered to be relevant at the very least to the nature of your relationship with Mr Grill? --- Yes, I did at the time and I do now.<sup>77</sup>*

...

*And that you thought that that was an important piece of evidence because that shows that you were acting absolutely properly at all times? --- Yes.*

*And by that I take it that although it was in relation to another planning matter, it shows that you were not beholding to Mr Grill. You were quite prepared to say no to him? --- I don't know whether it was in relation to another planning matter. I've got to tell you that since the hearing of 22 February this year and my voluntary interview in February of this year, I can't be absolutely certain in my mind what the reference was that Grill raised with me. I mean, I've run over all of the things that I can possibly think of and I can't be absolutely certain that it was one matter or another. What I'm confident about, and I'll be happy to be shown how accurate my memory is, is that when Grill asked to meet with me and to put a proposition, I said, "I can't do it that way. You've got to go and put the proposition to my officers and I'll take a brief from them".*

*So the emphasis - if I can suggest to you, the emphasis that you are putting on it is not which planning it was but the refusal? --- Yes.<sup>78</sup>*

(emphasis added)

- [158] So as to correctly identify the call Mr McRae thought relevant to the inquiry, Counsel Assisting played excerpts of every intercepted conversation between Mr McRae and Mr Grill that was in the Commission's possession.
- [159] There was only one telephone call in which Mr Grill had sought a meeting that fitted with Mr McRae's recollection of the timing. On the morning of 27 June 2006 Mr Grill left a message on Mr McRae's message bank asking him to phone back. Mr McRae promptly did so.

**GRILL:** *Hello, Tony*

**MCRAE:** *Giddyay, mate. How are ya?*

**GRILL:** *Oh, great. Uh, how are you enjoying life?*

**MCRAE:** *Loving it.*

**GRILL:** *Good.*

**MCRAE:** *Just loving it.*

**GRILL:** *It's, it's where you've gotta be isn't it? I mean*

**MCRAE:** *Oh*

**GRILL:** *that's what politics is all about.*

**MCRAE:** *(Laughs) And a great Portfolio too, mate.*

**GRILL:** *Yeah.*

**MCRAE:** *Really.*

**GRILL:** *Yeah.*

**MCRAE:** *If you're not in the economic side then this is, uh, this is terrific.*

**GRILL:** *Yeah. I, I haven't had a close look at it but, uh, it looked pretty good to me. Uhm, you, you're helping Alannah too, aren't you?*

**MCRAE:** *Yeah, that's right.*

**GRILL:** *Right. Uh, is that*

**MCRAE:** *On licensing and the Dampier to Bunbury*

**GRILL:** *Uh*

**MCRAE:** *gas pipeline.*

**GRILL:** *I, I'm sorry?*

**MCRAE:** *What's that?*

**GRILL:** *Oh, are you working on that as well are you?*

**MCRAE:** *I'm the Land Access Minister under the Act.*

**GRILL:** *Uh huh.*

**MCRAE:** *So we're widening the, uh, widening the reserve.*

**GRILL:** *Oh, right. Oh, yeah, yeah, yeah, yeah. Well, uhm, what are your responsibilities then?*

**MCRAE:** *What are my responsibilities? I, I'm not*

**GRILL:** *Yeah.*

**MCRAE:** *a responsible person at all.*

**GRILL:** *(Laughs) Yeah. Uhm*

**MCRAE:** *What am I supposed to do?*

**GRILL:** *Yeah.*

**MCRAE:** *Well the land access. That's, that's the key element*

**GRILL:** *Yeah.*

**MCRAE:** *in Dam, in Bunbury, uh, Dampier sorry.*

**GRILL:** *Yeah.*

**MCRAE:** *Why? What area were you thinking?*

**GRILL:** *Oh, no, no. I, I, I, I've sent a, uhm, a little, uh, email to, uh, your, your appointments secretary. Uhm, uh, Brian and I act for a com, for Griffin and, uhm, sorry, we don't act for Griffin, we act for a company called, uhm, Canal Rocks.*

**MCRAE:** *Oh, yes.*

**GRILL:** *And they, they're getting a project off the ground down at Smiths Beach. Now, it's had a sort of chequered career but they are good people and they are trying to do the right thing and, uhm, they are just a bit confused about where the matter's going at the moment and how Alannah's viewing it, and I was wondering whether they could perhaps come in and have a talk with you and you might be able to at least give them some advice. Uh, I think you need to be fairly careful, if I can be frank, as to just how Alannah is dealt with. But, uh, it would be of great help to me and I think of some help to them if you could just listen to them and just sort of ascertain what their problems are and perhaps put them on the right track.*



**MCRAE:** Yeah. I'd be happy to listen to them, mate. I, it's very difficult of course. That's not an area that I have responsibility for.

**GRILL:** Uh huh.

**MCRAE:** So you're limit

**GRILL:** Alright.

**MCRAE:** You'll be limited.

**GRILL:** Yeah. Go on.

**MCRAE:** I think what would be better is, uhm, if you let me know, if you and I had a meeting.

**GRILL:** Yeah.

**MCRAE:** And you let me know what the issues were and I could, I can make some, ah, inquiries as to what the lay of the land is.

**GRILL:** Well, that's what I was thinking of to be honest with you but it would reflect a lot better on me if I could just organise uhm, a, a, a meeting of say, uh, the principal of the company plus their planner and myself with you.

**MCRAE:** Yeah.

**GRILL:** Uh, see I don't really expect

**MCRAE:** Well, do you want to do that? Okay, mate, let's do it.

**GRILL:** Yeah.

**MCRAE:** That's alright. Let's do it. I'm happy to do that but can you ring ah Rewi, Rewi Lyall?

**GRILL:** Yes.

**MCRAE:** You know Rewi don't you?

**GRILL:** Yes I can, yes.

**MCRAE:** He's my, he's my Chief of Staff.

**GRILL:** Oh, excellent, excellent, excellent, yeah. Yes, I'll ring him.

**MCRAE:** And a, and a, and a bloke you should talk to anyway and make sure he knows.

**GRILL:** Yeah great, alright then. Well, I'll do that and he can make the, the appointment can he?

**MCRAE:** Yes, absolutely.

**GRILL:** Okay then.

**MCRAE:** We'll do it at the, do it up the Ministry, Ministerial Office.

**GRILL:** Oh that'd be excellent.

**MCRAE:** Thanks a lot.

**GRILL:** Okay then.

**MCRAE:** Alright, right mate.

**GRILL:** See you soon.

**MCRAE:** Bye for now.

**GRILL:** Bye bye.<sup>79</sup>

(emphasis added)

### 3.3.5.1 Meeting Request

[160] Mr McRae's memory of the call was apparently faulty. He had not refused Mr Grill's meeting request – in fact, he had agreed to it.

**COUNSEL ASSISTING:** *It doesn't appear to accord with your recollection, Mr McRae? --- No, it doesn't and - no, it doesn't.*

*In fact you would accept, would you not, that you did not refuse to meet Mr Grill? --- Not in that conversation.*

*Quite to the contrary, in that conversation you seem to have been very happy to meet with him and you say so? --- That's surprises me because that's not what I actually did.<sup>80</sup>*

[161] In the conversation, Mr McRae had initially been reluctant to meet with Mr Grill's client but then succumbed to Mr Grill's persistence. Mr Grill's desire to

have his client attend a meeting with a Minister would have been for the purpose of creating a good impression.

*In this conversation when Mr Grill says, "It would reflect a lot better on me", what did you understand him to mean by that? It's at the top of the page that's now on the screen? --- Probably that he was a paid - I would read that now - if you're asking what my memory of it is at the time or what my thoughts of it at the time is I can't tell you but looking at that now I would say, "It would reflect a lot better on me", means he's a paid lobbyist and it's useful for him to be seen to be achieving things.*

*Yes. Do you not see that what he's suggesting there is that it would be in his interests and would be better for him because he would be seen by his clients as having contacts and influence over a person who is a Minister? - -- Yes, I accept that.<sup>81</sup>*

[162] It was asserted in Mr Grill's section 86 representations that the proposition that Mr Grill's desire to have his client attend a meeting with a Minister would have been for the purpose of creating a good impression, is entirely speculative and had not been put to Mr Grill. However, the Commission considers that was exactly what Mr Grill himself was expressing when he said to Mr McRae that it would reflect a lot better on him if he could organise a meeting of the principal of the company, plus their planner and himself, with Mr McRae. The proposition was later put to Mr Grill when he was called to give evidence at a Commission private hearing on 13 October 2008, and he agreed that it was correct.

**COUNSEL ASSISTING:** ... you raise the possibility of a meeting with clients from your - from the company Canal Rocks and you say at the bottom of that large paragraph that's in the middle of the screen now:

*It would be of great help to me and I think of some help to them if you could just listen to them and ascertain what their problems are and perhaps put them on the right track.*

*Why would it be of great help to you but only of some help to them?---Well, I think I was having trouble convincing them that the government was prepared to listen to them, and if I could at least get Tony to listen to their problems they would accept that the government was in fact open and prepared to listen to their side of the case.*

*I see. Would it assist you in forming a favourable impression with your clients as to the doors that you were able to open?---Well, we're always trying to create a favourable impression with our clients. You know, we operate on word of mouth. If you do a good job then you get more clients; but I think it was more in terms of they just didn't know where they were going with government and they were getting any clear messages.*

*Did you have that as a purpose, to create a good impression with your clients?---We're always trying to make a good impression.*

...

**THE ACTING COMMISSIONER:** Sorry, does that mean yes?  
---Yes.<sup>82</sup>

- [163] Mr McRae's offer of a meeting in the Ministerial Office would have only enhanced the impression that Mr Grill was seeking to convey. Mr McRae claimed that his only consideration in offering that location was convenience.

*... Well, when you suggested that it be at the Ministerial Office Mr Grill appears to have thought that that was a fine idea because he says, "Oh, that would be excellent". It must have been the case that at that time you realised that holding a meeting in the Ministerial Office would play into his intention to impress his clients? --- No, I don't believe that's the case at all. If I may suggest to you my schedule around that time was such that the idea of me having to meet anywhere else would be ridiculous and it simply wouldn't have been able to be done. Meeting at the Ministerial Office is simply a matter of convenience and time management. I don't believe that I was playing up to his desire.*<sup>83</sup>

### 3.3.5.2 Canal Rocks Meeting

- [164] The meeting that Mr McRae agreed to took place on 30 June 2006 at the Ministerial Office. Mr McRae, however, was not present, as Mr Lyall attended instead.
- [165] Mr Lyall telephoned Mr Grill on the afternoon of 29 June 2006 and made his Minister's excuses; he said Mr McRae's diary was booked solid for two weeks, after which he would be travelling to New Zealand. As an alternative, Mr Lyall offered to see Mr Grill and his client the following afternoon.<sup>84</sup>
- [166] Mr McRae's evidence to the Commission was that he had chosen not to attend the meeting because, having reflected upon his conversation with Mr Grill, he decided that it was not a good idea. Whatever the reasons behind Mr McRae's second thoughts, they were not conveyed to Mr Grill.

*Well, if you had a reservation about that why did you not say to Mr Grill, "I will not do it?" --- This is the first time I've seen this and because it's not consistent with my memory I can only say to you that my memory must have been influenced by what my actions were which was to in fact say to Rewi Lyall, "I'm not meeting with Grill, you will meet with him".*

*Did you tell Mr Grill why you were not meeting with him? --- No, I think - well, I don't remember whether I did but my - my memory of it is that the meeting was set for a time when I was going to be away from the Ministerial Office.*

*Did you ever - you didn't ever contact him to say in fact - to apologise, that although you had agreed to meet with him you would now no longer be able to? --- I don't remember doing that.*

*You see, Mr Grill must have left, you would have thought, from this conversation with the impression that you were happy to speak to him? --- Yes, by - by the sound of my response, yes, he probably would have been.*

*And you never disabused him of that, did you? --- Other than that he'd never met with me on it.*

*Sure. --- So he was disabused of it at some later point.*

*But he was - he was given an excuse, wasn't he, that you were in fact overseas and unavailable? --- No, not overseas. Just in the electorate office or - - -*

*Or unavailable? --- Unavailable.*

*You didn't ever say to him plainly that it was your view -inappropriate for you to meet with him? --- No, I don't remember making that comment to him.<sup>85</sup>*

Mr McRae's comment that his memory was that the meeting was set for a time when he was going to be away from the Ministerial Office, rather tends to suggest that that was the reason he did not in fact meet with Mr Grill and his clients, rather than because he thought it was inappropriate.

[167] Immediately after his meeting with Mr Lyall, Mr Grill telephoned Mr Burke. In the call, Mr Grill expressed his reservations about using Mr McRae to further the interests of Canal Rocks with the Minister for Planning and Infrastructure, the Hon Alannah MacTiernan MLA. Mr Burke concurred:

**GRILL:** *So, uh, anyhow, I said at the end of it I, I didn't think it was a good idea for Tony to intervene and, uh*

**BURKE:** *Nuh.*

**GRILL:** *We'll save him for a rainy day.*

**BURKE:** *Yeah, I think that's wise.<sup>86</sup>*

[168] The Commission does not hold any evidence that Mr Grill made subsequent approaches to Mr McRae in relation to Canal Rocks. Whilst it may initially have been Mr Grill's intention to do so, the Commission's public hearings into Smiths Beach began less than four months later, creating notoriety for the development and its lobbyists.

[169] The Commission has taken into account the fact that Mr McRae did not attend the meeting with Mr Grill and representatives of Canal Rocks. However, the essential aspect is that, as a consequence of the telephone conversation of 27 June 2006, Mr Grill was deliberately left in a state of belief that Mr McRae was amenable to a meeting.

[170] Coming less than six weeks after Mr Grill supported Mr McRae's efforts to be promoted to the Ministry, in the Commission's opinion, Mr McRae's conduct demonstrates his reluctance to deny Mr Grill a favour in return.<sup>87</sup>

### 3.3.6 Commission's Omission of Call from Public Hearing

- [171] The Commission takes a great deal of care in selecting intercepted material for use in hearings. Commissioner Hammond explained the process in his opening address at the February 2007 public hearings in which Mr McRae appeared:

*In preparing for the conduct of examination, specific attention is paid to ensuring that only the material that is relevant to the hearing's scope and purpose is used. In doing this the Commission applies what it believes is an appropriate test. Through this test the Commission assesses whether the revelation of the information is relevant to the matter being investigated, is in the public interest and considers the potential for unfair damage to the reputation of individuals and/or organisations.*<sup>88</sup>

- [172] Far from being wilfully withheld because it could have been in some way favourable to Mr McRae, Commission investigators and Counsel Assisting had not included Mr McRae's 27 June 2006 telephone call in the 22 February 2007 public hearing as it was simply not relevant to the matter being presented. The investigation had been focussed on events that occurred in October 2006 with respect to the Shire of Gingin. The Canal Rocks meeting in June 2006 was in no way linked to this and self-evidently, contrary to Mr McRae's subsequent public assertions, it in no way showed him refusing to meet with Mr Grill and his clients, but rather showed the opposite.
- [173] Mr McRae had been critical of the Commission, publicly claiming that the Commission had wilfully withheld the telephone call that would "clear his name".<sup>89</sup>
- [174] After the telephone call had been played in a private hearing on 6 July 2007, Mr McRae was asked if he wished to reconsider his position in relation to that criticism.

*... in regards to that telephone call do you want to take this opportunity to reconsider what you said in that regard or do you accept that in fact the CCC was not reckless, unprofessional or in any way wilfully withheld evidence that could prove that you acted properly in regard to that telephone call? --- That wasn't - the allegation about the CCC's behaviour wasn't just in relation to that telephone call.*

*No, but I'm just asking you about that telephone call now. Do you accept - - -? --- Well, certainly those - those allegations around the CCC's behaviour and conduct could not apply to that telephone call, and I certainly would not want it going beyond today for you or anybody else to believe that that's included in my assertion about the behaviour of the CCC's hearing.*

**THE COMMISSIONER:** *But it was until you just said that? --- Yes, Commissioner, it was. I mean, I said to you a little while ago that I'm embarrassed that my memory is so faulty. I apologise to the Commission unreservedly for including that telephone call in the batch of things that I was distressed about as not having been presented, and I withdraw the suggestion that it was connected in some way to showing my relationship*

*to Grill was always - always at arm's length. I do say though that the behaviour of me in my office was critical because whilst the telephone call is not as I would like it, my behaviour is precisely as my memory - maybe it's a reconstructed memory but my memory would have it that I didn't meet with Grill on this matter.*<sup>90</sup>

(emphasis added)

### 3.4 Parliamentary Inspector Correspondence

[175] By letter dated 27 June 2007 the Parliamentary Inspector, Mr Malcolm McCusker AO QC, wrote to the Commission advising that he had received a complaint from Mr McRae regarding a number of issues related to the public hearing to which Mr McRae had been summonsed to appear on 22 February 2007. The Parliamentary Inspector requested copies of transcripts of certain intercepted telephone conversations and details of the justification and reasons underlying the decision that Mr McRae should attend a public hearing.

[176] The Commission provided the requested materials and information in subsequent correspondence.

[177] By letter dated 8 April 2008 the Parliamentary Inspector advised that he had received a copy of a letter to the Commission from Mr McRae's lawyers dated 3 April 2008. He canvassed a number of the issues raised by them, including their submission that the Commission should report directly, specifically and separately on the investigation relating to Mr McRae. At that stage the Commission had already decided to report separately in respect of Mr McRae, and so advised the Parliamentary Inspector.

[178] By letter dated 11 April 2008 the Parliamentary Inspector again wrote to the Commission, having received a further communication from Mr McRae's lawyers, raising a complaint which he suggested it

*... would be useful for the Commission to consider, before finalising its report, particularly one in which it may be proposed to find "serious misconduct" by Mr McRae.*

[179] The Parliamentary Inspector added that before finalising its report the Commission "may find it helpful" to consider the matters which he had set out in a draft paper enclosed with his letter.

[180] The letter dated 11 April 2008 and the enclosed draft paper are at Appendix 1 to this report.

[181] The Commission notes that at that time the investigation into the allegation against Mr McRae was still not complete, that although the draft report was substantially progressed it was not finished and, in particular, the Commission

was still considering whether or not the evidence established misconduct on the part of Mr McRae.

[182] The Commission includes reference to these matters, because the Parliamentary Inspector having raised certain issues in the course of the investigation, it was of course necessary for the Commission to give consideration to them – which it has done.



## CHAPTER FOUR

### LOBBYING

#### 4.1 External Influences on Public Officers

- [183] Sections of this report refer to the activities of “lobbyists”.
- [184] “Lobbying” is the process by which individuals or groups seek to represent their views to government representatives, and to influence or persuade government decision-making. A “lobbyist” is a person whose business it is to represent the views of a third party, their client, to government. In November 2006 the Government of Western Australia established the *Contact with Lobbyists Code* to ensure that contact between lobbyists and government representatives is conducted in accordance with public expectations of transparency, integrity and honesty. This Code defines a “lobbyist” as a person or company “whose business includes being contracted or engaged to represent the interests of a third party to a Government Representative”.<sup>91</sup>
- [185] Lobbying can be direct (by direct approaches to public officers) or indirect (for example, by exerting pressure through the media). Giving individuals and interest groups the chance to convey their views and to inform government decision-making is important to our democratic process: while their representations may be self-interested, they can bring marginal interests to attention, raise issues that have not previously appeared on the party political agenda, and contribute relevant specialist knowledge and experience.<sup>92</sup> Lobbyists often perform the role of conveying the views of interest groups to government representatives in a professional and effective manner, assisting those who may find it difficult to approach and communicate directly with government hierarchies for any reason.
- [186] By their nature, therefore, lobbyists do not usually take a neutral stance, nor do they promote an unbiased or balanced view of the issue at hand. Lobbyists are responsible for communicating the merits of one position, not for safeguarding the public interest.
- [187] Most democratic countries have legislative provisions, codes of conduct and policies, be they focused on the lobbyist or the lobbied, aimed at defining, preventing and managing improper influence on government decision-makers. Regulations, codes and systems, no matter how extensive, are only ever as effective as the individuals that use and operate within them. Regulations unsupported by cultural and attitudinal acceptance are unlikely to be effective. In the final analysis, it is how public officers respond to approaches from third parties and requests for support and assistance that matters. Any organisation that seeks to appropriately address lobbying must, in the first instance, have this as its focus.

## 4.2 Fund-Raising and the Sale of Access

- [188] For some public officers, particularly politicians or political candidates, lobbyists can also provide a link to the corporate world. Such a link might be of use if politicians need to contact or convey advice to commercial stakeholders, or indeed to seek advice and information from corporations in order to make well-informed decisions. A more contentious use of this connection occurs when public officers use third parties to solicit campaign support from corporate bodies who have both the motivation and means to provide financial support.
- [189] One of the methods of fund-raising employed at all levels of State Government and the Federal Government can be called “fund-raising through the sale of access”. This is a process by which guests purchase tickets for gatherings (dinners and the like) on the understanding that Ministers or other government representatives will also be in attendance. For the purchase price of a ticket guests receive not only refreshments, but the opportunity to speak directly and informally to government representatives who might make significant decisions in their favour, now or even far down the track. Such access might genuinely be considered beyond price.
- [190] Interestingly, under most Australian electoral funding regulations (both Federal and State), campaign money contributed through the sale of tickets to events such as these is not legally considered a “gift”, and hence does not need to be disclosed in any annual or post-election returns. This can lead to suspicion that corporations and public officers use such events to conceal significant donations from interest groups. An attendant suspicion, of course, is that those interest groups that can afford such donations enjoy unfair access to and influence over policymakers.
- [191] A position paper by the Australian Democrats in 2007 points out that:
- ... The perception of huge and sometimes dubious donations by corporations, organisations and unions attempting to do business with both state and federal governments has facilitated media criticism and public cynicism. Although reform measures have been enacted since the early 1980s, it is essential further measures be taken to ensure that nothing short of full and open disclosure is required. Political parties must provide explicit details of the true sources of their donations and the destinations of their expenditures. This is essential for public confidence in our political system.*<sup>93</sup>
- [192] Some, but not all, political groups in Australia provide codes of conduct for fund-raising to members and candidates. Most political groups and Parliaments have requirements for disclosure of financial conflicts of interest. These are discussed in more detail below. In general terms, such Codes and regulations attempt to ensure financial contributions are not accepted if they are made in return for some consideration, such as, making a particular decision or taking a particular stance, and that politicians declare situations in which they face a conflict of interest.

[193] Elections in Australia are not, in the main, publicly funded, and fund-raising is an essential part of political life and campaigning. The dividing line between acceptable and unacceptable contributions is not always clear. Current regulations rely on disclosure “after the fact” to mitigate the risk of undue influence through donation. At present there appear to be “gaps” in Australian electoral requirements for declaration of fund-raising money, and these “gaps” might be exploited by the ill-intentioned, or expose public officers to a misconduct risk.

### **4.3 Current Legislative and Regulatory Framework in Western Australia**

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

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

- *Public Sector Management Act 1994* (“the PSM Act”) which sets general principles of official conduct in the public sector;
- *Code of Ethics* established by the Commissioner of Public Sector Standards (CPSS);
- sections of *The Criminal Code* which apply to the conduct of public officers;
- instructions and policies issued by the Department of the Premier and Cabinet to public sector bodies and staff;
- other “lawful orders” constituted by official agency policies and procedures;
- *Freedom of Information Act 1992* (“the FOI Act”), which provides for public access to official matters;
- *Corruption and Crime Commission Act 2003*, which makes it an obligation for various public sector bodies to report suspected misconduct to the Commission;<sup>94</sup> and
- *Contact with Lobbyists Code*, which came into effect in November 2006.<sup>95</sup>

[196] These individual codes, policies and regulations are of course not universally relevant to all public sector employees. The PSM Act and CPSS Code of Ethics, for example, apply only to “public service officers”, defined as “employees of the Public Service”. This definition does not encompass elected Members of Parliament.

[197] All these accountability mechanisms are, however, underpinned by common principles and values. These principles reflect the community’s expectations of public sector performance and provide benchmarks for the assessment of public sector performance. These principles may be summarised as detailed below.

- *Public interest is paramount.* To protect the public interest, decision-making must be impartial, aimed at the common good, uninfluenced by personal interest and avoid abuse of privilege.
- *Public officers should be accountable, effective and efficient.* Processes used and decisions taken must be open, honest, transparent and lawful, balancing the cost of processes against the effectiveness and efficiency of decision-making.
- *Equity and fairness.* The processes adopted should be non-discriminatory, merit-based, consistent, accessible and equitable.
- *Inclusive, just and balanced decision-making.* Processes used and decisions taken should be based on partnerships and an integrative approach.
- *Ethical and responsible care.* This requires protecting and managing with care the human, natural and financial resources of the State, carrying out promptly and correctly official duties and functions.

[198] Alongside the regulatory frameworks above, these principles individually and collectively provide an ethical framework and guide for public officers in monitoring their own actions and conduct.

#### **4.4 Parliamentary Codes of Conduct in Western Australia**

[199] The *Code of Conduct for Members of the Legislative Assembly*, adopted by the House on 29 August 2003, states that

*Members of the Legislative Assembly ... acknowledge their responsibility to maintain the public trust placed in them by performing their duties with honesty and integrity, respecting the law and the institution of Parliament, and using their influence to advance the common good of the people of Western Australia.*<sup>96</sup>

[200] The Code of Conduct requires Members to act impartially in the discharge of their duties, to disclose conflicts of interest and to handle confidential information appropriately.

[201] Section (2) is headed Conduct and states that:

*Members shall accept that their prime responsibilities are to –*

*(a) perform their public duty in an objective manner and without consideration of personal or financial interests, including a duty to declare any relevant private interest; and*

*(b) represent the interests of their own electorate and their constituents.*

[202] Section (3) is headed Disclosure of Conflict of Interest and states that

*(a) A conflict of interest exists where a member participates in or makes a decision in the execution of their office knowing that it will improperly and dishonestly further the Member's private interest or another person's private interest directly or indirectly.*

*(b) A conflict of interest also exists where the member executes, or fails to execute, any function or duty knowing that it will improperly and dishonestly benefit their or another person's private interests directly or indirectly.*

[203] Cabinet Ministers in Western Australia are also subject to a code of conduct specific to their Ministerial role, entitled *Government of Western Australia Ministerial Code of Conduct March 2005*. This Code covers areas including: official conduct; conflicts of interest; confidential information; and record keeping. The version of the Code that was in effect during the period covered by this report was the version adopted in March 2005.<sup>97</sup>

[204] Section (5) is headed Conflicts of Interest and states that:

*Public duties must be carried out objectively and without consideration of personal or financial gain. Circumstances which could give rise to a serious conflict of interest are not necessarily restricted to those where an immediate advantage will be gained. They may instead take the form of a promise of future benefit, such as a promise of post-parliamentary employment. Any conflict between a Minister's private interest and their public duty which arises must be resolved promptly in favour of the public interest.*

[205] Section (9) is headed Use of Confidential Information and states that:

*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.*

[206] The Legislative Assembly also has in place Standing Orders, which govern behaviour and procedures in the Chamber. The Orders cover election of official positions and committees, record keeping, conduct of matters in the House and procedures for considering matters before the House, but do not refer to the general conduct or ethics of Members outside sittings of Parliament.<sup>98</sup>

[207] The ALP also requires its candidates to abide by an *ALP Code of Conduct for Fundraising*. This Code was put in place following ALP Conferences in 1994 and 2004. The Code states that: “The Labor Party believes that democracy in Australia will be strengthened by moderate and equal financial contributions from corporate Australia to both sides of politics”.<sup>99</sup> It goes on to encourage Members of Parliament and candidates to attend “Party fundraisers” and to declare all donations as per the requirements of the *Commonwealth Electoral Act 1918*. It also states that:

- *... The Labor Party does not accept funds that are subject to conditions of any kind.*
- *Under no circumstances will the Labor Party accept funds which, even if only by inference, are intended to obtain the Party's support for specific actions, attitudes or public statements.*
- *Donors have a right to put views to the Party—but a right to no more than that.*
- *The Labor Party never raises funds on behalf of any other Party or Organisation.*
- *Under no circumstances will the Labor Party or any of its endorsed candidates accept donations from the tobacco industry.*
- *Candidates for public office who act outside these guidelines will be liable to sanctions by the relevant Labor Party Caucus or State or Territory Administrative Committee or other interested parties.*

[208] The *ALP Code of Conduct for Fundraising* establishes the conditions that govern “fundraising by the Labor Party at State, Territory and National levels. It is binding on all Labor Party branches, units and candidates for public office”.<sup>100</sup>

#### 4.5 Influence of Mr Burke and Mr Grill within the Australian Labor Party

- [209] Throughout the Commission public hearings in February 2007 the intra-party influence of Mr Burke and Mr Grill was revealed to be of significance. Both had considerable networks of friends, former colleagues and factional allies within their own Party.
- [210] Mr Burke has been described as a “power-broker” and a significant player in factional ALP politics.<sup>101</sup> As a senior figure within the “Old Right” faction of the of the ALP (Western Australian Branch), Mr Burke boasted about his control over their voting power in Caucus.<sup>102</sup>
- [211] Mr Burke openly asserted to several politicians that he had been instrumental in them securing a seat in Parliament. In January 2006 Mr Burke told the Hon Vincent Catania MLC (whom he was lobbying on various matters) that he and his faction had “given” Mr Catania his seat:

**BURKE:**

*The situation is this mate, Adele Farina would not be there unless we'd given a seat to her, you wouldn't be there unless we'd given you one of our seats, neither would Ben Wyatt and then when the Federal Executive met and endorsed all the people we wanted they gave Giffard and a couple of others seats that they mightn't have got otherwise.*

**CATANIA:**

*Yeah I agree with all that.*<sup>103</sup>

- [212] Mr Grill, too, was regarded as wielding considerable influence over factions within the ALP. Mr Grill's own assessment was that he effectively controlled the Centre whilst he was a Member of Parliament.

**GRILL:**

*Now Adele and a few other of the girls may not have liked the way that I effectively ran, ran the Centre, ah y'know in the, in the five years prior to that but Jesus Christ, we won votes, we won every fucking vote we went into. We decided who was getting what at the Cabinet level. We were always the delegate out of Caucus to State Executive.*

**MCRAE:**

*Yep.*<sup>104</sup>

- [213] The Commission emphasises that it expresses no opinion about the truthfulness or otherwise of these and other such claims by Mr Burke and Mr Grill. Their relevance for present purposes is simply that they were made and so fed into the perceptions of others about their capacity to influence. Nor

does the Commission infer or suggest in this report any misconduct or impropriety on the part of those persons named by Mr Grill or Mr Burke.

- [214] Mr McRae's evidence at Commission hearings in 2007 showed that he, at least, was under the impression that Mr Grill remained influential even after his retirement. Mr McRae was asked at a private hearing on 6 July 2007 about a conversation he conducted with Mr Grill in 2006:

*... You're trying to determine where people sit and where they may vote - - -? --- Yes.*

*- - - in regards to the vacancy. Why were you speaking to Mr Grill about that? --- Because Mr Grill is well connected throughout the Labor Party or was.*<sup>105</sup>

- [215] As well as claiming that his influence could sway preselections and nominations for various Party positions (including Cabinet seats),<sup>106</sup> Mr Burke repeatedly implied that he could assist public officers and Ministerial staff in commencing or furthering their political careers. He claimed on numerous occasions to be establishing a "dream team", an elite group of candidates for electoral office who would carry forward the Party in Western Australia. Mr Burke included in his team Western Australian sports people and journalists that were of a high enough profile to be household names, and would "drop" these names casually as if their cooperation was a *fait accompli*.

- [216] He would use the promise of elevation to this team as an incentive when speaking to public officers from whom he wanted assistance.

**BURKE:**

*Yeah. Simon a couple of things uhm, I'm not sure if I've mentioned this to you but I've mentioned it to Julian uh and I've now had a couple of meetings uh uh what I'm addressing is, uh, not on anyone's behalf the need I see for the Party to present a slate of twelve or fourteen candidates at the next election who might be considered to be an elite group of potential leaders and Ministers. Now, they'd include people for instance some of whom are already there Ben Wyatt, people who aren't there like Peter Bell the foot- I'm speaking to you confidentially*

**CORRIGAN:**

*Ah yep.*

**BURKE:**

*Peter Bell the footballer, uh my daughter Sarah, Gary Grey, uh Bill Johnson, Graham Giffard coming down into the Lower House, uh yourself, uh Tim Wallster uh and a group of people.*<sup>107</sup>



[217] In this telephone call to Nathan Hondros, Chief of Staff to then Minister the Hon Jon Ford MLC, Mr Burke's "grooming" technique is apparent.

**BURKE:** *But, but you know at the end of the day if you opt for poor quality,*

**HONDROS:** *Mm-mm*

**BURKE:** *you are long term fucked.*

**HONDROS:** *Yeah ...*

**BURKE:** *so unless we start getting some good, that's why I said to you about his dream team of twelve young people.*

**HONDROS:** *Mm-mm.*

**BURKE:** *It's not because I've got any obligation to you or to Roger Cook if you come from the left, or to Bill Bloggs.*

**HONDROS:** *Yeah.*

**BURKE:** *It's because I've got a view*

**HONDROS:** *Mm-mm.*

**BURKE:** *about how the Party's best served fifteen years from now.*

**HONDROS:** *Mm-mm.*<sup>108</sup>

[218] Later in the same conversation, Mr Burke's sketch of a promising future is followed by a caveat:

**BURKE:** *Well mate I I'm, I'm committed to you and I I'll help you as much as I can, but you have to start getting Michelle to be sensible about things, that Tuesday night was terrible. Just the wrong way.*<sup>109</sup>

[219] Mr Burke favoured this technique in approaches to Chiefs of Staff and young public servants who had only recently commenced, or were considering, forays into politics. The Commission accepts the broad proposition put in Mr Burke's section 86 representations, that there can be no criticism of a member of a political party putting in place a plan to ensure the long-term future of the Party by attracting talented people to run as Members of Parliament. That is clearly a perfectly proper and, indeed, admirable objective. It could never sensibly be suggested that merely to discuss ways in which political success

can be achieved with able and intelligent young people who are thought able to contribute to that success, could be corruption. Nonetheless, whilst Mr Burke obviously viewed the formation of such a team as a real strategy that the ALP should use to move into the next decade, in the Commission's assessment these conversations were also part of a campaign to establish a "next generation" of government officials who would remember Mr Burke with appreciation.<sup>110</sup> In the Commission's assessment, this was at least one of Mr Burke's purposes, and it bears directly on potential misconduct by public officers. The Hon Shelley Archer MLC, when called before the Commission to give evidence in regards to provision of official information to Mr Burke, described Mr Burke as a "mentor".<sup>111</sup> This was obviously a role which Mr Burke found useful in terms of strategy as well as friendship. The Commission reiterates that it is not concerned with Mr Burke himself. The relevance of this is the potential it may have to induce or lead to misconduct by public officers.

[220] It should be noted that Mr Burke's attempts to cultivate this idea in the minds of Ministerial staff and others with political ambitions were not always successful. In Commission public hearings conducted in February 2007, Mr Corrigan recalled the first telephone conversation quoted above, saying that Mr Burke rang and told him "that he was putting together a list of people for pre-selection and he felt that I - my name should be on the list". Mr Corrigan described this as Mr Burke making "a ridiculously transparent attempt to ingratiate himself" which did not work.<sup>112</sup>

#### **4.6 Use of Influence in Lobbying by Mr Burke and Mr Grill**

[221] Mr Burke and Mr Grill ran a successful, and busy, lobbying practice. Their many clients (including unions, developers and mining companies) paid monthly retainers to have the pair advance their interests with the State Government and with Local Governments. Often the retainer would be as much as \$10,000 per month. In addition to this, a substantial "success fee" was usually negotiated, to be paid upon the achievement of a favourable outcome.

[222] The goals of some clients could take many months or even years to be achieved. It would have been important for those clients incurring the ongoing monthly expense of hiring the lobbyists to feel that progress was being made. One way that Mr Burke and Mr Grill gave their clients this impression was to arrange meetings with key government decision-makers or public sector departmental representatives. Having already-established relationships within Government certainly would have made it easier for them to facilitate this.

[223] Even if the government representatives did no more than give a small parcel of time to accommodate a meeting with clients of Mr Burke and Mr Grill, this allowed Mr Burke and Mr Grill to reassure and impress their clients, ensuring their loyalty and, in turn, their ongoing financial commitment.

## 4.7 Fund-Raising Assistance Provided by Mr Burke and Mr Grill

- [224] Mr Burke and Mr Grill also maintained links with government representatives independent of the needs of their lobbying clients. They were both active in Party political decision-making, and used these political links to benefit their business where they could.
- [225] Assisting Parliamentarians and candidates with fund-raising was doubly rewarding for Mr Burke and Mr Grill as lobbyists and consultants. Not only might the recipient of the funds be inspired to feel gratitude towards them, it was one of the most effective methods Mr Burke and Mr Grill had for introducing their clients to decision-makers.
- [226] One common way for Members of Parliament and candidates to raise electoral funds is through events such as dinners, breakfasts or “drinks”. Such events promise informal access to a Minister or similar personage as an incentive for members of the public to purchase often expensive tickets. Money raised from ticket sales goes to a selected cause, usually the host’s electoral “war chest”.
- [227] For clients with potentially millions of dollars riding on a government decision, parting with a few thousand to spend an evening in the company of government representatives and Ministers can be seen as money well spent.
- [228] Where Mr Burke and Mr Grill were involved in organising such events, as might be expected, they would strategically coordinate seating arrangements to make sure that each of their clients was best placed to access relevant people. On 23 February 2006 a dinner was held at Fraser’s Restaurant to raise funds for the preselected candidate for the electorate of Victoria Park, Mr Ben Wyatt. Mr Burke and Mr Grill organised the event and several of their clients paid \$3,000 a ticket to attend.
- [229] In telephone conversations before the dinner, Mr Burke provided coaching to his clients in how to finesse the best outcome from the opportunity.

**BURKE:** *I’ve sat you, I’ve sat you next to Shelley Archer.*

**BROWN:** *Oh good, good, and mate the other thing is uh, what do I need to wear, I don’t want to go like a peacock either but uhm ...*

- [230] And further on in the same call:

**BROWN:** *Okay mate and is there any coaching I need at all?*

**BURKE:** *Not at all, just be yourself and they’ll like ya.*

**BROWN:** *Okay and I won't mention anything about pearling or anything like that either of course.*

**BURKE:** *No let, let Shelley take it up.*

**BROWN:** *Yep, yep, okay mate if, if the opportunity is there, if it's not it doesn't matter you know. Okay mate.*

**BURKE:** *She'll, she'll make it. See ya.<sup>113</sup>*

[231] Another example:

**SMITH:** *So it's not, it's not a lobbying opportunity for everybody? So there not, you know there's not going to be the seafood people trying to push*

**BURKE:** *Oh no*

**SMITH:** *the seafood agenda*

**BURKE:** *No no no.*

**SMITH:** *and the mining people pushing the mining agenda*

**BURKE:** *No, it's nowhere, it's much much more subtle than that.*

**SMITH:** *Right.*

**BURKE:** *I mean John Bowler for instance will know, you know, Xstrata's matter backwards and may talk to you about that and say how pleased he was, and I'm sure he'd be pleased to hear how Windimurra's going and all that sort of thing.*

**SMITH:** *Yes.*

**BURKE:** *But wouldn't be appropriate to, uh for an occasion to ask them for things.*

**SMITH:** *Right.*

[232] And further in the same call:

**SMITH:** *Uhm, does John uhm, has John been introduced to the topic at all of Yeelirrie?*

**BURKE:** *Not at all.*

**SMITH:** *Okay.*

**BURKE:** *Not at all. I mean*

**SMITH:** *If it, if it seems opportune should I, or should I just, should I leave that alone?*

**BURKE:** *Uhm, I'd be very very circumspect unless they raise it because Carpenter will be sitting, if the table, unless the table's a great big round circle*

**SMITH:** *Yep.*

**BURKE:** *you know, Carpenter will be sitting within spitting distance of you and he'll hear everything you say.*

**SMITH:** *Mm hm*

**BURKE:** *Uh he won't want to hear anything that is potentially a political problem and uranium is potentially a political problem until we can sort it out for him.*

**SMITH:** *Alright so I should leave that, that alone?*

**BURKE:** *Yeah, I'd leave it completely, yeah.*

**SMITH:** *So it's enough to be there and seen as a Labor Party supporter?*

**BURKE:** *It's enough to be, everyone, mate, everyone. Well you're not a Labor Party supporter, you're supporting Ben Wyatt 'cause he's an outstanding young candidate*

**SMITH:** *Right.*

**BURKE:** *and you've just articulated that yourself*

**SMITH:** *Mmm*

**BURKE:** *so if anyone asks you your politics you say well look you know, I'm I'm generally a conservative supporter uhm, and I'm here because I think Ben Wyatt's an*

*outstanding candidate and I think uh, in the first month Alan Carpenter's been a breath of fresh air so that's why I'm here.*

**SMITH:** *Right.*<sup>114</sup>

[233] The Commission is aware of fund-raising events that were organised in their entirety by Mr Burke and Mr Grill, as well as events to which Mr Burke, Mr Grill and their clients purchased tickets. When receiving an injection of campaign funds in the order of \$20,000 or \$30,000 after just one dinner, it can be understood why the recipient(s) would be thankful to Mr Burke and Mr Grill. In the call below the Hon Shelley Archer MLC thanks Mr Burke for arranging the dinner for Mr Wyatt.

**ARCHER:** *It was brilliant, thank you very much*

**BURKE:** *Oh it was good?*

**ARCHER:** *Yeah it was.*

**BURKE:** *The food was alright?*

**ARCHER:** *The food was fabulous, the wine was fabulous*

**BURKE:** *Oh good.*

**ARCHER:** *and I think everyone really enjoyed themselves.*

**BURKE:** *Oh good.*

**ARCHER:** *Mmm.*

**BURKE:** *...*

**ARCHER:** *So thank you very much for that, it was just great.*

**BURKE:** *No it's no worries, we can means we can have another one, see?*

**ARCHER:** *Mmm.*

**BURKE:** *No, no that's good.*

**ARCHER:** *Absolutely. ... But it was brilliant so thank you*

**BURKE:** *Good on ya.*

**ARCHER:** *so much for that.*

[234] And the point was, in the same call:

**BURKE:** *Well you should make thirty grand out of it  
I reckon.*<sup>115</sup>

[235] That conversation was in itself innocuous, and the Commission does not suggest otherwise, but generating this sort of favour was part of a long-term plan for Mr Burke and Mr Grill. They may not have had an immediate need to lobby that particular Parliamentarian but should it be required at some stage in the future, they had already paved the way to having a more receptive audience. Both Mr Burke and Mr Grill deny any motive of that kind. They contend they were just supporting their own political party and candidates they regarded as worthwhile. That was no doubt true, but there was another aspect which served their own personal interests, and which represented a real risk of potential public officer misconduct.

[236] In a recorded conversation on 1 September 2006 Mr Grill explained to a client how fund-raising is used to extract favourable treatment at a later date.

**GRILL:** *Yeah, I know that's probably what you're saying, but we don't work in sort of neat modules like that. For instance, Dianne Guise. Right?*

**[CLIENT]:** *Yeah.*

**GRILL:** *So. If she, if she's strongly behind you, you got a good chance of getting up.*

**[CLIENT]:** *Yep.*

**GRILL:** *So she was in here yesterday. She was sitting over there.*

**[CLIENT]:** *Yeah.*

**GRILL:** *So Brian and I are, are going to organise a fund-raiser for her where she'll get twenty five thousand dollars for her campaign.*

**[CLIENT]:** *Right.*

**GRILL:** *Now that's all part and parcel of putting in place the building blocks to ensure that you're successful. Uhm, and, and, it's, I'm I'm happy to do it the way you want, but I just want you to understand that, it's maybe not as neat,*

**[CLIENT]:** Mm.

**GRILL:** as you would imagine.

**[CLIENT]:** Mm.

**GRILL:** Uhm, I mean send us ... the job so we start thinking of, how do we bring these people to come in and agree and get behind your, your ah, proposal. So,

**[CLIENT]:** Well.

**GRILL:** you know. So the the then we bring her in and we talk to her and,

**[CLIENT]:** Or, or maybe,

**GRILL:** We didn't even talk about your issue yesterday.

**[CLIENT]:** Mm.

**GRILL:** Right. We didn't even talk about that.

**[CLIENT]:** Mm.

**GRILL:** But we talked about her interests, which were getting some money for her next election.

**[CLIENT]:** Mm.

**GRILL:** So we'll organise a fund-raiser for her.

**[CLIENT]:** Mm.

**GRILL:** And Lesley will be involved and. Cameron will come along and pay some money. But you know. We'll all. You'll come along and pay some money.

**[CLIENT]:** Mm.

**GRILL:** Everyone will come along and pay some money, right.

**[CLIENT]:** Mm.



**GRILL:** *So we'll organise twenty-five thousand dollars, for her campaign. And Brian sold four tickets for that last night at a, dinner we were at, so.*

**[CLIENT]:** *Mm.*

**GRILL:** *But you know, there, there'll be twenty-five thousand dollars going to her, so. But we won't make the direct link between you and, and her.*

**[CLIENT]:** *Mm.*

**GRILL:** *It'll just be that, at the end of the day she knows we're supporting her and it enthuses her a bit more. But if the link's too direct, people start looking askew at it, if you know what I mean?<sup>116</sup>*

[237] The fund-raising dinner that Mr Grill refers to in this conversation was held on 26 October 2006. Ms Guise had arranged for the Premier to attend, along with other ALP Members of Parliament.<sup>117</sup>

[238] Although the Premier apparently had no knowledge of Mr Burke's involvement, Mr Burke used the opportunity to position his best clients nearest to the Premier.

[239] On his arrival at the Perugino's Restaurant, the Premier learned that Mr Burke had arranged the function. He immediately made his excuses and left.<sup>118</sup>



## CHAPTER FIVE

### MR ANTHONY (TONY) DAVID McRAE

#### 5.1 Mr McRae

[240] Mr McRae was elected to the Western Australian Legislative Assembly as the member for the electorate of Riverton in February 2001 and then re-elected in February 2005. Prior to entering Parliament Mr McRae had been the Director, Research and Information, National Native Title Tribunal (1996 - 2000), and an industrial relations and training adviser to Minister and Premier, Mr Peter Dowding (1985 - 1991).<sup>119</sup>

[241] It was while working for Mr Dowding that Mr McRae met Mr Grill, who was a Minister at the time. Mr McRae stated in his evidence to the Commission that Mr Grill has been a “warm acquaintance” for 20 years.<sup>120</sup>

[242] Mr McRae and Mr Grill were aligned in the Centre faction of the State ALP. Mr McRae explained the extent of this alliance to the Commission at a private hearing on 6 July 2007.

*... Is Mr Grill in the same faction as you? --- I wouldn't - yes, generally speaking that's true. It's a very loose grouping.*

*All right? --- I was baulking at the idea of in the same faction but in broad terms it's the same grouping.*<sup>121</sup>

[243] Although new to Parliament in 2001, Mr McRae very quickly obtained significant appointments. Less than four months into his political career, Mr McRae was elected to the position of Acting Speaker of the Legislative Assembly (1 May 2001 - 23 January 2005). Later the same month he was appointed Chairman of the Economics and Industry Standing Committee (30 May 2001 - 23 January 2005).<sup>122</sup>

[244] Mr McRae's natural ambition to move into the upper levels of Government is evident from his numerous attempts to be elected to the Ministry.

[245] In the ALP at this time, Ministers were elected by Caucus: that is, by all Labor members of Parliament (the Premier allocated Ministerial Portfolios). Candidates for Ministerial vacancies thus required the support of their Party colleagues to be elected. Factional “power-brokers”, such as Mr Burke, claim to be able to control how their factions will allocate their votes and therefore control the outcome of Ministerial elections.

[246] Mr McRae was confident of having support for a Cabinet vacancy in early 2005 but was asked not to nominate so as to allow Mr John Bowler MLA to be elected unopposed. Mr McRae agreed to step aside with the expectation that he was next in line for any Ministerial vacancy. In a telephone call with Mr Grill on 26 January 2006, Mr McRae expressed his regret over that lost opportunity.

**MCRAE:** *And I I I stood aside so that he didn't have a challenger. And I've got to tell you the longer the time ticks on the more and more I regret it. 'Cause I could have got up last year, we had one position open to us.*

**GRILL:** *Mate I I spoke to, I spoke to John about your, your candidature.*

**MCRAE:** *Mm. No no I'm not talking about last November.*

**GRILL:** *Oh right, okay.*

**MCRAE:** *I'm talking about February last year*

**GRILL:** *Yeah.*

**MCRAE:** *when John Bowler became a Minister. I did not stand so as to allow him to get up because he was saying he wouldn't contest if there was a serious contender. Now I had the endorsement of the Old Right and Centre if I chose to stand, and, and er I chose not to stand so as to allow Bowler up ...<sup>123</sup>*

[247] Mr McRae's February 2005 belief that he would be supported for the next available Ministerial position was misguided. He nominated for a vacancy in November 2005 but was beaten by the Member for Girrawheen, Ms Margaret Quirk MLA.<sup>124</sup> In an interview with Commission investigators on 6 February 2007 Mr McRae described his 2005 Cabinet attempt as "spectacularly unsuccessful".<sup>125</sup>

[248] In January 2006 another opportunity to enter the Ministry was available and again it seemed that Mr McRae would not be supported in his ambition to take the Cabinet spot. In the telephone call to Mr Grill on 26 January, Mr McRae was clearly disillusioned, frustrated and angry over what he perceived as a lack of support from Party colleagues.

**MCRAE:** *So ..... I have to do the same thing again.*

**GRILL:** *What's that again?*

**MCRAE:** *So the, y'know, third time around I am being asked to do the same thing again. And and I'm being told y'know that you'll*

*be next and that's the same message now for the third time. And er,*

**GRILL:** *Next amongst our group.*

**MCRAE:** *That's right. That's right Julian.*

**GRILL:** *Yeah.*

**MCRAE:** *And what does this group do? We keep on trading off to others, ...*

[249] Then later in the same telephone call:

**MCRAE:** *And uh, uh, uhm uhm one of the outcomes of er this Julian will be, uhm my formal withdrawal of support for Eric as leader of our group.*

**GRILL:** *If he continues on that way.*

**MCRAE:** *No no when and if I withdraw, if and when I withdraw from this contest that will be one of the, er that will be one of the er er elements of my withdrawal.*

**GRILL:** *But he he*

**MCRAE:** *I won't give him my support for anything in the future. It's off, over, finished. Mate I am going to extract a price for this I can tell you because I am furious about it. And I don't think I'm done yet but I, if I have to go out, if I have to pull out for some strategic plan at the end of five years of of selling our fucken soul, and giving up positions for other people, then somebody is going to understand they're responsible for it.*

**GRILL:** *Don't burn your bridges now.*

**MCRAE:** *No no I'm not, I'm Julian I'm telling you*

**GRILL:** *Mm.*

**MCRAE:** *because you're a mate.*

**GRILL:** *Yeah.*

**MCRAE:** *But that's how angry I am.*<sup>126</sup>

(emphasis added)

## 5.2 Riverton

[250] The electorate of Riverton is located in the South Metropolitan Region and includes the suburbs/towns of Parkwood, Shelley and parts of Canning Vale, Riverton, Rossmoyne and Willetton. The electorate has an area of approximately 21 square kilometres and had an enrolment of 22,860 as at 26 February 2007.<sup>127</sup>

[251] During the period with which this report is concerned Riverton was a marginal seat for the ALP, held at the 2005 election by less than 3.5%. When Mr McRae first won the seat in 2001 he outpolled his Liberal opponent by fewer than 80 votes, before distribution of preferences. He received more of the primary vote in 2005 but received fewer of the preferences, creating an even tighter final margin than in 2001.<sup>128</sup>

[252] In the telephone conversation with Mr Grill on 26 January 2006 Mr McRae expressed his belief that his success in holding Riverton was not a feat anyone else in the ALP could have accomplished.

**MCRAE:** *If they want to disendorse me fine.*

**GRILL:** *Yeah*

**MCRAE:** *I'm the member for Riverton and let's see anyone else win Riverton.*

**GRILL:** *Oh they couldn't.*

**MCRAE:** *Exactly.*<sup>129</sup>

[253] Representing a marginal electorate is obviously a vulnerable position for an ambitious politician.

[254] As would be expected, fund-raising for the next political campaign had always been treated as a priority by Mr McRae.

## 5.3 Importance of Campaign Funding in Riverton

[255] The longevity of the member's career hangs in the balance at every State poll and even the most promising and talented Parliamentarians can find their political future abruptly derailed. It is, therefore, vital for members in marginal seats to foster community awareness, promote Party policies and demonstrate their personal commitment to the electorate.

- [256] Such self-promotion within the electorate can be costly. Expenses that a candidate in an election campaign would normally incur include: the printing of letters, cards and brochures; postage costs; directly addressed targeted mail-outs; advertising, including television, radio and newspapers; webpage design; and signage around the electorate and at polling booths. In addition, increased telephone, travel and office-related expenses would be incurred.
- [257] Campaign expenditure by candidates for State electorates is likely to run into the tens of thousands of dollars, and amounts of \$50,000 to \$100,000 would not be unusual. The Commission has been told that a campaign in a marginal seat might cost as much as \$150,000.
- [258] The importance of soliciting support and maintaining a public profile require candidates in marginal seats to spend more on their campaigns than those in safe seats. During a debate on electoral reform in the Western Australian Legislative Assembly on 14 September 2006, Ms Sue Walker MLA (member for Nedlands) told the Parliament that her 2005 campaign cost \$45,000. The Hon Colin Barnett MLA (member for Cottesloe) replied that he spent approximately \$25,000. Prior to the 2005 election, both Nedlands and Cottesloe were considered very safe seats for the Liberal Party. Mr Barnett went on to acknowledge that a lot more funding is needed in marginal seats:

**Mr C.J. BARNETT:** ... I am conscious that in marginal seats, candidates would be spending way above that. Ranges from \$50 000 to \$100 000 would not be ...<sup>130</sup>

- [259] In the same debate the Liberal member for Roe, who had won the seat from the National Party in 2005, stated that the cost of running a campaign was “enormous”, saying that he had spent \$23,000 on television advertising alone.

**Dr G.G. JACOBS (Roe):** ... Politicians understand the difficulties with, and the cost of, running campaigns. The costs are enormous and are increasing. For instance, the television advertising component of the election campaign in the electorate of Roe in 2005 was \$23 000.<sup>131</sup>

- [260] Amounts spent by ALP candidates were similar. Collectively, the Party spent over \$2.2 million on the 2005 State election campaign.<sup>132</sup> Mr Grill acted as campaign manager for Mr Bowler who was a candidate for the seat of Murchison-Eyre. Email correspondence located on Mr Grill’s computer shows that the campaign team estimated they would require at least \$60,000 to pay for Mr Bowler’s campaign.<sup>133</sup>
- [261] ALP Parliamentarians in Western Australia contribute to the Party’s campaign funds upon their election by paying a levy from their salaries into the State ALP “election fund”: Members of the Legislative Assembly are levied 4% of their base pay; and Members of the Legislative Council 7%.<sup>134</sup> These contributions are separate, however, from funds that can be used for individual campaigns.
- [262] The Commission has been told by sources within the ALP that unless the candidate is standing in a “targeted seat”, to which the Party may contribute

funds, the majority of campaign costs must be borne locally. In order to meet this need, the candidates must rely on their own fund-raising efforts as well as that of the ALP local branches and electorate councils. "Targeted seats" are determined by the Party's administrative committee and are generally seats the Party thinks it can win with an additional investment. A marginal seat will not necessarily be "targeted" even at the risk of losing a sitting member. If public opinion or local issues are such that re-election is unlikely, the Party's valuable funds would more likely be directed elsewhere.

- [263] The seat of Riverton was a marginal seat for the ALP, held by Mr McRae at the 2005 election by a narrow margin.<sup>135</sup> That Mr McRae would need to raise a substantial "war chest" to fund his next campaign is undeniable. He could not necessarily rely on the hope that his seat would be "targeted" and receive additional Party funding. Instead Mr McRae would need to work towards accumulating financial independence for his campaign throughout his Parliamentary term.
- [264] One fund-raising strategy employed by Mr McRae was the selling of tickets to dinner events at which the Premier and other senior Parliamentarians would appear. In September 2004 Mr McRae held a successful dinner of this kind at Friends Restaurant.
- [265] Mr McRae had scheduled another of these dinners to take place on 19 October 2006 and had hoped to sell at least 50 tickets priced at \$275 each. After costs had been deducted, the dinner would have generated in excess of \$10,000 for the Riverton campaign account. Unfortunately for Mr McRae, the timing of this dinner coincided with a number of other ALP fund-raising events.<sup>136</sup> This resulted in a lack of interest and a low number of ticket purchases.
- [266] It was after reviewing "the numbers" for the dinner that Mr McRae telephoned Mr Grill on the morning of 11 October 2006.

**MCRAE:**

*... the ... conversation [with Mr Grill] was in relation to a fund raising dinner that I'd, I'd been organising and Julian had been an invitee and , I was a bit concerned that the timing was clashing with a number of other things that were on ... the numbers have [had] been a bit slow ...*<sup>137</sup>

- [267] Mr McRae told the Commission that he had no particular need for campaign funds at that time. He said he was about two years out from an election and indeed had recently redirected his campaign funds to the Federal election. A fund-raising officer, Mr Rasa Subramaniam, told the Commission that in August 2006 he helped organise a "Bollywood" movie for the Indian community. He was keen that the money should go to Mr McRae, but he was "quite happy" that it should go into the ALP electoral fund for the Federal seat



of Tangney. The Commission accepts this was so, but the fact remains that Mr McRae did have an ongoing need to raise campaign funds.

- [268] It is important for the Commission to take into account Mr McRae's state of mind at the time of the telephone call when making assessments about his conduct. Mr McRae held a marginal seat and it is widely recognised that marginal seats require large amounts of funding. ALP candidates are mostly responsible for generating their own campaign funds, and Mr McRae was facing a situation where a major fund-raising initiative was floundering. All of these factors would have combined to cause Mr McRae genuine and legitimate concern about his ability to raise adequate funds for his re-election.

## **5.4 Assistance by Mr Burke and Mr Grill in Mr McRae's Promotion to Cabinet**

### **5.4.1 Cabinet Vacancy: January 2006**

- [269] The resignation of the Premier, the Hon Dr Geoffrey Gallop MLA, on 16 January 2006 and that of the Hon Dr Judith Edwards MLA later the same day created two vacancies within Cabinet. Mr McRae had aspirations to fill one of those vacancies.<sup>138</sup>
- [270] The Commission intercepted several very lengthy telephone conversations between Mr McRae and Mr Grill, in the lead up to the Caucus vote on 31 January 2006.
- [271] When questioned about these calls at a private hearing on 6 July 2007 Mr McRae answered that he had hoped that Mr Grill would lobby "various people" on his behalf.

*... Did in fact you look for his - or did he offer his support? --- I would have sought - in the course of seeking endorsement from my Caucus colleagues - support from people who might lobby various people on my behalf, yes.*

*One of those being Mr Grill? --- Possibly, yes.*

*What about Mr Burke? --- I've met with Brian Burke once in April or - April or May of last year before I became a Minister, asking - and asked him whether he would speak in favour of my candidacy to people in the - what's called the "old right" of the Labor Party.*

*Did he give you that undertaking? --- Not unequivocal, no.*

*I see. There was - -? --- And I would say general without being kind of effusive or absolutely clear.*

*Sure. Do you recall having a conversation with Mr Burke earlier than May in which he indicated that he would give you his support? --- No, I don't.<sup>139</sup>*

[272] An intercepted telephone call on 27 January 2006<sup>140</sup> confirms that Mr McRae did speak with Mr Burke prior to the January Caucus vote. Mr Burke declined to support Mr McRae on this occasion as his priority was to help good friend Mr Norm Marlborough get elected. Mr Burke did however promise his support to Mr McRae for the next vacancy.

**BURKE:**

*... Firstly to assure you and, and this is unequivocal, that you will have my support for what it's worth at the next vacancy that occurs within the Government for a Minister to be selected so if Kobelke leaves, I will be putting the point of view very strongly that you should fill that position and in addition to that I am committed to trying to engineer some vacancies because I don't believe that we've got the best people in the Ministry now and I think that's a legacy of Gallop. The second thing I wanted to say is this and*

**MCRAE:**

*And, and Brian would Di [sic: I], would Di [sic: I] have your support for any of those that come up?<sup>141</sup>*

**BURKE:**

*I said the next position not any. The next position that comes up. You will have my support. Now I'm confident completely I could carry the New, the Old Right and I may well be in a position later to, to be able to ex- extend that influence. I don't say it idly. Let's say the next position that comes up is, is Kim Chance's. If you are of the view that you should run for that position and that it should be transferred to the Lower House you'll have my support for that. I don't have a difficulty in the world provided that's the decision that's come to and you're the candidate, supporting you. If however we can engineer a, a, a vacancy by Kobelke going, I'm happy to say to you now in front of Julian that I'll support you for that vacancy ...*

[273] Later in the same telephone call:

**BURKE:**

*... I just repeat by saying if and when there is another vacancy in the Lower House whether it's one created by the transfer of*

*a Minister from the Upper House to the Lower House or one created by the resignation of someone in the Lower House, if you won [sic: run] then you will have my support. That's it.*

[274] Mr Burke also promised the future support of his faction, the Old Right.

**BURKE:** *... I'm saying this no more no less the next vacancy that occurs in the Lower House is a vacancy for which you will have my full support. That's it stop finish. Whether you win or not I don't know but there'll be no ifs, no buts you'll have my full support and that would extend to the, to the Old Right ...*

[275] During the same call Mr Grill also tried to dissuade Mr McRae from contesting the January 2006 vacancy as it interfered with a strategy to build an alliance with the New Right faction. Mr Grill discussed factional issues with Mr McRae at great length, always making it clear that he felt this was not the right time for Mr McRae to nominate.

**GRILL:** *Well Tony I really think it's a road to nowhere and ah, I'd really like, I'd really [like] you to think very seriously about the position.*

**MCRAE:** *Oh, oh I will.*

[276] After his conversation with Mr Burke, Mr McRae was left in no doubt that Mr Burke and Mr Grill were not supporting his candidacy. He was upset about this, as is evidenced below.

**BURKE:** *Anyway I'll leave it with you. You can have a talk to Julian yet that's what he asked me to say when he asked me, that I made up my mind. So that's my piece I'll leave you, you can work through it with Julian.*

**MCRAE:** *Thanks Brian. All the best.*

**GRILL:** *So uhm, how do you feel Tony?*

**MCRAE:** *Ah I feel bruised, Julian.*

(emphasis added)

[277] Ultimately Mr McRae was not successful in January 2006 and the vacancies were filled by Mr Marlborough MLA and Mr David Templeman MLA.<sup>142</sup>

#### 5.4.2 Cabinet Vacancy: May 2006

[278] On 9 May 2006 the Hon John D’Orazio MLA, the Member for Ballajura, resigned from the Ministry. He had been removed from the Police and Emergency Services, Justice and Community Safety Portfolios by the Premier the day before.<sup>143</sup> Before Mr D’Orazio had even announced it to the Parliament,<sup>144</sup> Mr McRae contacted Mr Grill seeking support.

**MCRAE:** *Have you heard the news?*

**GRILL:** *I’ve heard the news and I know you, I, I, I know you’ll be it the, uh, in the market and*

**MCRAE:** *Yeah.*

**GRILL:** *I think you’ve got a very good chance.*

**MCRAE:** *Uh, I do too, mate. Yeah.*

**GRILL:** *And you’re calling in your favours. Is that right?*

**MCRAE:** *(laughs) Uhm, without being too craven about it, yes.*

**GRILL:** *Okay. I’ll ring this evening.*

**MCRAE:** *Good on ya.*

**GRILL:** *Good.*

**MCRAE:** *And, mate just, uh, uh, just I’d appreciate it if you, uh, just let me know as things unfold over the next week or so.*

**GRILL:** *Certainly.*

**MCRAE:** *Good on ya.*

**GRILL:** *See ya.*

**MCRAE:** *Thanks very much, Julian. Cheers mate.<sup>145</sup>*

(emphasis added)

[279] Mr Grill phoned Mr McRae the following day and they made arrangements to meet at a coffee shop in East Perth. Mr Burke also attended.<sup>146</sup> When questioned about the meeting Mr McRae told the Commission that he “left

there with the impression that Grill and Burke were going to support me in my candidacy".<sup>147</sup>

[280] Following the meeting Mr Burke and Mr Grill made numerous telephone calls to assist Mr McRae in "getting the numbers". These calls were placed not only to members of their own factions but also to Caucus members in other factions with whom each had a friendly relationship.

[281] Mr McRae appeared to be aware of this, and was grateful. On 11 May 2006 he sent an SMS message to Mr Grill:

*Julian, thanks for your support mate. regards, Tony*<sup>148</sup>

[282] He followed this up with a telephone call, again to express his thanks.

**GRILL:** *Hello?*

**MCRAE:** *Julian, Tony.*

**GRILL:** *I'm at a meeting so we'll have to be fairly quick.*

**MCRAE:** *Okay, mate. That's okay. I just wanted to say thanks.*

**GRILL:** *Oh, right. Okay, mate. I'll be in contact. Don't worry.*

**MCRAE:** *Cheers.*

**GRILL:** *Any problem just let me know straight away.*

**MCRAE:** *Okay.*

**GRILL:** *Good.*

**MCRAE:** *Cheers now. Bye*<sup>149</sup>

[283] Mr McRae's thanks could only have been in response to the support provided by Mr Burke and Mr Grill for his candidacy to a position in Cabinet. As far as the Commission is aware Mr Grill was not at this time providing Mr McRae with any other assistance.

[284] On 12 May 2006 Mr Burke spoke with Ms Guise who was aligned within one of the two Left factions of the Party. In that telephone call Mr Burke discouraged Ms Guise from contesting the vacancy and offered her support should she wish to pursue the role of Speaker of the Legislative Assembly. It could be concluded that Mr Burke's aim was to prevent Mr McRae having Ms

Guise as a competitor. This was put to Mr Burke at a Commission private hearing on 14 October 2008.

*... You remember that one of the - I'm assuming you saw the letter that your lawyers wrote; yes. One of the complaints was in relation to a comment in the draft report which referred to a conversation that you had had with Ms Guise on 12 May 2006 and it was said in that telephone call that you discouraged her from contesting a vacancy and offered her support should she wish to pursue the role of speaker of the legislative assembly. Do you recall having a conversation with her about that?*

*... I remember being of that mind. I don't remember the exact conversation.*

*All right, and why was it that you were trying to discourage her from contesting the vacancy?---I think because she wouldn't win.*

*Did it have anything to do with you wanting Mr McRae to be successful for that position?---It wouldn't have made any difference. Mr - she came from a completely different faction to Mr McRae, she came from the left, and she wouldn't have got votes that McRae would get anyway. No, I don't think that's the case. I think it was just that I didn't think that she would win and she wouldn't be very pleased about it*

*... I don't remember the exact call.*<sup>150</sup>

[285] Mr McRae and Mr Grill spoke to each other several more times before the Caucus vote on 22 May 2006. On the afternoon of 21 May 2006 Mr McRae contacted Mr Grill to discuss the way he expected the votes to go. When detailing those whom he thought had committed to support him, Mr McRae stated that he was confident of receiving nineteen votes from the Centre and Old Right factions of the Party.

**GRILL:** *How are they made up?*

**MCRAE:** *Uh, all the Centre, twelve.*

**GRILL:** *Yeah.*

**MCRAE:** *Uh, the Old Right.*

**GRILL:** *How solid are they?*

**MCRAE:** *Well, I've, I've checked with Kate, uh, and Ed, uhm*

**GRILL:** *Yeah.*

**MCRAE:** *They, they*

**GRILL:** *I'd be very surprised if they weren't so*

**MCRAE:** *And*

**GRILL:** *how many have they got there?*

**MCRAE:** *Uhm, seven.*<sup>151</sup>

[286] Although it could be argued that the Old Right and Centre factions would have voted for Mr McRae even without the support of Mr Burke and Mr Grill, the fact that they were in favour of his candidacy would have given Mr McRae a great deal of comfort. Mr Burke and Mr Grill had not supported Mr McRae in January 2006 and he had failed. Now that he was receiving their aid he anticipated all available votes from both their factions.

[287] On 22 May 2006 Mr McRae was successful in being elected to the Cabinet. His victory was against Ms Jaye Radisich MLA who was a member of the New Right faction.

[288] Mr McRae told Commission investigators that he understood that Mr Grill and Mr Burke had been instrumental in this internal party process leading to his election.

*... I acknowledge that Julian had been of assistance and I said and pass on my thanks to Brian. I think his assistance in ensuring that the Old Right faction, of which he was, to which he was connected had been very important in holding numbers together for my election to, to Cabinet.*<sup>152</sup>

[289] Mr Grill was delighted with the result and felt that having a friend such as Mr McRae in Cabinet was a crucial step in securing more "clout" within the Party. He expressed this view in a telephone call to Mr Burke.<sup>153</sup>

[290] Later in the same telephone call<sup>154</sup> Mr Grill made it clear that helping Mr McRae into the Ministry was part of a "numbers game" and a "power play" that he and Mr Burke could use to their advantage. Mr Grill's understanding was that Mr McRae would be indebted.

**BURKE:** *Anyway I'm just pleased, uh, McRae got up and you should let him know he got every one of our votes plus I got, uh, Watson for him, uh, and he got all the independents he had for Kucera as far as I know.*

**GRILL:** *Yeah.*

**BURKE:** *So he didn't do bad, did he?*

**GRILL:** *No.*

...

**GRILL:** *Mate, we've got, just gotta, this is a numbers game. It's a powerplay. We've just gotta*

**BURKE:** *Yeah.*

**GRILL:** *play it to our advantage at the*

**BURKE:** *Well, that's right*

**GRILL:** *end of the day.*

**BURKE:** *mate, but I mean he, you know, he's the sort of bloke, I mean, you saw last time he wouldn't give a commitment about Norm. And, and where his own interests are concerned he's not fuckin' intelligent or generous at all. And the rest of 'em, Kate and the rest of 'em, were, are absolutely sure that if he had to promise the bloody n, Sue Ellery the next vacancy to get, to get up this time he'd do it, you know? No one trusts him.*

**GRILL:** *Mm.*

**BURKE:** *And he had some cock-and-bull story about why he didn't give us a commitment for Norm for some, he was waiting on somethin' else. Do you remember that?*

**GRILL:** *Yeah. Well he, he said he was waiting on the metalworkers. Mm.*

**BURKE:** *Yeah, he would.*

**GRILL:** *He tipped off the metalworkers in.*

**BURKE:** *Yeah, I, well, fuck him. Anyway, mate, he's got what he wanted and that's that and I played my part so that's all that, uh*

**GRILL:** *Mate, he, there's another side to it.*

**BURKE:** *Yeah?*

**GRILL:** *The other side to it is he owes us.*

**BURKE:** *Yeah, well*



**GRILL:** He owes us.

**BURKE:** I'll

**GRILL:** Okay?

**BURKE:** (Laughs) Mate, I must say I, I reached the stage where so many people owe you that you never hear from [them] again that you don't worry, you know?

**GRILL:** Yeah, but they're there, okay?

**BURKE:** Mm.

**GRILL:** I mean, you don't always get 'em across the line on things but.

**BURKE:** No.

**GRILL:** Anyway.

**BURKE:** Nuh. Anyway, mate, it's all worked out okay.

**GRILL:** Yeah, good.

**BURKE:** Alright, mate.

**GRILL:** See ya.

**BURKE:** See ya.

(emphasis added)

#### 5.4.2.1 Mr McRae's Appreciation

[291] Shortly after his success at the 22 May 2006 Caucus meeting, Mr McRae called Mr Grill to express his thanks. He left the following message on Mr Grill's voicemail that day.

*Julian, Tony McRae mate. Just ringing to say, uh, uhm, thank you very, very much indeed for your, uh, unstinting support. Uhm, we, we were successful today with a very comfortable, very healthy margin and, uh, mate, uh, please pass on my regards to Brian. Both of you guys, uh, were superb. Thank you very much. Talk to you soon, mate. All the best.*<sup>155</sup>

[292] Mr McRae called back again, later the same day, to thank Mr Grill.

**GRILL:** *Ah, Minister. How are ya?*

**MCRAE:** *Julian, I'm fine, mate. I wanted to ring and say thank you.*

**GRILL:** *Ah, no, no, no. Uhm, I'm just, just so pleased. It's uh, it's a great, uhm, privilege I think, to serve, uh, the people of Western Australia as a Minister. It doesn't happen to a lot of people so, uh, I think you're very lucky.*<sup>156</sup>

[293] The content of those calls show that Mr McRae attributed his success, at least in part, to Mr Burke and Mr Grill's support. In evidence to the Commission about this, Mr McRae accepted that he was "thankful" but did not acknowledge that he felt "gratitude", for fear of being misinterpreted as meaning "indebted".

*... You wanted them to be clear in their minds that you felt gratitude to them? --- No, I wanted to acknowledge that they had been supporting. There's a - sorry, Mr Hall, there's a difference between wanting them to think that I felt gratitude and wanting to say thank you for your efforts and I don't have in my mind and I don't think it's in my make up to think that I wanted them to feel gratitude - or to have a sense that I had gratitude.*

*Yes. All right.*

*Were you not saying that you were grateful for their support? --- I was saying thank you because they had done a lot of work. They had spoken to a lot of people.*

*Were you not grateful for that? --- Well, I think we're - do I actually use the word grateful?*

*No?---Okay, so we're - - -*

*No. I only ask that question because, Mr McRae, you seem to draw a distinction between being grateful and simply saying thank you? --- Mr Commissioner, Mr Hall used the expression gratitude - - -*

*Yes and you drew the distinction and said, "No, but I was thanking them?" - -- Gratitude to me implies a whole bunch of other things that I don't believe I had in my mind. Thankful, yes. Grateful, probably but implying some sort of gratitude also in my understanding of the word has a connotation of servitude and I would disagree with that.*

*So you're drawing a distinction, I must say, which I have a little bit of difficulty following at the moment given that you say gratitude yes - I'm sorry - - -? --- Grateful.*

*- - - grateful, yes, but not gratitude?---Simply because of my interpretation and connotation of some form of servitude implied in the word gratitude and I'm sensitive about the way these words might be interpreted.*<sup>157</sup>

[294] Regardless of whether Mr McRae felt indebted to Mr Grill that was certainly Mr Grill's assessment of the situation. In his telephone conversation with Mr Burke on 22 May 2006 Mr Grill has said of Mr McRae that "he owes us".<sup>158</sup> In the following call with a client on 8 September 2006, Mr Grill repeats that view.

**GRILL:** *And uhm Tony, I mean we wouldn't use anything against Tony but the thing is that that Tony owes us and uh we're not asking for a lot.*

**LOMBARDO:** Yes.<sup>159</sup>

(emphasis added)

[295] Mr McRae was sworn in as a Minister of the State on 26 May 2006, and was assigned the Portfolios of Disability Services; and Citizenship and Multicultural Interests. Mr McRae was also designated as the Minister Assisting the Minister for Planning and Infrastructure.<sup>160</sup> Less than five weeks later Mr Grill telephoned Mr McRae seeking a meeting for himself and one of his lobbying clients.<sup>161</sup>



## **CHAPTER SIX**

### **MR McRAE'S FUND-RAISING IN 2004 AND 2005**

#### **6.1 Introduction**

- [296] In the course of the Commission's 2006 investigation into the proposed Smiths Beach Development at Yallingup, Mr Grill's computers were seized. Forensic analysis of the computers revealed numerous contacts between Mr Grill and Mr McRae during 2004 and 2005. The contacts related to Mr McRae's fund-raising and also his official duties as the Chairperson of the Economics and Industry Standing Committee (EISC), Parliament of Western Australia (30 May 2001-23 January 2005).
- [297] Given the nature of the Commission's 2007 examination into Mr McRae's conduct, events of earlier years became relevant. What was identified was a series of incidents with notable similarity to each other, providing a better understanding of Mr McRae's conduct in October 2006.

#### **6.2 Economics and Industry Standing Committee 2004**

- [298] In 2004 EISC conducted an inquiry into the closure of the Windimurra vanadium mine. The improper release and subsequent unauthorised editing of the Committee's report formed part of the Commission's investigation and public hearings in February 2007 and led to the resignation of the Hon John Bowler MLA from Cabinet and the ALP.
- [299] In March 2007 the Procedure and Privileges Committee ("the Privileges Committee") of the Legislative Assembly launched their own investigation into the EISC breach. The Commission assisted by supplying a large number of documents and electronic communications lawfully obtained under warrant during the course of the Commission investigation into the proposed Smiths Beach Development.
- [300] As a former Chairperson of the 2004 EISC inquiry, Mr McRae was called to give evidence to the Privileges Committee. During an appearance before the Privileges Committee on 18 May 2007 Mr McRae was questioned about the appropriateness of his fund-raising with respect to Mr Roderick Smith.<sup>162</sup>
- [301] Mr Smith was the founding Managing Director of Precious Metals Australia (PMA),<sup>163</sup> the company adversely affected by the closure of the Windimurra mine. Mr Smith, on behalf of PMA, had made submissions and given evidence to the EISC inquiry.
- [302] PMA had retained the lobbying services of Mr Burke and Mr Grill shortly after the Windimurra mine was permanently closed in May 2004.<sup>164</sup> Mr McRae was aware of Mr Grill's association with PMA.<sup>165</sup>

### 6.3 Fund-Raising Dinner: 1 September 2004

- [303] The EISC inquiry, of which Mr McRae was Chairperson, commenced on 30 June 2004 and tabled its final report on 11 November 2004. During the inquiry EISC received submissions from both PMA and its former joint-venture partner Xstrata, made visits to the mine site and conducted hearings. Mr Smith personally gave evidence twice; at hearings on 11 August 2004 and 22 September 2004.<sup>166</sup>
- [304] In the midst of this process Mr McRae held a campaign fund-raising dinner. An invitation to the event was sent to Mr Grill via email on 25 August 2004. Held on 1 September 2004, the function was entitled “Dinner with Friends and Leaders on Economic Development” and took place at Friends Restaurant with a ticket cost of \$275 per person.<sup>167</sup>
- [305] Mr Grill forwarded the invitation to Mr Smith with the comment that it would be very much in Mr Smith’s interest to support the function.<sup>168</sup> When questioned about this email by the Privileges Committee on 18 May 2007, Mr Grill explained that he thought it would be a good idea if Mr Smith were on good terms with Mr McRae as he was Chairperson of EISC.<sup>169</sup> In Mr Grill’s mind at least, there was a direct link between Mr McRae’s fund-raising needs and his role as the Chairperson of EISC.

<b>Subject:</b>	FW:
<b>From:</b>	Julian Grill
<b>Date:</b>	25/08/2004 2:39:00 PM
<b>To:</b>	'brianburke@[redacted]'; Roderick Smith; Roderick Smith [redacted]
<b>Message Body</b>	
Dear Rod,	
It would be very much in your interest to support this function. I shall attend, but it would be good if you could help to fill a table. I think that there are tables of seven.	
Regards	
Julian Grill	
-----Original Message-----	
From: Sheila Mills [mailto:smills@[redacted]]	
Sent: Wednesday, 25 August 2004 9:53 AM	
To:	
[redacted] grill1@ [redacted] lesleygrill@	
Subject:	
<b>Attachment</b>	
Leaders and Friends Dinner.pdf	

[306] Mr Smith purchased six tickets on Mr Grill's table. The Privileges Committee Inquiry Report found that Mr McRae became aware of this fact before the dinner but made no attempt to dissuade Mr Smith from attending. Mr McRae's lack of action in this regard attracted criticism from the Privileges Committee in its report.

*The central concern is that Mr Roderick Smith's attendance at the function, and his obligation to pay money to the ALP Riverton Election Campaign fund, occurred during the EISC's inquiry, which inquiry directly concerned the commercial interests of PMA.*<sup>170</sup>

[307] Mr McRae told the Privileges Committee he was cautious not to discuss the EISC inquiry with Mr Smith at the fund-raising dinner. Mr Smith told the Privileges Committee Inquiry that Mr McRae simply shook his hand and thanked him for attending.<sup>171</sup> Nonetheless, Mr Grill's notion that supporting the function would be in Mr Smith's interest was well founded as Mr Smith and Mr McRae started communicating more directly afterwards.<sup>172</sup>

[308] The report tabled by the Privileges Committee on 20 June 2007 made the recommendation that Mr McRae apologise to the Legislative Assembly for failing to prevent Mr Smith's attendance at his fund-raiser.<sup>173</sup> Accordingly, Mr McRae made this apology:

*In the terms of recommendation 3 of the committee, I say, without hesitation and without any clarifying comments whatsoever, that I apologise unreservedly for my actions that have potentially diminished public trust in the parliamentary institution and its processes through the lack of my action to prevent Mr Smith from attending that event. I accept the perception that might be drawn from it. I say that that perception could arise.*<sup>174</sup>

## **6.4 Events Subsequent to Economics and Industry Standing Committee Inquiry**

[309] In August 2004 Precious Metals Australia (PMA) lodged a damages claim against Xstrata in the New South Wales Supreme Court. Consequently, both parties had a significant interest in the contents of the EISC report, which had not yet been handed down.

[310] When questioned about his awareness of the law suit at the Privileges Committee hearing 23 March 2007, Mr McRae answered as follows.

**The CHAIRMAN:** *Were you aware during the inquiry that Precious Metals Australia had begun civil action in New South Wales against Xstrata, alleging loss of royalties that Xstrata had contracted to pay?*

**Mr A.D. McRAE:** *I became aware of that as we had finished our hearings and had started deliberation and framing of the report.*

...

**The CHAIRMAN:** *Did you know that Precious Metals Australia and Mr Smith had a financial interest in whether it could be shown that Xstrata had closed a viable mine?*

**Mr A.D. McRAE:** Yes.<sup>175</sup>

[311] Simultaneous to the legal battle over Windimurra, Xstrata was seeking to purchase Western Mining Corporation (WMC). To be allowed to bid for WMC, Xstrata required the consent of the Foreign Investment Review Board and the Federal Treasurer, the Hon Peter Costello MP.

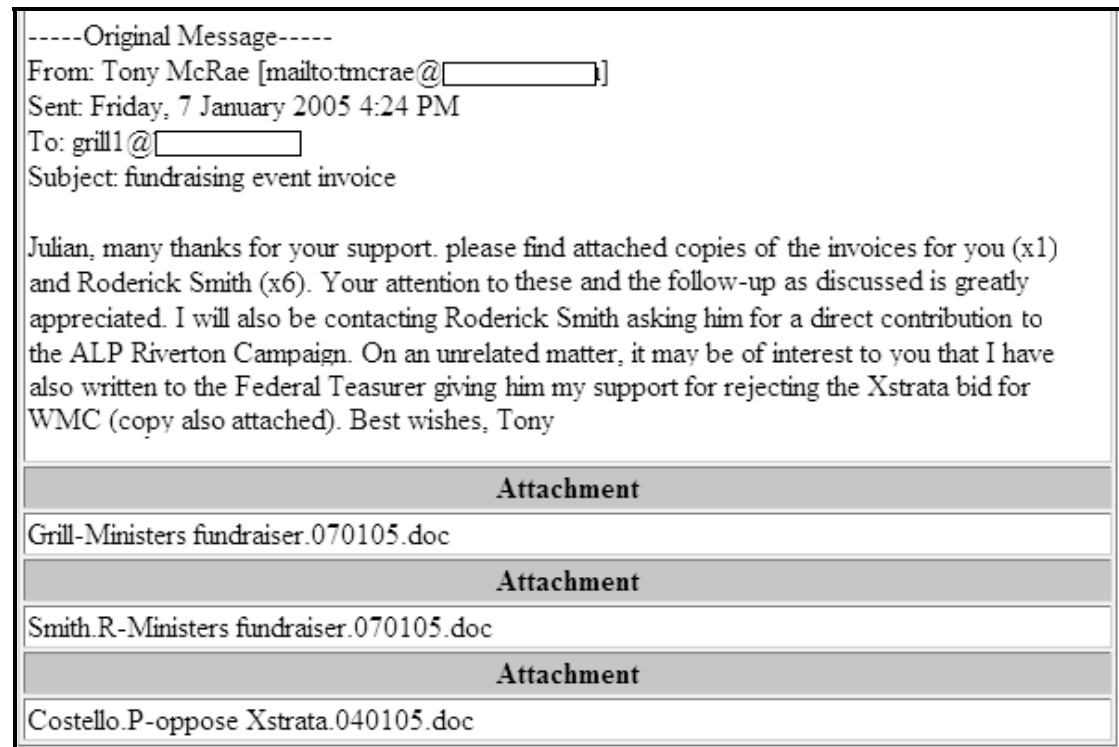
[312] The EISC report, tabled in November 2004, was very critical of Xstrata. Mr Burke and Mr Grill assisted PMA in bringing the report to the attention of the Federal Parliament. It seems they hoped that, faced with pressure from arguments in Federal Parliament, Xstrata might be more disposed to consider settling with PMA over the Windimurra issue. Their strategy was to use their contacts in the ALP, and the Liberal Party through Mr Crichton-Browne, to advise Mr Costello against a decision favourable to Xstrata.<sup>176</sup>

[313] On 4 January 2005 Mr Burke contacted Xstrata executive Mr Marc Gonsalves in London. Mr Gonsalves claims that in their 26-minute telephone conversation, Mr Burke boasted that he could change the course of Xstrata's fortunes in the Federal Parliament if Xstrata would only settle their legal dispute with PMA.<sup>177</sup>

## **6.5 Donation Request 7 January 2005: Email to Mr Grill**

[314] Mr McRae must have been aware that PMA, with Mr Burke and Mr Grill, were actively lobbying against Xstrata's WMC bid. On 7 January 2005, Mr McRae sent an email to Mr Grill following up payment for his September fund-raiser and stating his intention to seek a campaign donation directly from Mr Smith. Attached to the email was a strongly-worded letter Mr McRae had written to Mr Costello under the auspices of EISC.<sup>178</sup>





[315] In the letter to Mr Costello, Mr McRae expressed his concern about Xstrata's corporate culture and enclosed a copy of the EISC report into the closure of the Windimurra mine.<sup>179</sup> He signed off the letter in the following manner:

In light of this experience, I am opposed to Xstrata's attempts to gain control of WMC Resources and I would support any decision taken by you to disallow this bid.

Yours sincerely

**Tony McRae MLA**  
**Member for Riverton**  
**Chairperson, Economics and Industry Standing Committee (WA Parliament)**

4<sup>th</sup> January 2005

[316] Given the strategy that Mr Burke and Mr Grill had employed to pressure Xstrata into settling the lawsuit with PMA, the letter is significant. Mr McRae had written the document in his capacity as the Chairperson of EISC. He had then attached it to an email transmission in which he dealt with fund-raising assistance. This was, of course, inconsistent with his explanation in evidence, that he appreciated the need to separate the political processes from policymaking and determination-making.<sup>180</sup>

## 6.6 Donation Request 7 January 2005: Email to Mr Smith

[317] Mr McRae gave evidence to the Privileges Committee on 18 May 2007 that he could not recall making a direct request to Mr Smith for campaign funds.<sup>181</sup> Mr Smith was certain that he had.<sup>182</sup> Information in the Commission's possession

confirms that Mr McRae did in fact send an email to Mr Smith on 7 January 2005. In the email Mr McRae expressed his support for PMA's battle against Xstrata before asking for a donation to the Riverton campaign.

-----Original Message-----  
From: Tony McRae [mailto:tmcrae@[redacted]]  
Sent: Friday, 7 January 2005 4:56 PM  
To: roderick@[redacted]  
Subject: Riverton Campaign

Dear Roderick,

Best wishes for 2005 and your battle against the Xstrata ogre.

I'm writing to ask for your support in my campaign to retain the seat of Riverton. I know from our conversations that you have been pleasantly surprised about the work of the Labor Government. I am working to be an ongoing part of the team that continues to surprise people such as yourself in our pursuit of a sustainable growth model for WA. This is a great place - your contribution to my campaign will help me hold Riverton and be a part of continuing our work.

Thanks for giving this your consideration - if you are able to contribute, please make cheques payable to: "ALP Riverton Campaign" and mail to: PO Box 639 Willetton WA 6955. If you want to contact me at any time, my office number is 9457 1282 and mobile [redacted]

Thanks once again for your support to date.

Yours sincerely  
Tony McRae MLA  
Member for Riverton

- [318] Mr Smith replied to Mr McRae that he would be delighted to make a donation and then forwarded the email chain to Mr Burke and Mr Grill asking for advice. Mr Grill responded that PMA should contribute as the EISC inquiry had been the springboard for their efforts against Xstrata.<sup>183</sup>
- [319] Whether or not it was deliberately done, Mr McRae had used their shared EISC experience to give Mr Smith a sense of obligation. Mr Grill was certainly conscious of the obligation to support Mr McRae due to his role in the EISC inquiry as he stated as much in his reply to Mr Smith.
- [320] In the text of Mr Grill's email to Mr Smith on 7 January 2005, he refers to the fact that Mr McRae had called him prior to sending the solicitous email to Mr Smith. In his own email of the same date<sup>184</sup> Mr McRae said that Mr Smith could contact him at any time and asked him for a direct contribution to the ALP Riverton campaign. This demonstrates that Mr McRae's approach to Mr Smith was not spontaneous or clumsy; it was considered and deliberate.

<b>Subject:</b>	<b>RE: Riverton Campaign</b>
<b>From:</b>	Julian Grill
<b>Date:</b>	7/01/2005 7:00:00 PM
<b>To:</b>	'roderick@[redacted]'; 'Brian Burke'
<b>CC:</b>	[redacted]
<b>Message Body</b>	
<p>Dear Roderick,</p> <p>Tony rang me before he sent the e-mail. If PMA is in a position to contribute then I think that it should. The Parliamentary inquiry was the real springboard for the campaign against Xstrata. Could we discuss this when we meet on Monday?</p> <p>Regards</p> <p>Julian Grill</p> <p>-----Original Message-----  From: Roderick Smith [mailto:roderick@[redacted]]  Sent: Friday, 7 January 2005 5:11 PM  To: Brian Burke; 'Julian Grill'  Subject: FW: Riverton Campaign</p> <p>What should I do?</p> <p>-----Original Message-----  From: Roderick Smith [mailto:roderick@[redacted]]  Sent: Friday, 7 January 2005 5:11 PM  To: 'Tony McRae'  Subject: RE: Riverton Campaign</p> <p>Dear Tony</p> <p>Of course I would be delighted to contribute as we have for other Labor candidates.</p> <p>You are right that we have been pleasantly surprised by the work of the Labor government. Your Government has shown that it is prepared to stand up to bullies (from either side of the fence) and to defend the rights of the public against exploitation in the many forms it can take.</p> <p>The battle continues apace. The more people ask questions, the more concerns seem to emerge about Xstrata. They are now in trouble for environmental issues arising from their rapid destruction of Windimurra. They continue to treat the Government and media with contempt which suggests they are very slow learners at best.</p> <p>I know you have a very balanced approach to business and the community and applaud you for it.</p> <p>Best wishes for your campaign.</p> <p>Regards  Roderick</p>	

## 6.7 Donations to Mr McRae's Campaign

[321] In evidence given to the Privileges Committee on 18 May 2007, both Mr McRae and Mr Smith said they could not remember whether PMA did, in the end, make the donation to the Riverton campaign fund.<sup>185</sup> What is clear from Mr Grill's email to Mr Smith on 7 January 2005 is that the issue was to be

discussed by them at a meeting on Monday 10 January 2005. Some 10 days later Mr Grill sent a cheque for \$2,000 to Mr McRae's election campaign.

21<sup>st</sup> January 2005

Mr Tony McRae MLA  
Member for Riverton  
Shop 5,  
Riverton Forum  
PO Box 139  
WILLETTON WA 6955

Dear Tony,

Please find enclosed my cheque in the sum of \$2,000 being a donation towards your election campaign

Lesley and I wish you all the best for a successful outcome.

Kind regards.

Yours sincerely,

Julian Grill

[322] Although there is no conclusive evidence that that the cheque was sponsored by PMA, the possibility cannot be dismissed. At the same time as Mr McRae was hoping to be re-elected as the Member for the electorate of Riverton, Mr Bowler was a candidate for the newly created seat of Murchison-Eyre. Like Mr McRae, Mr Bowler had been a member of EISC and had been involved in the 2004 inquiry into the closure of the Windimurra mine. An email located on Mr Grill's computer shows that one of his donations to Mr Bowler's campaign was actually funded by PMA.<sup>186</sup>

Subject: RE: donations

From: Julian Grill

Date: 15/02/2005 2:15:00 PM

To: 'Rosemary Braybrook'

Message Body

Dear Rosemary,

The \$2000 in my name is OK. But just so that John knows, it actually came from PMA.

Regards

Julian Grill

Phone

Fax

Mobile

-----Original Message-----

From: Rosemary Braybrook

Sent: Tuesday, 15 February 2005 12:45 PM

To: ; grill1@;

Subject: Fwd:

Hi

Here is the latest donors list as of today.

Thanks

Rosemary Braybrook  
Electorate Officer to  
John Bowler MLA  
Member for Eyre  
Phone

Fax

- [323] The amount of the donation to Mr Bowler was \$2,000, exactly the same amount Mr Grill had given to Mr McRae only weeks earlier. Both cheques were drawn from Mr Grill's business account.<sup>187</sup>
- [324] In the lead-up to the February 2005 State Election, Mr Grill is known to have engaged in the practice of making political donations at the instruction of his clients. A \$5,000 donation Mr Grill made to the National Party on behalf of a client was the reason the ALP expelled him from the Party in June 2007.<sup>188</sup>
- [325] In February 2005 Mr Burke and Mr Grill made a subsequent donation of \$3,000 to Mr McRae's campaign, for which Mr McRae expressed "many thanks".<sup>189</sup>

<b>Subject:</b>	<b>RE: Election Donation</b>
<b>From:</b>	Tony McRae
<b>Date:</b>	17/02/2005 9:33:54 AM
<b>To:</b>	brianburke@[redacted]; grill1@[redacted]
<b>Message Body</b>	
<p>Dear Gang of Two, many thanks!! best wishes, Tony</p> <p>&gt;&gt;&gt; "Brian Burke" &lt;brianburke@[redacted]&gt; 16/02/2005 9:40:32 pm &gt;&gt;&gt;</p> <p>Dear Julian</p> <p>I will have the cheque on Friday and will give it to you.</p> <p>Regards</p> <p>BRIAN BURKE</p> <p>_____</p> <p>From: Julian Grill [mailto:grill1@[redacted]]</p> <p>Sent: Wednesday, 16 February 2005 9:30 PM</p> <p>To: Tony McRae</p> <p>Cc: Ljiljanna Ravlich; Brian Burke</p> <p>Subject: Election Donation</p> <p>Dear Tony,</p> <p>I have spoken to Brian and we feel that we could find \$3000 to contribute to your campaign account.</p> <p>Brian shall arrange for the cheque to be sent shortly.</p> <p>Regards</p> <p>Julian Grill</p>	



## **CHAPTER SEVEN**

### **COMMISSION ASSESSMENTS, OPINIONS AND RECOMMENDATIONS: MR McRAE**

#### **7.1 Millbank on Moore Decision**

- [326] Having conducted its hearings and fully assessed the documentation for the Millbank on Moore matter, the Commission has found no evidence to suggest that Mr McRae's decision of 9 October 2006, to reverse his earlier decision of 9 August 2006, was made on any improper basis. No misconduct has been shown with respect to the decision itself.
- [327] Similarly, there is no suggestion of impropriety in the conduct of Mr Woodward of DPI in relation to his contact with Mr Burke. Interviews conducted by Commission investigators with various parties involved did not indicate any misconduct on his part.
- [328] The relevance of the Lombardo matter to the Commission's inquiry is that it is the background to the telephone call of 11 October 2006. Mr McRae had very recently officiated over a matter relating to a client of Mr Grill. Mr Grill was a paid lobbyist for Mr Lombardo and each of them stood to achieve a financial gain from Mr McRae's decision.

#### **7.2 Telephone Call of 11 October 2006**

- [329] Mr McRae was well aware of the impropriety of a Minister linking the potential exercise of Ministerial power to the seeking of a benefit. From his very first interview with Commission investigators, and subsequently in his evidence in a formal hearing, he sought to portray his conversation with Mr Grill in a false light. He claimed variously that:
- the discussion about progress of the Lombardo development and about his fund-raising problem occurred in separate conversations;
  - and
  - he told Mr Grill he had already dealt with the Lombardo proposal.
- [330] Both of these claims were false. The Commission is satisfied these were not simply inaccurate recollections, but a deliberate attempt by Mr McRae to conceal what he well knew to have been the purpose of his call on 11 October 2006.
- [331] Mr McRae had made his decision on the Lombardo development on 9 October 2006. He called Mr Grill on the morning of 11 October. At the very outset of the conversation he asked Mr Grill whether "we" had made any progress with "your" request. Mr Grill's response and his subsequent

conversation with Mr Burke makes it clear he understood them to be talking about the Lombardo development. The Commission is satisfied that was what Mr McRae was talking about. There was no confusion or misunderstanding in his mind. It follows that when he then went on to tell Mr Grill he had not seen it, he was being deliberately deceitful. The question then is what motive he could possibly have had to deceive Mr Grill about that. As the Parliamentary Inspector puts it: “The crucial question is, if he did deliberately conceal that he had made his decision, why did he do it?”.<sup>190</sup>

- [332] There then followed a brief discussion about the “request”. Mr McRae undertook to track it down. Mr Grill then said he had received the invitation to Mr McRae’s (fund-raising) show, and that he and his wife would go along. Mr McRae explained that was what he was ringing about. Mr Grill certainly understood that to have been the real purpose of the telephone call. He told Mr Burke so immediately afterwards. The Commission is satisfied Mr McRae’s purpose for the call was to discuss his fund-raising plans with Mr Grill and secure his assistance and that of Mr Burke for them.
- [333] Mr McRae could offer no reasonable explanation for lying to Mr Grill about the Lombardo development proposal (noting, of course, that he maintained he did not do so, but was merely confused).
- [334] Mr McRae needed to raise funds for his re-election campaign. His planned fund-raising dinner was not going well. There had been a low acceptance-rate. He was considering cancelling it. Fund-raising assistance from Messrs Burke and Grill would have been invaluable to him. However, past experience showed they would not necessarily have been as helpful to him as he would have wished if it did not serve their purposes. Anything that would persuade them they needed to keep in favour with him would help. That he was able to help them in relation to the Lombardo development placed them in a position of obligation to him.<sup>191</sup>
- [335] Mr McRae had linked the use of his political position to approaches for funds previously. He had sought (and possibly received) a financial contribution from Mr Smith for his political campaign in 2005, deliberately using his role as Chair of the EISC inquiry. He had also been forced to apologise to Parliament over Mr Smith’s attendance at his fund-raising dinner whilst he was dealing with a matter in which Mr Smith had a commercial interest. The telephone call of 11 October 2006 was not “clumsy” and “an error” (as Mr McRae described it to the media), but it was deliberate, advertent and purposeful, and in the Commission’s opinion reflected the imperatives of fund-raising felt by Mr McRae as the holder of a marginal seat.
- [336] In the telephone call Mr Grill said that he and his wife were going to attend Mr McRae’s dinner. Mr Grill’s purchase of only two tickets might well have been a disappointment to Mr McRae. In his interview with Commission investigators on 6 February 2007, Mr McRae stated that he telephoned Mr Grill as he was someone that Mr McRae normally relied upon to “put tables together”:



**MCRAE:**

*... in September, October, I initiated, in fact I'm sure I initiated it, because I was ringing a few people that I kind of rely on normally to put tables together ...*<sup>192</sup>

[337] The Commission is unable to accept the proposition that the suggestion by Mr Grill, that he and Mr Burke could organise an alternative fund-raising event for him, was neither solicited by Mr McRae nor adopted by him.

[338] As explained, in the Commission's opinion Mr McRae called Mr Grill specifically to solicit assistance from him and Mr Burke in fund-raising. The conversation itself shows that (after talking about the "progress with your request"<sup>193</sup>) Mr McRae told Mr Grill he was ringing about his fund-raising dinner. He said he wanted Mr Grill's opinion. He had to make a decision about whether he could still do it. He had a pressing request that conflicted. Also, there was a "light to moderate" take-up of the invitation. Mr Grill suggested that if he had a few doubts he could postpone it and the two of them could get together with Mr Burke and they would try and arrange something that would be a bit better attended. He asked Mr McRae how many he wanted along. Mr McRae said that: "with the Premier, ah, and, and with the range of things that intersect either with the Premier or with my Portfolio interests or a range of other Ministers who've I've got coming that you really should be able to get eighty people there". Mr Grill asked what he was charging. Mr McRae said: "Two seventy-five". Mr Grill said: "You can do it the other way like we're doing it with ah, ah, ah, Di Guise ... We just have sixteen people, ah, and we charge them all two grand". Mr Grill explained: "... the Premier and Alannah will be along".<sup>194</sup> They discussed aspects of that and then Mr Grill said:

*Alright. Well I think you've pretty much decided to postpone it so let's work on that basis.*

Mr McRae then said:

*Well mate, here's the alternative. Let me put the positive view. ...*

He said that he was confident he could get 45 or 50 people without trying too hard, although he would

*have to defer this other thing which would cause ... [him] some problems ...*

but he could do it. His "anxiety" was that if one got the Premier to an event like that one really should have "70 people plus". At \$275 a head, 50 people would be the minimum – which he thought he could get – but he was anxious it would "... look a little bit light", and he asked what Mr Grill's view was about that.

[339] The Commission notes that to this point in the conversation:

- Mr McRae had told Mr Grill he had not yet seen the proposal concerning Mr Grill's client, with which he had to deal (which was untrue);
- Mr McRae had said he was concerned about his imminent fund-raising function because the take-up of attendances was light (which was true) and he had a pressing commitment that conflicted (which was not true);
- he thought he could get a minimum of 50 people at \$275 a head (a total of \$13,750);
- he was seeking Mr Grill's opinion on what he should do;
- Mr Grill had suggested Mr McRae postpone his event and they get together with Mr Burke to arrange something that would be better attended; and
- Mr Grill suggested it could be done the way he and Mr Burke were doing it with Ms Guise, which was 16 people at \$2,000 per head (that of course would produce funds in excess of \$30,000).

[340] The conversation shows clearly enough that even at that point Mr Grill thought Mr McRae was indicating that he would cancel his planned event and take-up the offer of having Messrs Grill and Burke organise one like that for Ms Guise. He told Mr McRae he would need to talk to Mr Burke about it just to make sure they could work together on it. Mr McRae interrupted him saying he was not talking about their alternative, and just to put it on one side for a moment. He continued to explain his thinking about his own planned fund-raiser. He said his judgement was that at \$275 a head,

*given the other pressing things that I've got,*

if he was only going to do 50 people, it would still be \$6,000 or \$7,000 in the campaign (the difference would presumably go in costs). Mr Grill pointed out it was "not a big sum of money" and said he would tend to postpone it and go for a better one. There then followed –

**MCRAE:** *Yeah okay. I, I, I just wanted to bounce it off somebody I, I knew I can trust in terms of that kind of*

**GRILL:** *Oh good.*

**MCRAE:** *assessment.*

**GRILL:** *Alright. Well it's nice that you think of me in those terms. I'll uhm, okay then, so I'll*

*probably get a notice from you it's not on.  
That'll be fine.*

**MCRAE:** *Mm.*

**GRILL:** *And then we'll work on the other side of it.*

**MCRAE:** *Yeah, good on ya.*

**GRILL:** *Right.*

**MCRAE:** *Ah, look Julian, take it that it's not on.  
Take it from me now*

**GRILL:** *Okay then.*

**MCRAE:** *as a result of this conversation and I'll only  
term, I'll only tell people now who contact  
me to say that we would like to come to  
say, oh look we've had to postpone it, I  
won't actually do a general broadcast.*

**GRILL:** *Okay Tony. Alright.*

**MCRAE:** *Thanks mate, I appreciate that.*<sup>195</sup>

(emphasis added)

[341] What is uncontrovertibly clear from this part of the conversation is that:

- when Mr Grill pointed out that the amount Mr McRae could anticipate from his proposed fund-raiser was not a big sum of money and suggested he postpone it and go for a better one, Mr McRae agreed;
- Mr Grill acknowledged that by saying he would probably get a notice from Mr McRae that the planned dinner was not on, to which Mr McRae indicated agreement;
- Mr Grill said they would work on "the other side of it";
- to which Mr McRae agreed and told Mr Grill to take it from him now, that his planned fund-raiser was not on, and said he would tell other people who might contact him that they had to postpone it.

[342] In short, by the end of the conversation Mr Grill had offered to talk to Mr Burke and work on an alternative type of fund-raising dinner for Mr McRae, similar to that they were doing for Ms Guise, which would bring in a lot more money, and Mr McRae had accepted that offer and told Mr Grill he would cancel his own function. It is, therefore, simply not correct to say that the suggestion by

Mr Grill, that he and Mr Burke could organise an alternative fund-raising event for Mr McRae, was neither solicited by Mr McRae nor adopted. In the Commission's opinion, it was both solicited and adopted – although for other reasons it did not eventuate.

[343] It is apparent to the Commission that Mr Grill's offer of assistance and Mr McRae's acceptance occurred in the context of Mr McRae's representations to Mr Grill, at the start of the telephone conversation, that he had yet to make a decision on the Lombardo matter, but that he would call for the file and do so immediately.

[344] The Commission was aware that no fund-raising assistance by Messrs Burke and Grill in fact eventuated as a result of the telephone conversation of 11 October 2006. However, the reasons for that are, in the Commission's opinion, self-evident.

[345] That the fund-raiser to be organised by Mr Grill and Mr Burke never eventuated can be attributed solely to timing. Two very relevant events occurred later that month. On Monday 23 October 2006 the Commission's public hearings into the "Smiths Beach" matter commenced and there was considerable negative publicity that followed with respect to Mr Burke and Mr Grill. The second relevant event also occurred in that week on Thursday evening, 26 October 2006. That was the evening of Ms Guise's fund-raising dinner at Perugino's Restaurant which had been organised by Mr Burke and Mr Grill. As mentioned above Minister MacTiernan and the Premier were supposed to be the "special guests". However, when the Premier arrived he was asked by the proprietor's wife at the restaurant's reception desk whether he was attending the "Burke function". Upon being asked that, the Premier spoke briefly with Ms Guise, explained why he wouldn't stay and left. The Premier later telephoned Ms Guise and informed her that he would not be returning to the dinner. This evidence regarding the Premier's actions was obtained from an intercepted telephone between Mr Burke, the proprietor of the restaurant and Ms Guise on the evening of the dinner.

[346] There is no doubt once word had got around within the Government of the Premier's actions it would have been politically dangerous to have Mr Burke and/or Mr Grill arrange any fund-raising events for Members of Parliament. Indeed all the evidence at the Commission's disposal indicated that the "Di Guise function" was the last fund-raising event organised by Mr Burke and Mr Grill for a Member of Parliament.

[347] At a Commission private hearing on 13 October 2008 Mr Grill was asked several questions in relation to the proposed fund-raising dinner for Mr McRae, discussed during the telephone conversation of 11 October 2006.

*... I don't think that went ahead ...*

*Why not?---What was the date of all that?*

*... 11 October?---I think that - well, either the triple C inquiries commenced or word got out that they had commenced or we got banned again - something of that sort.*

*If I were to tell you the triple C hearings started on 23 October?---Sorry, and we're looking at what?*

*The 11th?---Well, that's probably the answer then.*

*So what relevance did the triple C hearings have on a fund-raiser for Mr McRae?---I think it pretty well made us in certain circles persona non grata.<sup>196</sup>*

[348] At a Commission private hearing on 14 October 2008 Mr Burke was asked several questions, and responded as follows, in relation to the proposed fund-raising dinner.

*Right?---Maybe the CCC started or something. I don't know.*

*Yes, the CCC hearings did start on 23 October?---And what date was this?*

*This conversation was 11 October, so do you think that had an influence on it?---I don't even remember it but I would've thought that it's logical to think it might've.<sup>197</sup>*

[349] It is the Commission's opinion that Mr McRae, in phoning Mr Grill on 11 October 2006, had sought a benefit, and accepted an offer of one. The Commission is also satisfied that, in the same conversation, Mr McRae deliberately raised the subject of Mr Grill's client and then deceived Mr Grill into believing he had yet to exercise his Ministerial discretion but was willing to be helpful. It is not reasonable to accept that the convergence of these two matters was accidental.

[350] In Mr Grill's section 86 representations it was said that as Mr Grill had not (at that stage) been questioned about his telephone conversation with Mr McRae of 11 October 2006, he had no opportunity to explain that, in his view, his subsequent telephone call to Mr Burke (concerning his conversation with Mr McRae) did not link the Lombardo matter with the fund-raising issues discussed. It was said that no suggestion was made by Mr Grill during his conversation with Mr Burke, that the fund-raising issues were in some way conditional on the outcome of the Lombardo matter.

[351] The Commission accepts that there was no overt link made by Mr McRae between the Lombardo matter and the fund-raising issue in his conversation with Mr Grill, and likewise that no suggestion to that effect was made by Mr Grill in his telephone conversation with Mr Burke. However, that essentially misses the point. The process was more subtle than that. The fact is, Mr Grill wanted something from Mr McRae to the benefit of his client. Mr McRae had indicated he would provide it. In the circumstances that was calculated to put Mr Grill in Mr McRae's debt. It was in that context that Mr McRae then solicited assistance from Mr Grill and Mr Burke with his fund-raising, and Mr Grill responded favourably to that.

[352] The matters were raised with Mr Grill in a Commission private hearing on 13 October 2008. Mr Grill then said:

*Was your willingness to do so on this occasion influenced by the fact that he told you he had yet to make the decision on the Lombardo matter?---  
No, no.*

*... Did you consider that if you made an offer to arrange a fund-raising functions that it might favourably dispose him to your client, Mr Lombardo?--Well, he's already, I think, favourably disposed towards me, but it's - it adds to the - adds to the friendship, I guess.*

*... but what I'm specifically asking you is is that a factor that in your decision to make this offer to him it might favourably dispose - - -?---I don't think it's a big factor, but I mean I'd be telling you a lie if, you know, if I didn't hope to - you know, to get some sort of favourable sort of impression from him about it. I mean, if I arrange a function for someone, you know, I expect they'll think kindly of me. I don't expect any - any repayment or anything like that, and I hope they come along to functions that I arrange, you know. It's a bit of a quid pro quo.<sup>198</sup>*

[353] In his section 86 representations Mr McRae complained that the Commission had not interviewed his electorate office staff, who could have confirmed his (eventual) recollection of events. It is true that they had not been interviewed by Commission officers by June 2008, as on the face of it there was no reason to think they would have any relevant information. However, in light of Mr McRae's representations, they were interviewed and Ms Fiona Crowe was summonsed to give evidence at a Commission private hearing on 24 July 2008.

[354] It was upon Ms Crowe's evidence that Mr McRae particularly relied. It is necessary for the Commission to discuss that in some detail, because her account of what happened evolved over time. Ms Crowe had made a written statement at Mr McRae's request, probably in late February or early March 2007, some five months or so after the telephone conversation of 11 October 2006. That was after Mr McRae had given his evidence to the Commission in a public hearing on 22 February 2007, which was extensively reported in the media. There were subsequent communications then between Mr McRae and Ms Crowe about her recollections and the content of her statement. When she gave evidence before the Commission in July 2008, she did so initially in general accordance with her statement, but on further questioning, some relevant differences became apparent.

[355] Ms Crowe worked part-time in Mr McRae's electorate office as a research officer. Ms Crowe was there for four and a half years, to June 2007. Ms Crowe job-shared with another research officer. There was an electorate officer, two men who worked half a day a month and a woman who worked as a volunteer once or twice a week.

[356] Ms Crowe said the major form of fund-raising was to have fund-raising dinners. Ms Crowe said there was a need for fund-raising, because Mr

McRae was in a marginal seat and marginal campaigning is expensive. It was not done just when funds ran low, it was more about building-up funds for the election campaign.

- [357] According to Ms Crowe, they were hoping for about 65 to 70 people for the dinner on 19 October 2006. They had booked out “Friend’s Restaurant” for the night, but the take-up was very poor – there was “virtually nobody” and the electorate office staff were quite concerned that if they cancelled too late they could incur costs from the restaurant, and so they raised it with Mr McRae on the morning of 11 October 2006. At that stage, they only had about 10 people coming, including staff and a couple of Ministers, who would be non-payers. Ms Crowe said:

*... we sort of discussed, you know, whether or not to cancel it and how none of [us] really knew how to fund-raiser for those sort of, I don't know, big end of town events and, you know, who - who should we - you know, we sort of wished that there was someone we could talk to who knew about fund-raising, you know, that none of us knew about and that's when Tony said he would go and phone Julian Grill. ...*

*So that was something that he suggested he would do?---Yes.*

*It wouldn't be correct to say that anybody who was present, the staff, asked him to ring Mr Grill?---No.<sup>199</sup>*

- [358] Ms Crowe’s evidence on that last point conflicts directly with what Mr McRae has said about that. He told the Commission that he rang Mr Grill when he was asked to do so by his electorate office staff.<sup>200</sup>

- [359] Ms Crowe’s evidence was that following Mr McRae’s telephone call he came out of his office and told her to cancel the dinner, it was just not worth holding it. She said he told her that Mr Grill had spoken to him about different kinds of fund-raising and had mentioned a fund-raiser that Ms Guise had held where the Premier and Alannah MacTiernan had gone and they’d raised about \$30,000 (she obviously must have been mistaken in her evidence that Mr McRae told her of a dinner for Ms Guise that had been held – it was not held until 26 October 2006). She added:<sup>201</sup>

*... but, you know, he never said he wanted us to hold one of those. It was more, you know, "Cancel the other one. It probably wasn't a goer," yeah.*

- [360] Ms Crowe went on to say that Mr McRae had called her into his office and said

*I just got the feeling that Julian wanted to organise that fund-raiser then and there but I cut him off,*

and he then asked her how much Mr Grill had contributed to his campaign. In the Commission’s opinion, if that was what Mr McRae told her, it conveyed quite a misleading impression about the conversation. In any event, Ms

Crowe's later evidence cast a different complexion on the telephone conversation between Mr McRae and Mr Grill, and what happened afterwards.

- [361] Ms Crowe checked the records. Mr Grill had paid for tickets and attended a couple of fund-raising dinners and there was "another amount of a couple of thousand dollars". He then asked her how much Mr Burke had contributed to his campaign, and she told him. She did not mention an amount in evidence, but the Commission takes it not to have been significant in any relevant respect. She then continued.<sup>202</sup>

*... and then he said to me that he'd been - he was having to make a decision about some land that a client of Julian's was involved in in the Guilderton, sort of Moore River area, and I can't remember - I noticed in my statement, witness statement, it was Moore River but it could quite easily have been Guilderton that he said, and that Alannah hadn't been able to make that decision because of a conflict of interest. So he just wanted to find out sort of how much, you know, Julian had contributed to his campaign because, you know, he sort of didn't want to - if he was going to be making any decisions, you know, he sort of didn't want to be seen with a conflict of interest or perceived conflict of interest but he was quite sort of relieved that those amounts were sort of relatively low and, you know, he - and I said to him something like, "Well, Tony, you know, if you're making these decisions, you know, you would follow due process" " - or something like that - "wouldn't you?" and he just - you know, he said to me, "Fiona, of course I would," you know, and that sort of was it.*

- [362] When asked by Counsel Assisting, Ms Crowe said that Mr McRae had never mentioned to her that he had discussed a planning matter in his telephone conversation with Mr Grill.
- [363] Ms Crowe explained in evidence that when Mr McRae had asked her to check these details, she had to look them up in the campaign accounts and she subsequently incorporated all the details in a statement.
- [364] As to the timing of the planning decision to which Mr McRae had referred, Ms Crowe initially said he spoke in terms of a decision he still had to make.
- [365] The statement to which Ms Crowe was referring was one made by her "between a week to three weeks after the - - -The public hearing?---Yeah, the public hearing. Which was in February 2007?---Yes",<sup>203</sup> that is to say, after Mr McRae had first given evidence to the Commission. A copy of that statement<sup>204</sup> is Appendix 2 to this report.
- [366] Counsel Assisting drew Ms Crowe's attention to the last substantive paragraph in the statement –

*I said something to the effect that if he had followed due process he should not have anything to worry about and he said that he had.*

(emphasis added)



Counsel Assisting put it to Ms Crowe that the words emphasised rather suggested the past tense. Ms Crowe agreed, but said (that by the time she came to give her evidence) there had been a lot in the press about decisions Mr McRae had made about Moore River and

*... I guess I was affected by that I have to say.*<sup>205</sup>

As observed above, Ms Crowe said she made her statement between one and three weeks after Mr McRae's public hearing in February 2007 and she agreed that on the basis of that it was likely Mr McRae had spoken of a decision he had made rather than one he still had to make. She agreed it would be fair to say that at the time she was giving her evidence (in July 2008) she could not recall whether he had used the future or past tense.

[367] Counsel Assisting then turned to ask Ms Crowe about the circumstances in which she had come to make her statement. She explained that Mrs McRae had come into the office. She and Mr McRae were "devastated". They all went out to lunch. It was very emotional. Mr and Mrs McRae said they could not understand why people would think he would have taken up that fundraiser. Ms Crowe said she told him his concern at the time was more that there might be a perceived conflict of interest because of Mr Grill having contributed to his campaign; that was what he was more worried about. She testified that Mr McRae then asked her to "put it down in a statement". She went back to the office, wrote the statement and gave it to him.

[368] Counsel Assisting then went through the content of the statement with Ms Crowe.

[369] As to the reason for the dinner on 19 October 2006 not going ahead, her evidence went as follows.<sup>206</sup>

*Did Mr McRae ever suggest to you that there was another reason why the dinner couldn't go ahead on 19 October?---We - we said, you know, when we were phoning people to cancel just that something had come up in his Portfolio.*

*But that wasn't true?---No.*

*No. All right?---We didn't want it - I mean, it's - you know, you don't sort of want to say, "I'm sorry, we didn't get enough people coming along," so, yeah, we just said an urgent matter had come up.*

*Sure. Right. But Mr McRae didn't suggest to you that prior making this call to Mr Grill that in fact he had some negotiations in regards to a Commonwealth state agreement that he had to go east to deal with?---That was the excuse we used.*

*Right. When was that - -?---I don't know, he may have actually, you know, told that to Julian, I don't know. Yeah.*

*When was the first that you heard of that excuse then?---We discussed what we were going to say to people for the reason for cancelling the - -*

*That was after the decision had been made to cancel?---Yes; yeah.*

Asked about what she had put in her statement, that Mr McRae had not said he wanted to organise a fund-raiser of the type mentioned by Mr Grill, she said:

*... He didn't sort of make any comment about it either way.*

*One way or the other?---No.<sup>207</sup>*

[370] The Commission's assessment is that at that point (immediately after Mr McRae's telephone conversation with Mr Grill on 11 October 2006), the only matter discussed with Ms Crowe was the cancellation of the dinner proposed for 19 October 2006. There is no reason Mr McRae would have needed at that point to discuss with her his expectation that Messrs Grill and Burke would be organising a bigger fund-raising event for him. Although of course he could have done had he wished, the fact he did not mention it to her says nothing at all about whether or not that was what he then expected.

[371] Counsel Assisting then referred to what Ms Crowe had said about Mr McRae telling her that:

*Julian wanted to organise the fund-raiser. ... but ... I cut him off.<sup>208</sup>*

She agreed that she had not mentioned that in her original statement prepared in February-March 2007. She said she just had not thought about it then. She said it was a stressful and emotional time when she prepared her statement, and she was thinking more in terms of the concerns Mr McRae had expressed to her after that telephone call. In January 2008, when she was not so stressed about it, her memories had become clearer. The Commission notes that was some months later.

[372] The examination continued.

*I see, but when you were drafting your statement you were trying to include the content of what Mr McRae had told you about his discussions with Mr Grill weren't you?---Well, he - he didn't actually say that he'd had discussions about the planning matter with Julian Grill in that phone call. He just said to me that he had to make a decision about Julian Grill. He didn't say he discussed it in the last phone call.*

*Yes, I'm sorry, I appreciate that but in that fourth paragraph and fifth paragraph of your statement you were endeavouring to give a full account - - -?---Yes.*

*- - - of what Mr McRae had said to you - - -?---Yes.*

*- - - about what Mr Grill had said on the phone?---No. No, that was what Tony said to me. Not what Julian had said to him on the phone.*

*No; no, I'm sorry, that's probably my fault - - -?---Yes.*

*--- but you were trying to put down in your statement everything that Mr McRae had said to you?---Yes.*

*There would be no reason why you would have left out that comment about, "I cut him off"?---No, except I forgot to put it in. I'm sorry, I just - I forgot.*

*Right, and you have said a moment or two ago that you remembered it in January of this year?---Yes; yeah.*

*Can you tell us how that came about?---Well, Tony had phoned me and he wanted me to do a different - new statement. I had already given him this one and another statement of sort of question and sort of a - there was a question and a "yes" and a question and a "no". Sort of a "yes/no" sort of statement that I had emailed to him in December and he wanted me to do another statement sort of incorporating those "yes/no" answers in just a - a statement. And, you know, we had a conversation about it and I said to him - while we were talking I said to him, "No, Tony, you - Julian - you said that, you know, you'd cut Julian Grill off and that's" - you know, I do remember him in this conversation he was saying, "I did cut Julian Grill off," because he thought Julian - but it doesn't appear in this statement.*

*Right?---And Tony wanted me to incorporate that into the yes no statement and what - but I just - I didn't feel comfortable about doing that. You know, if it had been "Could you write it as an amendment to this statement to say you've remember something," or something like that I would have probably been prepared to do that but I - I just felt uncomfortable about not being able to explain the fact that I hadn't remembered to put it into this one so I just said I didn't want to change my statement, didn't want to give him a new statement, yes no thing.*

*You said that came up in conversation with Mr McRae, was this a face-to-face conversation?---It was a phone call.*

*A phone call. One phone call or a number of phone calls?  
---A number, yeah.*

*Right. What was Mr McRae asking of you in these phone calls?---He wanted me to - well, the yes no one sort of happened in November, he wanted - he put a series of questions to me that he wanted me to answer yes no to and I didn't feel they were - that I could answer just yes no to them. So I sort of - I changed the questions in such a way that I could answer yes no to and it wasn't anything sort of - that changed the truth of what I was saying but it was just, you know, things like was I primarily responsible for fund-raising and no I wasn't, I was just someone who - who did some of the fund-raising, you know, to help so that was why I sort of - I couldn't have answered yes to that but I could answer yes I did assist with fund-raising.<sup>209</sup>*

[373] Ms Crowe explained that Mr McRae had sent his questions to her by email. She told him she was redrafting some of the questions because she was not prepared to answer them "yes" or "no" as he had framed them and she sent him her own version of the questions with her answers. She did not keep a copy of the original questions as he had sent them to her. The document she

returned to him was dated 30 November 2007 and is included at Appendix 3 to this report.

[374] The Commission notes that the question posed at number 9 is actually two questions, but calls for only one “yes” or “no” answer. The (distinct) questions are:

- Did Mr McRae indicate that he would cancel his “Friend’s Restaurant” event? (To which Ms Crowe’s answer in evidence was “yes”.)
- Was that so he could take-up Mr Grill’s offer? (To which Ms Crowe’s evidence was that he said nothing about that either way.)

[375] In her evidence to the Commission, Ms Crowe went on to say that after she gave her statement of 30 November 2007 to Mr McRae, they had some discussions about it. She said that in the course of those she had mentioned him telling her that he had “cut Mr Grill off”. Her evidence continued:<sup>210</sup>

*... Tony emailed me a statement that he had made up from these sort of yes no questions in January - - -*

*Which you didn't sign?---Which - no, I didn't sign.*

*Why?---Well, I had already given him the other statement and it wasn't my statement. I just didn't feel comfortable about signing it.*

*Did you say that to him?---Yep.*

*What was his response?---He - he accepted it, yeah. He wasn't happy but he accepted it.*

[376] Ms Crowe’s evidence then was that:<sup>211</sup>

*He just phoned me out of the blue and wanted to talk about statements again and he - I didn't want to talk to him about it at work, so I arranged to meet him at lunchtime at His Majesty's and he asked me to make another statement basically.*

*About what?---About the - you know, what happened on the - about the Julian Grill conversation.*

*But specifically about that comment about cutting Mr Grill off?---Yeah. He wanted me to include that and he also - he also asked me if I remembered what area that it was about and I said, "Guilderton," and he pounced on that and said, "Guilderton?" So I said, "Well, Guilderton, Moore River," and he said, you know, that was really important because he kept on mixing up the Guilderton-Moore River proposal with whoever Julian Grill - was his client and - - -*

*That's what he was saying to you?---Yes, that's what he said to me; yeah, and you know, could I - you know, "Was it Guilderton?" and I just - I said, "I*

*can't remember, Tony. It could've been Guilderton. It could've been Moore River," you know.*

*Although in your statement you said Moore River?---Yes, I did say Moore River.*

*What did you say to him then at this coffee meeting?*

*---Well, he asked me if I would do another statement and I said I'd think about it, and that was it.*

*Did you intend to think about it?---I did, yeah.*

*What was the outcome of that?---Well, in the end I again felt that I'd already - you know, I'd given him these two statements. I didn't want to give a third and I - - -*

*Neither of them canvassed this comment about cutting Mr Grill off?---No; no, but I - I just - I wanted to talk to talk to somebody and just sort of explain, you know, why, you know, they didn't and why - you know, I did remember that he had said, "I cut him off."*

*Did you tell him that your decision was not to give him another statement?--*

*-Yes. I sent him an email and I said that and, you know, I said that I would be happy to talk to the CCC and to the Parliamentary Inspector who wanted to talk to me about it.*

*Did you hear from Mr McRae again after that?---No.*

[377] However, her evidence was that she did receive a further communication from Mr McRae in the form of a text message. It is appropriate to have regard to the sequence of relevant email communications between 25 February and 12 June 2008.

*From: "Crowe, Fiona [suppressed]  
To: "Tony McRae" [suppressed]  
Cc: [suppressed]  
Sent: Friday, 30 November 2007 12:52 PM  
Attach: 1.doc  
Subject: Q&A*

*Hello Tony*

*Attached is my response to the Q & A that you sent. This is what I am prepared to commit to without consulting a lawyer.*

*Take care*

*F<sup>212</sup>*

The "Questions and Answers" document, at Appendix 3 to this report, was attached.

The next email was one from Mr McRae to Ms Crowe on 14 January 2008.

*From: Tony McRae [suppressed]  
Sent: Monday, 14 January 2008 11:41 AM  
To: Crowe, Fiona [suppressed]  
Cc: [suppressed]  
Subject: CCC statement*

*Hi Fiona, all the best for 2008! Hope to see you at lunch or for a cuppa later today. Have looked at your responses to the fundraising questions and redrafted as a positive statement rather than a Q&A. Please have a look and let me know if you're still happy for this to be used. If yes, any chance you could do it as a a [sic] stat dec please? response to my mp account is best. regards and thanks, Tony<sup>213</sup>*

[378] In an email at 10:49 a.m. on 10 June 2008 Ms Crowe's husband sent an email to Mr McRae complaining in strong terms about him "badgering" Ms Crowe and saying that his repeated contacts with her about the matter was causing her distress.<sup>214</sup>

[379] Mr McRae replied by email at 3:29 p.m. that day. In substance, he said he was "painfully aware" of the distress Ms Crowe had been occasioned by the whole episode and he was only trying to have the truth told.<sup>215</sup>

[380] At 6:28 p.m. on 12 June 2008 Mr McRae emailed Ms Crowe's husband as follows.

*Hello [suppressed]  
I'm sorry to trouble you again.*

*I need to finalise my statements to the CCC.*

*I haven't received an acknowledgement or response to my text message to Fiona or my email to you on Tuesday. In the absence of any other communication, I assume this is an indication from you both that you do not wish to have any further discussions on the matter.*

*Unfortunately, in the absence of a personal statement from Fiona, I will still need to include in my statement the things Fiona told me last week. This may mean that the CCC or the Parliamentary Inspector will want to discuss these matters direct with Fiona. I don't know if this will happen, I just know that it's a possibility. I'm sorry for any stress this may cause you and Fiona.*

*Please understand that this is far more serious than simply me trying to resurrect my reputation.*

*The matters I intend to include in my statement are:  
That I met with Fiona last week and she told me she could remember talking with me immediately after my conversation with Julian Grill in*

October 2006. That I said a planning decision had come up in the conversation and that I wanted to "cut him off". That I said I was concerned not to discuss or allow any confusion about a planning matter at South Guilderton that I was dealing with in the next few weeks. That I said that I had no intention of taking up his offer for a Burke/Grill fundraising event. That at no later stage did I ever ask the staff/campaign volunteers to discuss or plan to take up Grill's offer.

Apologies for any distress this may cause. Please feel welcome to call me [suppressed] or email me about any comments.

Sincerely,

Tony<sup>216</sup>

(emphasis added)

[381] At 11:04 p.m. Ms Crowe replied with the following email:

From: G & F Crowe [suppressed]

Sent: Thursday, 12 June 2008 11:04 PM

To: McRae, Tony

Subject: Re: Request for statement

Attachments: page 1.jpg; page2.jpg

Hello Tony

I have attached a copy of the statement that I gave to you shortly after you were called before the CCC. This is the statement that I talked about last week when we met for coffee. I gave you a signed and dated copy on the day we went out to lunch with Maria.

Also attached is a copy of a series of "yes" "no" answers to questions that you asked me to provide, dated 30 November last year. These were emailed to you on that date.

We had further conversations in January this year when you asked me to sign a statement that you had prepared. I told you then that I recalled that you had said you "cut Julian Grill off" in the phone call. You will recall in January that I said that I did not think I could provide you with any further statements and I faxed to you the "yes" "no" answers that you had asked me to provide in November.

When we met for coffee last week you asked me to make a statement about our conversation of the 11 October 2006, especially the part about you cutting Julian Grill off.

My recollection of our conversation of 11th October 2006 is that you said Julian Grill wanted to try to make arrangements for the fundraiser he was talking about so you "cut him off".

*You subsequently asked me how much Julian Grill and Brian Burke had contributed to your campaign and then we talked about a planning decision you had to make.*

*When we met for coffee last week you asked me if I could remember the area of the planning decision we spoke about was. I said "Guilderton". You then said "Guilderton?" and I said "Well, Guilderton or Moore River". You said that it was very important because because you had to make a decision on land in Guilderton [sic] around the same time as you had to make the decision on the matter Julian Grill was involved with. I notice in my statement that I said Moore River, but as I think of them as the same place you may have said "Guilderton" in our conversation of 11 October 2006.*

*I confirm that you never asked me, or to my knowledge, any of the other staff or volunteers to organise a fundraiser of the type that Julian Grill talked about.*

*Please feel free to use these clarifications to my two statements when you give the information to the Parliamentary Inspector or the CCC.*

*I am happy to talk to the CCC or the Parliamentary Inspector if they wish to speak to me, but I do not think it is appropriate that we talk any further about these matters.*

*Regards  
Fiona Crowe<sup>217</sup>*

(emphasis added)

[382] In her evidence, Ms Crowe said that so far as she could remember, Mr McRae had never mentioned that a planning decision had come up in his conversation with Mr Grill.

[383] Later, she said when the Commission hearings into the Smiths Beach matter started, they were the subject of some discussion in Mr McRae's office. They did not discuss it with Mr McRae, but "it was all over the papers".<sup>218</sup> As a result, they took Mr Grill off any lists they had, to make sure they did not contact him again.

[384] Asked about the final paragraph of her email in which she wrote that she was "happy to talk to the CCC or the Parliamentary Inspector ... but ... [did] not think it ... appropriate ... [to] talk any further [with Mr McRae] about these matters", she responded:<sup>219</sup>



*... I didn't want to feel pressured into making statements that I didn't feel comfortable about making.*

*Sure. Were you at all concerned that Mr McRae's account in his email to you of what you had said to him was not accurate?---Yes, I was.*

*Did he ever explain to you how it was that he got the wrong end of the stick?---Well, I just didn't want to talk to him about it because I didn't think it was appropriate.*

*Have you spoken to him again about that since?---No.*

*Did Mr McRae ever tell you that he was concerned that in his conversation with Mr Grill there had been any reference to any planning matter?---Sorry, could you repeat that?*

*Has Mr McRae ever said to you or in your presence that he was concerned that in the telephone call there had been a reference to a planning matter?--  
-No.*

[385] She said that prior to her discussion with Mr McRae on 11 October 2006 she did not know he had a decision to make about Moore River.

[386] At the conclusion of Ms Crowe's examination by Counsel Assisting, the Acting Commissioner asked her a few questions for clarification and then released her from further attendance. Ms Crowe asked if she could say something further. She then explained that she did not want it thought that her evidence was affected by the fact that Mr McRae had blamed her for what happened. She said it was not, and she understood he was stressed at the time. She was asked to explain what she meant.<sup>220</sup>

*When you say he blamed you can you tell us what he said to you?---Well, Tony thought - well, he said that I had told him to phone Julian Grill and we had a late night phone call one night and that was what had upset my husband so much where Tony was sort of yelling down the phone at me that it was all my fault and so on.*

*Did you tell him phone Julian Grill?---No. No. I didn't.*

*Do you know how he could have got such an impression?---No.*

*But he was quite heated on that occasion, was he?---Yes, he was. Yeah.*

*You saw him again after that though?---Yes. Yeah and I carried on working for him after that and so on but it's just, you know, that was part of the email that my husband had sent to Tony which was when I said, you know, he had sort of emailed him to tell him to, you know, stop harassing me, that was sort of part of it. I guess he was angry at Tony because of - - -*

*Because of that?---That, yeah.*

*Did Mr McRae ever raise that with you again, that suggestion that it was you who had asked him to ring Julian Grill?---He actually said it at the - at the coffee - when we went for coffee. He said - - -*

*To His Majesty's?---Sorry?*

*When you went to His Majesty's?---At His Majesty's, yeah. He said he thought that either [suppressed] or I had asked him and I again said no, you know, [suppressed] had never even heard of Julian Grill and she'd been out of the country then; and I didn't tell him to phone him and - yeah.*

*Right, and I take it you just want us to understand that notwithstanding that he did behave in that way on that occasion, you don't bear him any malice or ill-will?---Yes; yeah, that's right.*

[387] In the Commission's assessment, on all the evidence (including the terms of the telephone conversation between Mr McRae and Mr Grill on 11 October 2006, and Ms Crowe's evidence), when Mr McRae spoke to Ms Crowe immediately afterwards, he told her to cancel his planned fund-raising dinner but said nothing about holding an alternative event. Nonetheless, it is clear from his conversation with Mr Grill that he intended at that point to take-up Mr Grill's offer. Although Mr McRae says he "cut Mr Grill off" when the latter tried to talk about a planning matter, that is certainly not what happened in that conversation and that is not what he told Ms Crowe. According to Ms Crowe he told her that he "cut Mr Grill off" when Mr Grill wanted to organise a fund-raiser – but that is not what happened either.

### **7.3 Assessment of Misconduct**

[388] Section 4 of the 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.

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

[390] Because that was the nature of the allegation concerning Mr McRae being investigated by the Commission, it was not one which fell within section 27A(1)(a) of the Act, which requires allegations of misconduct, not being serious misconduct, made against a member of the Legislative Assembly in the performance by him or her of the functions of that office, to be referred to the Speaker of the Legislative Assembly.

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

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

[392] As explained, Mr McRae was a public officer at all relevant times.

- [393] By deliberately linking the exercise of his Ministerial power to approve the Lombardo development to gaining assistance from Mr Grill for his political fund-raising, Mr McRae took advantage of his public office.
- [394] The next question is whether that could be said to have been done “corruptly”, within the meaning of section 4 of the Act.
- [395] 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.
- [396] The leading authority in Western Australia on the meaning of corruption is Willers v R (1995) 81 A Crim R 219. In that case Malcolm CJ said that section 83 of *The Criminal Code* (“the Code”), Western Australia, “is concerned with the use of power or authority for improper purposes”. Malcolm CJ noted that in the context of the corporations law the term improper “has been held not to be a term of art, but simply to refer to conduct by an officer of a company which was inconsistent with the proper discharge of the duties, obligations and responsibilities of the officer concerned ...”. Malcolm CJ went on to cite various definitions from the dictionary. Malcolm CJ said, for example, that the Oxford English Dictionary definition of “corrupt” included “perverted from uprightness and fidelity in the discharge of duty; influenced by bribery or the like”. In the same dictionary the verb “corrupt” meant “to destroy or pervert the integrity or fidelity of (a person) in his discharge of duty”. Ultimately Malcolm CJ concluded that an exercise of lawful authority for an improper purpose can amount to corruption under section 83 of the Code. Malcolm CJ’s *ratio decidendi* should not be taken as an exhaustive definition of the meaning of corruption. The facts in that case involved the abuse of an otherwise lawful power for an improper purpose and so Malcolm CJ’s reasons must be understood in that context. The case does, however, provide a guide to what may amount to corruption in the circumstances of that case.
- [397] 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)

[398] 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.

[399] 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)

[400] 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.

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

[402] More importantly, the same distinction is made clear in section 4 of the 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.

[403] It is axiomatic that the proper construction of a statutory provision turns upon the words used in the particular provision, read in the context of the Act of which the provision is part, and having regard to the general purpose and policy of the legislation.<sup>221</sup>

[404] Ordinary dictionary definitions support the conclusion that in section 4 of the Act, “corruptly” connotes dereliction or breach of duty, or acting contrary to one’s duty; being perverted from fidelity or integrity. “Corruption” is the perversion of a person’s integrity in the performance of official or public duty or work.<sup>222</sup> It involves the concept of a prohibited act undertaken with a wrongful intention.<sup>223</sup> The Commission accepts that the notion of “corruptly” in section 4(a) and (b) of the 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;<sup>224</sup> an improper purpose;<sup>225</sup> in circumstances in which there is some conflict between the public officer’s interests and their duty; or in some other relevant factor.<sup>226</sup>

[405] 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 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.

[406] The implication, which the Commission is satisfied Mr McRae was deliberately conveying to Mr Grill in their telephone conversation of 11 October 2006, was that he could, and would, assist Mr Grill’s client by reversing his earlier decision, because that was what Mr Grill wanted. His purpose was to secure the assistance of Mr Grill and Mr Burke in organising his fund-raising. A Ministerial decision made on that basis would not be “impartial, aimed at the common good (or) uninfluenced by personal interest ...”, and nor would it be honest. It would be a breach of clause (2) of the Legislative Assembly Code of Conduct, in that it would be a failure to perform his duty in an objective manner and without consideration of his personal and financial interests. It

would, accordingly, be done “corruptly”. The Commission emphasises there is no suggestion that Mr McRae actually made his decision about the rezoning on any improper basis. The conduct with which the Commission is here concerned is him deliberately conveying the impression he would act in that way – whereas in fact he had already made the decision (on proper grounds). The “corrupt” conduct was in seeking to get Mr Grill to believe he would act that way, so as to obtain a personal benefit. That was a breach of his duty to act with integrity and his purpose was improper. He was soliciting a benefit for himself in respect of the exercise of his Ministerial discretion. His conduct was attended by moral turpitude in the sense described, and so fell within the meaning of “corruptly” in section 4(b) of the Act. In the Commission’s opinion this element has been established.

[407] The fourth element, in section 4(b), “to obtain a benefit ...”, is purposive. It does not connote that a benefit must in fact be obtained (although of course it would include that situation). Rather it speaks of the purpose with which the public officer engages in the relevant conduct. Here the evidence establishes that in what he said to Mr Grill at the outset of the conversation Mr McRae was seeking to create the impression he was still to make the decision on the Lombardo development. The Commission is satisfied that his purpose was to secure the assistance of Mr Grill and Mr Burke in organising a fund-raising dinner for him, by creating the impression he would immediately call for, and deal favourably with, the Lombardo application (knowing that in fact he had already done so). In short, his purpose was to obtain a personal or financial benefit for himself out of the purported exercise of his Ministerial power. It is hardly surprising that he did not expressly put it in those terms – the process was much more subtle than that.

### **7.3.1 Serious Misconduct Opinion**

[408] To summarise, in the Commission’s opinion –

- Mr Mc Rae was a public officer at all relevant times.
- By deliberately (albeit subtly) linking the exercise of his Ministerial power to approve the Lombardo development, to gaining assistance from Mr Grill for his political fund-raising, Mr McRae took advantage of his public office.
- He deliberately sought to convey the impression to Mr Grill that he could, and would, assist Mr Grill’s client by reversing his earlier decision, because that was what Mr Grill wanted. His purpose was to secure the assistance of Mr Grill and Mr Burke in organising his fund-raising. That was a breach of his duty to act with integrity and his purpose was improper. His conduct accordingly fell within the meaning of “corruptly” in section 4(b) of the Act.
- His purpose was to obtain a personal or financial benefit for himself out of the purported exercise of his Ministerial power.

The necessary four elements having been established on the balance of probabilities, it is the Commission's opinion that Mr McRae's conduct constitutes serious misconduct under sections 3 and 4(b) of the Act.

- [409] The Commission points out that an opinion by it that misconduct has occurred is not, and is not to be taken as, finding or opinion that Mr McRae has committed a criminal or disciplinary offence.<sup>227</sup>

### **7.3.2 Recommendation**

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

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

*(a) ...*

*(b) ...*

*(c) acts corruptly in the performance or discharge of the functions of his office ...,*

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

- [412] The Commission recommends consideration should not be given to the prosecution of Mr McRae. That is because the only potentially relevant offence would be one under section 83(c) of *The Criminal Code*. The elements of misconduct under section 4(b) of the Act are not the same as those required to establish an offence under section 83(c) of *The Criminal Code*. One of the essential elements which the prosecution would have to prove under the latter would be that Mr McRae acted corruptly “in the performance or discharge of the functions of his office”. The gravamen of his (mis)conduct here was his linking of his potential Ministerial approval of a development proposal, with his solicitation of fund-raising assistance. In fact, he had already discharged that particular function of his office – and it had been done entirely properly, based, as it was, on Departmental advice. Although in his telephone conversation with Mr Grill he deliberately conveyed the impression he still had to act in the performance or discharge of the functions of his office in relation to the Lombardo development application, in fact Mr McRae had already done so. There is, therefore, no sufficient prospect this element of an offence under section 83(c) could be established.

[413] In other circumstances the Commission would have recommended to the Premier that he consider what, if any, action should be taken in respect of Mr McRae. However, Mr McRae, is no longer a public officer, having lost his seat in Parliament as a result of the State General Election on 6 September 2008, at which the ALP also lost Government. The Commission, accordingly, makes no recommendation in respect of Mr McRae.



## **CHAPTER EIGHT**

### **MR REWI EDWARD LYALL**

#### **8.1 Mr Lyall's Position**

- [414] Upon Mr McRae's promotion to the position of Minister on 26 May 2006, he selected Mr Lyall to fill the position of Chief of Staff. Prior to this, Mr Lyall had worked as a Senior Policy Advisor in the Department of the Premier and Cabinet, and in a similar role with the Aboriginal and Torres Strait Islander Services.<sup>228</sup>
- [415] During the time relevant to the Commission's inquiry, Mr Lyall was a "term of government" employee, but resigned following his appearance at a Commission public hearing on 22 February 2007.
- [416] Mr Lyall was an active member of the ALP, being the Convenor of the Indigenous Affairs Policy Committee, a member of the Law and Justice Policy Committee, State Executive Delegate and Secretary of the Highgate–East Perth Sub-branch.<sup>229</sup>

#### **8.2 Mr Lyall's Relationship with Mr Grill**

- [417] With regard to all matters featured in this report, Mr Lyall's only relevant contact was with Mr Grill. The Commission holds no evidence that would suggest Mr Lyall had any form of relationship with Mr Burke.
- [418] Like Mr McRae and Mr Grill, Mr Lyall was aligned with the Centre faction of the ALP.<sup>230</sup> Despite being Party and factional colleagues, Mr Lyall did not have a relationship with Mr Grill, other than having met him occasionally:

*Mr Lyall, can you tell us please, what is your relationship to Mr Grill? --- I met Mr Grill on a couple of occasions through the Australian Labor Party of which I'm a member ... I have a cordial relationship with him.*<sup>231</sup>

- [419] That Mr Grill was not particularly familiar with Mr Lyall is evidenced by his frequent mispronunciation of Mr Lyall's name during intercepted telephone calls.<sup>232</sup>
- [420] During the early months of 2006 there was considerable upheaval within the Western Australian Parliamentary Labor Party and the Centre faction held numerous meetings in response.<sup>233</sup> Mr Grill and Mr Lyall may have crossed paths at one of these meetings and had a conversation about Mr Lyall's career. Whatever precipitated it is unknown but on 23 March 2006 Mr Lyall telephoned Mr Grill and arranged to supply his curriculum vitae:

**LYALL:** *G'day Julian it's Rewi again, look I, what I was ringing for is, shall I just drop my c.v. off in your letter box at er, Mill street?*

**GRILL:** *Or email it to me, whichever suits you.*<sup>234</sup>

[421] Although Mr Grill supplied his email address for this purpose, and Mr Lyall agreed, the Commission's examination of Mr Grill's computer yielded no evidence that an email was ever sent. Mr Lyall told the Commission at a public hearing on 22 February 2007 that he could not recall why the conversation had occurred:

*... Prior to being appointed as Chief of Staff to Minister McRae, did you have a conversation with Mr Grill regarding a CV that you had prepared? --*  
*- Perhaps. I can't recall, possibly.*

*All right. Can you - could you possibly enlighten us as to what that might have been about? --- No, because I can't recall the - the conversation.*<sup>235</sup>

[422] And further:

*... I don't remember why I was giving him my CV, I'm sorry.*

*No? --- No, I don't. I mean, it's possible - no, look, I - I wouldn't want to speculate. I - I just don't remember what - - -*

*Were you in between jobs at that point in time? --- What date was the phone call?*

*23 March of 2006 --- No*

*No?---No, I don't think so; no. No.*

*Has Mr Grill offered assistance to you in you obtaining employment? ---*  
*Well, I mean, I can only assume that he has because that's why I'd give him my CV.*

*Yes?---But I can't recall the circumstances of why that might be the case.*<sup>236</sup>

[423] Despite Mr Grill telling Mr Lyall in their telephone call on 23 March 2006 that he'd be in touch, the Commission is not aware of any further communication between them about Mr Lyall's curriculum vitae or his career.

[424] The next contact occurred on 3 April 2006 when Mr Grill approached Mr Lyall on behalf of a client. Unlike some other public officers, Mr Lyall showed no difficulty in refusing a request from Mr Grill.<sup>237</sup> This is evidenced in an email exchange shown below.

<b>Subject:</b>	Re: FW: Briefing Note to [redacted]
<b>From:</b>	Rewi Lyall
<b>Date:</b>	4/04/2006 8:20:05 AM
<b>To:</b>	grill1@[redacted]
<b>Message Body</b>	
<p>Dear Julian,</p> <p>Thank you for your email.</p> <p>I regret, however, that I am unable to meet with you with respect to this issue. I can understand that you may be less than satisfied with this response, and suggest that, should you think it appropriate, you take the matter up with my manager, Mr Mike Megaw, the Deputy Premier's Chief of Staff.</p> <p>Regards,</p> <p>Rewi Lyall Senior Policy Adviser Office of the Deputy Premier</p> <p>&gt;&gt;&gt; "Julian Grill" &lt;grill1@[redacted]&gt; 3/04/2006 10:45 pm &gt;&gt;&gt;</p> <p>Dear Rewi,</p> <p>As you can see from the attachments, [redacted] is having extreme difficulties in handling [redacted] in the Pilbara. Could I talk to you about the situation?</p> <p>Regards</p> <p>Julian Grill Phone [redacted] Fax [redacted] Mobile [redacted]</p>	

[425] If Mr Lyall truly wished to obtain Mr Grill's support for his career, he did not let it interfere with what he felt was the best course of action in carrying out his duties as a public officer in this instance.

### 8.3 Canal Rocks Meeting on 30 June 2006

[426] Following Mr Lyall's refusal of his request in April 2006, information available to the Commission suggests that Mr Grill did not make any further approaches to Mr Lyall until he was told to do so by Mr McRae in their telephone call of 27 June 2006.

**MCRAE:**

*That's alright. Let's do it. I'm happy to do that but can you ring ah Rewi, Rewi Lyall?*

**GRILL:** Yes.

**MCRAE:** You know Rewi don't you?

**GRILL:** Yes I can, yes.

**MCRAE:** He's my, he's my Chief of Staff.

**GRILL:** Oh, excellent, excellent, excellent, yeah.  
Yes, I'll ring him.<sup>238</sup>

[427] Mr McRae's evidence to the Commission in a private hearing on 6 July 2007 was that, upon reflection, he had decided not to meet with Mr Grill. Instead, he instructed Mr Lyall to do it:

*... what my actions were which was to in fact say to Rewi Lyall, "I'm not meeting with Grill, you will meet with him".*<sup>239</sup>

[428] Mr Grill had sought the meeting hoping that Mr McRae could assist Canal Rocks in understanding how the Minister for Planning and Infrastructure, the Hon Alannah MacTiernan MLA, was viewing "a project ... at Smiths Beach". As Mr McRae had forewarned in his conversation with Mr Grill on 27 June 2006, although he held the position of Minister Assisting the Minister for Planning and Infrastructure, he would be limited in what aid he could provide.

**MCRAE:** Yeah. I'd be happy to listen to them, mate.  
I, it's very difficult of course. That's not an area that I have responsibility for.

**GRILL:** Uh huh.

**MCRAE:** So you're limit

**GRILL:** Alright.

**MCRAE:** You'll be limited.<sup>240</sup>

[429] It had been perceived by Mr Burke and Mr Grill that Mr McRae had a good relationship with Minister MacTiernan and may have been able to advocate on behalf of Canal Rocks and to ultimately support the "project ... at Smiths Beach" in Cabinet. In a telephone call that followed Mr Grill's meeting with Mr Lyall, Mr Burke and Mr Grill discussed this tactic. The call also gives understanding to what may have transpired in the meeting with Mr Lyall: Mr Grill had been informed of the limited role Mr McRae had been allocated in the Planning and Infrastructure Portfolio.

**GRILL:** Uh, I just took David and, uh, Mike Swift to, uh, see, uh, Rewi, uh, Lyall.

**BURKE:** Yeah.

**GRILL:** *And another guy that's, uhm, I think the med, media adviser up there, Les someone. Uhm, I came to the conclusion it probably wouldn't be a good idea for them to intercede on behalf of David. Uh, she's, that's Alannah's, given, uhm, him fuck all. Uhm, initially she only offered him either the germs or, uhm, or, uh, licensing of country taxis.*

**BURKE:** *(Laughs)*

**GRILL:** *Amazing, isn't it?*

**BURKE:** *Isn't that funny? But they're supposed to be, get on well together.*

**GRILL:** *Yeah. Well, Rewi said that too. Anyhow (clears throat) you know, just a reflection on her really. So he's ended up with, uhm, the gas pipeline and licensing. Uhm, I don't know what sort of licensing. It's obviously too narrow ...*

[430] And further in the call:

**GRILL:** *I don't think that's the way to go. And the other thing is, uh, you know, we could save him [McRae] for another day. You know I think this thing'll possibly end up in Cabinet and, uhm, you know, we've got to, sort of, engender some more support and that.<sup>241</sup>*

[431] Mr Lyall has told Commission investigators that he met with Mr Grill on the instruction of Minister McRae and, after doing so, reported back to the Minister that there was no further action required.<sup>242</sup> This version of events is substantiated by evidence given to the Commission by Mr McRae.<sup>243</sup>

[432] The Commission concludes that Mr Lyall's conduct in relation to this meeting was entirely appropriate; it was conducted in an open manner, in the presence of other Ministerial staff, at the direction of the Minister. Mr Grill does not appear to have been treated in a preferential manner and it does not seem likely that the information supplied to him in the meeting was confidential or commercially sensitive.

## 8.4 Millbank on Moore

- [433] On 29 August 2007 Mr Lombardo hand-delivered a letter to Mr McRae's office in Dumas House. The letter, which Mr Burke and Mr Grill had assisted in writing, was an appeal to Mr McRae to reconsider the decision he'd previously made that the LPS9 amendments affecting Millbank on Moore were substantial.<sup>244</sup>
- [434] Retainer negotiations between Mr Grill and Mr Lombardo were finalised on the evening of 29 August 2007.<sup>245</sup> The following day Mr Grill sent an email to Mr Burke outlining his lobbying strategy with respect to contacting the Minister's office. It was Mr Grill's plan to speak with Mr Lyall before making any approach to Mr McRae.<sup>246</sup>

<b>Subject:</b>	RE: Lombardo
<b>From:</b>	Julian Grill
<b>Date:</b>	30/08/2006 11:23:00 PM
<b>To:</b>	'brianburke@[redacted]
<b>Message Body</b>	
<p>Dear Brian,</p> <p>I thought that I would speak to Rewi Lyall and Tony McRae. If you could speak to DPI, that would be good.</p> <p>I suggest that you speak to DPI after I contact Rewi Lyall and before Tony is approached. I intend to speak to Rewi tomorrow.</p> <p>Regards</p> <p>Julian Grill</p> <p>Phone [redacted]</p> <p>Fax [redacted]</p> <p>Mobile [redacted]</p>	

- [435] On 6 September 2006 Mr Grill telephoned Mr Lyall to advise that he represented Mr Lombardo for Millbank on Moore. In this conversation Mr Grill explained his client's position and requested an appointment for himself and Mr Lombardo. Mr Lyall agreed and a meeting was scheduled for 8 September 2006.
- [436] The Commission understands that, in agreeing to the meeting, Mr Lyall was carrying out one of the duties of Chief of Staff to a Minister. Mr McRae explained this to the Commission during a public hearing on 22 February 2007.

*And a Chief of Staff's duties? --- Many and varied. They are to act on my behalf when I can't attend.*

*Yes? --- To liaise directly with departments. It's - it's a substantial position.<sup>247</sup>*

[437] And in his 6 February 2007 interview:

**MCRAE:** *And to make an arrangement to meet with him [Mr Grill] and the Departmental Officers. You know, I still think, I thought at the time, and I still think it's inappropriate and that's what he's there for.*<sup>248</sup>

(emphasis added)

#### **8.4.1 Mr Lyall's Meeting with Mr Grill and Mr Lombardo on 8 September 2006**

[438] The meeting that took place at the Dumas House Ministerial Office was also attended by an officer from DPI, Mr Woodward. Mr Lyall was questioned at a public hearing on 22 February 2007 about what had occurred at the meeting with Mr Grill and Mr Lombardo.

*... Can your [sic] recall what was discussed at this meeting which... took place on 8 September of 2006?---Yeah. Mr Grill advocated on behalf of his client and his client advocated on his own behalf his case pursuant to the - the request for the review, and essentially restated the case that was made in the letter plus raised some - you know, may have raised some peripheral matters that may or may not have been valid or relevant to the request. I can't remember those particular - - -*

*Did you indicate your support of Mr Lombardo's position? --- No because I'm in no position to offer an opinion really about whether a thing should be done or not. So Mr Lombardo appeared distressed by - in the meeting. He physically appeared distressed about - by the circumstances that he was in so I may have expressed some sympathy for him in that sort of context but I - no.*<sup>249</sup>

[439] As with the Canal Rocks meeting in June 2006, Mr Lyall's inclusion of a DPI officer impresses upon the Commission the likelihood that the meeting was conducted in a proper and official manner. Mr Woodward's presence supports that the meeting had not been convened by Mr Lyall for any reason other than to consider the Ministerial appeal lodged by Mr Lombardo on 29 August 2006.

[440] That Mr Grill was dissatisfied with the meeting was made clear in a telephone call to Mr Burke later that day at 4:11 p.m.

**BURKE:** *How did it go with Rewi Lyall?*

**GRILL:** *Oh (pause). We did better with Phil than Rewi. I mean Rewi's just trying to cover bloody Tony's arse. He's trying to say that this matter is linked to uh, the uh, South*

*Moore River issue and Plunketts and uh, had to be dealt with together. Now*

**BURKE:** *What?*

**GRILL:** *I got told, in the end I got a bit angry at him, told him it was bullshit so he started backing off a bit but uh, that was essentially what he was trying to say. And then he said that you know, they, and this was the thing that David sort of latched onto, then he said well they'd been instructed by the department that these were significant changes. Now that, that wasn't David's understanding at all.*

**BURKE:** *Well I don't know, I said to David, I said I don't think I ever addressed with them whether or not the ques, the question of whether or not they're substantial.*

**GRILL:** *Hm.*

**BURKE:** *I addressed with them the question of, regardless of whether they're substantial or not, the advertising that's been done is sufficient to make that question irrelevant.*

**GRILL:** *Yeah.*

**BURKE:** *You see?*

**GRILL:** *And I think I got that across to Rewi and he sort of addressed it in a way and said well you're saying that this is unique and I'm saying yes it's unique.*

**BURKE:** *It is yeah.*<sup>250</sup>

[441] Later in the same conversation, having listened to Mr Grill's version of the meeting, Mr Burke appeared less than impressed:

**BURKE:** *... mate, this tells you exactly why you'd never have people of the calibre of Rewi Lyall as Chief of Staff.*

**GRILL:** *Well let's see how he goes but yeah I've got a few doubts.*

**BURKE:** *He's a boy mate.*<sup>251</sup>



[442] Following the 8 September 2006 meeting Mr Grill had a conversation with Mr Lombardo at 5:25 p.m. on the same day in which he outlined his potential use to Mr Lyall's political prospects. Mr Grill told his client that if Mr Lyall wanted to get ahead in the Party, he might need help from himself and Mr Burke:

**GRILL:** *I think, I think we might get there despite everything because uhm Rewi uhm uh if he if he wants to get somewhere within the party that's politically uh he might have to call on Brian and I to help him.*

**LOMBARDO:** *Right.*

**GRILL:** *And uhm Tony, I mean we wouldn't use anything against Tony but the thing is that that Tony owes us and uh we're not asking for a lot.*

**LOMBARDO:** *Yes.*

**GRILL:** *I mean it was, we didn't hear any opposition today from Phil Woodward.*

**LOMBARDO:** *Not at all.*

**GRILL:** *... department. Uhm and uh it was all, it was all about uhm uh Rewi and uh and Tony playing the politics side. Now I'm not very impressed with that.<sup>252</sup>*

[443] At a public hearing on 22 February 2007 the above intercepted telephone call was played to Mr Lyall. When asked whether he agreed with Mr Grill's view, Mr Lyall answered:

*Did you wish to keep Mr Burke and Mr Grill on your side? --- I didn't want them to be - to have cause to be upset with me but I didn't want to curry favour.*

*... but what about to his proposition that if you wanted to get somewhere within the Party, politically, you might have to call on him and Brian to help him?--- I'm not sure that I agree with his assumption that I work for this Government in order to get somewhere within the Party. I work and have always worked for this Government and I - I dispute his construction of our relationship.<sup>253</sup>*

#### **8.4.2 Telephone Contact between Mr Lyall and Mr Grill following the Meeting**

[444] On 12 September 2006 Mr Burke telephoned Mr Woodward, a DPI officer. During their conversation, Mr Woodward confirmed that it was his intention to supply formal advice to Mr McRae with respect to the Millbank on Moore

matter. Mr Woodward intended to prepare the advice that very afternoon but quite properly refused Mr Burke's request for a copy of it. Mr Burke stated that he would leave it until the end of that week before following up with the Minister's office.<sup>254</sup>

[445] It was with the understanding that such advice was imminent that Mr Grill next contacted Mr Lyall on 15 September 2006. During this conversation, Mr Lyall made the suggestion that Mr Lombardo delay relisting with the State Administrative Tribunal until October, when Mr McRae would again be Acting Minister for Planning and Infrastructure.

**GRILL:** *I'm off to America tonight and I was just wondering uhm*

**LYALL:** *Okay.*

**GRILL:** *how're we going with that uhm*

**LYALL:** *Yeah.*

**GRILL:** *Lombardo thing?*

**LYALL:** *Uhm when's the sat [sic: SAT] thing date? Do you have another date for the sat [sic: SAT]?*

**GRILL:** *Uhm we'll go uh I think uh I'm not sure. I-I think when we met with the lawyers the other day we to- we told them to g-go ahead and relist but I don't know whether we got a date for it.*

**LYALL:** *Okay. Well I just suggest that uh it'd be good if it wasn't heard before the week starting the second of October.*

**GRILL:** *Uh do I, just ...*

**LYALL:** *The decision, the decision, the deci-*

**GRILL:** *just nod your head.*

**LYALL:** *Hey?*

**GRILL:** *Just nod your head. Do I, do I read between the lines that you might be able to make a decision by that stage?*

**LYALL:** *I just, I would simply say that the Minister will be acting Minister again during that week.*

**GRILL:** *Oh, during that week. Okay then right, okay. Alright I'll*

**LYALL:** *But don't, yeah I know, yeah. You can't obviously*

**GRILL:** *I can't read anything into that?*

**LYALL:** *No you can't read anything into that.*

**GRILL:** *Okay.*

**LYALL:** *But you know, anyway, I-I, I won't say any more.*<sup>255</sup>

[446] In suggesting that a delay would be advantageous to Mr Lombardo and saying not to "read anything into that", Mr Lyall implied that Mr Grill was being provided with information that he would not normally be entitled to. Regardless of whether or not the information being supplied to Mr Grill was sensitive, the manner with which Mr Lyall conducted the conversation created the perception of preferential treatment. Mr Grill's responses of "just nod your head" and "do I read between the lines" confirm that this was indeed Mr Grill's understanding.

[447] Mr Grill's section 86 representations asserted this was mere speculation and, importantly, did not appear to have been put to Mr Grill. At that time it had not, but it was put to him in a private hearing on 13 October 2008. There he said:

*What did you mean when you said to Mr Lyall, "Just nod your head"?---I'm not sure at this stage, but I - I guess I was asking whether there was some sort of coded message there.*

*Right. Can I suggest to you what you were looking for from Mr Lyall was an indication as to what the minister was going to decide on this re-advertising issue?---Yes*

*And there was reference to SAT there, the State Administrative Tribunal?--  
-Yes.*

*And it would seem that your client, Mr Lombardo, had ready and waiting an application to SAT?---I think there were proceedings in process.*

*All right, and Mr Lyall - - -?---It was a matter of relisting it, I think.*

*I see, yes. I think you're right, it does refer to "relist" or you refer to "relist". Mr Lyall then says, "Well, I'd suggest not doing that before the week starting 2 October"?---Yes.*

*It's after that you then say, "Just nod your head. Just nod your head. Do I read between the lines that you might be able to make a decision by that stage"?---Well - - -*

*You're there referring to - - -?--- - - - it seems pretty straightforward*

*Yes, you're there referring to asking him whether he can give you an indication that the minister will make a decision in that week - yes?---Yes.*

*And that being Mr McRae?---Yes.*<sup>256</sup>

[448] When questioned about the telephone conversation of 15 September 2006, at a public hearing on 22 February 2007, Mr Lyall admitted that he provided more information to Mr Grill than he would ordinarily have done.

*... were you providing him with more information than you might ordinarily provide say if Mr Lombardo himself rang you? --- I don't know. I don't know. I haven't - can't recall being placed in those circumstances.*

*All right, think about it?- - - I don't - seriously, I don't - I don't know.*

*Was it the fact that Mr Grill was ringing you, rather than ordinary Joe Blow, influenced you to provide some little more information that you may not have ordinarily done? --- Yeah.*<sup>257</sup>

[449] The next telephone contact between the pair was on 4 October 2006. Mr Grill called Mr Lyall enquiring after the status of the Lombardo matter. Mr Lyall explained that the advice from DPI had yet to be received.

**GRILL:** *Wh- what do we need to do in relation to this, uhm,*

**LYALL:** *I'm*

**GRILL:** *Lombardo?*

**LYALL:** *I'm waiting for something to come up from the Department.*

**GRILL:** *Are you?*

**LYALL:** *And then, uhm, ah, then the Minister will have a look at ah, whatever advice we get up from it.*

**GRILL:** *Mm hm.*

**LYALL:** *Ahm, Phil Woodward who, ah, you've met at a meeting is away this week and he's left it in the hands of uh, one of his colleagues.*

**GRILL:** Oh yeah.

**LYALL:** And I'm expecting that that, that the uh, the file will come up, ah, this week.

**GRILL:** Right. Okay then. Uh, so what shall I do? Give you a ring

**LYALL:** Uhm

**GRILL:** next week or something?

**LYALL:** I'd, I'd say, uh, leave it with me and I'll give you a call.

**GRILL:** Okay.<sup>258</sup>

[450] Mr Lyall's disclosure of the status of the matter is not considered to be improper. His offer of a telephone call when the documents were eventually received was a courtesy rather than a specific favour to Mr Grill for some improper purpose.

[451] Two days later, Mr Grill contacted Mr Lyall again. In this conversation Mr Lyall instructed Mr Grill not to panic about delays as Mr McRae's role as Acting Minister was to continue for a further week.

**LYALL:** Hello Julian. Sorry I didn't call you back. Look don't panic, er, we're acting next week as well.

**GRILL:** Oh great, okay.

**LYALL:** Yeah (laughs) so that's the first thing, uhm and, er, I've been out of the office for most of the afternoon, so it may even be in there, er, now.

**GRILL:** Mm hm.

**LYALL:** Uhm, but if it, if it's not, I'll chase it up first thing on Monday.

**GRILL:** Oh, great. What I can't understand is that, uhm, that uh, that brief was gunna be sent up I think a week or so ago. Er, what happened? It just doesn't get to you when you're

**LYALL:** Hold on a second.

**GRILL:** *in your office.*

**LYALL:** *Just a sec. Uhm, it may have gone, ah, directly to Alannah's office. Last time that's what's happened. What happened, uhm, it went there and then we eventually got it, uhm, so I'll just need to check was it*

**GRILL:** *Oh, great.*

**LYALL:** *Yeah, but, uhm, yeah, I, I'm sure that it must be in the system somewhere.*

**GRILL:** *Great. Okay then.*

**LYALL:** *Alright.*

**GRILL:** *Alright, look forward to uhm, shall I ring you or*

**LYALL:** *I'll speak to you on Monday.*

**GRILL:** *Great. That'll be great.*<sup>259</sup>

[452] Mr Lyall's comment on 15 September 2006 that "the Minister will be Acting Minister again during that week" and then on 6 October 2006 "don't panic ... we're acting next week" give the impression that Mr Lyall was confused about his Minister's role.

[453] Standing in for the designated Minister during an absence is one of the duties carried out by an Acting Minister. The "acting" which Mr Lyall refers to in the telephone calls of 15 September and 6 October 2006 relate to periods when Mr McRae had full responsibility for the Planning and Infrastructure Portfolio due to the absence of Minister MacTiernan.

[454] That Mr McRae was "acting" as Minister for Planning and Infrastructure is not actually relevant to his involvement in the decisions affecting Mr Lombardo. As outlined previously, Minister MacTiernan had devolved all responsibility for the Shire of Gingin's LPS9 to the Acting Minister due to a perceived conflict of interest. Regardless of the timing of the DPI advice, Mr McRae would ultimately be the one to decide upon it.

[455] Mr Grill had initially, and correctly, believed that Mr McRae was responsible for the Lombardo decisions due to Minister MacTiernan's decision to remove herself from the matter. He stated this in his first telephone call to Mr Lyall on 6 September 2006:

**GRILL:** *With a view to uhm, approaching ah, Tony. Uh, Tony's the acting minister there because I think Alannah's, adjudged that*

*she's got a bit of a con, conflict of interest essentially because of the Plunkett development.*

**LYALL:** Yes.<sup>260</sup>

[456] Over the course of his communications with Mr Lyall, however, Mr Grill was led to the view that Mr McRae could only adjudicate over the matter whilst in full Acting capacity. This is supported by his comments to Mr Burke:

**BURKE:** *Will you do me an email on that Lombardo one?*

**GRILL:** *Ah yeah, okay.*

**BURKE:** *Rewi Lyall and what he said.*

**GRILL:** *Yeah, okay, just what I told you at lunch time, you know.*

**BURKE:** *Yeah.*

**GRILL:** *Okay. Okay. Alright.*

**BURKE:** *So we gotta hold off until he's Acting Minister again?*

**GRILL:** *Yeah.*<sup>261</sup>

(emphasis added)

[457] The Commission has considered the possibility that Mr Lyall may have deliberately misled Mr Grill into this belief, however, other than an effort to placate Mr Grill, no purpose for a deceit could be identified. It is a more likely proposition that Mr Lyall may not have understood the capacity in which Minister McRae had responsibility for the Lombardo matter. This is supported by comments made by Mr Lyall in an interview with Commission investigators on 10 July 2007.

**CCC INVESTIGATOR:** *... Tony McRae had taken Alannah MacTiernan's place wasn't it because of that perceived conflict?*

**LYALL:** *... He dealt with the matter he dealt with the matter because it came to him while he was an Acting Minister.*<sup>262</sup>

[458] Mr Lyall's next telephone contact with Mr Grill was on 10 October 2006, the day after Mr McRae had signed the DPI briefing note. In this conversation Mr Lyall stated that the outcome was satisfactory to Mr Lombardo but wasn't

prepared to elaborate further as the Minister had yet to sign correspondence that was being drafted.

**LYALL:** *Well. Uhm just to update you, the Minister's considered the issue.*

**GRILL:** *Mm hm.*

**LYALL:** *And there'll be correspondence being drafted to Mister Lombardo, mm over the next couple of days we'll get it signed.*

**GRILL:** *Ah ha.*

**LYALL:** *Yeah.*

**GRILL:** *How does it look?*

**LYALL:** *Uhm, not sure how much I can and can't say to tell you the truth err I uhm what is what is proper and what isn't to, to I, he hasn't actually signed the letter yet.*

**GRILL:** *Oh I see, yeah.*

**LYALL:** *Uhm, so until he's actually signed it I think it would be pre-emptive, you know how things can*

**GRILL:** *Yeah.*

**LYALL:** *change, uhm but err it, it seems at this stage a bit err ... Lombardo will be relatively satisfied.*

**GRILL:** *Okay, well uhm Tony'll probably sign it in a in a couple of days but*

**LYALL:** *Yeah.*

**GRILL:** *err I guess by the end of the week he might get the letter or?*

**LYALL:** *Err, early next week I would say.*

**GRILL:** *Early next week, okay then. Would you like to fax a copy through to, to me when its, when its done?*

**LYALL:** *Sure what's your fax number?<sup>263</sup>*

(emphasis added)



- [459] Mr Lyall exhibited uncertainty about whether communicating Mr McRae's decision to Mr Grill was appropriate but then proceeded to do so anyway. Mr Lyall has admitted to the Commission that he gave more information to Mr Grill than he would have otherwise done for others.<sup>264</sup>
- [460] The Commission can attribute Mr Lyall's uncertainty to his relative inexperience, having only been a Chief of Staff to a Minister for four months, but he should have sought guidance from the Minister if he had been in doubt.
- [461] There is no evidence of misconduct by Mr Lyall in his dealings with Mr Grill concerning the Millbank on Moore development.

## 8.5 Mr Lyall's Contact with Mr Grill in Relation to Artrage

- [462] Between 27 October and 5 November 2006 Artrage, a not-for-profit support organisation for contemporary artists, held a festival in Northbridge entitled "Ten Days on Artrage" which consisted of exhibitions, live music, theatre performances, cinematic presentations and comedy routines.<sup>265</sup>
- [463] Mr Lyall had been a board member of Artrage since November 2004<sup>266</sup> and had advised Mr McRae of his involvement with that organisation.<sup>267</sup>
- [464] In a written submission made to the Commission, Mr Lyall detailed the financial difficulties faced by Artrage approximately three weeks prior to the 2006 festival. The appointed Sponsorship Manager had resigned suddenly, for health reasons, creating a situation where the organisation's commitments might not be met by their reduced income. Staff and board members of the organisation decided to assist by pursuing their own avenues for corporate sponsorship.<sup>268</sup>
- [465] On 16 October 2006 Mr Lyall telephoned Mr Grill to ask for his "assistance" in the form of an introduction to "businesses that might be interested in a commercial sponsorship arrangement".<sup>269</sup>

**LYALL:** *I'm ringing you in a, different capacity. Uhm, just to ah, I guess pick your brains a bit. Uhm, and you may be able to help you may not. I'm on the board of an organisation called Artrage. Which you may or may not*

**GRILL:** *Yes. I've heard of it.*

**LYALL:** *Ah you have heard of it. Uhm, it's ah a not for profit arts organisation which*

**GRILL:** *Yep.*

**LYALL:** *as you would know and runs the festival annually. Uhm, they're looking for, we are looking for some potential sponsors, ah and I thought that you might know of ah, some of your clients or so forth who might have an interest in ah, the arts and just*

**GRILL:** *Yeah.*

**LYALL:** *be interested in, some sort of a sponsorship arrangement, with Artrage uhm, oh I don't expect to you to be able to tell me now but uhm, is that, ah the kind of thing*

**GRILL:** *Yeah and I'd certainly have a think about it and ah, see what I can do.*

**LYALL:** *Okay because that'd, yeah that'd be great.*

**GRILL:** *Oh that's fine. Okay uhm.*

**LYALL:** *Anyway would you speak*

**GRILL:** *Have you got any material on it, on Artrage?*

**LYALL:** *Yes I can get you some yes.*

**GRILL:** *If you could just, ah flick that through to me in the email I'll pick it up tomorrow evening.*

**LYALL:** *Okay.*

**GRILL:** *And ah, then I'll give it some thought.*

**LYALL:** *No problem.*

**GRILL:** *Great mate yeah I'll help if I can.*

**LYALL:** *Alright mate. Thanks for that.*<sup>270</sup>

[466] The email Mr Grill requested was sent by Mr Lyall on 18 October 2006, from his private email account.<sup>271</sup>

<b>Subject:</b>	Artrage
<b>From:</b>	[REDACTED]
<b>Date:</b>	18/10/2006 11:42:04 AM
<b>To:</b>	grill1@[REDACTED]
<b>Message Body</b>	
<p>Julian,</p> <p>As discussed, please find info on Artrage for potential sponsors.</p> <p>Regards</p> <p>Rewi</p>	
<b>Attachment</b>	
ARTRAGE BAR proposal.doc	
<b>Attachment</b>	
ARTRAGE seeks a partner[7].pdf	

[467] Mr Lyall was asked at a public hearing on 22 February 2007 why he had asked Mr Grill for this assistance.

*... Now, why did you approach Mr Grill? ---Because I don't have very many business contacts and his name - he's, in fact, I think the only person I know in - and have met who has the kind of - who I understood to have the kind of business contacts that - he might have a broad enough pool that one of them might be open to Artrage which, as I say, is a fringe organisation. It's not to everybody's taste.*

*Yes, in fact were you the - was Mr Grill the only person that you did actually approach in relation to this? --- Yes. As far as I can recall, yes, he was.<sup>272</sup>*

[468] Mr Grill attempted to call Mr Lyall on the evening of 26 October 2006 but was unsuccessful. Mr Lyall phoned back the following morning. In this conversation Mr Lyall asked if Mr Grill could email him the names of six people to invite to an Artrage "VIP" event.

**LYALL:** *If you uhm, wanted to email me about half a dozen people if you could think of them in- a, include yourself on the list if you and Lesley would like to come, we would be delighted to err host you. Uhm, err and then I can send the invites out to you and to others.*

**GRILL:** *Oh, I see. Err well essentially uhm initially you wanted the money...*

**LYALL:** *Well that's right, that's right. Look and if its, if its an incentive for you apart from,*

*you know, err dragging people along so that uhm they might err be interested in giving us some money at some stage err there will be others there, there will be the Lord Mayor and err, err a couple of Cabinet Ministers uhm and err other VIP's.*

**GRILL:** *Yeah, well, the err, I mean these uhm in lieu of the events of the last week we haven't really had a chance to look at the err you know getting donors in,*

**LYALL:** *...*

**GRILL:** *its not a good time for us, err and with, so on that front we haven't done, really haven't done anything.*

**LYALL:** *Oh, okay.*

**GRILL:** *I uhm I thought I might just give you a donation myself and err sort of uhm*

**LYALL:** *Well, I mean, that, that I mean, I, I appreciate that, that's, that's not necessary really Julian but err look if uhm if you and Lesley I, I, appreciate that's it's a bad time, if you and Lesley would like to come, I'd be delighted to send you an invitation so that you can at least come and enjoy a drink on us and err the, the event is on the balcony of ...<sup>273</sup>*

(emphasis added)

[469] Shortly after his conversation with Mr Lyall, Mr Grill raised the possibility of a donation to Artrage with Mr Burke. Mr Burke agreed to Mr Grill's suggestion of a \$5,000 donation.

**GRILL:** *Rewi Lyall sent me an email about help for Artrage a while ago. He rang again this morning I said look, Brian and I haven't, haven't had time to really consider it. It's a very short timetable, and uhm, uhm, and you know we've got problems with all this publicity at the moment we're not keen to go down to our clients for funding. Uhm, I said I might be prepared to put some money in myself, uhm.*

**BURKE:** *How much is he looking for?*

**GRILL:** *Well I noticed the lower level sponsorships are about five thousand and I, I thought maybe we could, put in five between us.*

**BURKE:** *Yeah I think we can but let's me and you have a talk about this on Monday. Uhm, because there might be one or two of our clients we can talk to.*

**GRILL:** *I'd rather if I could I'd rather make a commitment and then sort of go to our clients and just ask 'em.*

**BURKE:** *Okay.*

**GRILL:** *They, they can get invited, there's a show next, Saturday week.*

**BURKE:** *Yeah. Julian I'm relaxed. Do you want to give him five grand?*

**GRILL:** *I do.*

**BURKE:** *Okay off you go.*

**GRILL:** *Okay.<sup>274</sup>*

[470] Mr Grill telephoned Mr Lyall back and made the offer of \$5,000, which was refused by Mr Lyall.

**GRILL:** *Oh hi I just rang to say that uhm, I spoke to Brian. He's too tied up with these other things at the matter but, ah we'll jointly give you five thousand dollars. Okay?*

**LYALL:** *Uhm, that's, that's ah very nice. Uhm, er, I*

**GRILL:** *I'll get Lesley to*

**LYALL:** *I, I really, I really sincerely ...*

**GRILL:** *organise that with you today or, or Monday.*

**LYALL:** *Well, no I was, I was just going to say that, I do, I do appreciate that. Uhm, ah but, I, I would, uhm, rather ah, wait for longer and talk to you about those other things at a*

*more convenient time. Really I mean, while, while that is very generous of you uhm, in, in terms of the organisation and its, future I mean, it's a, a got an annual budget of in, in the order of about a million dollars. Uhm, and ah, uhm, I'd, I'd, I would rather discuss with you and, and Brian at some later date when it's, when everything else is sorted out and we're in a better, space to talk about it. Uhm, some other uhm, alternatives. It's, I do appreciate the offer. Uhm, but I, I think that, if that's okay with you I don't mean to sound.*

**GRILL:** *Yeah fine. Yeah sure.*

**LYALL:** *But I, I you know I don't mean to sound, discourteous or*

**GRILL:** *Mm. No, no.*

**LYALL:** *unappreciative but I just think that uhm, I think it's better that we have another chat about it when you're in a better place to talk about it.*

**GRILL:** *Okay then.*

**LYALL:** *Alright?*

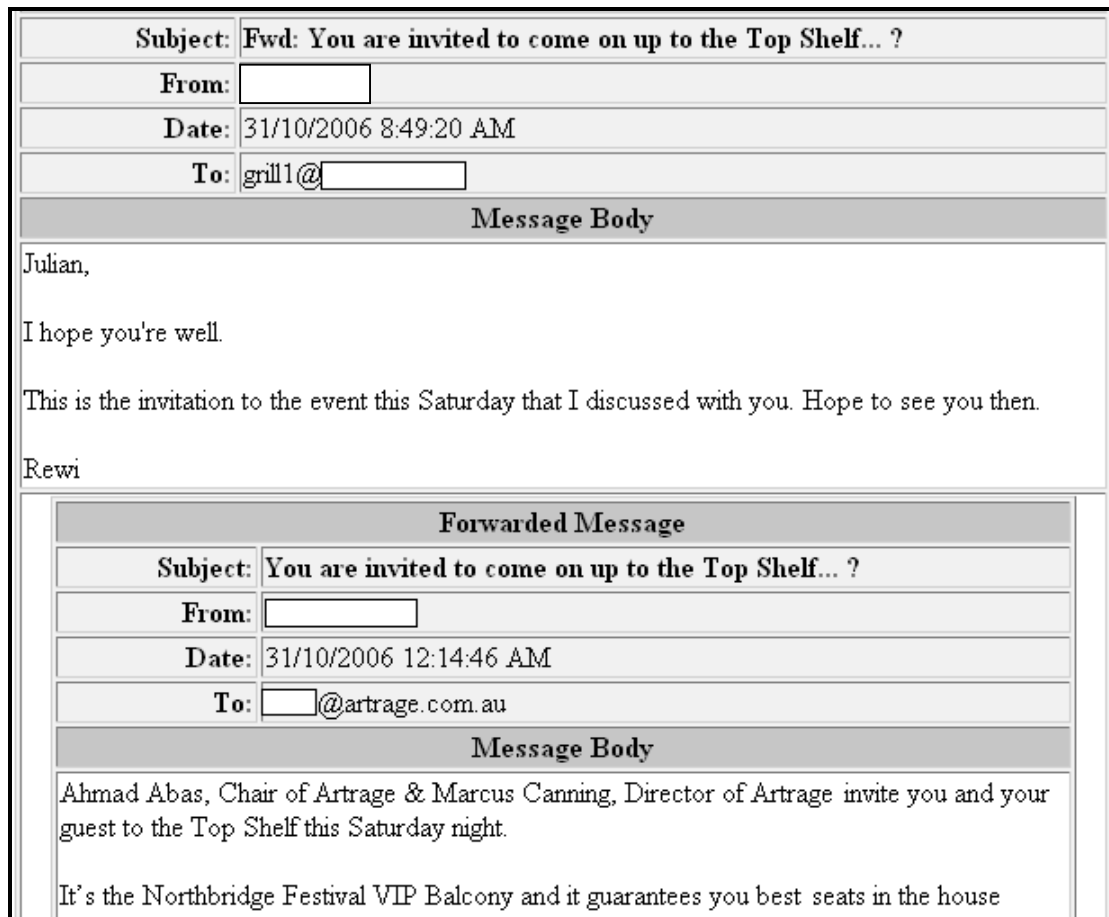
**GRILL:** *Alright. That's fine.*

**LYALL:** *Okay. Uhm, and like I say I'll send you out the invite for the, the thing.*

**GRILL:** *Okay. That's excellent.*

**LYALL:** *Okay. Thanks Julian.*<sup>275</sup>

[471] Despite having refused Mr Grill's offer of a donation, Mr Lyall reissued his earlier invitation for Mr Grill to attend the "VIP" event. On 31 October 2006, again from his personal email account, Mr Lyall sent the following email to Mr Grill.<sup>276</sup>



[472] When asked at a public hearing on 22 February 2007 about why he had made the request of Mr Grill and whether it was linked to Mr Lyall's involvement in the Lombardo matter, Mr Lyall accepted that their recent contact had been an influence but not that he had believed Mr Grill would be amenable because of it.

*... So this was just several days after the minister reversed his decision. Did you think that Mr Grill might be more amenable to your request in those circumstances? --- No. No, I don't think so. I mean he either has clients who are willing to - or interested or he doesn't. So, you know, like I said, that's it. They're either interested or they're not.*

*Was it because of your dealings with him in the weeks preceding this request that he was someone that came to mind? --- Yeah, yeah, fair enough. Yes.<sup>277</sup>*

[473] Mr Lyall's refusal of Mr Grill's donation occurred on 27 October 2006, four days after the Commission public hearings into Smiths Beach had begun. One possibility is that Mr Lyall had declined the offer because he was aware that Mr Grill was the subject of a Commission investigation. When asked at a public hearing on 22 February 2007 Mr Lyall denied knowing that Mr Grill was involved.

*And he also goes on to say, "It's not a good time for us," and indeed on the second page you actually indicate yourself that you appreciate that it's a bad time? --- Sure.*

*Now, can you recall whether that was in a reference to the fact that the CCC hearings into Canal Rocks had just commenced that week? --- Yeah, I guess that must be - although at that time I had no knowledge of his personal involvement in any of those issues.*

*All right? - - - So when I was saying I appreciate that it's a bad time - - -*

*That would indicate to you, wouldn't it, that you did have some understanding of his involvement in that?---Well, some understanding. Well, no, no, I wouldn't necessarily agree with that. I - I was aware that he was in a business relationship with Mr Burke and that - that that may cause some problems for him.<sup>278</sup>*

[474] Mr Lyall argued that he had never sought a donation from Mr Grill and had only wished to be introduced to potential sponsors. When Mr Grill made the donation offer, Mr Lyall said that "alarm bells went off" in relation to the propriety of such an arrangement.

*... I wasn't looking for Messrs Burke and Grill to become sponsors of Artrage. That was not the intent of any of the discussions that I'd had with him.*

*All right. They are offering you \$5,000. Why could you not accept it, bearing in mind we can hear from Mr Grill and Mr Burke's arrangement that they were going to get it off a client of his in any event?---Because as soon as he made the original offer, alarm bells went off in my mind and I just - the - because, because - - -*

*What was the cause - - -?---Because I was very - the intent of my conversations with him were a genuine attempt to look at potential commercial arrangements between clients of his who might be interested in Artrage and Artrage and not - not to do with him. When he made that offer, I became suddenly and acutely aware of issues of propriety that might be perceived about such an arrangement.<sup>279</sup>*

[475] And further:

*... I got spooked. That is what happened. I got spooked.*

*You got spooked?---And that's why I - I refused.<sup>280</sup>*

## **8.6 Commission's Opinions in Relation to Mr Lyall**

[476] In assessing Mr Lyall's conduct in relation to his contacts with Mr Grill, the Commission must take into account a different regulatory framework to the one which applied to Mr McRae. Mr Lyall was bound to act in accordance with the *Department of the Premier and Cabinet Code of Conduct* and the *Western Australian Public Sector Code of Ethics*.<sup>281</sup>



[477] At the outset of his first telephone call to Mr Grill about Artrage, Mr Lyall announced that he was “ringing ... in a different capacity”. Mr Lyall’s subsequent email contact with Mr Grill was conducted from his personal email account. This shows Mr Lyall adhering to the *Department of the Premier and Cabinet Code of Conduct* which applies to Ministerial officers as well as employees within that Department.

*The Department recognises its employees’ rights to be involved in public life, including participation in groups such as trade unions, interest groups or political parties. However, the exercise of this right should not interfere with an officer’s ability to properly carry out their duties, and no government resources should be used to these ends.*<sup>282</sup>

[478] It would appear that Mr Lyall had made a deliberate effort to separate his fund-raising for Artrage from his official position. However, by contacting Mr Grill, with whom he had established a relationship through his employment, some link between the two is inevitable. The timing of the request to Mr Grill, coming less than a week after the Lombardo issue was resolved, could potentially create the perception that Mr Lyall sought the assistance of Mr Grill because Mr Grill might have felt an obligation to assist him. In the weeks immediately preceding the request Mr Lyall had been helpful to Mr Grill and on two separate occasions had arguably given Mr Grill the impression of preferential treatment.

[479] That Mr Grill was the only person from whom Mr Lyall sought assistance might strengthen this perception. Had Mr Lyall utilised some of his other ALP contacts to seek out sponsors, and not just Mr Grill, the approach would have appeared more benign. Mr Lyall said, in his written submission to the Commission, that Mr Grill was the only person he knew with significant business contacts:

*Knowing personally only one person with significant business contacts, I telephoned Mr Grill and sought his assistance.*<sup>283</sup>

(emphasis added)

[480] Although Mr Lyall had known Mr Grill prior to his employment with Mr McRae, it would be difficult for Mr Lyall to argue that he would have approached Mr Grill regardless of their recent contact. Mr Lyall had stated in evidence at a public hearing on 22 February 2007 that they had only met on a couple of occasions.

*... I met Mr Grill on a couple of occasions through the Australian Labor Party of which I’m a member.*<sup>284</sup>

[481] It is apparent it was Mr Lyall’s recent contacts with Mr Grill in his capacity as Chief of Staff to Minister McRae that prompted him to approach Mr Grill and seek assistance for Artrage.

- [482] In their telephone conversations Mr Grill did not demonstrate any great personal interest in Artrage but was still willing to donate \$5,000. The Commission makes no comment on what his motivation for that may have been.
- [483] The Commission accepts that the timing of the Lombardo decision and the Artrage festival were largely coincidental. Mr Lyall should, however, have recognised that his request for assistance, coming so soon after having discussions with Mr Grill as Chief of Staff to Minister McRae was potentially problematical.
- [484] The Commission also considered whether the timing of the Commission's public hearings into Smiths Beach, which commenced on 23 October 2006, also had an impact. That the Commission was investigating a matter involving Mr Burke and Mr Grill's lobbying practice became public knowledge. Whether Mr Lyall's choice to decline Mr Grill's offer of a donation on 27 October 2006 was as a result of his own views on its propriety, or whether he was merely concerned about attracting the Commission's scrutiny, was an obvious question.
- [485] In their telephone calls on 27 October 2006 Mr Grill explained to Mr Lyall that it was not a good time for him or Mr Burke to approach potential sponsors. Mr Lyall rejected Mr Grill's offer of a donation, saying that he would prefer to "discuss with you and ... Brian at some later date when ... everything else is sorted out and we're in a better, space to talk about it". These comments could support a proposition that Mr Lyall was aware that the activities of Mr Burke and Mr Grill were being examined by the Commission and that he wished to put off any further discussion about donation or sponsorship assistance until after that focus had subsided. Mr Lyall said he was aware Mr Grill was in a business arrangement with Mr Burke and that may cause some problems for him.
- [486] Mr Lyall never explicitly asked for a donation from Mr Grill. In all of his communications with Mr Grill, Mr Lyall only ever asked for an introduction to Mr Grill's "significant business contacts"; individuals and corporate entities that might have had a genuine interest in sponsoring Artrage.<sup>285</sup> When Mr Grill twice offered a donation of his own to Artrage, Mr Lyall refused both times. He said he became "spooked".
- [487] In determining whether Mr Lyall has engaged in misconduct, the Commission must first identify whether he has breached the applicable codes of conduct that apply to his public position. The *Department of the Premier and Cabinet Code of Conduct* is not definitive in dealing with a scenario such as this. Its only reference to the seeking or accepting of a benefit comes under the heading of "Acceptance of Gifts".

*Officers should not seek or receive rewards, gratuities or remuneration in connection with their official duties, either in or out of the hours of duty, without the permission of the Director General.*<sup>286</sup>

- [488] The *Western Australian Public Sector Code of Ethics* that applied in 2006 (current version introduced in February 2008) appears to have only one relevant reference, under the section entitled “Justice”.

*Refrain from using any circumstance or information connected to official duties for personal profit or gain.*<sup>287</sup>

- [489] The Explanatory Notes accompanying this state:

*Apart from their remuneration and conditions of employment, public sector employees should not benefit from their position in any manner.*<sup>288</sup>

- [490] Unlike the *Ministerial Code of Conduct* that prohibits seeking or accepting a benefit for themselves or others, both of the documents that applied to Mr Lyall deal specifically with benefits to the individual employee only. That Mr Lyall had sought the benefit for Artrage is irrefutable. Other than the personal satisfaction and possible prestige of assisting the organisation that he was associated with, it is not possible for the Commission to identify a direct benefit to Mr Lyall.

- [491] In any event, and more particularly, the evidence does not establish that Mr Lyall sought a benefit “in connection with” or “from” the use of his position. He neither stated nor implied any link between his official duties or position, and his request for assistance from Mr Grill. He took positive steps to separate the two. The evidence does not establish any misconduct on the part of Mr Lyall in this regard.

- [492] At present, Western Australia does not have a specific code of conduct that applies to Ministerial staff; instead they are required to adhere to the *Department of the Premier and Cabinet Code of Conduct*. The Commission is of the view that such an arrangement is inadequate and that a separate code, more in line with the *Ministerial Code of Conduct*, should be introduced. It is an unsatisfactory circumstance that Ministerial officers are not subject to the same level of ethical standard that is expected of Ministers.

- [493] In late 2006 the Office of the Public Sector Standards Commissioner (OPSSC) released a discussion paper as part of a ten-year review. The discussion paper, entitled *A separate ethical code for ministerial staff?*, identified many flaws in relation to this matter and the conclusion detailed on p.44 of the discussion paper is detailed below.

*In the Commissioner’s view, there is a need for a code of ethics, separate from the code which covers public servants, to regulate the conduct of ministerial staff. This is based on the importance of their role, the lack of specific guidelines in the existing instruments relevant to their role, the nature of their interactions with the public sector, and the trend towards separate regulation in other Westminster systems. The Commissioner believes it is important that*

*the minimum expectations regarding their conduct are put on an open and transparent basis.*<sup>289</sup>

[494] The OPSSC report entitled *Ten-Year Review Four: The principle of integrity in official conduct* has, as Appendix Two, a Gazetted Code of Ethics, i.e., the *Western Australian Public Sector Code of Ethics* which commenced operation on 8 May 2007. The Code contained a new section, specifically addressing Ministerial staff. A new Code was released by the OPSSC on 1 February 2008, which replaced the 8 May 2007 Code and did not include specific reference to Ministerial staff.

[495] Also in the aforementioned OPSSC report, is a recommendation made by the Public Sector Standards Commissioner that a separate Code of Conduct be established for Ministerial staff and that a committee be formed, involving the Commission, with the purpose of developing the Code.

4. *The Commissioner recommends that:*

4.1. *A Code of Conduct for Ministerial Staff be developed to include, amongst other things, a description of the roles and responsibilities of ministerial staff (either in terms of what they can do or what they cannot do)*

4.2. *A Ministerial Staff Ethics Committee be established, to include representatives from the Department of the Premier and Cabinet, the Office of the Public Sector Standards Commissioner, ministerial staff, the Corruption and Crime Commission and an agency representative, and that the Committee be responsible for:*

4.2.1. *providing input into the development of a separate Code of Conduct for Ministerial Staff;*

4.2.2. *determining the content of appropriate training courses for ministerial staff, particularly for chiefs of staff (including but not limited to roles and responsibilities, ethical conduct, interaction with the public sector, and the Westminster system of government), and ensuring this training is regularly delivered;*

4.2.3. *developing strategies to ensure better understanding and adherence to the requirements of s74 arrangements for communication between ministers' offices and public sector staff;*

4.2.4. *developing guidelines to apply to any committee or working group where ministerial staff and public sector staff are represented; and*

*4.2.5. developing conflict of interest guidelines for ministerial staff.*<sup>290</sup>

[496] The Commission supports the concept of improved accountability for Ministerial officers. It is understood that the Department of the Premier and Cabinet is in the process of developing a specific code of conduct for Ministerial officers.



## **APPENDICES**





## **APPENDIX 1**

**Letter to Mr C P Shanahan SC, Acting Commissioner,  
Corruption and Crime Commission, of 11 April 2008 from  
Mr Malcolm McCusker AO QC, Parliamentary Inspector, and  
enclosed Draft Paper (13 pages) entitled *Complaint by Mr  
Tony McRae***





**PARLIAMENTARY INSPECTOR  
OF THE CORRUPTION AND CRIME COMMISSION  
OF WESTERN AUSTRALIA**

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Our ref: MJMcC:095/07  
Your ref: 0899/06

11 April 2008

Mr C P Shanahan SC  
Acting Commissioner  
Corruption and Crime Commission of  
Western Australia  
PO Box 7667  
CLOISTERS SQUARE WA 6850

Dear Acting Commissioner

**Mr McRae**

I am sorry to burden you, at a time when you have just "taken over the reins" in the Commissioner's absence. However, I think it appropriate that I should write to you, having recently received a further communication from Mr McRae's lawyers, with respect to a complaint that Mr McRae has made, and which I suggest it would be useful for the Commission to consider, before finalising its report, particularly one in which it may be proposed to find "serious misconduct" by Mr McRae.

Mr McRae's complaint, in essence, is that when he was questioned at the public hearing on 22 February 2007, and it was put to him that he had deliberately concealed from Mr Grill the fact that he had already approved the recommendation by the WAPC (that the modified Shire of Gingin TPS9 should not be readvertised) he did so with the motive of obtaining Mr Grill's assistance to raise funds for Mr McRae's electoral campaign.

Mr McRae claims that he neither requested Mr Grill's assistance for an alternative fund raising events, nor did he in fact obtain any such assistance. This, he says, is surely relevant to the question of whether his alleged purpose was as put to him in the public examination. He says that the investigation did not inquire into that matter, which he says was a relevant matter which ought to have been investigated before he was questioned.

Could you arrange for some enquiries to be made, to determine whether that line of investigation was in fact pursued, before Mr McRae was publicly examined; and if so, what was the result of that line of investigation?

---

Locked Bag 123, Perth Business Centre, 6839  
Telephone: (08) 9323 2222 Facsimile: (08) 9325 3280  
Email: [piccc@piccc.wa.gov.au](mailto:piccc@piccc.wa.gov.au)  
ABN: 39 838 081 950

As I have said in my earlier letter to you, I think it desirable, and only fair to Mr McRae, that any outstanding issue relating to him should be made the subject of a separate report (rather [sic] than part of a "Smiths Beach" report), and sooner rather than later, as over a year has already passed since he was publicly examined.

Before finalising your report, you may find it helpful to consider the matters which I have set out in the **enclosed** draft paper, which I would be happy to discuss with you, if you wish.

Yours faithfully



**Malcolm McCusker AO QC**  
**PARLIAMENTARY INSPECTOR**

enc

PS I have not provided a copy of this paper to Mr McRae's solicitors or to Mr McRae, and, as you will see, the paper does not express a concluded view.



**PARLIAMENTARY INSPECTOR  
OF THE CORRUPTION AND CRIME COMMISSION  
OF WESTERN AUSTRALIA**

---

**COMPLAINT BY MR TONY McRAE**

1. At a public examination of Mr Tony McRae by the Corruption and Crime Commission ("CCC") on 22 February 2007 it was put to Mr McRae by counsel assisting, Philip Urquhart, that in the course of an intercepted telephone call from Mr McRae to Mr Julian Grill on 11 October 2006 he had deliberately deceived Mr Grill, by not disclosing to Mr Grill a decision which Mr McRae had already made, viz to approve a request, by Mr Grill's client Lombardo (Terana Holdings Pty Ltd), to reverse an earlier decision requiring re-advertising of an amendment to a town planning scheme, and that he had done so to make it look like (he) had got onto the matter straightaway (ie immediately after the conversation) see T616, and had then reversed his earlier decision.
2. The obvious question, if that were so (and it was denied by Mr McRae) is, what motive could he have for doing so? Although not put to Mr McRae directly, the clear insinuation in the questions that were put to him is that he did so in the hope that Mr Grill would help him out with a fund raising event. See T599 - 602, 611, 616, 622. Mr McRae denies this allegation, which has had a seriously adverse impact on his political career, and his general reputation. He, both directly and through his lawyers has made a complaint to me, that the suggestion should not have been made, as it was without a proper basis; and that the Commission's investigators knew, or should have known by reasonable enquiry, that Mr McRae did not in fact seek or obtain any assistance for a fundraising event.
3. On 27 June 2006 Mr Grill telephoned Mr McRae and said that he was acting for a developer in relation to a proposed development at Smiths Beach. He asked Mr McRae to meet him and representatives of the developer, to give

them some advice, and "put them on the right track" (T1300 p3). Mr McRae said it would be "better" "if you and I had a meeting", at which Mr Grill could let him know "what the issues were" and he could make "some inquiries as to what the lay of the land is". Mr Grill pressed Mr McRae to meet him and "the principal of the company plus their planner". Mr McRae said "All right", but asked him to ring his Chief of Staff, Mr Rewi Lyall, to make the appointment for a meeting at the Ministry office.

4. However, after the phone call, Mr McRae changed his mind about attending the meeting, and asked his Chief of Staff, Mr Lyall, to meet Mr Grill and "the Smiths Beach people". He decided it would not be a good idea for him to be there. He asked Mr Lyall to give Mr Grill a "fair hearing". In a closed hearing held on 6 July 2007 the transcript of this was played to Mr McRae. Before this, Mr McRae had complained to me that the failure to play that call to him, at the public examination of 22 February 2007, had prejudiced him, and that the TI of the "the second conversation" (as it was referred to) would show that Mr McRae had refused to meet Mr Grill "on another planning matter" - obviously a reference to the Smiths Beach matter. It was pointed out to Mr McRae, after the audio was played in the closed hearing, that contrary to his recollection, he had not in fact refused to meet with Mr Grill during that conversation but had said that he would; but as Mr McRae pointed out, although his memory was wrong on this point, he did not meet with Mr Grill, but Mr Lyall, his Chief of Staff, met him at Mr McRae's request.
5. Mr Lyall (to whom I have spoken by telephone several times) says he did meet Mr Grill, and a director of the Smiths Beach development company, Mr McKenzie. He says that the meeting (notes of which were taken) lasted about 45 minutes. Messrs Grill and McKenzie explained in some detail the problems they were having in obtaining development approval for Smiths Beach, and asked Mr Lyall if he would request his Minister, Mr McRae, to speak to the Minister for Planning, Ms McTiernan, and seek to persuade her to change her attitude towards the proposed development.

6. Mr Lyall said that he thought that that would not be advisable or appropriate for his Minister, and although he did not refuse to put the request to Mr McRae, he believes that by the end of the meeting Mr Grill would have understood that if he were to do so at all, it would be with his advice not to raise the matter with Minister McTiernan. In fact, Mr Lyall says that he did not put Mr Grill's request to Mr McRae, or report to him what was said by Mr Grill at the meeting.
7. In June 2006 Terana Holdings Pty Ltd, whose director was David Lombardo, was developing "Millbank on Moore", in the Gingin Shire. Stage 1 of the development was approved. To proceed with stages 2 & 3, a detailed Outline Development Plan (ODP) was prepared and advertised. Terana had agreed to do this, at an interlocutory hearing in SAT, where it had an appeal pending.
8. The Shire of Gingin TPS 9, as advertised, showed the Millbank land as zoned "general rural". The ODP provided for that land to be zoned GR20 and GR30. Although that "modified" TPS 9, the WAPC did not consider that the modification was "substantial". If it were, that would mean that TPS 9 would have to be re-advertised.
9. On 9 August 2006 Mr McRae considered TPS 9 for final approval. The advice of the then Parliamentary Secretary for Planning, Ms Farina, was that the modification was "substantial", and therefore TPS 9, if modified as proposed, would have to be re-advertised. Mr McRae, as Acting Minister, accepted that advice, and directed re-advertising of the modified TPS9.
10. On 29 August 2006 Mr Lombardo (for Terana) wrote to Mr McRae, requesting that he reconsider the requirement for re-advertising, pointing out that the modifications to the TPS 9, as recommended by WAPC, were not so substantial as to require re-advertising; that this was the view of WAPC; that the ODP, which showed the lot sizes in the development as those consistent with GR20 and GR30, had already been advertised 2 months earlier, so to re-advertise TPS 9 simply because of this modification was unnecessary, and would cause considerable delay.

11. The letter did not mention that Mr Grill acted for Lombardo/Terana, and there is no evidence that Mr McRae knew that he did, at that time. In a letter dated 8 July 2007 it was pointed out by Mr Stephen Hall (paragraph 1 page 2) that Mr McRae had not said at the public hearing in February 2007 that he was unaware that Grill acted for Lombardo at the time of the *"third telephone call"* and that *"The hearing on 22 February proceeded on the assumption that the third call was referring to the Lombardo matter and Mr McRae said nothing to the contrary"*. Although, at T588 (top of page) of the transcript of the 22 February 2007 public hearing, Mr McRae said that he did not remember Mr Grill saying that he was acting for Lombardo, he had previously said, at a private hearing that he believed he had had a telephone call, at some point, from Mr Grill, and say that he was a lobbyist acting for a company seeking a variation to the Gingin Shire TPS.
12. On 6 September 2006 Mr Grill (who had been engaged as a consultant by Mr Lombardo) telephoned Mr Lyall and asked to meet with him regarding the Lombardo matter. He explained what the problem was - ie the proposal for re-advertising.
13. Mr Lyall said that the Minister had already received a letter from Mr Lombardo about the matter. He agreed to meet, and did meet with Mr Grill, Mr Lombardo, and an officer from DPI to discuss the issue on Friday 8 September 2006. Mr Lyall says that he later told Mr McRae that he had met Lombardo and Grill, who were seeking to have the Minister reverse his decision to require re-advertising of the Terana land. At T593 Mr McRae was asked whether a meeting did take place between Lombardo, Grill and someone from DPI, to which he replied *"I remember being told by my Chief of Staff that he had met with Lombardo and Grill"*.
14. Mr Lyall says that his advice to Mr McRae, at that stage, was to maintain the requirement for re-advertising, as he thought that it would be *"impolitic"* to change that decision, in the light of Mr Grill's involvement. To change as it might be perceived to be doing Mr Grill a favour. Mr McRae says he has no recollection of this, but accepts that it is possible.



15. On the same day, 8 September 2006, Mr Grill rang Mr Lombardo, to report on the outcome of his meeting that day and said *"We didn't hear any opposition today from Phil Woodward"* (the officer from DPI who attended the meeting with Mr Lyall). He also said *"...it was all about Rewi (Lyll) and Tony (McRae) playing the politics side. Now I'm not very impressed with that"*. This is consistent with the view of Mr Lyall which he conveyed to Mr McRae (and which he says he believes he gave to Mr Grill at the meeting) that it would be politically unwise for Mr McRae to reverse his decision.
16. The request by Mr Lombardo for a review of Mr McRae's decision was sent to the WAPC for its advice. That was an entirely appropriate step to take. On 4 October 2006 a briefing note was sent to the Minister (Mr McRae) from the head of DPI, Mr Greg Martin, stating that in the view of DPI the proposed modifications were not "substantial", and recommending that, for the reasons stated in the note - which seem sensible and cogent - the Minister should so determine, and reverse his earlier decision, requiring re-advertising.
17. On the same day, 4 October 2006, Mr Grill rang Mr Lyall and asked about the Lombardo matter. Mr Lyall said he was waiting for *"something to come up from the Department"* meaning the DPI. The briefing note had in fact gone forward but Mr Lyall had not seen it. Mr Lyall told Mr Grill that when something did come up from DPI *"The Minister will have a look at whatever advice we get up from it"* and that he was expecting that the file would come up that week. He said to leave it with him (Lyll) and he would give Mr Grill a call.
18. On Friday 6 October 2006 Mr Grill called Mr Lyall again. Mr Lyall said that it (meaning the briefing note from DPI) might be in the office, which it probably was then but if not he would *"chase it up first thing Monday"* (ie 9 October).
19. On Monday 9 October 2006 Mr McRae endorsed the DPI's recommendation, and wrote on the DPI's recommendation a note that further advertising and consultation was no longer required (T596 - this is not the whole of the note

that Mr McRae made, but the only part that is relevant). This decision, made on the advice and recommendation of the DPI, would appear entirely proper.

20. On Tuesday 10 October 2006, Mr Lyall rang Mr Grill, as he had promised. He said that the Minister had "considered the issue", that "correspondence" was being drafted to Mr Lombardo, which would be "*signed over the next couple of days*", and that Mr McRae hadn't "*actually signed the letter yet*". He was asked by Mr Grill "*How does it look?*" Mr Lyall said until the Minister had actually signed it, it would be "*pre-emptive*" of him to say anything but added "*Lombardo will be relatively satisfied*", and that he should get the letter "*early next week*". In his public examination, at T640, Mr Lyall said that at that point he knew that the Minister had made his decision, but he wasn't prepared to convey that decision to Mr Grill until a letter had been sent to Mr Lombardo (as it was Mr Lombardo, not Mr Grill, who was the applicant).
21. On Tuesday 10 October 2006, DPI faxed to the Shire of Gingin a letter from WAPC dated 10 October 2006, advising that Minister McRae had reviewed his decision, and that re-advertising would not be required. On the same day, the secretary of the WAPC wrote to similar effect to the Shire of Gingin, and the State Solicitor's office telephoned Mr Lombardo's lawyer, Mr Hardy (at 9:06am) and advised him that the Minister had decided that re-advertising was not necessary.
22. On 11 October 2006 Mr McRae rang Mr Grill (for full transcript see T602 - 609).
23. As noted earlier, the allegation made by counsel assisting the CCC against Mr McRae (which he says caused him great damage, because it was made in public) was that he had deliberately concealed from Mr Grill, when Mr Grill telephoned him on 11 October 2006, that he had already made a decision that re-advertising was not required, and that his purpose in doing so was to induce Mr Grill to assist him in a fundraising function. This allegation was put to him by Mr Urquhart (at T616).

24. The conversation between Mr Grill and Mr McRae, on the morning of 11 October 2006, began (see T603) by Mr McRae asking Mr Grill *"Did we make any progress with your request?"* Mr Grill replied that he understood from Mr Lyall that Mr McRae had received a brief, and was going to *"sign off on it"* and it would *"probably make our client reasonably happy"*, but that Mr Lyall couldn't go into any more detail than that, to which McRae said *"I haven't seen it as yet ... didn't expect immediately, I thought I'd see it, you know, sometime within the next week or two ..."* Now that I've had this conversation I'll ask where it is".
25. The intercepted telephone conversation (which Mr McRae had initiated) then continued:
- Grill: *Rewi thought something might disturb you this week and ... you'd sign it next week, you know go ahead early next week, but anyhow ... if you could track it down that'd be excellent.*
- McRae: All right
- Grill: *Yeah. So ah, look thanks for the concern on that ah, I hadn't spoken to you directly but ....*
- McRae: *Oh no I thought it was important to get the process done first, you know.*
- Grill: *Yeah*
- McRae: *and, and get, get all the sort of nuts and bolts sorted so that I could actually, 'cos with the, the State Administrative Tribunal in place now that procedural stuff is absolutely essential to get right.*
- Grill: *Yes*
- Grill: *Yeah, I think that's true. Ah, we ah, I mean we, we, we wouldn't try and advocate to anything that would ah, embarrass you or*
- McRae: *No I know that mate.*
- Grill: *ah endeavour to uhm, uhm downgrade uhm, you know your authority or position.*
- McRae: *No, no I understand that.*
- Grill: *Yeah. Okay. Now I've got the invitation to your show and*
- McRae: *Now, I was just ringing, I*
- Grill: *Lesley and I will go along.*

26. Mr McRae then went on to discuss, at length, difficulties he was having with getting enough people to attend his forthcoming fundraising function, and sought the advice of Mr Grill.

27. As mentioned earlier, at T616 the following was put by Mr Urquhart to Mr McRae:

*... on 11 October 2006. You see, what then happened, I'm going to suggest to you, is that you made it look like you had got onto that matter straightaway and had reversed your decision. Would you accept that proposition? ....*

*Would you like to answer that question? That it made it seem as though I'd got onto it straightaway?*

*And reversed your decision, yes? No. I don't think that would have been in my thinking.*

*In order to falsely convey to Mr Grill that you had given it your immediate attention.*

*No? You don't agree with that? No.*

28. There are some difficulties with Mr Urquhart's hypothesis:

28.1 Mr McRae had, on 9 October 2006, accepted, in writing, the DPI recommendation. On 10 October 2006 his decision was faxed to the Shire of Gingin, and on the same day, at 9:06am Mr Lombardo's lawyer Mr Hardy was informed by telephone of that decision, by the State Solicitor's office.

28.2 If Mr McRae had been trying to create the false impression put to him by Mr Urquhart, it would have been a very foolish thing to do, because Lombardo, the Shire of Gingin and Lombardo's lawyer would almost certainly have already been informed of the Minister's decision. So, if McRae was attempting to deceive Mr Grill, it would inevitably - as he must have known - have been discovered by Mr Grill, very soon afterwards.

28.3 If the purpose of Mr McRae was to get Mr Grill's help for an alternative fundraising event, therefore how could it be more conducive to obtaining that help, to conceal his decision, and then try to make it appear that he had "got onto it" immediately after the

telephone discussion, rather than to tell Mr Grill the good news there and then, that he had reversed his decision.

- 28.4 There was no overt attempt whatever by Mr McRae, during the 11 October discussion, to link Mr Grill's possible assistance in fundraising, to Mr McRae's decision on "the planning matter".
- 28.5 If Mr Urquhart's hypothesis were valid, one would expect Mr McRae to have telephoned Mr Grill back, shortly afterwards, and tell him that he had located the file and approved Mr Lombardo's request - so as to make it appear that he had "got onto the matter" straight away, as it was put. But he did not.
- 28.6 At no time in the discussion did McRae suggest that Mr Grill should organise for him an "alternative" fundraising event, instead of the event which Mr McRae had already scheduled for 19 October 2006. The suggestion by Mr Grill, that he and Mr Burke could do that, was neither solicited by Mr McRae nor adopted. That is supported by the following:
  - (a) A signed statement by Fiona Grove [sic: Crowe], a part-time employee at Mr McRae's Electoral office at the relevant time.
  - (b) In the course of the discussion of 11 October 2006 (T1114) when Mr Grill suggested the alternative, in lieu of the scheduled fundraising event, he said he and Mr Burke had arranged one for Diane Guise, (see T606 - 607) Mr McRae replied "*Just put your alternative to one side for the moment*" (T608).
  - (c) The discussion is entirely consistent with Mr McRae simply asking Mr Grill for advice on how he should deal with a problem he had, given that the fundraising function was scheduled for the following Thursday, that he had fewer acceptances than hoped for, and that he had another engagement on that day as Minister (see T604).
  - (d) Mr Grill's offer to arrange an alternative function was never taken up.
29. My tentative assessment of the matter is as follows:

- 29.1 It is possible that when Mr McRae spoke about Mr Grill's "request" at the beginning of the call of 11 October 2006, he had in mind the request made by Mr Grill, on 27 June 2006 (the last time he had spoken to Mr Grill) for a meeting with him re the Smiths Beach matter (which Mr McRae had "handballed" to Mr Lyall), and that as he did not know what the outcome was, he was asking about that.
- 29.2 It is also possible that when Mr Grill responded and started to talk about "a brief came up to you" etc, intending to refer to the Lombardo matter, Mr McRae (having begun with what he intended to be a reference to the Smiths Beach matter and Mr Grill's "request" for a meeting on that matter) was taken aback, did not realise that Mr Grill was talking about the Lombardo matter, and was confused.
- 29.3 It is impossible to reach any definite conclusion on what Mr McRae thought Mr Grill was talking about, as neither "Smiths Beach" nor the Lombardo matter was specifically mentioned.
- 29.4 Mr McRae was unable to say, at the public hearing on 22 February 2007, why he spoke to Mr Grill as he did, on 11 October 2007. He said he just did not remember:

Mr Urquhart: *Why did you pretend to Mr Grill that you hadn't actually seen the brief for this matter?...*

Mr McRae: *I don't know that I did pretend. I just don't remember.*

*Go to page 1. This is you ringing Mr Grill and, apart from the normal pleasantries, "How are ya?" and "Can you talk?" the very first question you ask is, "Did we make any progress with your request?" Why were you saying that when the request had been finalised? --- Look, I don't - I don't know.*

*What do you mean, you don't know? --- Well, I don't, I don't. I can't answer your question. I don't know.*

- 29.5 Objectively viewed, the evidence could support a conclusion that although he had really been asking, initially, how Mr Grill had got on with the Smiths Beach "planning matter"; at a later point in the

discussion, it dawned on him that Mr Grill was actually talking the Lombardo matter (given his very recent decision on that matter, and his knowledge that Messrs Grill and Lombardo had previously met with Mr Lyall to discuss it) and that he and Mr Grill were at cross purposes, but decided not to correct the misunderstanding.

30. The important issue however, is not whether he deliberately concealed from Mr Grill the fact that he had already "signed off" on the Lombardo matter. That is a conclusion which may be open, although there is no direct evidence that he did so, since (as I have observed) exactly what "matter" was being referred to was not specified. That could not, of itself, be "misconduct", of course.
31. The crucial question is, if he did deliberately conceal that he had made his decision, why did he do it? On that issue, the theory floated at the public hearing, that he did so for the purpose of enlisting Mr Grill's help in fundraising, has the difficulties I have referred to in paragraph 28. There is no direct evidence that that was his purpose. It is a matter of an inference, which is weakened by the factors listed in paragraph 28.
32. It has been suggested to me, in correspondence from the Commission, that consideration is being given to a possible finding of "serious misconduct" by Mr McRae.
33. The difficulties in the way of an inference of an "improper purpose", to which I have referred, include the objective fact, confirmed by Ms Fiona Grove [sic: Crowe], that Mr McRae did not seek, or get, Mr Grill's assistance for an "alternative" fundraising event, although it was offered.
34. The relevant definition of "serious misconduct" is Section 4(b):  

*"4(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"*
35. Could it be said, on any objective view of the facts, that Mr McRae "corruptly (took) advantage" of his position as a Minister, "to obtain a benefit for himself".
36. Certainly, on the evidence, he did not, in fact, obtain any "benefit". Even assuming that "to obtain an advantage" is read as covering not only the actual

"obtaining" of an advantage, but also an "attempt" to corruptly obtain an advantage (which the Act does not expressly state, in contrast to the Criminal Code which deals with "attempts" separately and specifically) does the evidence show that he did "attempt to obtain an advantage"? If so, what was the "attempt"? He did not, in the 11 October conversation, ask Mr Grill for help in fundraising. If he was asking for anything, it was advice: in view of the low number of acceptances, and his Ministerial commitments on the day fixed for the event, perhaps he should cancel? And when Mr Grill suggested that he and Mr Burke could assist with an alternative event, as they had done for Diane Guise, Mr McRae said *"Just put your alternative to one side for the moment"*. That does not seem consistent with having rung Mr Grill for the purpose of persuading him to help with a fundraising event, similar to that put on for Ms Guise.

#### **Tentative conclusion**

37. I have reached the following tentative conclusions regarding Mr McRae's confluent [sic: conduct]:

- 37.1 There was nothing improper in Mr Urquhart putting to him the suggestion, that he had deliberately concealed from Mr Grill that he had "signed off" on the Lombardo matter. That inference was open, although not the only inference available.
- 37.2 Nor was it improper to suggest to him that his motive was to obtain a "benefit" i.e. assistance with a fundraising event.
- 37.3 However, a full and proper investigation should have been made, to determine whether such assistance was either sought or received.
- 37.4 Such inquiries had been made, and had revealed that no such assistance was either sought or received, then counsel assisting should have been informed of that, before the public examination, so that he could either
  - (a) decide not to put the allegation, or



- (b) if he did, also refer to the fact that Mr McRae had not sought or received fundraising assistance, so that could be made public as well.



## **APPENDIX 2**

### **Statement of Ms Fiona Crowe**



#### Statement

On 11 October 2006 the electorate office staff talked to Tony McRae MLA regarding the Friend's Restaurant Fundraising Dinner that was scheduled to be held the following week and that the Premier was to be the keynote speaker.

The staff advised Tony that we were low on numbers and that we thought that we could get around 50 people to attend if he did some ringing around. We discussed why the response rate had been so low, when at a previous fundraising dinner of this nature we had managed to get more people to attend.

We discussed whether it was the wrong point in the electoral cycle, or because we had a bad mailing list, or both. We could not decide whether or not to cancel the fundraiser and Tony phoned Julian Grill to discuss with him whether or not he should cancel the fundraiser.

After the phone call Tony said to us that he had decided to cancel the dinner. He also told us that Julian had told him that he had organised a fundraiser for Diane Guise at which the Premier and Alannah MacTiernan attended and where only a few people attended, but raised around \$30000.

Tony did not say to us he wanted to organise a fundraiser of this type.

Tony then called me into his office and asked me to look up what Julian Grill and Brian Burke had contributed to his last campaign. I gave him the figures. These were

Fundraisers	J. F. Grill	\$	250.00
	J Grill	\$	1,650.00
	J Grill	\$	275.00
Donation	J Grill	\$	2,000.00
		\$	4,175.00
Donation	Abbey Lea Pty Ltd	\$	3,000.00

Tony was relieved that the amounts involved were relatively small. He told me that he had to make a decision on a planning matter involving a client of Julian Grill because Alannah MacTiernan could not make the decision due to a conflict of interest. He said he was concerned that there might be a perception that he had made the decision based on the fact that they had contributed to his campaign. The decision was about land in Moore River, but he did not tell me what decision he had made.

I said something to the effect that if he had followed due process he should not have anything to worry about and he said that he had.

That was the end of the conversation.



## **APPENDIX 3**

**Series of “Yes” and “No” Answers to Questions Provided by  
Ms Fiona Crowe on 30 November 2007 to Mr A D McRae**





1. Were you a member of Tony McRae's Electorate Office staff, employed as a Research Officer on a part-time basis?

Yes.

2. Did you also help Tony McRae on a voluntary basis?

Yes.

3. Did this include assisting with the organisation of a number of his political fund-raising efforts?

Yes.

4. Did you and other electorate office staff assist with coordinating the "Friend's Restaurant Fundraising Dinner" scheduled for 19 October 2006?

Yes.

5. On the morning of Wednesday 11 October did Tony McRae have a discussion with the electorate office staff about a low response rate to that dinner?

Yes.

6. After that discussion, did Tony McRae phone Julian Grill?

Yes.

7. Did Tony McRae tell the staff after that telephone conversation, that Mr Grill had suggested holding an alternative fund-raising event to the "Friend's Restaurant" event?

Yes.

8. Had Tony McRae ever mentioned this alternative fundraising event before his conversation with Mr Grill?

No.

9. Did Mr McRae indicate that he would cancel his "Friend's Restaurant" event so as to take up Mr Grill's offer?

No.

10. Were you ever asked to follow up on Mr Grill's suggestion?

No.

11. To your knowledge, did Tony McRae follow up on Mr Grill's suggestion?

No.

*T. G. M.*  
*30/11/07.*



## ENDNOTES

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

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<sup>1</sup> The term “Smiths Beach” does not have a possessive apostrophe.

<sup>2</sup> 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](http://www.ccc.wa.gov.au), Publications and Speeches, Publications, viewed 29 October 2008.

<sup>3</sup> Pursuant to section 140(2) of the *Corruption and Crime Commission Act (2003)*.

<sup>4</sup> Transcript of Proceedings, Public Examination, Opening Address by Commissioner Hammond on 12 February 2007, pp.2-3.

<sup>5</sup> Speech by Commissioner Hammond to the Institute of Public Administration Australia, entitled *Corruption, Integrity and the Public Sector*, on 20 March 2007.

<sup>6</sup> Transcript of Proceedings, Public Examination, Address by Counsel Assisting on 12 February 2007, p.12.

<sup>7</sup> *Corruption and Crime Commission Act 2003*, p.28.

<sup>8</sup> *The Criminal Code*, section 1, p.31, point (e), and section 81, p.76.

<sup>9</sup> *Corruption and Crime Commission Act 2003*, *op cit*, pp.9-10.

<sup>10</sup> *Ibid*, p.68.

<sup>11</sup> *Ibid*.

<sup>12</sup> *Ibid*.

<sup>13</sup> *Ibid*, p.69.

<sup>14</sup> *Corruption and Crime Commission Act 2003*, *op cit*, p.115.

<sup>15</sup> *Ibid*.

<sup>16</sup> *Ibid*, p.117.

<sup>17</sup> *Ibid*.

<sup>18</sup> *Ibid*, p.118.

<sup>19</sup> State legislation (the *Telecommunications (Interception) Western Australia Act 1996* (“the Western Australia Act”) gives the Corruption and Crime Commission (“the Commission”) its status as an intercepting agency. The Western Australia Act is an Act to enable the Commission to be declared an agency for the purposes of the *Telecommunications (Interception) Act 1979* of the Commonwealth and for related purposes.

<sup>20</sup> *Telecommunications (Interception and Access) Act 1979* (Commonwealth), p.17.

<sup>21</sup> Butterworths Concise Australian Legal Dictionary (Third Edition), Lexis Nexis Butterworths, Australia 2004, p.42.

<sup>22</sup> *Briginshaw v Briginshaw* (1938) 60 CLR 336 per Dixon J at 361-363; *Rejfeek v McElroy* (1965) 112 CLR 517; *Neat Holdings Pty Ltd v Karajan Holdings Pty Ltd* (1992) 110 ALR 449.

<sup>23</sup> Department for Planning and Infrastructure, Closed Off File, letter to the Hon Tony McRae MLA of 29 August 2006 from Mr David Lombardo [E 11628].

<sup>24</sup> Briefing Note to the Hon Tony McRae MLA, Acting Minister for Planning and Infrastructure, entitled *Draft Shire of Gingin Local Planning Scheme No. 9 – Millbank Estate* [E 11622].

<sup>25</sup> *Ibid*.

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- <sup>26</sup> Memo to the Hon Alannah MacTiernan MLA, Minister for Planning and Infrastructure, from the Hon Adele Farina MLC, Parliamentary Secretary to the Minister for Planning and Infrastructure [E 12498].
- <sup>27</sup> Legislative Assembly of Western Australia, Hansard for 28 February 2007, Millbank on Moore-Decision by Minister for Planning and Infrastructure.
- <sup>28</sup> Email to the Hon Adele Farina MLC of 9 August 2006, 6:08:58 p.m., from Mr Ian Patterson [E 12499].
- <sup>29</sup> Department for Planning and Infrastructure, Closed Off File, letter to the Hon Tony McRae MLA of 29 August 2006 from Mr David Lombardo [E 11628], *op cit*.
- <sup>30</sup> WA Labor History: <http://www.wa.alp.org.au/about/index.php#History>.
- <sup>31</sup> *Ibid*.
- <sup>32</sup> See, for example, Corruption and Crime Commission *Report on the Investigation of Alleged Public Sector Misconduct Linked to the Smiths Beach Development at Yallingup*, 5 October 2007, *op cit*, p.38.
- <sup>33</sup> ABC News, *WA Govt bans ministers from meeting former premier*, posted 10 April 2003, 12:38 p.m. AEST, <http://www.abc.net.au/news/stories/2003/04/10/829055.htm>.
- <sup>34</sup> Government Media Office, Ministerial Media Statements: *Alan Carpenter to be sworn in on Wednesday*, Monday 23 January 2006.
- <sup>35</sup> ABC News Online PM: *Carpenter elected WA Labor Leader*, Tuesday 24 January 2006, 6:18 p.m.
- <sup>36</sup> *Ibid*.
- <sup>37</sup> *The Australian* newspaper, 26 June 2007, *Labor dumps Grill over Nationals donation*.
- <sup>38</sup> Email to Mr Julian Grill of 29 August 2006, 8:08 p.m., from Mr David Lombardo.
- <sup>39</sup> Telecommunications Intercept, T 0802, 12 September 2006.
- <sup>40</sup> Briefing Note to the Hon Tony McRae MLA, Acting Minister for Planning and Infrastructure, entitled *Draft Shire of Gingin Local Planning Scheme No. 9 – Millbank Estate* [E 11622], *op cit*.
- <sup>41</sup> Telecommunications Intercept, T 0802, 12 September 2006, *op cit*.
- <sup>42</sup> Telecommunications Intercept, T 0781, 10 October 2006.
- <sup>43</sup> Letter to Chief Executive Officer, Shire of Gingin, of 10 October 2006, from Ms Robyn Watts on behalf of Mr Moshe Gilovitz, Secretary, Western Australian Planning Commission [E 11619].
- <sup>44</sup> Telecommunications Intercept, T 1114, 11 October 2006.
- <sup>45</sup> *Government of Western Australia Ministerial Code of Conduct March 2005*, p.4 [E 9972].
- <sup>46</sup> Telecommunications Intercept, T 1136, 11 October 2006.
- <sup>47</sup> Record of Interview of Mr Anthony (Tony) David McRae at the Corruption and Crime Commission, 186 St Georges Terrace, Perth WA 6000, on 6 February 2007, p.5.
- <sup>48</sup> *Ibid*.
- <sup>49</sup> Transcript of Proceedings, Public Examination, Opening Address by Commissioner Hammond on 12 February 2007, *op cit*, p.2.
- <sup>50</sup> Transcript of Proceedings, Public Examination of Mr Anthony David McRae on 22 February 2007, p.598.
- <sup>51</sup> *Ibid*.
- <sup>52</sup> *Ibid*, pp.599-600.

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- <sup>53</sup> *Ibid*, p.600
- <sup>54</sup> *Ibid*, p.601.
- <sup>55</sup> *Ibid*, pp.610-611.
- <sup>56</sup> Excerpt of Statement from Tony McRae, 25 February 2007, on Mr McRae's Website at [www.tonymcrae.com](http://www.tonymcrae.com), viewed 11 June 2008.
- <sup>57</sup> Extract of Channel 2 ABC News Bulletin, 29 March 2007 [E 13260].
- <sup>58</sup> Excerpt from Transcript of Interview of Mr McRae by Mr Geoff Hutchison, 720 ABC Perth Mornings, entitled *McRae-Sacking as Environment Minister*, 26 February 2007, provided by the Government Media Monitoring Unit, p.4 [E 13266].
- <sup>59</sup> Extract of Channel 2 ABC News Bulletin, 29 March 2007 [E 13260], *op cit*.
- <sup>60</sup> Transcript of Proceedings, Private Examination of Mr Anthony David McRae on 6 July 2007, *op cit*, pp.11-12.
- <sup>61</sup> *Ibid*, p.12.
- <sup>62</sup> *Ibid*, p.35.
- <sup>63</sup> Telecommunications Intercept, T 1114, 11 October 2006, *op cit*.
- <sup>64</sup> Transcript of Proceedings, Public Examination of Mr Anthony David McRae on 22 February 2007, *op cit*, p.610.
- <sup>65</sup> Transcript of Proceedings, Private Examination of Mr Anthony David McRae on 6 July 2007, *op cit*, pp.33-34.
- <sup>66</sup> Transcript of Proceedings, Public Examination of Mr Anthony David McRae on 22 February 2007, *op cit*, p.593.
- <sup>67</sup> Record of Interview of Mr Rewi Edward Lyall at the Corruption and Crime Commission, 186 St Georges Terrace, Perth WA 6000, on 10 July 2007, p.7.
- <sup>68</sup> *Ibid*, p.11.
- <sup>69</sup> Telecommunications Intercept, T 1114, 11 October 2006, *op cit*.
- <sup>70</sup> Record of Interview of Mr Anthony (Tony) David McRae at the Corruption and Crime Commission, 186 St Georges Terrace, Perth WA 6000, on 6 February 2007, *op cit*, pp. 10-11.
- <sup>71</sup> Transcript of Proceedings, Private Examination of Mr Anthony David McRae on 6 July 2007, *op cit*, p.36.
- <sup>72</sup> *Ibid*, p.45.
- <sup>73</sup> *Ibid*, p.35. *Loc cit*.
- <sup>74</sup> *Ibid*, pp.39-41.
- <sup>75</sup> Telecommunications Intercept, T 1114, 11 October 2006. *op cit*.
- <sup>76</sup> Extract of Channel 2 ABC News Bulletin, 29 March 2007 [E 13260], *op cit*.
- <sup>77</sup> Transcript of Proceedings, Private Examination of Mr Anthony David McRae on 6 July 2007, *op cit*, p.13.
- <sup>78</sup> *Ibid*, p.14.
- <sup>79</sup> Telecommunications Intercept, T 1300, 27 June 2006.

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- <sup>80</sup> Transcript of Proceedings, Private Examination of Mr Anthony David McRae 6 July 2007, *op cit*, pp.15-16.
- <sup>81</sup> *Ibid*, p.17.
- <sup>82</sup> Transcript of Proceedings, Private Examination of Mr Julian Fletcher Grill on 13 October 2008, pp.158-159.
- <sup>83</sup> Transcript of Proceedings, Private Examination of Mr Anthony David McRae 6 July 2007, *op cit*, p.18.
- <sup>84</sup> Telecommunications Intercept, T 1321, 29 June 2006.
- <sup>85</sup> Transcript of Proceedings, Private Examination of Mr Anthony David McRae on 6 July 2007, *op cit*, pp.17 (*loc cit*) and 19.
- <sup>86</sup> Telecommunications Intercept, T 1318, 30 June 2006.
- <sup>87</sup> See 5.4.2 below.
- <sup>88</sup> Transcript of Proceedings, Public Examination, Opening Address by Commissioner Hammond on 12 February 2007, *op cit*, p.9.
- <sup>89</sup> Excerpt of Statement from Tony McRae, 25 February 2007, on Mr McRae's Website at [www.tonymcrae.com](http://www.tonymcrae.com), viewed 11 June 2008. *op cit*.
- <sup>90</sup> Transcript of Proceedings, Private Examination of Mr Anthony David McRae on 6 July 2007, *op cit*, pp. 21-22.
- <sup>91</sup> <https://secure.dpc.wa.gov.au/lobbyistsregister/index.cfm?event=contactWithLobbyistsCode>. The Code defines a "Government Representative" as "a Minister, Parliamentary Secretary, Ministerial Staff Member or person employed, contracted or engaged by a public sector agency".
- <sup>92</sup> Mr David Beetham and Mr Stuart Weir, *Political Power and Democratic Control in Britain: The Democratic Audit of the United Kingdom*, Routledge, London 1999, p.271.
- <sup>93</sup> Australian Democrats, August 2007. Disclosure of Political Donations, Australian Democrats Action Plan: Political Donations, Electoral Matters and Public Administration. [http://www.democrats.org.au/docs/ActionPlans/Electoral\\_PoliticalDonations\\_2007.pdf](http://www.democrats.org.au/docs/ActionPlans/Electoral_PoliticalDonations_2007.pdf), viewed 13 November 2008.
- <sup>94</sup> *Corruption and Crime Commission Act 2003*, Division 3-Duty to notify, *op cit*, pp.32-35.
- <sup>95</sup> See endnote 91.
- <sup>96</sup> [www.parliament.wa.gov.au/web/webpages.nsf/WebFiles/LA+Code+of+Conduct+for+Members/\\$FILE/Code+of+Conduct+for+Members.pdf](http://www.parliament.wa.gov.au/web/webpages.nsf/WebFiles/LA+Code+of+Conduct+for+Members/$FILE/Code+of+Conduct+for+Members.pdf), viewed 13 November 2008.
- <sup>97</sup> *Government of Western Australia Ministerial Code of Conduct March 2005* [E 9972], *op cit*.
- <sup>98</sup> Available on-line at <http://www.parliament.wa.gov.au/web/newwebparl.nsf/iframewebpages/Site%2BSearch>, viewed 7 November 2008.
- <sup>99</sup> Australian Labor Party, 2004. ALP Code of Conduct for Fundraising. Available online at [http://www.alp.org.au/platform/chapter\\_17.php#17alp\\_code\\_of\\_conduct\\_for\\_fundraising\\_decision\\_of\\_the\\_1994\\_and\\_2004\\_conferences](http://www.alp.org.au/platform/chapter_17.php#17alp_code_of_conduct_for_fundraising_decision_of_the_1994_and_2004_conferences), viewed 13 November 2008.
- <sup>100</sup> *Ibid*.
- <sup>101</sup> See, for example, Transcript of Proceedings, Public Examination of Ms Adele Farina on 6 December 2006.
- <sup>102</sup> Telecommunications Intercept, T 1281, 27 January 2006.

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- <sup>103</sup> Telecommunications Intercept, T 1006, 31 January 2006.
- <sup>104</sup> Telecommunications Intercept, T 1285, 26 January 2006.
- <sup>105</sup> Transcript of Proceedings, Private Examination of Mr Anthony David McRae on 6 July 2007, *op cit*, p.23.
- <sup>106</sup> Telecommunications Intercept, T 1281, 27 January 2006, *op cit*.
- <sup>107</sup> Telecommunications Intercept T 0664, 26 May 2006.
- <sup>108</sup> Transcript of meeting [excerpt] held on 9 October 2006, 10:28 a.m.-11:38 a.m., between Mr Julian Grill, Mr Brian Burke and Mr Nathan Hondros, at Mount Street, Perth WA, [T 1184].
- <sup>109</sup> Transcript of meeting [excerpt] held on 9 October 2006, 10:28 a.m.-11:38 a.m., between Mr Julian Grill, Mr Brian Burke and Mr Nathan Hondros, at Mount Street, Perth WA, [T 1186].
- <sup>110</sup> See also Transcript of Proceedings, Public Examination of Mr Julian Fletcher Grill on 28 February 2007, pp.1096-1098.
- <sup>111</sup> Transcript of Proceedings, Public Examination of the Hon Shelley Archer MLC on 28 February 2007, p.1013.
- <sup>112</sup> Transcript of Proceedings, Public Examination of Mr Simon John Corrigan on 27 February 2007, pp.927-928.
- <sup>113</sup> Telecommunications Intercept, T 1764, 23 February 2006.
- <sup>114</sup> Telecommunications Intercept, T 1766 and T 1767, 23 February 2006.
- <sup>115</sup> Telecommunications Intercept, T 1769, 24 February 2006.
- <sup>116</sup> Transcript of meeting held on 1 September 2006, 11:52 a.m.-11:56 a.m., at Mount Street, Perth WA, pp.1-3 [T 0947].
- <sup>117</sup> Email to Mr Brian Burke of 5 September 2006, 10:43:50 a.m., from Ms Dianne Guise MLA, entitled *Invitation List*.
- <sup>118</sup> Telecommunications Intercept, T 1137, 26 October 2006.
- <sup>119</sup> <http://www.tonymcrae.com/tonymcrae.html>, viewed 11 June 2008.
- <sup>120</sup> Transcript of Proceedings, Public Examination of Mr Anthony David McRae on 22 February 2007, *op cit*, p.576.
- <sup>121</sup> Transcript of Proceedings, Private Examination of Mr Anthony David McRae on 6 July 2007, *op cit*, p.27.
- <sup>122</sup> <http://www.parliament.wa.gov.au/web/newwebparl.nsf/iframewebpages/Members+-+Former>, viewed 13 November 2008.
- <sup>123</sup> Telecommunications Intercept, T 1285, 26 January 2006.
- <sup>124</sup> ABC News, *The Western Australian Government has a new female Minister*, 22 November 2005, 4:33 p.m. AEDT.
- <sup>125</sup> Record of Interview of Mr Anthony (Tony) David McRae at the Corruption and Crime Commission, 186 St Georges Terrace, Perth WA 6000, on 6 February 2007, *op cit*, p.7.
- <sup>126</sup> Telecommunications Intercept, T 1285, 26 January 2006, *op cit*.
- <sup>127</sup> <http://www.parliament.wa.gov.au/web/newwebparl.nsf/iframewebpages/Members+-+Current>, viewed 13 November 2008.
- <sup>128</sup> WA Electoral Commission Website: [www.waec.wa.gov.au](http://www.waec.wa.gov.au).

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- <sup>129</sup> Telecommunications Intercept, T 1285, 26 January 2006, *op cit*.
- <sup>130</sup> Legislative Assembly of Western Australia, Hansard for 14 September 2006.
- <sup>131</sup> *Ibid*.
- <sup>132</sup> ALP Electoral Return 2005 – WA Electoral Commission.
- <sup>133</sup> Email to Mr Julian Grill and others of 24 February 2005, 11:50:10 a.m., from Ms Rosemary Braybrook.
- <sup>134</sup> Australian Labor Party (Western Australian Branch) (2007) Constitution and Rules, viewed 20 May 2008, <http://www.wa.alp.org.au>.
- <sup>135</sup> WA Electoral Commission Website: [www.waec.wa.gov.au](http://www.waec.wa.gov.au), *op cit*.
- <sup>136</sup> ALP State Secretary's Newsletter October 2006, p.3, *2006 Event Calendar*.
- <sup>137</sup> Record of Interview of Mr Anthony (Tony) David McRae at the Corruption and Crime Commission, 186 St Georges Terrace, Perth WA 6000, on 6 February 2007, *op cit*, pp. 4-5.
- <sup>138</sup> Transcript of Proceedings, Private Examination of Mr Anthony David McRae on 6 July 2007, p.23, *loc cit*.
- <sup>139</sup> *Ibid*, p.24.
- <sup>140</sup> Telecommunications Intercept, T 1281, 27 January 2006.
- <sup>141</sup> In evidence at a Private Examination on 6 July 2007, p.25, Mr McRae agreed that he could "quite possibly" have asked Mr Burke "would I, would I, have your support ...".
- <sup>142</sup> Government Media Office, Ministerial Media Statements: *Premier unveils new State Cabinet*, 1 February 2006.
- <sup>143</sup> Government Media Office, Ministerial Media Statements: *A statement from Premier Alan Carpenter*, 8 May 2006.
- <sup>144</sup> Legislative Assembly of Western Australia, Hansard for 9 May 2006, 2:04 p.m.
- <sup>145</sup> Telecommunications Intercept, T 1290, 9 May 2006.
- <sup>146</sup> Telecommunications Intercept, T 1291, 10 May 2006.
- <sup>147</sup> Transcript of Proceedings, Private Examination of Mr Anthony David McRae on 6 July 2007, *op cit*, p.29.
- <sup>148</sup> Telecommunications Intercept [SMS], T 1292, 11 May 2006.
- <sup>149</sup> Telecommunications Intercept, T 1293, 11 May 2006.
- <sup>150</sup> Transcript of Proceedings, Private Examination of Mr Brian Thomas Burke on 14 October 2008, pp.364-366.
- <sup>151</sup> Telecommunications Intercept, T 1295, 21 May 2006.
- <sup>152</sup> Record of Interview of Mr Anthony (Tony) David McRae at the Corruption and Crime Commission, 186 St Georges Terrace, Perth WA 6000, on 6 February 2007, *op cit*, p.2.
- <sup>153</sup> Telecommunications Intercept, T 1778, 22 May 2006.
- <sup>154</sup> Telecommunications Intercept, T 1779, 22 May 2006.
- <sup>155</sup> Telecommunications Intercept, T 1296, 22 May 2006.
- <sup>156</sup> Telecommunications Intercept, T 1298, 22 May 2006.
- <sup>157</sup> Transcript of Proceedings, Private Examination of Mr Anthony David McRae on 6 July 2007, *op cit*, pp.30-31.



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- <sup>158</sup> See paragraph [290].
- <sup>159</sup> Telecommunications Intercept, T 0775, 8 October 2006.
- <sup>160</sup> <http://www.parliament.wa.gov.au/web/newwebparl.nsf/iframewebpages/Members+-+Former>, *op cit*, viewed 13 November 2008.
- <sup>161</sup> Telecommunications Intercept, T 1300, 27 June 2006.
- <sup>162</sup> *Procedure and Privileges Committee* [of the Legislative Assembly of the Parliament of Western Australia], *Transcript of Meeting Taken at Perth Friday, 18 May 2007*, Session Three.
- <sup>163</sup> PMA, Precious Metals Australia Limited, Media Release *entitled PMA Board and Management Changes*, 21 June 2007.
- <sup>164</sup> Email to Mr Julian Grill of 11 May 2004, 12:47:30 p.m., from Mr Roderick Smith entitled *Windimurra Vanadium Mine Proposed Closure*.
- <sup>165</sup> *Procedure and Privileges Committee* [of the Legislative Assembly of the Parliament of Western Australia], *Transcript of Meeting Taken at Perth Friday, 18 May 2007*, Session Three, *op cit*.
- <sup>166</sup> *Procedure and Privileges Committee Inquiry into the Member for Murchison-Eyre's Unauthorised Release of Committee Documents and Related Matters*, Report No. 2, 20 June 2007.
- <sup>167</sup> Invitation entitled *Dinner with Friends and Leaders on Economic Development* attached to email to Mr Roderick Smith and Mr Brian Burke of 25 August 2004, 2:39 p.m., from Mr Julian Grill.
- <sup>168</sup> Email to Mr Roderick Smith and Mr Brian Burke of 25 August 2004, 2:39 p.m., from Mr Julian Grill.
- <sup>169</sup> *Procedure and Privileges Committee* [of the Legislative Assembly of the Parliament of Western Australia], *Transcript of Meeting Taken at Perth Friday, 11 May 2007*, 2:30 p.m., p.15.
- <sup>170</sup> *Procedure and Privileges Committee Inquiry into the Member for Murchison-Eyre's Unauthorised Release of Committee Documents and Related Matters*, Report No. 2, 20 June 2007, *op cit*, p.20.
- <sup>171</sup> *Ibid*, p.19.
- <sup>172</sup> Email Chain between Mr Roderick Smith and Mr Tony McRae of 27 and 28 October 2004, and 7 January 2005.
- <sup>173</sup> *Procedure and Privileges Committee Inquiry into the Member for Murchison-Eyre's Unauthorised Release of Committee Documents and Related Matters*, Report No. 2, 20 June 2007, *op cit*, Recommendation 3, p.26.
- <sup>174</sup> Legislative Assembly of Western Australia, Hansard for 20 June 2007, 7:52 p.m.
- <sup>175</sup> *Procedure and Privileges Committee* [of the Legislative Assembly of the Parliament of Western Australia], *Transcript of Meeting Taken at Perth Friday, 23 March 2007*, Session One, p2.
- <sup>176</sup> Emails retrieved from computers owned by Mr Brian Burke and Mr Julian Grill [E 11252 and E 11126].
- <sup>177</sup> Statutory Declaration, Mr Marc Gonsalves, Executive General Manager, Corporate Affairs at Xstrata, 28 January 2005 [E 12648].
- <sup>178</sup> Email to Mr Roderick Smith of 8 January 2005, 6:26:34 a.m., from Mr Julian Grill.
- <sup>179</sup> Letter of 4 January 2005 to the Hon Peter Costello MP, Federal Treasurer, from Mr Tony McRae MLA, attached to email of 7 January 2005, 4:24 p.m., to Mr Julian Grill from Mr Tony McRae.
- <sup>180</sup> See paragraphs [111]-[113].

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<sup>181</sup> *Procedure and Privileges Committee* [of the Legislative Assembly of the Parliament of Western Australia], *Transcript of Meeting Taken at Perth Friday, 18 May 2007*, Session Three, *op cit*, p.9.

<sup>182</sup> *Ibid*, p.18.

<sup>183</sup> Email to Mr Roderick Smith, Managing Director, Precious Metals Australia, of 7 January 2005, 7:00 p.m., from Mr Julian Grill, *op cit*.

<sup>184</sup> See paragraph [317].

<sup>185</sup> *Procedure and Privileges Committee* [of the Legislative Assembly of the Parliament of Western Australia], *Transcript of Meeting Taken at Perth Friday, 18 May 2007*, Session Three, *op cit*. pp.9-10 and 18.

<sup>186</sup> Email to Ms Rosemary Braybrook of 15 February 2005, 2:15 p.m., from Mr Julian Grill [E 12091].

<sup>187</sup> BankWest Account Statements, Mr Julian Grill [E 8460].

<sup>188</sup> ABC News, *Lobbyist Grill expelled from ALP*, 26 June 2007, 1:01 p.m. AEST.

<sup>189</sup> Email to Mr Brian Burke and Mr Julian Grill of 17 February 2005, 9:33:54 a.m., from Mr Tony McRae [E 12113].

<sup>190</sup> See Appendix 1 at paragraph [31].

<sup>191</sup> This is an example of the psychological theory known as the rule for reciprocation, which says that we should try to repay, in kind, what another person has provided us. One aspect of the rule is that a person can trigger a feeling of indebtedness in another by doing that other an uninvited favour. For a useful discussion of the rule, see “Influence – The Psychology of Persuasion”, by Robert V Cialdini, The Business Library, 1984, Chapter 2.

<sup>192</sup> Record of Interview of Mr Anthony (Tony) David McRae at the Corruption and Crime Commission, 186 St Georges Terrace, Perth WA 6000, on 6 February 2007, *op cit*, p.6.

<sup>193</sup> Telecommunications Intercept, T 1114, 11 October 2006, *op cit*.

<sup>194</sup> *Ibid*.

<sup>195</sup> *Ibid*.

<sup>196</sup> Transcript of Proceedings, Private Examination of Mr Julian Fletcher Grill on 13 October 2008, *op cit*, p.184.

<sup>197</sup> Transcript of Proceedings, Private Examination of Mr Brian Thomas Burke on 14 October 2008, *op cit*, p.360.

<sup>198</sup> Transcript of Proceedings, Private Examination of Mr Julian Fletcher Grill on 13 October 2008, *op cit*, p.179.

<sup>199</sup> Transcript of Proceedings, Private Examination of Ms Fiona Crowe on 24 July 2008, pp.15-16.

<sup>200</sup> For example, letter from Mr Tony McRae to the Commissioner, dated 4 July 2008, p.4.

<sup>201</sup> Transcript of Proceedings, Private Examination of Ms Fiona Crowe on 24 July 2008, *op cit*, p.16.

<sup>202</sup> *Ibid*, pp.16-17.

<sup>203</sup> *Ibid*, p.19.

<sup>204</sup> Statement of Ms Fiona Crowe [E 17609].

<sup>205</sup> Transcript of Proceedings, Private Examination of Ms Fiona Crowe on 24 July 2008, p.19, *loc cit*.

<sup>206</sup> *Ibid*, pp.21-23.

<sup>207</sup> *Ibid*, p.24.

<sup>208</sup> *Ibid*, p.25.

<sup>209</sup> *Ibid*, pp.25-27.

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- <sup>210</sup> *Ibid*, p.29.
- <sup>211</sup> *Ibid*, p.30.
- <sup>212</sup> Email to Mr Tony McRae of 30 November 2007, at 12:52 p.m., from Ms Fiona Crowe [E 16545].
- <sup>213</sup> Email to Ms Fiona Crowe of 14 January 2008, at 11:41 a.m., from Mr Tony McRae [E 17646].
- <sup>214</sup> Email to Mr Tony McRae of 10 June 2008, at 10:49 a.m., from Mr Crowe [E 17649].
- <sup>215</sup> Email to Mr Crowe of 10 June 2008, at 3:29 p.m., from Mr Tony McRae [E 17649].
- <sup>216</sup> Email to Mr Crowe of 12 June 2008, at 6:28 p.m., from Mr Tony McRae [A413840].
- <sup>217</sup> Email to Mr Tony McRae of 12 June 2008, at 11:04 p.m., from Ms Fiona Crowe [E 17608].
- <sup>218</sup> Transcript of Proceedings, Private Examination of Ms Fiona Crowe on 24 July 2008, *op cit*, p.36.
- <sup>219</sup> *Ibid*, p.38.
- <sup>220</sup> *Ibid*, pp.42-44.
- <sup>221</sup> See Martin CJ (with whom Newnes AJA agreed) in Ex parte West Australian Newspapers Ltd [2008] WASCA 209 at [51].
- <sup>222</sup> Shorter Oxford English Dictionary, Sixth Edition, p.529; Macquarie Dictionary, 2<sup>nd</sup> Revised Edition, p.417.
- <sup>223</sup> R v Gallagher (1987) 29 A Crim R 33.
- <sup>224</sup> Willers v R (1995) 81 A Crim R 219 per Malcolm CJ at 224.
- <sup>225</sup> Willers v R, *supra*, per Malcolm CJ at 225; Rowland J at 231; Application by DPP (C'th) for a Superannuation Order in Respect of Hogarth (1995) 93 A Crim R 452 per Higgins J at 454-5.
- <sup>226</sup> Williams v R (1979) 23 ALR 369 per Franki J at 381.
- <sup>227</sup> Section 23(2) of the *Corruption and Crime Commission Act 2003*, *op cit*.
- <sup>228</sup> Section 94 response from Mr Rewi Edward Lyall, 30 January 2007.
- <sup>229</sup> *Ibid*.
- <sup>230</sup> Emails retrieved from a computer owned by Mr Julian Grill.
- <sup>231</sup> Transcript of Proceedings, Public Examination of Mr Rewi Edward Lyall on 22 February 2007, p.624.
- <sup>232</sup> Telecommunications Intercepts, e.g., T 1300, T 1318, T 0773, T 0775 and T 0777. on 27 June 2006 (*op cit*), 30 June 2006 (*op cit*), 6 September 2006, 8 September 2006 and 15 September 2006 respectively.
- <sup>233</sup> Emails, January-March 2006, retrieved from a computer owned by Mr Julian Grill.
- <sup>234</sup> Telecommunications Intercept, T 1140, 23 March 2006.
- <sup>235</sup> Transcript of Proceedings, Public Examination of Mr Rewi Edward Lyall on 22 February 2007, *op cit*, pp.625-626.
- <sup>236</sup> *Ibid*, p.627.
- <sup>237</sup> Email to Mr Julian Grill of 4 April 2006, 8:20:05 a.m., from Mr Rewi Lyall.
- <sup>238</sup> Telecommunications Intercept, T 1300, 27 June 2006, *op cit*.
- <sup>239</sup> Transcript of Proceedings, Private Examination of Mr Anthony David McRae on 6 July 2007, p.17, *loc cit*.
- <sup>240</sup> Telecommunications Intercept, T 1300, 27 June 2006, *op cit*.
- <sup>241</sup> Telecommunications Intercept, T 1318, 30 June 2006, *op cit*.

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- <sup>242</sup> Record of Interview of Mr Rewi Edward Lyall at the Corruption and Crime Commission, 186 St Georges Terrace, Perth WA 6000, on 10 July 2007, *op cit*, p.3.
- <sup>243</sup> Transcript of Proceedings, Private Examination of Mr Anthony David McRae on 6 July 2007, p.19, *loc cit*.
- <sup>244</sup> Email to Mr Julian Grill of 29 August 2006, 8:08 p.m., from Mr David Lombardo.
- <sup>245</sup> Email Chain of 29 August 2006 between Mr David Lombardo and Mr Julian Grill, entitled *Fees*.
- <sup>246</sup> Email to Mr Brian Burke of 30 August 2006, 11:23 p.m., from Mr Julian Grill.
- <sup>247</sup> Transcript of Proceedings, Public Examination of Mr Anthony David McRae on 22 February 2007, *op cit*, p.588.
- <sup>248</sup> Record of Interview of Mr Anthony (Tony) David McRae at the Corruption and Crime Commission, 186 St Georges Terrace, Perth WA 6000, on 6 February 2007, *op cit*, p.10.
- <sup>249</sup> Transcript of Proceedings, Public Examination of Mr Rewi Edward Lyall on 22 February 2007, *op cit*, pp.628-629.
- <sup>250</sup> Telecommunications Intercept, T 0774, 8 September 2006.
- <sup>251</sup> *Ibid*.
- <sup>252</sup> Telecommunications Intercept, T 0775, 8 September 2006, *op cit*.
- <sup>253</sup> Transcript of Proceedings, Public Examination of Mr Rewi Edward Lyall on 22 February 2007, *op cit*, pp.629-630.
- <sup>254</sup> Telecommunications Intercept, T 0802, 12 September 2006.
- <sup>255</sup> Telecommunications Intercept, T 0777, 15 September 2006, *op cit*.
- <sup>256</sup> Transcript of Proceedings, Public Examination of Mr Julian Fletcher Grill on 13 October 2008, *op cit*, p.168.
- <sup>257</sup> Transcript of Proceedings, Public Examination of Mr Rewi Edward Lyall on 22 February 2007, *op cit*, p.634.
- <sup>258</sup> Telecommunications Intercept, T 0771, 4 October 2006.
- <sup>259</sup> Telecommunications Intercept, T 1134, 6 October 2006.
- <sup>260</sup> Telecommunications Intercept, T 1133, 6 September 2006.
- <sup>261</sup> Telecommunications Intercept, T 1776, 15 September 2006.
- <sup>262</sup> Record of Interview of Mr Rewi Edward Lyall at the Corruption and Crime Commission, 186 St Georges Terrace, Perth WA 6000, on 10 July 2007, *op cit*, p.5.
- <sup>263</sup> Telecommunications Intercept, T 0781, 10 October 2006.
- <sup>264</sup> Transcript of Proceedings, Public Examination of Mr Rewi Edward Lyall on 22 February 2007, p.634, *loc cit*.
- <sup>265</sup> Attached to email to Mr Julian Grill of 18 October 2006, 11:42:04 a.m., from Mr Rewi Lyall.
- <sup>266</sup> Artrage Website: <http://www.artrage.com.au>.
- <sup>267</sup> Section 94 response from Mr Rewi Edward Lyall, 30 January 2007, *op cit*.
- <sup>268</sup> *Ibid*.
- <sup>269</sup> *Ibid*.
- <sup>270</sup> Telecommunications Intercept, T 0792, 16 October 2006.
- <sup>271</sup> Email to Mr Julian Grill of 18 October 2006, 11:42:04 a.m., from Mr Rewi Lyall.

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- <sup>272</sup> Transcript of Proceedings, Public Examination of Mr Rewi Edward Lyall on 22 February 2007, *op cit*, pp.642-643.
- <sup>273</sup> Telecommunications Intercept, T 0794, 27 October 2006.
- <sup>274</sup> Telecommunications Intercept, T 0796, 27 October 2006.
- <sup>275</sup> Telecommunications Intercept, T 0798, 27 October 2006.
- <sup>276</sup> Email to Mr Julian Grill of 31 October 2006, 8:49:20 a.m., from Mr Rewi Lyall.
- <sup>277</sup> Transcript of Proceedings, Public Examination of Mr Rewi Edward Lyall on 22 February 2007, *op cit*, p.643.
- <sup>278</sup> *Ibid*, pp.644-645.
- <sup>279</sup> *Ibid*, pp.648-649.
- <sup>280</sup> *Ibid*, p.651.
- <sup>281</sup> Ministerial Office Manual [E 12568].
- <sup>282</sup> *Department of the Premier and Cabinet Code of Conduct*, p.10 [E 11645].
- <sup>283</sup> Section 94 response from Mr Rewi Edward Lyall, 30 January 2007, *op cit*.
- <sup>284</sup> Transcript of Proceedings, Public Examination of Mr Rewi Edward Lyall on 22 February 2007, p.624, *loc cit*.
- <sup>285</sup> Section 94 response from Mr Rewi Edward Lyall, 30 January 2007, *op cit*.
- <sup>286</sup> *Department of the Premier and Cabinet Code of Conduct*, *loc cit* [E 11645].
- <sup>287</sup> <http://www.opssc.wa.gov.au/documents/ethicsintegrity/codeofethicsbooklet.pdf>, viewed 14 November 2008.
- <sup>288</sup> *Ibid*.
- <sup>289</sup> Office of the Public Sector Standards Commissioner, *Ten-Year Review Four Discussion Paper: A separate ethical code for ministerial staff?*, <http://www.opssc.wa.gov.au/publications/reports.htm>.
- <sup>290</sup> Office of the Public Sector Standards Commissioner, *Ten-Year Review Four: The principle of integrity in official conduct*, p.7, <http://www.opssc.wa.gov.au/publications/reports.htm>.