



CORRUPTION AND CRIME COMMISSION

REPORT ON THE INVESTIGATION OF ALLEGED PUBLIC SECTOR MISCONDUCT BY ANY PUBLIC OFFICER IN RELATION TO THE PERTH HILLS BUSHFIRES OF 6 FEBRUARY 2011

15 June 2012

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Corruption and Crime Commission

Postal Address	PO Box 7667 Cloisters Square PERTH WA 6850
Telephone	(08) 9215 4888 1800 809 000 (Toll Free for callers outside the Perth metropolitan area.)
Facsimile	(08) 9215 4884
Email	info@ccc.wa.gov.au
Office Hours	8.30 a.m. to 5.00 p.m., Monday to Friday.

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CORRUPTION AND CRIME COMMISSION

Mr Malcolm Peacock
Clerk of the Legislative Council
Parliament House
Harvest Terrace
PERTH WA 6000

Mr Peter John McHugh
Clerk of the Legislative Assembly
Parliament House
Harvest Terrace
PERTH WA 6000

Dear Mr Peacock
Dear Mr McHugh

As neither House of Parliament is presently sitting, in accordance with section 93 of the *Corruption and Crime Commission Act 2003* ("the CCC Act"), the Commission hereby transmits to you a copy of its *Report on the Investigation of Alleged Public Sector Misconduct by Any Public Officer in Relation to the Perth Hills Bushfires of 6 February 2011*.

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

Yours faithfully

Roger Macknay, QC
COMMISSIONER

15 June 2012

ABBREVIATIONS AND ACRONYMS

BFS	Bush Fire Service
BOM	Bureau of Meteorology
(“the CCC Act”)	<i>Corruption and Crime Commission Act 2003</i>
CCRs	Call Charge Records
(“the CDJSC Inquiry”)	Community Development and Justice Standing Committee of the Legislative Assembly of the Parliament of Western Australia
CEO	Chief Executive Officer
CFRS	Career Fire and Rescue Service
(“the Commission”)	Corruption and Crime Commission
(“Commissioner of Police”)	Dr Karl Joseph O’Callaghan, APM
DEC	Department of Environment and Conservation
(“Dr O’Callaghan”)	Commissioner of Police
EM	Emergency Management
(“the EM Act”)	<i>Emergency Management Act 2005</i>
FESA	Fire and Emergency Services Authority of Western Australia
(“the Gregson Conversation”)	The telephone conversation between Dr Karl Joseph O’Callaghan, APM, Commissioner of Police, and Mr Wayne Gregson, APM, at 2:13:31 p.m. on 6 February 2011. At that time Mr Gregson was Assistant Commissioner Judicial Services, Western Australia Police.
HMA	Hazard Management Agency
(“the Keelty Inquiry”)	Perth Hills Bushfires Review by Mr Michael Joseph Keelty, AO, APM. A <i>Shared Responsibility: The Report of the Perth Hills Bushfire February 2011 Review</i> was provided to the Public Sector Commissioner, Mr Malcolm Charles Wauchope, on 16 June 2011 and tabled in the Parliament of Western Australia on 17 August 2011.
MIR	Major Incident Review
MROC	Metropolitan Regional Operations Centre
OASG	Operational Area Support Group

(“the Perth Hills Bushfires”)	A number of bushfires that destroyed 71 homes and damaged a further 39 homes in the Roleystone-Kelmscott area of the Perth Hills in Western Australia on 6 February 2011. Another fire in the Red Hill area commenced at approximately 9:15 p.m. on 5 February 2011 and continued into the morning of 6 February 2011.
PMWS	Perth Metropolitan Weather Station
POC	Police Operations Centre
(“the PSM Act”)	<i>Public Sector Management Act 1994</i>
SDC	State Disaster Council
SEC	State Emergency Coordinator
SECG	State Emergency Coordination Group
SEMC	State Emergency Management Committee
SEMP	State Emergency Management Policy
SMS	Short Message (or Messaging) Service
(“Special Report”)	<i>Special Report by the Corruption and Crime Commission on its Reporting Function with Respect to Misconduct Under Part 5 of the “Corruption and Crime Commission Act 2003” (WA)</i>
TPC	Telephone Call
VFRS	Volunteer Fire and Rescue Service
WACA	Western Australian Cricket Association
WALGA	Western Australian Local Government Association
WAPOL	Western Australia Police

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EXECUTIVE SUMMARY

Introduction

- [1] This is a report on the investigation by the Corruption and Crime Commission (“the Commission”) of alleged public sector misconduct by any public officer in relation to the Perth Hills Bushfires of 6 February 2011.ⁱ The investigation commenced as a consequence of a report made to the Commission pursuant to section 25 of the *Corruption and Crime Commission Act 2003* (“the CCC Act”), whereby a public officer or any other person (such as a member of the public) may report to the Commission any matter which that person suspects on reasonable grounds concerns or may concern misconduct.
- [2] The Commission investigation encompassed a review and analysis of documentation and materials provided to the Commission voluntarily and in response to notices served on persons pursuant to sections 94 and 95 of the CCC Act. The Commission investigation also encompassed interviews of various persons, conducted by Commission investigators, and private examinations (hearings),ⁱⁱ which were conducted by the Commission pursuant to sections 137 and 139 of the CCC Act during February, April and May 2012.

Scope and Purpose of Commission Investigation

- [3] The general scope and purpose of the Commission investigation was:

[t]o determine whether any public officer may have engaged in misconduct or serious misconduct in relation to evidence given, material provided or statements made about the Perth Hills Bushfires of 6 February 2011, to any Inquiry thereinto, the media, or in relation to any other function in their capacity as a public officer.
- [4] Following the Perth Hills Bushfires questions were raised, by the Western Australian community, about the adequacy of the response to those fires and relative responsibility, in particular that of Western Australia Police (WAPOL) and the Fire and Emergency Services Authority (FESA) of Western Australia. Those questions resulted in the Perth Hills Bushfire Review by Mr Michael Joseph Keelty, AO, APM, referred to as “the Keelty Inquiry” throughout this report. The final report of the Keelty Inquiry, dated 16 June 2011, was tabled in the Parliament of Western Australia on 17 August 2011. Dr Karl Joseph O’Callaghan, APM, Commissioner of Police,

ⁱ A number of bushfires destroyed 71 homes and damaged a further 39 homes in the Roleystone-Kelmscott area of the Perth Hills in Western Australia (“the Perth Hills Bushfires”) on 6 February 2011.

ⁱⁱ Although the *Corruption and Crime Commission Act 2003* refers to examinations (of persons for the purpose of obtaining information to advance an investigation), there is a general tendency for those examinations to be described by the media as “hearings”. Examinations or “hearings” conducted by the Commission are compulsory examinations of persons before it.

gave evidence as part of the Keelty Inquiry on 14 March 2011. All of the evidence before the Keelty Inquiry was unsworn (as was open under the terms of the *Public Sector Management Act 1994*).

- [5] Following the tabling of the report of the Keelty Inquiry, there arose, in August 2011, media reports referring to the fact that Dr O'Callaghan had been at a cricket match at the Western Australian Cricket Association (WACA) on 6 February 2011 during the period that the Perth Hills Bushfires were underway. Following those media reports the Commissioner of Police made a number of statements to the media (in person and by way of news release) in relation to the events of 6 February 2011, in particular on 28 August 2011 and 3 September 2011.
- [6] On 7 September 2011 the Community Development and Justice Standing Committee of the Legislative Assembly of the Parliament of Western Australia commenced the inquiry into "Western Australia's Readiness for the 2011-2012 Bushfire Season" ("the CDJSC Inquiry").ⁱⁱⁱ On 28 September 2011 Dr O'Callaghan gave evidence to the CDJSC Inquiry, in which he referred to the events of 6 February 2011.^{iv} Again, the evidence at that Inquiry was unsworn.
- [7] It is the evidence to the Keelty Inquiry, the statements to the media and the evidence to the CDJSC Inquiry that are, relevantly, the subject of the scope and purpose of the Commission investigation.

Issues of Misconduct

- [8] Although differing in detail, the statements made by Dr O'Callaghan in evidence to the Keelty Inquiry, to the media and in evidence to the CDJSC Inquiry are largely consistent. Taken together the substance of those statements are:
 - (1) Dr O'Callaghan's first contact in relation to the Roleystone Fire was when he received the telephone call at approximately 2:30 p.m. (that is, the call from Mr Richard John Butcher, Executive Director Emergency Management Western Australia, FESA, at precisely 2:28:28 p.m. (from Call Charge Records (CCRs));
 - (2) the first time he was advised of the extent and seriousness of the Roleystone Fire damage was at 4:30 p.m. by Mr Christopher John Dawson, APM, Deputy Commissioner, WAPOL, (that is, at precisely 4:33:38 p.m. (from CCRs)); and

ⁱⁱⁱ The report of the inquiry into "Western Australia's Readiness for the 2011-12 Bushfire Season" by the Community Development and Justice Standing Committee was tabled in the Legislative Assembly of the Parliament of Western Australia on 24 November 2011.

^{iv} Mr Wayne Gregson, APM, Chief Executive Officer of the Fire and Emergency Services Authority (FESA) of Western Australia, gave evidence to the CDJSC Inquiry on 30 September 2011. Mr Gregson joined FESA from the Western Australia Police, where at the relevant time (that is, 6 February 2011) he held the position of Assistant Commissioner Judicial Services.

(3) Dr O'Callaghan left the WACA at approximately 4:40 p.m.

[9] The principal issue which arises in relation to the accuracy of those statements concerns telephone conversations between Dr O'Callaghan and Mr Wayne Gregson, APM, who was then Assistant Commissioner Judicial Services, WAPOL, that took place on 6 February 2011 prior to the telephone call from Mr Butcher.

[10] There is no doubt that there were telephone conversations between Dr O'Callaghan and Mr Gregson on 6 February 2011. CCRs for the mobile telephone used by Dr O'Callaghan on 6 February 2011 reveal (and both Dr O'Callaghan and Mr Gregson confirm) the following calls to and from that mobile on 6 February 2011.

Mobile Telephone Call Charge Records for Dr O'Callaghan

Call Start Time	Call End Time	Call Duration (Seconds)	Direction
2:07:21 p.m.	2:07:33 p.m.	12	Outgoing
2:08:19 p.m.	2:08:36 p.m.	17	Incoming
2:08:54 p.m.	2:09:51 p.m.	57	Incoming
2:13:31 p.m.	2:14:31 p.m.	60	Incoming

[11] The evidence in relation to those telephone calls is dealt with in Chapter Two of this report. For present purposes it suffices to note that, in general terms, Mr Gregson's evidence to the Commission is that in the final telephone call at 2:13:31 p.m. ("the Gregson Conversation") he informed Dr O'Callaghan of the detail of a situation report he had received from Inspector Jeffrey Cyril Ellis of WAPOL, which included information in relation to the Roleystone Fire.^v

[12] Dr O'Callaghan denied receiving information in relation to the Roleystone Fire in the Gregson Conversation and gave evidence to the Commission that his recollection is that the Gregson Conversation related to a fire in the Bentley area that Dr O'Callaghan could observe from the WACA.

[13] Dr O'Callaghan also gave evidence to the Commission that he had not recalled the Gregson Conversation until he was reminded of it by Mr Gregson on 3 September 2011, that is, after he had given evidence to the Keelty Inquiry and made the statement to the media of 28 August 2011.

[14] In addition to the Gregson Conversation, another issue arising as to the accuracy of statements made by Dr O'Callaghan is the statement that he left the WACA at approximately 4:40 p.m. on 6 February 2011. In fact, the records of Dr O'Callaghan's "Swipe Card" indicate that he entered WAPOL Headquarters, Adelaide Terrace, East Perth, at 6:00 p.m. Dr

^v Inspector Jeffrey Cyril Ellis, Western Australia Police, was Duty Officer at the Police Operations Centre on 6 February 2011.

O'Callaghan's explanation for the discrepancy is set out in Chapter Two of this report.

[15] Therefore, the issues of potential misconduct arising out of the scope and purpose of the Commission investigation (refer [3] above) were whether Dr O'Callaghan engaged in misconduct or serious misconduct in relation to the Perth Hills Bushfires by:

- (1) giving false or misleading evidence on 14 March 2011 to the Keelty Inquiry by intentionally withholding evidence of the Gregson Conversation;
- (2) making false or misleading statements to the media by intentionally withholding evidence of the Gregson Conversation;
- (3) making false or misleading statements to the media by indicating that he left the WACA to return to WAPOL Headquarters, Adelaide Terrace, East Perth, at 4:40 p.m. on the day of the Perth Hills Bushfires when he did not in fact return until 6:00 p.m.; and
- (4) giving false or misleading evidence on 28 September 2011 to the CDJSC Inquiry by intentionally withholding evidence of the Gregson Conversation.

[16] The assessment of evidence in relation to each of these issues, and the Commission opinions as to misconduct, are dealt with in Chapter Three of this report.

Conclusion

[17] The investigation by the Commission was concerned with the provision of evidence, material and statements relating to the Perth Hills Bushfires by any public officer, and in particular whether that evidence, material and those statements were false or misleading in such a way as to fall within the definition of either "serious misconduct" pursuant to section 3 of the CCC Act or "misconduct" pursuant to section 4 of the CCC Act.

[18] Having considered and assessed the material and evidence gathered during the investigation the Commission has concluded that it is unable to form an opinion that any public officer engaged in either serious misconduct or misconduct (as set out in sections 3 and 4 of the CCC Act) in relation to the scope and purpose of the Commission investigation as set out at [3] above.

[19] In particular, in the opinion of the Commission, the available evidence does not support a finding, for reasons set out in this report, that Dr O'Callaghan engaged in either serious misconduct or misconduct as defined by sections 3 and 4 of the CCC Act, by:

- (1) giving false or misleading evidence on 14 March 2011 to the Keelty Inquiry by intentionally withholding evidence of the Gregson Conversation;

- (2) making false or misleading statements to the media by intentionally withholding evidence of the Gregson Conversation;
- (3) making false or misleading statements to the media by indicating that he left the WACA to return to WAPOL Headquarters, Adelaide Terrace, East Perth, at 4:40 p.m. on the day of the Perth Hills Bushfires when he did not in fact return until 6:00 p.m.; or
- (4) giving false or misleading evidence on 28 September 2011 to the CDJSC Inquiry by intentionally withholding evidence of the Gregson Conversation.

[20] However, in relation to the CDJSC Inquiry, in the opinion of the Commission, for the reasons identified at [256] in Chapter Three of this report, it would have been prudent and more open, and in the interests of transparency, for Dr O'Callaghan to have made known to the CDJSC Inquiry (or otherwise make it known publicly) the existence of the Gregson conversation, together with his and Mr Gregson's differing recollections of it.

[21] In relation to Mr Gregson, and in fairness to him, it should be noted that he had drawn the fact of the conversation of 6 February 2011 at 2:13:31 p.m. (or the Gregson conversation) to the attention of his immediate superior, that is, Dr O'Callaghan, and others prior to either Dr O'Callaghan or himself giving evidence to the CDJSC Inquiry (that is, on 28 and 30 September 2011 respectively). In the Commission's view, Mr Gregson had, therefore, endeavoured to correct misinformation that was in the public domain.

[22] However, as is the case with Dr O'Callaghan, in the opinion of the Commission, for the reasons identified at [256] in Chapter Three of this report, it would still have been prudent and more open, and in the interests of transparency, for Mr Gregson to have made known to the CDJSC Inquiry (or otherwise make it known publicly) the existence of the Gregson conversation, together with his and Dr O'Callaghan's differing recollections of it.

[23] Significantly, there was not a positive obligation by either Dr O'Callaghan or Mr Gregson to raise the matter of the existence of the Gregson conversation, together with their differing recollections of it, before the CDJSC Inquiry. In the absence of such an obligation, the failure to make reference to the Gregson Conversation to the CDJSC Inquiry could not, therefore, be regarded as misconduct as defined by sections 3 and 4 of the CCC Act.

CHAPTER ONE

INTRODUCTION

1.1 Background

- [1] This is a report on the investigation by the Corruption and Crime Commission (“the Commission”) of alleged public sector misconduct by any public officer in relation to the Perth Hills Bushfires of 6 February 2011.¹
- [2] The Commission investigation encompassed a review and analysis of documentation and materials provided to the Commission voluntarily and in response to notices served on persons pursuant to sections 94 and 95 of the *Corruption and Crime Commission Act 2003* (“the CCC Act”), which included relevant policies and procedures, records, reports, transcriptions and declarations. Section 94 of the CCC Act relates to the Commission’s power to obtain information from a public authority or officer and section 95 of the CCC Act relates to the Commission’s power to obtain documents and other things.
- [3] In addition to a review and analysis of documentation and materials the Commission investigation encompassed interviews of various persons, conducted by Commission investigators, and private examinations (hearings),² which were conducted by the Commission pursuant to sections 137 and 139 of the CCC Act during February, April and May 2012.

1.1.1 Genesis of Commission Investigation

- [4] The Commission investigation commenced as a consequence of a report made to the Commission in October 2011 pursuant to section 25 of the CCC Act, whereby a public officer or any other person (such as a member of the public) may report to the Commission any matter which that person suspects on reasonable grounds concerns or may concern misconduct that:
 - (a) *has or may have occurred*;
 - (b) *is or may be occurring*;
 - (c) *is or may be about to occur*; or
 - (d) *is likely to occur*.

¹ A number of bushfires destroyed 71 homes and damaged a further 39 homes in the Roleystone-Kelmscott area of the Perth Hills in Western Australia (“the Perth Hills Bushfires”) on 6 February 2011.

² Although the *Corruption and Crime Commission Act 2003* refers to examinations (of persons for the purpose of obtaining information to advance an investigation), there is a general tendency for those examinations to be described by the media as “hearings”. Examinations or “hearings” conducted by the Commission are compulsory examinations of persons before it.

- [5] Commission investigators, subsequent to receipt of the report, undertook preliminary inquiries to obtain further and better particulars about the allegation of misconduct.
- [6] Specifically, it was alleged that Dr Karl Joseph O'Callaghan, APM, Commissioner of Police, had received advice about the Perth Hills Bushfires of 6 February 2011 from Mr Wayne Gregson, APM, Assistant Commissioner Judicial Services, Western Australia Police (WAPOL), prior to the Commissioner of Police receiving a telephone call from Mr Richard John Butcher, Executive Director Emergency Management Western Australia, Fire and Emergency Services Authority (FESA) of Western Australia, "at 2:30 p.m." and Mr Christopher John Dawson, APM, Deputy Commissioner, WAPOL, "at 4:40 p.m."³.
- [7] At the time that the allegation was made knowledge about an alleged conversation with Mr Gregson, in which the Commissioner of Police had received advice about the Perth Hills Bushfires of 6 February 2011 prior to a telephone conversation with Mr Butcher at "2:30 p.m." and Mr Dawson at "4:40 p.m.", was not public knowledge. The issue, therefore, arose as to when the Commissioner of Police was first provided with substantive information about the Perth Hills Bushfires. Was this during the conversation with Mr Gregson or later with Mr Butcher at "2:30 p.m." or Mr Dawson at "4:40 p.m."?
- [8] Concerns were also raised with Commission investigators about when the Commissioner of Police became aware of the need "to call the State Emergency Management Committee" (SEMC).⁴ Was this during the telephone conversation with Mr Butcher at "2:30 p.m." or Mr Dawson at "4:40 p.m."?
- [9] Subsequently, Commission investigators interviewed a range of public officers in order to obtain further relevant information. These public officers ranged from relatively junior to senior public officers, whose names have not necessarily been included in this report (refer [52] below).
- [10] The Commission recognises that making a report about alleged misconduct by a public officer, particularly a senior public officer, is not often undertaken without some difficulty, be that because of professional and/or social connections and, in some circumstances, a genuinely held fear of harassment, victimisation or detriment. Since its establishment in January 2004 the Commission has been supported in the achievement of one of its main purposes, that is, to improve continuously the integrity of, and to reduce the incidence of misconduct in, the public sector, by the willingness of persons to report incidents of alleged misconduct by public

³ The Corruption and Crime Commission subsequently, as part of its investigation, obtained Call Charge Records (CCRs) for the mobile telephone used by the Commissioner of Police, on 6 February 2011. CCRs provide precise times of telephone calls. The call from Mr Butcher was at 2:28:28 p.m. (and not "2:30 p.m.") and the call from Mr Dawson was at 4:33:38 p.m. (and not "4:40 p.m."). CCRs indicate that on 6 February 2011 the Commissioner of Police telephoned Mr Gregson at 2:07:21 p.m., and that Mr Gregson telephoned the Commissioner of Police at 2:08:19 p.m., 2:08:54 p.m. and 2:13:31 p.m.

⁴ Sic: State Emergency Coordination Group (SECG).

officers pursuant to section 25 of the CCC Act. Without those reports many incidences of misconduct would have gone undetected, as misconduct is generally insidious by nature and often difficult to detect.

[11] Relevantly, section 175 of the CCC Act provides protection for persons who give evidence to, or assist, the Commission in the performance of its functions. Any person who threatens to prejudice the safety or career, intimidates or harasses, or threatens to intimidate or harass, or does an act that is, or is likely to be, to the detriment of any person who gives evidence to, or assists, the Commission in the performance of its functions is liable to incur a penalty of imprisonment for three years and a fine of \$60,000.

1.1.2 Assessment of Allegations

[12] Pursuant to section 32(1) of the CCC Act the Commission deals with an allegation by assessing the allegation and forming an opinion pursuant to section 22 of the CCC Act, and making a decision pursuant to 33 of the CCC Act that the Commission considers appropriate in the circumstances. Section 32(2) provides for the conduct of a preliminary investigation into the allegation by the Commission for the purposes of section 32(1).

[13] As it was considered that further information about alleged public sector misconduct by the Commissioner of Police was required before an assessment and formation of an opinion as to the occurrence of misconduct pursuant to section 22 of the CCC Act, and a decision to take further action pursuant to section 33 of the CCC Act, could be made, it was recommended to Acting Commissioner Mark Edward Herron⁵ by the then Acting Director Operations that a preliminary investigation be conducted pursuant to section 32(1). Acting Commissioner Herron approved the recommendation and on 7 November 2011 authorised a preliminary investigation. In approving the recommendation Acting Commissioner Herron had regard for sections 34(2)(a) and (c) of the CCC Act, which are matters to be considered by the Commission in deciding how action should proceed in relation to an allegation, that is —

34. *Matters to be considered in deciding who should take action*

(a) *the seniority of any public officer to whom the allegation relates;*

...

(c) *the need for there to be an independent investigation rather than an investigation by a public authority with*

⁵ Commissioner Roger Macknay, QC, was appointed on 15 November 2011 by the Governor of the State of Western Australia (“the Governor”) to be the Commissioner of the Corruption and Crime Commission with effect from and including 21 November 2011. Prior to that time Acting Commissioner Mark Edward Herron (appointed by the Governor on 25 January 2011 to act in the office of Commissioner with effect from 27 January 2011) undertook the functions of the Commission under the *Corruption and Crime Commission Act 2003* and any other written law with all of the powers and responsibilities of the Commissioner.

which any public officer to whom the allegation relates is connected by membership or employment or in any other respect.

1.1.3 Preliminary Investigation

- [14] The Commission undertook a range of inquiries in relation to the Perth Hills Bushfires of 6 February 2011. The inquiries were undertaken in order to determine whether the Commissioner of Police had engaged in misconduct by providing misleading information to any inquiry or the media about his level of knowledge of the Perth Hills Bushfires at a particular point of time on 6 February 2011.
- [15] Accordingly, Mr Gregson was served with notices pursuant to sections 94 and 95 of the CCC Act on 5 January 2012 (refer [2] above). The notices required Mr Gregson to provide to the Commission information about any communications that he may have had with the Commissioner of Police on 6 February 2011.⁶ Mr Gregson responded to the notices on 12 January 2012.
- [16] On 12 January 2012 Mr Butcher was served with a notice pursuant to section 94 of the CCC Act. The notice required Mr Butcher to provide information about his telephone conversation with the Commissioner of Police on 6 February 2011 at 2:28:28 p.m. Mr Butcher responded to the notice on 19 January 2012.
- [17] The responses provided by Mr Gregson and Mr Butcher to section 94 and section 95 notices contained significant and relevant information

1.1.4 Authorisation to Conduct Investigation

- [18] On 25 January 2012, after an assessment of available information, Commissioner Macknay, QC, authorised the conduct of an investigation pursuant to section 33(1)(a) of the CCC Act into alleged misconduct by the Commissioner of Police in respect of matters arising from the Perth Hills Bushfires of 6 February 2011, and determined that a number of private examinations should be conducted for the purposes of an investigation.

1.1.5 Scope and Purpose of Commission Investigation

- [19] Before the Commission conducts an examination, either private or public, pursuant to section 138 of the CCC Act, it is to inform the witness of the general scope and purpose of the investigation, unless the Commission considers that in the circumstances it would be undesirable to so inform the witness. Accordingly, during the private examinations conducted in February, April and May 2012 Commissioner Macknay, QC, so informed each witness prior to examination.

⁶ Section 158 of the *Corruption and Crime Commission Act 2003* states that a “person who fails, without reasonable excuse, to comply, with a notice served on the person under section 94 or 95 ... or furnishes information knowing it to be false or misleading ... is in contempt of the Commission”.

[20] As the general scope and purpose of the investigation was amended during the course of the investigation either to be more definitive or to include additional, but relevant, matters, the general scope and purpose applicable during particular examinations varied to some extent. For the purpose of this report it is sufficient to identify the scope and purpose of the investigation by reference to that which applied during the examinations of 28 and 29 February 2012, and 30 April 2012, which is outlined below.

To determine whether any public officer may have engaged in misconduct or serious misconduct in relation to evidence given, material provided or statements made about the Perth Hills Bushfires of 6 February 2011, to any Inquiry thereinto, the media, or in relation to any other function in their capacity as a public officer.

1.1.6 Leak to the Media

[21] Late in the afternoon on Monday 12 March 2012 the Commission received a telephone call from Mr Gary Adshead, State Political Editor, *The West Australian* newspaper, enquiring as to whether or not the Commission was investigating two matters that involved, Dr O'Callaghan, Commissioner of Police. Mr Adshead indicated that the matters related to evidence given by Dr O'Callaghan to the Keelty Inquiry (refer [64]–[68] below) and to a Parliamentary Inquiry (refer [112] below), and the use of a WAPOL Corporate Credit Card (also known as Western Australian Government Purchasing Card) by Dr O'Callaghan in Broome. On that day the Commission made no comment to Mr Adshead.

[22] On Tuesday 13 March 2012 an article by Mr Adshead entitled “Police Chief Faces CCC Investigation” appeared on the front page of *The West Australian* newspaper. The Commission released a Media Statement later that day confirming that it “is investigating allegations it has received against the Commissioner of Police ... one allegation relates to ... responses to various inquiries about his knowledge of the bushfire in the Perth Hills on 6 February 2011 ... [and the] other concerns use of his Corporate Credit Card” ... [and] it is the Commission’s role to investigate such allegations concerning senior public officers”. It was emphasised in the Media Statement that until “the Commission’s investigations are completed ... the allegations are unsubstantiated and unproven”.

[23] The Media Statement was released by the Commission pursuant to section 152(6) of the CCC Act as it was considered to be in the public interest to quell speculation and rumour.

[24] The investigation by the Commission of alleged public sector misconduct by Dr O'Callaghan, or any other public officer, in relation to the use of a WAPOL Corporate Credit Card (also known as Western Australian Government Purchasing Card) is not the subject of this report.

1.2 Commission Private Examinations

[25] As aforementioned, for the purposes of the investigation the Commission conducted private examinations pursuant to section 137 and 139 of the CCC Act. These private examinations were conducted on:

- 13 and 14 February 2012;
- 28 and 29 February 2012;
- 30 April 2012; and
- 1 May 2012.

[26] Section 139(1) of the CCC Act stipulates that, “[e]xcept as provided in section 140”, an examination is not to be open to the public. Section 140(2) allows the Commission to “open an examination to the public if, having weighed the benefits of public exposure and public awareness against the potential for prejudice or privacy infringements, it considers that it is in the public interest to do so”. That weighing process must be applied with respect to the examination of each witness.

[27] In this case the Commission weighed the benefits of public exposure and public awareness against the potential for prejudice or privacy infringements in respect of **each** person to be examined, and decided that those benefits did not outweigh the potential for prejudice or privacy infringements in the case of each witness and, hence, all examinations were conducted in private. However, each witness was advised by Commissioner Macknay, QC, prior to giving evidence that although the examination was to be conducted in private and would not be open to the media or the public it did:

... not necessarily mean that your evidence will not be made public at a later stage. It may also later be necessary to disclose that evidence to anyone adversely affected by it so as to give any such person an opportunity to respond to any evidence you might have given. It may also be necessary for the Commission to refer to or quote from your evidence in any report on this investigation which may be tabled in Parliament.⁷

[28] The following witnesses, public officers during the period relevant to the Commission investigation, were called to give evidence under oath or by affirmation during the above mentioned private examinations, pursuant to section 141 of the CCC Act.

- Mr Paul Anthony Zanetti, Commander, Specialist Crime, Western Australia Police (13 February 2012).
- Mr Christopher John Dawson, APM, Deputy Commissioner, Western Australia Police (13 February 2012).

⁷ Transcript of Proceedings, Private Examinations conducted during February, April and May 2012 by Commissioner Roger Macknay, QC.

- Mr Richard John Butcher, Executive Director Emergency Management Western Australia, Fire and Emergency Services Authority of Western Australia (13 February 2012).
- Mr Wayne Gregson, APM, Chief Executive Officer, Fire and Emergency Services Authority of Western Australia (14 and 28 February 2012).⁸
- Ms Suzanne Louise Short, Media Advisor to the Commissioner of Police (28 February 2012).
- Dr Karl Joseph O'Callaghan, APM, Commissioner of Police (29 February and 1 May 2012).
- Ms Josephine Charlotte Harrison-Ward, Management Consultant, Public Sector Commission (30 April 2012).⁹

[29] In relation to the conduct of examinations by the Commission, it should be noted that witnesses may be called for examination before the Commission for a variety of reasons. Witnesses may be called because they can assist the Commission by giving information about events, circumstances, systems, procedures or the activities of other persons, and not because their own conduct is in question.

[30] Prior to the commencement of the private examination conducted on 1 May 2012, at which the Commissioner of Police was a witness, the process for the preparation of, and response to, submissions to the Commission by Mr Peter Damien Quinlan, SC, Senior Counsel Assisting, was outlined. Senior Counsel Assisting explained:

... circumstances may arise where acceptance of a particular witness's evidence in whole or in part might lead to a finding adverse in relation to Dr O'Callaghan and where procedural fairness requires that he be afforded the opportunity to cross-examine.

...

For that reason, sir ... I propose ... following the conclusion of this private examination of Dr O'Callaghan I as [C]ounsel [A]ssisting will prepare written submissions to the Commission as to the opinions that are in my submission open on the evidence, including relevant passages from any evidence relied upon, and provide those submissions to Mr Davies [Legal Advisor to the Commissioner of Police].

In light of those submissions, Mr Davies on behalf of Dr O'Callaghan will then have the opportunity to make submissions to you, Commissioner, as to whether he should be given leave to cross-examine any particular

⁸ Mr Wayne Gregson, APM, was appointed as the Chief Executive Officer of the Fire and Emergency Services Authority (FESA) of Western Australia on 19 September 2011, for a period of 12 months. Mr Gregson joined FESA from the Western Australia Police, where at the relevant time (that is, 6 February 2011) he held the position of Assistant Commissioner Judicial Services.

⁹ At the relevant time (that is, 6 February 2011) Ms Josephine Charlotte Harrison-Ward was Chief Executive Officer of the Fire and Emergency Services Authority of Western Australia.

witness or witnesses and the basis for that leave. Whether that leave is granted and upon what terms would of course then be a matter for determination by you.

If leave to cross-examination is not sought or allowed, the investigation can then proceed to a conclusion, including any further submissions and conducting the process under section 86 of the “Corruption and Crime Commission Act [2003]” ...¹⁰

[31] Accordingly on 7 May 2012 Senior Counsel Assisting provided written submissions to the Commission in relation to the Perth Hills Bushfires of 6 February 2011. A copy of these submissions was provided to Mr Ronald John Davies, QC, as Legal Advisor to the Commissioner of Police, on 8 May 2012 (refer [42]-[45] below).

1.3 Jurisdiction of the Commission

[32] The Commission is an executive instrument of the Parliament (albeit an independent one). It is not an instrument of the government of the day, nor of any political or departmental interest. It must perform its functions under the CCC Act faithfully and impartially. The Commission cannot, and does not, have any agenda, political or otherwise, other than to comply with the requirements of the CCC Act.

[33] It is a function of the Commission, pursuant to section 18 of the CCC Act, to ensure that an allegation about, or information or matter involving misconduct by public officers is dealt with in an appropriate way. An allegation can be made to the Commission or made on its own proposition pursuant to section 26 of the CCC Act. The Commission must deal with any allegation of, or information about, misconduct in accordance with the procedures set out in the CCC Act.

1.4 Definitions

1.4.1 Misconduct

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

Misconduct occurs if —

- (a) *a public officer corruptly acts or corruptly fails to act in the performance of the functions of the public officer’s office or employment;*
- (b) *a public officer corruptly takes advantage of the public officer’s office or employment as a public officer to obtain a*

¹⁰ Transcript of Proceedings, Private Examination, Opening Remarks by Senior Counsel Assisting, Mr Peter Damien Quinlan, SC, on 1 May 2012, pp.3-4.

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).*

- [35] Misconduct, as defined in section 4 of the CCC Act applies only to the conduct of public officers.
- [36] In section 3 of the CCC Act "**serious misconduct**" is defined as "misconduct of a kind described in section 4(a), (b) or (c)".
- [37] Misconduct of a kind described in section 4(d)(i) – (iv) must not only involve the type of conduct described there, but must also be serious enough to meet the criteria set out in section 4(d)(v) or (vi).

[38] Further, the Commission refers to and incorporates into this report what is set out at [28]–[30] inclusive of the *Special Report by the Corruption and Crime Commission on its Reporting Function with Respect to Misconduct Under Part 5 of the “Corruption and Crime Commission Act 2003” (WA)* (“the Special Report”), tabled in the Parliament on 21 October 2010. That which is set out at [24]–[27] of the Special Report is set out at [146]–[149] of this report.¹¹

1.4.2 Public Officer

[39] The term “public officer” is defined in section 3 of the CCC Act by reference to the definition in section 1 of *The Criminal Code*, which states that the term “public officer” means any of the following:

- (a) *a police officer;*
- (aa) *a Minister of the Crown;*
- (ab) *a Parliamentary Secretary appointed under section 44A of the “Constitution Acts Amendment Act 1899”;*
- (ac) *a member of either House of Parliament;*
- (ad) *a person exercising authority under a written law;*
- (b) *a person authorised under a written law to execute or serve any process of a court or tribunal;*
- (c) *a public service officer or employee within the meaning of the “Public Sector Management Act 1994”;*
- (ca) *a person who holds a permit to do high-level security work as defined in the “Court Security and Custodial Services Act 1999”;*
- (cb) *a person who holds a permit to do high-level security work as defined in the “Prisons Act 1981”;*
- (d) *a member, officer or employee of any authority, board, corporation, commission, local government, council of a local government, council or committee or similar body established under a written law; [and]*
- (e) *any other person holding office under, or employed by, the State of Western Australia, whether for remuneration or not ...*

[40] By definition, therefore, WAPOL officers are “public officers”.

¹¹ Sections 83-86 of the *Public Sector Management Act 1994* (“the PSM Act”) were deleted by Amendment No. 39 of 2010 s. 99. Any reference to these sections in the *Special Report by the Corruption and Crime Commission on its Reporting Function with Respect to Misconduct Under Part 5 of the “Corruption and Crime Commission Act 2003” (WA)* (“the Special Report”) should be disregarded. In addition, parts of paragraphs [31]-[38] of the Special Report are no longer applicable as a result of other amendments made to the PSM Act by Amendment No. 39 of 2010.

1.5 Reporting by the Commission

[41] The Commission refers to and incorporates into this report what is set out at [40]–[41] inclusive of its Special Report.

[42] On 7 May 2012 Senior Counsel Assisting provided written submissions to the Commission which focused on the general scope and purpose of the Commission investigation, that is, alleged misconduct by any public officer in relation to “evidence given, material provided or statements made about the Perth Hills Bushfires of 6 February 2011, to any Inquiry thereinto, the media, or in relation to any other function in their capacity as a public officer”.

[43] The submissions provided to the Commission by Senior Counsel Assisting did not submit that any finding of misconduct ought to be made.

[44] However, the submissions did include arguments about findings and opinions that the Commission should form in relation to the Commissioner of Police which he may have considered reflected adversely on him in his capacity as a public officer. Accordingly, a copy of the written submissions by Senior Counsel Assisting was provided to Mr Davies, QC, as Legal Advisor to the Commissioner of Police, on Tuesday 8 May 2012 with a covering letter from Commissioner Macknay, QC, inviting him to make written submissions (by 15 May 2012) in relation to:

- whether leave is sought to recall a witness for the purposes of cross-examination and the basis for that leave on the grounds that natural justice and procedural fairness require that there be an opportunity for cross-examination; and
- the findings and opinions that Senior Counsel Assisting submits should be made.

[45] Mr Davies, QC, did not seek leave to recall any witnesses for the purposes of cross-examination but did provide written submissions on 14 May 2012 in relation to the findings and opinions that Senior Counsel Assisting submitted should be made in his submissions to the Commission dated 7 May 2012. The Commission has taken into consideration those submissions made by Mr Davies, QC, on behalf of the Commissioner of Police.

[46] Section 86 of the CCC Act requires that before reporting any matters that could be 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.

[47] A number of persons were notified by letter dated Tuesday 29 May 2012 of matters which it was proposed to include in this report. They were invited to make representations about those and other matters about which they might wish to do so by Tuesday 5 June 2012. They were advised that they and/or their legal advisor could inspect the transcripts of examinations before the Commission and evidentiary material going to

matters identified. A number of persons provided representations and the Commission has given consideration to them.

- [48] The Commission has taken all representations into account in finalising this report.

1.6 Disclosure

- [49] The Commission refers to and incorporates into this report what is set out at [43]–[45] inclusive of its Special Report.
- [50] 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 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.
- [51] The decision to report on the investigation by the Commission of alleged public sector misconduct by any public officer in relation to the Perth Hills Bushfires of 6 February 2011 was made in the public interest given that the events which occurred on that day affected many people, either directly or indirectly, and who, therefore, have an interest in knowing the outcome of the Commission investigation. Whilst no lives were lost as a consequence of the Perth Hills Bushfires, 71 homes were destroyed and a further 39 homes were damaged, and 517 families were evacuated from their homes.¹²

1.7 Privacy Considerations

- [52] 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. As a result of these considerations the Commission may decide not to include names of various individuals who assisted the Commission during its investigation.

1.8 Opinions of Misconduct

1.8.1 Publication of an Opinion

- [53] The Commission refers to and incorporates into this report what is set out at [49]–[51] inclusive of its Special Report.

1.8.2 Balance of Probabilities

- [54] 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

¹² *A Shared Responsibility: The Report of the Perth Hills Bushfire February 2011 Review*, by Mr Michael Joseph Keelty, AO, APM, p.3.

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.

[55] The balance of probabilities can be 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 ...¹³

[56] 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 proof beyond reasonable doubt. This was confirmed by the High Court in a unanimous judgement in Rejzek v McElroy (1965) 112 CLR 517:

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

[57] 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 ...

[58] 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.

¹³ *Butterworths Concise Australian Legal Dictionary* (Third Edition), Lexis Nexis Butterworths, Australia 2004, p.42.

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. Everyone must feel that, when, for instance, the issue is on which of two dates an admitted occurrence took place, a satisfactory conclusion may be reached on materials of a kind that would not satisfy any sound and prudent judgment if the question was whether some act had been done involving grave moral delinquency ... it is often said that such an issue as fraud must be proved "clearly", "unequivocally", "strictly" or "with certainty" ... This does not mean that some standard of persuasion is fixed intermediate between the satisfaction beyond reasonable doubt required upon a criminal inquest and the reasonable satisfaction which in a civil issue may, not must, be based on a preponderance of probability. It means that the nature of the issue necessarily affects the process by which reasonable satisfaction is attained.

(emphasis added)

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 ...".

[59] 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.¹⁴

1.8.3 Section 4(c), Section 23(1) and Section 23(2) of the Corruption and Crime Commission Act 2003 ("the CCC Act")

[60] Section 23(1) of the CCC Act prohibits the Commission from publishing or reporting a finding or opinion that a particular person has committed, is committing or is about to commit a criminal offence or a disciplinary offence. However, section 23(1) of the CCC Act allows the Commission to publish or report that a person has been convicted of, or pleaded guilty to, a criminal offence or disciplinary offence. In such a case the Commission would be reporting a fact, not its opinion, as to that. Further, section 23(2) of the CCC Act provides that an opinion that misconduct has occurred, is occurring or is about to occur is not, and is not to be taken as, a finding or opinion that a particular person has committed, or is committing or is about to commit a criminal offence or disciplinary offence.

(emphasis added)

[61] In the Commission's opinion section 23(2) allows the Commission to publish or report a finding or an opinion that the relevant conduct

¹⁴ Briginshaw v Briginshaw (1938) 60 CLR 336 per Dixon J at 361-363; Rejefek v McElroy (1965) 112 CLR 517; Neat Holdings Pty Ltd v Karajan Holdings Pty Ltd (1992) 110 ALR 449.

constitutes misconduct under section 4(c) of the CCC Act without the person having been convicted of an offence punishable by “2 or more years’ imprisonment”. Acknowledging that whether a criminal offence has been committed can only be determined by a court and that the elements of the offence must be proved beyond reasonable doubt, and further acknowledging that the Commission is not a court, does not make legally binding determinations and may form an opinion as to misconduct on the balance of probabilities, the Commission, in expressing and reporting an opinion that the misconduct constitutes serious misconduct under section 4(c) of the CCC Act is expressing and reporting an opinion that facts if proved beyond a reasonable doubt in a court could satisfy the elements of an offence, not that a particular person has committed an offence.

1.8.4 Expression of Opinion

[62] The Commission has borne all of the foregoing considerations (as set out in 1.8.1 to 1.8.3 above) 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

PERTH HILLS BUSHFIRES

2.1 Introduction

[63] On 6 February 2011 a number of bushfires destroyed 71 homes and damaged a further 39 homes in the Roleystone-Kelmscott area of the Perth Hills in Western Australia (“the Perth Hills Bushfires”). Another fire in the Red Hill area commenced at approximately 9:15 p.m. on 5 February 2011 and continued through the night and into the morning or 6 February 2011.

[64] On 23 February 2011 the Premier of Western Australia, the Hon. Colin James Barnett, MLA, announced the Perth Hills Bushfire Review, referred to as “the Keelty Inquiry” throughout this report. The report of the Keelty Inquiry, entitled *A Shared Responsibility: The Report of the Perth Hills Bushfire February 2011 Review*, by Mr Michael Joseph Keelty, AO, APM, was provided to the Public Sector Commissioner, Mr Malcolm Charles Wauchope, on 16 June 2011 and tabled in the Parliament of Western Australia on 17 August 2011. In the report it was stated that “[t]o the great credit of all of those involved, residents and responding agencies alike, no lives were lost ... [but] many lives were affected forever by the fires as 517 families were evacuated from their homes”.¹⁵

[65] The Keelty Inquiry had regard to all aspects of bushfire management in the Perth Hills area with specific reference to a number of matters including:

- the adequacy of current preventative measures, specifically prescribed burning and other bushfire mitigation activities;
- the adequacy and effectiveness of information and communication campaigns and mechanisms, including systems for alerting residents in relation to the fire or potential fires; and
- improvements that could be made in relation to the coordination of activities across all levels of government, including with volunteer groups.

[66] The Keelty Inquiry was conducted in circumstances where there was a real question as to whether State emergency plans in place at the time of the Perth Hills Bushfires on 6 February 2011 had proved adequate in light of events which occurred on that day, and also whether the response of relevant State Government agencies and organisations, and the relationships between those agencies and organisations was adequate.

[67] The Keelty Inquiry was conducted with relative informality, without Counsel Assisting or formal taking of evidence on oath, as was open to Mr Keelty under the *Public Sector Management Act 1994* (“the PSM Act”) and

¹⁵ Refer Footnote 12.

after he had obtained advice from Senior Counsel as to an appropriate process. As a result of that informality the Keelty Inquiry was apparently able to resolve the issues before it quickly, so that necessary alterations to the manner in which State Government agencies and organisations, and particularly FESA, responded to fire emergencies could be implemented.

- [68] It was perhaps, in part, as a consequence of that informality, and the terms of reference of the Keelty Inquiry, that individual recollections of certain of the events that occurred on 6 February 2011 were not scrutinised and tested, although given the nature of the Keelty Inquiry the Commission has no reason to doubt that Mr Keelty was entitled to be satisfied about the findings made on the evidence before him. The above must not be regarded as a criticism of Mr Keelty, who no doubt proceeded as he did with good reason, as set out above, whilst his findings produced rapid and salutary change. The fact that there was a need for an investigation by the Commission does, of course, highlight the fact that different forms of inquiry have different strengths and weaknesses.
- [69] As mentioned in Chapter One the Commission investigation commenced as a consequence of a report made to the Commission in October 2011 pursuant to section 25 of the CCC Act. For the purposes of the investigation the Commission conducted private examinations pursuant to sections 137 and 139 of the CCC Act (refer [25]–[31] above) during February, April and May 2012, and served notices pursuant to sections 94 and 95 of the CCC Act. As part of the investigation Commission investigators also conducted interviews of various persons.
- [70] As the general scope and purpose of the investigation was amended during the course of the investigation, either to be more definitive or to include additional, but relevant, matters, the general scope and purpose applicable during particular examinations varied to some extent. For the purpose of this report it is sufficient to identify the scope and purpose of the investigation by reference to that which applied during the examinations of 28 and 29 February 2012, and 30 April 2012, which is outlined below.

To determine whether any public officer may have engaged in misconduct or serious misconduct in relation to evidence given, material provided or statements made about the Perth Hills Bushfires of 6 February 2011, to any Inquiry thereinto, the media, or in relation to any other function in their capacity as a public officer.

- [71] As is apparent from the scope and purpose, the investigation was concerned with the provision of evidence, material and statements relating to the Perth Hills Bushfires, and in particular whether that evidence, material and those statements were false or misleading in such a way as to fall within the definition of either “serious misconduct” pursuant to section 3 of the CCC Act or “misconduct” pursuant to section 4 of the CCC Act.
- [72] This chapter considers evidence given by various witnesses during private examinations conducted by the Commission and the conclusions that

might be drawn from that evidence. As mentioned in [45] of this report, Mr Davies, QC, Legal Advisor to the Commissioner of Police, did not seek leave to recall any witnesses for the purposes of cross-examination, but did provide written submissions on 14 May 2012 in relation to the findings and opinions that Senior Counsel Assisting submitted should be made in his submissions to the Commission dated 7 May 2012. In addition, in response to the reasonable opportunity provided by the Commission pursuant to section 86 of the CCC Act, Mr Davies, QC, made representations to the Commission. The Commission has taken into account both the written submissions and representations made by Mr Davies, QC, on behalf of the Commissioner of Police in finalising this report.

- [73] In order to consider whether there is evidence in support of an opinion that misconduct has or may have occurred, pursuant to section 22 of the CCC Act, it will be necessary to identify the evidence, material and statements in question.
- [74] Before doing so, it is necessary to set out some background relating to the role of the Commissioner of Police in relation to emergency management and the events of 6 February 2011.

2.2 Factual Background

2.2.1 Role of the Commissioner of Police by Virtue of Office

- [75] The Commissioner of Police by virtue of office was and remains the State Emergency Coordinator (SEC) pursuant to section 10 of the *Emergency Management Act 2005* ("the EM Act"). The Commissioner of Police was and remains the Chairman of SEMC. The Commissioner of Police is a public officer for the purposes of the CCC Act (refer [39]–[40] above).
- [76] The Commissioner of Police as SEC is responsible, amongst other things, for coordinating the response to an emergency during a State of Emergency, providing advice to the Minister in relation to emergencies, providing advice to the State Disaster Council (SDC) during a State of Emergency and establishing a State Emergency Coordination Group (SECG) where a State of Emergency is declared (pursuant to sections 11 and 26 of the EM Act).
- [77] Section 11 of the EM Act provides for the functions of the SEC.
 - (1) *The State Emergency Coordinator is responsible for coordinating the response to an emergency during a state of emergency.*
 - (2) *In addition to his or her other functions under this Act and any other written law, the State Emergency Coordinator is to —*
 - (a) *provide advice to the Minister in relation to emergencies;*

- (b) *provide advice to the State Disaster Council during a state of emergency;*
- (c) *provide such advice and assistance to hazard management agencies as the State Emergency Coordinator considers appropriate; and*
- (d) *carry out other emergency management activities as directed by the Minister.*

(3) *Where authorised to do so under a State emergency management plan or State emergency management policy, or authorised to do so by the SEMC or the State Disaster Council, the State Emergency Coordinator may —*

- (a) *liaise with the Australian Government and other persons, in or outside the State; and*
- (b) *enter into agreements and arrangements with those persons,*

to assist the State to manage emergencies.

[78] Section 26 of the EM Act provides for the establishment of a SECG.

- (1) *If a state of emergency is declared, a State Emergency Coordination Group is established.*
- (2) *If an emergency occurs or is imminent, the State Emergency Coordinator may, on the request of the relevant hazard management agency, or on his or her own initiative and in consultation with the relevant hazard management agency, establish a State Emergency Coordination Group.*

...

[79] Section 27 of the EM Act provides for the functions of the SECG.

- (a) *to ensure the provision of coordinated emergency management by public authorities and other persons;*
- (b) *to provide advice and direction to public authorities and other persons to facilitate effective emergency management;*
- (c) *to liaise between emergency management agencies and the Minister.*

[80] Section 26(3) of the EM Act provides for the composition of the SECG.

- (a) *the State Emergency Coordinator;*
- (b) *the chairman of the SEMC;*

- (c) *the executive officer of the SEMC appointed under section 13(2)(c);*
- (d) *a representative of the relevant hazard management agency;*
- (e) *a person who is representative of the local governments in the emergency area, or in the area where the emergency is occurring or is imminent, as the case requires, nominated by the State Emergency Coordinator; and*
- (f) *such other members as are, in the opinion of the State Emergency Coordinator, necessary.*

[81] The SEC is the Chairman of the SECG. The people to be considered by the SEC for the purposes of paragraph (f) above may be dependent on the emergency. However, in accordance with SEMC Operational Procedures [OP 11] these must include (original emphasis) the following agencies for all activations:

- *Controlling Agency (if not the Hazard Management Agency);*
- *WAPOL;*
- *[Department of] Health;*
- *Department of Child Protection; [and]*
- *Department of the Premier and Cabinet.*¹⁶

[82] Pursuant to section 17 of the EM Act, the SEMC arranges for the preparation of State emergency management policies. These policies include State Emergency Management Policy 4.1 (“SEMP 4.1”) which details the principles, structures and responsibilities in place for managing emergency operations. Clause 17.3 of SEMP 4.1 provides that activation “of a State Emergency Coordination Group is coordinated by the Executive Officer SEMC in accordance with State Emergency Management Procedure OP – 11”.¹⁷

[83] Clause 17.3.1 sets out that possible triggers for activation of an SECG may include, but are not limited to:

- *multiple or complex Level 3 incidents;*
- *major or likely critical infrastructure failure;*
- *State level resource support required;*

¹⁶ Western Australia State Emergency Management Committee, Operational Management, *State Emergency Management Policy No. 41*, 9 March 2010, p.12 [02738-2011-0102].

¹⁷ *Ibid.*

- *relocation of a community;*
- *actual or potential loss of life or multiple serious injuries;* [and]
- *Australian Government Physical Assistance considered/required.*¹⁸

2.2.2 Overview of Bushfires on 5 and 6 February 2011

[84] The following general summary of the events of 5 and 6 February is taken largely from a Major Incident Review (MIR) prepared for FESA by Leading Emergency Services dated 15 June 2011.¹⁹

[85] Late on 5 February 2011 a fire broke out in the locality of Red Hill, a locality situated on the Darling Escarpment almost 30 kilometres from the Perth Central Business District, and which includes the suburbs of Millendon, Gidgegannup, Baskerville and Brigadoon.

[86] A Fire Weather Warning the previous day had forecast a Severe Fire Danger and, in accordance with Section 22A of the *Bush Fires Act 1954*, a Total Fire Ban was declared for 5 February 2011.

[87] The first report of the fire at Red Hill was by a member of the public, at 9:14 p.m., of a scrub fire in the vicinity of Toodyay Road and Roland Road, Gidgegannup. The fire quickly burnt into rocky and inaccessible country north of Toodyay Road.

[88] At 9:20 p.m. FESA received a report from the incident ground of a fire at the base of a power pole (size 100 metres deep and 50 metres wide) moving very quickly in a Westerly direction. Further resources were allocated. At 9:30 p.m. the fire was confirmed as a “3rd Alarm” resulting in further resources being mobilised including a request for WAPOL attendance to assist with the closure of Toodyay Road.

[89] An initial warning was sent out at 9:50 p.m. and a second request was made at 9:58 p.m. for an emergency warning message for the communities of Brigadoon, Baskerville and Millendon. The Metropolitan Regional Operations Centre (MROC) at FESA House was activated at 9:59 p.m. and the State Operations Centre was activated at 1:27 a.m. on 6 February 2011. A section 13 declaration under the *Bush Fires Act 1954* was made at 1:15 a.m. on 6 February 2011.

[90] The Red Hill Fire was managed as two divisions. Local Government and Department of Environment and Conservation (DEC) resources operated the Northern Division together with heavy machinery, establishing a mineral earth break along the Northern Boundary. Career Fire and Rescue Service (CFRS) crews operated on the Southern Division along the Toodyay Highway, and later on 6 February 2011 resources centred to

¹⁸ Western Australia State Emergency Management Committee, Operational Management, *State Emergency Management Policy No. 41*, 9 March 2010, p.12 [02738-2011-0102].

¹⁹ Fire and Emergency Services Authority of Western Australia Major Incident Review: Lake Clifton, Red Hill and Roleystone Fires, 15 June 2011, Leading Emergency Services.

the West, where the fire was accessible at the base of the Foothills. This was also where houses and other infrastructure required protection from the fire.

- [91] A request for aerial support was made at 5:15 a.m. Initially Helitacs were mobilised and later fixed wing bombers conducted one drop. However, due to the high wind shear over the escarpment in the vicinity of the incident, it was deemed unsafe for the fixed wing bombers to continue to operate. This situation was monitored and remained the case for the duration of the fire.
- [92] The air intelligence aircraft arrived at the Red Hill incident at 7:15 a.m. where it remained until a request for priority redeployment to the Roleystone incident was made at 2:16 p.m.
- [93] The following air operations data was provided to the FESA Major Incident Review in regard to the Red Hill Fire.
 - Total hours flown by Helitacs 41.7 hours.
 - Total drops conducted 354.
 - Total water delivered 472,440 litres.
 - Total foam concentrate used 967 litres.
 - Total hours flown Air Intelligence 6.1 hours.
- [94] The Red Hill Fire is recorded as burning a total of 1,020 hectares, with one shed destroyed but no other substantive losses. No lives were lost and there were no serious injuries reported.
- [95] During the late morning of 6 February 2011 a fire was ignited in the front yard of a home in Roleystone.
- [96] The initial response was at 11:45 a.m. by the Armadale CFRS, Roleystone Volunteer Fire and Rescue Service (VFRS), Roleystone Bush Fire Service (BFS) and Bedfordale BFS. The initial crews arrived at the incident scene in 11 minutes and after a further seven minutes reported the fire as contained at 12:03 p.m., with advice to stand down the aerial support.
- [97] Fuel load in the vicinity of this location was noted as being thin leaf litter, light dry grass and waist high foliage plants. Wind conditions were noted as “gusting at times” and coming from an easterly direction.
- [98] At 12:11 p.m., a “spot over” was identified rising out of lower ground previously unsighted and heading to the north-west. At 12:13 p.m. a request to upgrade the incident to a “3rd Alarm” was made along with a request for aerial support and additional appliances. By 1:08 p.m. the incident was upgraded to a “4th Alarm”. A section 13 declaration under the *Bush Fires Act 1954* was made at 2:15 p.m.
- [99] The developing fire, fanned by gusting winds, channelled by valleys and gullies, and hastened by often burning uphill, travelled up to 1.5 kilometres

per hour, effectively completing its main run from east to west by about 2:00 p.m.

- [100] Because of the speed of the fire, a defensive posture was generally adopted, that is, focusing on extracting residents from the multiple paths of the fire, and protecting properties where possible. The fire was managed through operating four sectors around the perimeter. Responding fire appliances were directed to report to the Roleystone Fire Station, some being confronted by burning buildings en route and being required to manage these incidents prior to formal fire ground briefings. Residents were advised to evacuate.
- [101] Aircraft operations were limited due to the gusty conditions. As was the case at the Red Hill Fire earlier in the day, it was deemed unsafe for fixed wing aircraft to operate in the vicinity of the escarpment, and rotary wing aircraft at times operated with lower payloads due to the flying conditions. This in turn impacted effectiveness on the ground, as drop accuracy was more challenging and the winds dissipated the drop.
- [102] The following air operations data was provided to the MIR in regard to the Roleystone Fire.
 - Total hours flown by Helitacs 37.5 hours.
 - Total drops conducted 261.
 - Total water delivered 437,571 litres.
 - Total foam concentrate used 873 litres.
 - Total hours flown Air Intelligence 11.3 hours.
- [103] The first media advice was issued on the FESA Website at 12:45 p.m., that is, within 30 minutes of the Incident Controller determining life and/or property was under threat.
- [104] An initial Operational Area Support Group (OASG) meeting was held on 6 February 2011 at 4:00 p.m. in the FESA State Operations Centre with the focus on the Roleystone Fire. The development of the Roleystone Fire, while the Red Hill Fire continued, and the subsequent competing resources from the metropolitan and regional areas, required the Emergency Management (EM) arrangements to be elevated from the District to the State level.
- [105] Representatives from FESA, the Department of Environment and Conservation (DEC), the Western Australian Local Government Association (WALGA), WAPOL, Main Roads WA, Western Power, the Department of Health, the Department of Education and the Department for Child Protection shared information and coordinated a Whole-of-Government response for both the Roleystone Fire and the Red Hill Fire.
- [106] The SECG met at 6:30 p.m. on 6 February 2011. The SECG was chaired by the Commissioner of Police.

- [107] Fire resources at the incident peaked at 56 appliances at approximately 6:30 p.m. on 6 February 2011. Subsequent crew deployments centred on blackening out the fire, maintaining a secure perimeter and ensuring the affected areas were safe.
- [108] A total of 71 houses was severely damaged and effectively “lost to the fire”, and 39 homes and structures were assessed as partially damaged but repairable.
- [109] On the 6 February 2011 Ms Josephine Charlotte Harrison-Ward was Chief Executive Officer of FESA, Mr Craig Hynes, AFSM, was the Chief Operations Officer and Mr Richard John Butcher was (and is currently) the Executive Director Emergency Management Western Australia. Mr Butcher, as Executive Director Emergency Management Western Australia, FESA, was also the Executive Officer of the SEMC and, as such, was administratively involved in the activation of an SECG.

2.3 Statements by the Commissioner of Police in Relation to the Events of 6 February 2011

- [110] Following the Perth Hills Bushfires questions were raised, by the Western Australian community, about the adequacy of the response to those fires and relative responsibility, in particular that of WAPOL and FESA. Those questions resulted in the Perth Hills Bushfire Review or Keelty Inquiry (refer [64] above). The final report of the Keelty Inquiry, dated 16 June 2011, was tabled in the Parliament of Western Australia on 17 August 2011. Dr O’Callaghan gave evidence as part of the Keelty Inquiry on 14 March 2011. As stated at [67] above, all of the evidence before the Keelty Inquiry was unsworn (as was open under the terms of the PSM Act).
- [111] Following the tabling of the report of the Keelty Inquiry, there arose, in August 2011, media reports referring to the fact that Dr O’Callaghan had been at a cricket match at the Western Australian Cricket Association (WACA) on 6 February 2011 during the period that the Perth Hills Bushfires were underway. Following those media reports the Commissioner of Police made a number of statements to the media (in person and by way of news release) in relation to the events of 6 February 2011, in particular on 28 August 2011 and 3 September 2011 (“the Media Statements”).
- [112] On 7 September 2011 the Community Development and Justice Standing Committee of the Legislative Assembly of the Parliament of Western Australia commenced the inquiry into “Western Australia’s Readiness for the 2011-2012 Bushfire Season” (“the CDJSC Inquiry”).²⁰ On 28 September 2011 Dr O’Callaghan gave evidence to the CDJSC Inquiry, in

²⁰ The report of the inquiry into “Western Australia’s Readiness for the 2011-12 Bushfire Season” by the Community Development and Justice Standing Committee was tabled in the Legislative Assembly of the Parliament of Western Australia on 24 November 2011.

which he referred to the events of 6 February 2011.²¹ Again, the evidence at that Inquiry was unsworn.

[113] It is the evidence to the Keelty Inquiry, the Media Statements and the evidence to the CDJSC Inquiry that are, relevantly, the subject of the scope and purpose of the Commission investigation. That material is set out below.

2.3.1 Evidence to the Keelty Inquiry on 14 March 2011

[114] In introductory remarks during the Keelty Inquiry on 14 March 2011 Mr Keelty stated:

Critical to the [I]nquiry thus far has been such things as the State Emergency Coordination Group, when it was convened, who convened it ... [and] what triggered the convening of the State Emergency Coordination Group.

[115] Shortly after on 14 March 2011 Dr O'Callaghan gave evidence and was asked by Mr Keelty at the commencement of his questioning:

Can you clarify for me your first involvement in the fires on the day?

Dr O'Callaghan replied:

Well, I would have got a call from FESA and specifically from John Butcher, sometime around 3 pm in the afternoon. I actually remember that because I was at the cricket and it was - and I got a call, just advising me that there were fires at Roleystone, and that they may call an SECG later in the day.

[116] It is clear that the call in this answer was a reference to a telephone call from Mr Butcher at 2:28:28 p.m. Dr O'Callaghan gave evidence to the Commission to that effect and that he had been relying upon his memory as to the timing of the telephone call.²² In the Commission's view nothing turns on the difference between 2:28:28 p.m. and 3:00 p.m.

[117] The substance of the evidence, for the purposes of the Commission investigation, is that Dr O'Callaghan's first involvement with the fires was when he received the telephone call from Mr Butcher.

2.3.2 Media Statements

[118] In the article in *The Sunday Times* of 28 August 2011 about the Perth Hills Bushfires Dr O'Callaghan was reported as saying that he was first alerted to the fires when an executive from FESA rang him at 2.32 p.m. on 6 February 2011. Dr O'Callaghan was also reported to have left the WACA at 4.40 p.m. This is consistent with information provided by the Media Advisor to the Commissioner of Police, Ms Suzanne Louise Short, in an email to Mr Anthony DeCeglie, a journalist with *The Sunday Times*, on 26 August 2011. That email stated:

²¹ Mr Wayne Gregson, APM, Chief Executive Officer of the Fire and Emergency Services Authority of Western Australia, gave evidence to the CDJSC Inquiry on 30 September 2011.

²² Transcript of Proceedings, Private Examination of Dr Karl Joseph O'Callaghan, APM, Commissioner of Police, on 29 February 2012, p.25, with Mr Peter Hastings, QC, Senior Counsel Assisting.

The Commissioner was at the WACA between 1100hrs and 1640hrs on February 6, 2011 ...

The Commissioner was first notified about the fires by FESA at precisely 1432 hrs ... The Commissioner was next contacted at 1630hrs by Deputy Commissioner Chris Dawson ...

...

Until this point, the Commissioner had not been advised of the extent of the fire damage. Immediately on receiving the call from Deputy Commissioner Dawson he telephoned Jo Harrison-Ward and an SECG was ordered to be convened. The Commissioner left the WACA immediately on receiving this information and met Deputy Commissioner Dawson at Police Headquarters. (NB: this is a short walk across the road from the WACA.)²³

[119] To similar effect was a news release ("the News Release") dated 3 September 2011, that was authorised by Dr O'Callaghan in response to articles in *The Sunday Times* on 28 August 2011 and, more immediately, *The West Australian* on 3 September 2011.

Police Commissioner Karl O'Callaghan stands by the evidence he gave to the Keelty Inquiry that the first time he was contacted about the fire by FESA was 1430hours on Sunday, February 6, 2011.

Mr O'Callaghan has confirmed this fact with FESA.

He is also unequivocal in his assertion that the first time he was advised of the extent and seriousness of the fire damage was at 1630hours by Deputy Police Commissioner, Chris Dawson.

Mr O'Callaghan was given no information prior to that time that would have prompted him to call a SECG, in accordance with policy.

The Commissioner set the meeting for 1830hours to allow sufficient time for all the members of the SECG to assemble at FESA House. He had no other commitments that day.²⁴

[120] The substance of the Media Statements, which in the Commission's assessment was based on information that could only have come from Dr O'Callaghan,²⁵ for the purposes of the Commission investigation, is that:

²³ Email to Mr Anthony DeCeglie, a journalist with *The Sunday Times*, of 26 August 2011, 1:35 p.m., from Ms Suzanne Louise Short, Media Advisor to the Commissioner of Police [02738-2011-0395].

²⁴ Western Australia Police News Release, Statement from the Commissioner, 3 September 2011, by Ms Suzanne Louise Short, Media Advisor to the Commissioner of Police [02738-2011-0112].

²⁵ Dr Karl Joseph O'Callaghan, APM, during a private examination conducted by the Commission on 29 February 2012, gave evidence to the effect that he agreed "that before any response was sent by her [Ms Short] to ... questions ... being asked ... [by a] journalist" the response would usually be discussed with him and that he and Ms Short "would decide on a response". Dr O'Callaghan explained that Ms Short's "normal MO is to copy me in, either as she sends it ... [or] normally she actually copies me in before she sends it, because she wants me to give an imprimatur" (refer pp.36-37 of the Transcript of Proceedings for that Examination).

- (1) Dr O'Callaghan's first contact in relation to the fires was when he received the telephone call at 2:30 p.m. (that is, the call from Mr Butcher at precisely 2:28:28 p.m. (from Call Charge Records or CCRs));
- (2) the first time Dr O'Callaghan was advised of the extent and seriousness of the fire damage was at 4:30 p.m. by Deputy Police Commissioner, Chris Dawson (that is, at precisely 4:33:38 p.m. (from CCRs)); and
- (3) Dr O'Callaghan left the WACA at approximately 4:40 p.m.

2.3.3 Statement to the Community Development and Justice Standing Committee (CDJSC) Inquiry

[121] On 28 September 2011 Dr O'Callaghan gave evidence to the CDJSC Inquiry. Dr O'Callaghan read a prepared statement where he said:

It has been suggested that telephone records would resolve any claims and counter claims about what advice was provided to me on the day and whether that would have led to an earlier calling of an SECG. My best recall of the timing of calls that day is already in the public domain. Let me make it clear that FESA's claims in its response to the Keelty [Inquiry] report that I was kept apprised still does not explain why an SECG incident level activation trigger information was not provided to me that afternoon. I am kept apprised of many emergency management incidents, but do not necessarily call an SECG because of it. It is the information passed between two parties in a telephone call that provides evidence of whether an activation trigger was discussed — not the telephone records themselves.

I make the point that the relevant SECG activation trigger information was first provided to me in a call from deputy police commissioner, Chris Dawson, at about 4:30 p.m. I am clear about this, and I am also clear that my first call from FESA was at 2:28 p.m. that day. I am also clear, having checked my outgoing telephone records, that I made a significant number of phone calls after 4:30 p.m. in response to information provided by deputy police commissioner Dawson. I was still making these calls well after 5:00 p.m. as part of the organising of the SECG. This at least is an indication that the activation trigger had been reached at 4.30 p.m.²⁶

[122] The substance of the statement to the CDJSC Inquiry, for the purposes of the Commission investigation, is that:

- (1) Dr O'Callaghan's first contact in relation to the fires was when he received the telephone call at 2:28 p.m.; and

²⁶ Community Development and Justice Standing Committee Bushfire Examinations, Transcript of Evidence, Dr Karl Joseph O'Callaghan, APM, Commissioner of Police, Taken at Perth on Wednesday 28 September 2011, pp.2-3 [02738-2011-0117].

(2) the first time he was advised of the extent and seriousness of the fire damage was at 4:30 p.m. by Mr Dawson (that is, at precisely 4:33:38 p.m. (from CCRs)).

2.3.4 Issues Concerning the Accuracy of the Statements

[123] Although differing in detail, the statements made by Dr O'Callaghan in evidence to the Keelty Inquiry, the Media Statements and the evidence to the CDJSC Inquiry are largely consistent. Taken together the substance of those statements are:

- (1) Dr O'Callaghan's first contact in relation to the Roleystone Fire was when he received the telephone call at approximately 2:30 p.m. (that is, the call from Mr Butcher at precisely 2:28:28 p.m. (from CCRs));
- (2) the first time he was advised of the extent and seriousness of the Roleystone Fire damage was at 4:30 p.m. by Mr Dawson (that is, at precisely 4:33:38 p.m. (from CCRs)); and
- (3) Dr O'Callaghan left the WACA at approximately 4:40 p.m.

[124] The principal issue which arises in relation to the accuracy of those statements concerns telephone conversations between Dr O'Callaghan and Mr Gregson, who was then Assistant Commissioner Judicial Services, WAPOL, that took place on 6 February 2011 prior to the telephone call from Mr Butcher.

[125] There is no doubt that there were telephone conversations between Dr O'Callaghan and Mr Gregson on 6 February 2011. CCRs for the mobile telephone used by Dr O'Callaghan on 6 February 2011 reveal (and both Dr O'Callaghan and Mr Gregson confirm) the following calls to and from that mobile on 6 February 2011.

Mobile Telephone Call Charge Records for Dr O'Callaghan

Call Start Time	Call End Time	Call Duration (Seconds)	Direction
2:07:21 p.m.	2:07:33 p.m.	12	Outgoing
2:08:19 p.m.	2:08:36 p.m.	17	Incoming
2:08:54 p.m.	2:09:51 p.m.	57	Incoming
2:13:31 p.m.	2:14:31 p.m.	60	Incoming

[126] The evidence in relation to those telephone calls is dealt with below. For present purposes it suffices to note that, in general terms, Mr Gregson's evidence to the Commission is that in the final telephone call at 2:13:31 p.m. ("the Gregson Conversation") he informed Dr O'Callaghan of the detail of a situation report he had received from Inspector Jeffrey Cyril Ellis of WAPOL, which included information in relation to the Roleystone Fire.

[127] Dr O'Callaghan denied receiving information in relation to the Roleystone Fire in the Gregson Conversation and gave evidence to the Commission

that his recollection is that the Gregson Conversation related to a fire in the Bentley area that Dr O'Callaghan could observe from the WACA.

- [128] Dr O'Callaghan also gave evidence to the Commission that he had not recalled the Gregson Conversation until he was reminded of it by Mr Gregson on 3 September 2011, that is, after he had given evidence to the Keelty Inquiry and made the Media Statement of 28 August 2011.
- [129] In addition to the Gregson Conversation, another issue arising as to the accuracy of the statements is the statement that Dr O'Callaghan left the WACA at approximately 4:40 p.m. on 6 February 2011. In fact, the records of Dr O'Callaghan's "Swipe Card" indicate that he entered WAPOL Headquarters, Adelaide Terrace, East Perth, at 6:00 p.m. Dr O'Callaghan's explanation for the discrepancy is set out later in this report.

2.4 Issues of Misconduct Arising from the Statements

- [130] The issues of potential misconduct arising out of the scope and purpose of the Commission investigation (refer [20] and [70] above) were whether Dr O'Callaghan engaged in misconduct or serious misconduct in relation to the Perth Hills Bushfires by:
 - (1) giving false or misleading evidence on 14 March 2011 to the Keelty Inquiry by intentionally withholding evidence of the Gregson Conversation;
 - (2) making false or misleading statements to the media by intentionally withholding evidence of the Gregson Conversation;
 - (3) making false or misleading statements to the media by indicating that he left the WACA to return to WAPOL Headquarters, Adelaide Terrace, East Perth, at 4:40 p.m. on the day of the Perth Hills Bushfires when he did not in fact return until 6:00 p.m.; and
 - (4) giving false or misleading evidence on 28 September 2011 to the CDJSC Inquiry by intentionally withholding evidence of the Gregson Conversation.

2.5 Relevant Legal Principles

2.5.1 Definition of Misconduct

- [131] "Misconduct" is defined in section 4 of the CCC Act, and described for "kinds" of misconduct set out in sections 4(a), 4(b), 4(c) and 4(d) respectively (refer [34]-[37] above). Misconduct of a kind described in sections 4(a), 4(b) or 4(c) is defined as "serious misconduct" by section 3 of the CCC Act.

2.5.2 Misconduct Pursuant to Sections 4(a) and 4(b) of the CCC Act

- [132] The conduct defined in section 4(a) of the CCC Act deals with public officers who act corruptly, or corruptly fail to act, in the performance of the

functions of their office or employment and section 4(b) of the CCC Act deals with public officers who corruptly take advantage of their office or employment to obtain a benefit or cause a detriment to any person.

- [133] Corruption is a notoriously difficult concept to define. The word is not defined in the CCC Act. Although there are many cases which discuss the meaning of corruption, each is a product of the statutory provision (or common law concept) being considered and the circumstances then at hand.
- [134] 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*, “is concerned with the use of power or authority for improper purposes”. Malcolm CJ noted that in the context of the corporations law the term improper “has been held not to be a term of art, but simply to refer to conduct by an officer of a company which was inconsistent with the proper discharge of the duties, obligations and responsibilities of the officer concerned ...”. Malcolm CJ went on to cite various definitions from the dictionary. Malcolm CJ said, for example, that the Oxford English Dictionary definition of “corrupt” included “perverted from uprightness and fidelity in the discharge of duty; influenced by bribery or the like”. In the same dictionary the verb “corrupt” meant “to destroy or pervert the integrity or fidelity of (a person) in his discharge of duty”. Ultimately Malcolm CJ concluded that an exercise of lawful authority for an improper purpose can amount to corruption under section 83 of *The Criminal Code*. Malcolm CJ’s *ratio decidendi* should not be taken as an exhaustive definition of the meaning of corruption. The facts in that case involved the abuse of an otherwise lawful power for an improper purpose. The charges were laid under section 83(c) of *The Criminal Code* of acting “corruptly in the performance or discharge of the functions of ... [the officer’s] office or employment, so as to gain a benefit ... or ... cause a detriment”. On such a charge, proof of an intent to obtain a benefit or cause a detriment was itself an element of the offence. 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.
- [135] 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)

[136] 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.

[137] 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, i.e., 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)

[138] 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.

[139] 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. As Willers demonstrates, section 83 of *The Criminal Code* makes it an offence for a public officer, without lawful authority or a reasonable excuse, to act “corruptly” in the performance or discharge of the functions of his office or employment, so as to gain a benefit for, or cause a detriment to, any person. The meaning of “corruptly” therefore

cannot necessarily involve an intent (or purpose) to obtain a benefit or cause a detriment.

- [140] More importantly, the same distinction is made clear in section 4 of the CCC Act itself. The word “corruptly” appears in both section 4(a) and 4(b). The former contains no reference to the gaining of a benefit or the causing of a detriment. That section makes it misconduct for a public officer to “corruptly” act or fail to act in the performance of his or her office or employment. The latter does expressly refer to gaining an advantage or causing a detriment, by the public officer “corruptly” taking advantage of his or her office or employment. If the notion of “corruptly” already included an intent to gain an advantage or cause a detriment, those words would be otiose.
- [141] 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.²⁷
- [142] Ordinary dictionary definitions support the conclusion that in section 4 of the CCC Act, “corruptly” connotes dereliction or breach of duty, or acting contrary to one’s duty; being perverted from fidelity or integrity. “Corruption” is the perversion of a person’s integrity in the performance of official or public duty or work.²⁸ It involves the concept of a prohibited act undertaken with a wrongful intention.²⁹ The Commission accepts that the notion of “corruptly” in section 4(a) and (b) of the CCC Act requires that the conduct contrary to the duties incumbent upon the public officer by virtue of their office (to adopt the language of Ryan J in *Re Lane*) also be attended by moral turpitude of a kind implied by the expression “perverted from fidelity or integrity”. Without attempting to be exhaustive, that may be found in dishonesty;³⁰ an improper purpose;³¹ in circumstances in which there is some conflict between the public officer’s interests and their duty; or in some other relevant factor.³²
- [143] Thus, “corruptly”, in section 4(a) and (b) is not to be equated with “dishonestly” nor “for an improper purpose”, nor (merely), “contrary to [their] duty”. For present purposes it is sufficient to state that the Commission takes the law to be that “corruptly” in section 4(a) and (b) of the CCC Act connotes conduct done deliberately, which is contrary to the

²⁷ See Martin CJ (with whom Newnes AJA agreed) in *Ex parte West Australian Newspapers Ltd* [2008] WASCA 209 at [51].

²⁸ Shorter Oxford English Dictionary, Sixth Edition, p.529; Macquarie Dictionary, 2nd Revised Edition, p.417.

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

³⁰ *Willers v R* (1995) 81 A Crim R 219 per Malcolm CJ at 224.

³¹ *Willers v R*, *supra*, per Malcolm CJ at 225; Rowland J at 231; *Application by DPP (Cwlth) for a Superannuation Order in Respect of Hogarth* (1995) 93 A Crim R 452 per Higgins J at 454-5.

³² *Williams v R* (1979) 23 ALR 369 per Franki J at 381.

duties incumbent upon the public officer by virtue of their office and attended by moral turpitude in the sense explained above.

2.5.3 Misconduct Pursuant to Section 4(c) of the CCC Act

[144] As outlined in [34] above, conduct proscribed in section 4(c) of the CCC Act defines as serious misconduct a public officer acting or purporting to act in his or her official capacity to commit an offence punishable by two or more years imprisonment.

2.5.4 Misconduct Pursuant to Section 4(d) of the CCC Act

[145] As outlined in [37] above, misconduct of a kind described in sections 4(d)(i) – (iv) must involve the type of conduct described there, but must also be serious enough to meet the criteria set out in section 4(d)(v) or (vi).

[146] Section 4(d)(v) says that the conduct must be serious enough so that it constitutes, or could constitute, an offence against a written law.

[147] Section 4(d)(vi) is more complex. It says that the conduct must be serious enough so that it constitutes or could constitute “a disciplinary offence providing reasonable grounds for the termination of a person’s office or employment as a public service officer under the *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)”.

[148] The words in brackets are important. They make it clear that where the public officer concerned is not an officer of the public service, and subject to the *Public Sector Management Act 1994* (“the PSM Act”), the test is notional – that is, although it cannot then apply directly, the Commission must assess the public officer’s conduct against the objective criteria set out in the PSM Act, as if that person were a member of the public service.

[149] In Cox v Corruption and Crime Commission [2008] WASCA 199, Martin CJ at [63] stated that:

... [s]ection 4(d)(vi) [of the CCC Act] expressly provides that the definition of “misconduct” applies whether or not the public officer is a public service officer whose employment could be terminated on the grounds of a disciplinary offence under the PSMA [the PSM Act]. It is therefore clear that the conduct defined as “misconduct” by s 4(d) of the [CCC] Act is that which would provide reasonable grounds for termination if the public officer was liable to termination under the PSMA, irrespective of whether or not the public officer is so liable. In the case of a public officer who is not a public service officer covered by the PSMA, the definition imposes a hypothetical standard of conduct – the hypothesis being that the officer could in fact be liable to dismissal under the terms of the PSMA.

Steytler P at [116] stated that:

... there is nothing in s 4(d)(vi) of the CCC Act that requires the public officer in question to have been a public service officer under the PSM Act. That is made plain by the words “(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). It is consequently irrelevant whether Dr Cox was, or was not, a public service officer for the purpose of the PSM Act.

[150] Conduct which falls within section 4(a), (b) or (c) would inevitably fall within one or more of sections 4(d)(i), (ii), (iii) or (iv), but the converse would not necessarily be so.

2.5.5 Application to Commission Investigation

[151] Before any opinion of “misconduct” could be formed within the scope and purpose of the Commission investigation, it would be necessary for the Commission to be satisfied that Dr O’Callaghan did in fact:

- (1) give false or misleading evidence on 14 March 2011 to the Keelty Inquiry by intentionally withholding evidence of the Gregson Conversation;
- (2) make false or misleading statements to the media by intentionally withholding evidence of the Gregson Conversation;
- (3) make false or misleading statements to the media by indicating that he left the WACA to return to WAPOL Headquarters, Adelaide Terrace, East Perth, at 4:40 p.m. on the day of the Perth Hills Bushfires when he did not in fact return until 6:00 p.m.; and/or
- (4) give false or misleading evidence on 28 September 2011 to the CDJSC Inquiry by intentionally withholding evidence of the Gregson Conversation.

[152] The Commission must be satisfied as to any or all of the above matters in order to form an opinion that misconduct has occurred. In that regard, the reference to “intentionally withholding evidence of the Gregson Conversation” in items (1), (2) and (4) invites attention to the nature of that conversation, and Dr O’Callaghan’s knowledge, appreciation or understanding of the Gregson Conversation at the time of the various statements.

[153] As to accuracy of the statement that Dr O’Callaghan left the WACA to return to WAPOL Headquarters at 4:40 p.m. it would be necessary to find that that statement was deliberately misleading.

[154] If the Commission can be satisfied that Dr O’Callaghan did in fact give false or misleading evidence to the Keelty Inquiry and/or the CDJSC Inquiry, and/or make false or misleading statements to the media, as detailed in points (1)-(4) above, the question would then arise as to whether that conduct fell within any of the categories in section 4 of the CCC Act. In the absence of such satisfaction the Commission would be unable to form an opinion that misconduct has occurred.

2.5.6 Standard of Proof

- [155] The standard of proof required to form an opinion of misconduct or serious misconduct is the civil standard on balance of probabilities as enunciated in *Briginshaw v Briginshaw* (1938) 60 CLR 336 as set out at [58] above. See also Cox v Corruption and Crime Commission [2008] WASCA 199 at paragraph [82] per Martin CJ.
- [156] On any view allegations of giving false or misleading evidence to the Keelty Inquiry and/or the CDJSC are of a serious nature, as indeed is an allegation of a person in Dr O'Callaghan's position of public trust making false and misleading statements to the media, for dissemination to the public. The standard of proof must be applied in this light.
- [157] It is necessary then to turn to consider the circumstances surrounding the Gregson Conversation.

2.5.7 Parliamentary Privilege

- [158] The effect of section 3(2) of the CCC Act is to prohibit the exercise of a "power, right or function" given to the Commission by the CCC Act where that exercise would relate to a matter within the exclusive determination "by a House of Parliament".
- [159] The Commission investigation of alleged misconduct by Dr O'Callaghan in relation to evidence given to the CDJSC Inquiry does not fall within that prohibition as pursuant to section 57 of *The Criminal Code* it is an offence for any person to knowingly give "a false answer to any lawful and relevant question put to him in the course of ... [an] examination" before "either House of Parliament, or before a committee of either House, or before a joint committee of both Houses". Such an allegation, which would in relation to a public officer, if established, constitute serious misconduct pursuant to section 4(c) of the CCC Act, is therefore justiciable by a court and not within the exclusive determination of "a House of Parliament".

2.6 Conversation with Mr Gregson at 2:13:31 p.m. on 6 February 2011 ("the Gregson Conversation")

- [160] From approximately 11:00 a.m. on Sunday 6 February 2011 Dr O'Callaghan was attending a cricket match at the WACA. He was the guest of the President of the WACA, seated in the President's Box on the second level of the Prindiville Stand. Mr Gregson's evidence to the Commission, upon being referred to CCRs, was that Dr O'Callaghan telephoned him at 2:07:21 p.m. on 6 February 2011. After an initial attempt to return the call (at 2:08:19 p.m., which lasted only 17 seconds) there was a call from Mr Gregson to Dr O'Callaghan at 2:08:54 p.m., which lasted 57 seconds.
- [161] Mr Gregson gave evidence during a private examination conducted by the Commission on 14 February 2012 and in relation to the later call gave evidence as follows.

During 6 February did you receive phone call communications from the [C]ommissioner of [P]olice?---I - I noticed that I missed a call from the [C]ommissioner of [P]olice. I looked at my phone and I saw it was the [C]ommissioner of [P]olice, but I didn't get to answer it quick enough so I missed a call. I tried to ring him back but it went through to his message bank and he was leaving a message for me to give him a call, so I left it a couple of minutes and I rang him back.

What was discussed?---The [C]ommissioner of [P]olice said that he could see smoke around on the horizon from where he was and he asked me if it was anywhere near my place because I live in the hills, and he wanted to know if I knew what was going on.

What did you say?---I said I wasn't at home. We had a discussion about the smoke. I think I too could see smoke at that stage from where I was and there had been some talk at the event that there were - there was a fire, and I - he asked me - I think he couldn't get hold - I believe he told me he couldn't get hold of the duty executive officer and so he asked me to find out what was going on for him.

What did you do?---I said I would do that and I made a phone call the [P]olice [O]perations [C]entre to get a situation report.³³

[162] Mr Gregson telephoned the Police Operations Centre (POC) at 2:10:40 p.m. and spoke to Mr Ellis, from whom he received a report. That call was recorded as lasting 141 seconds. The conversation between Mr Ellis and Mr Gregson was recorded and was as follows.

ELLIS: *Police Operations, Inspector Ellis.*

GREGSON: *Ah, Jeff, Wayne Gregson, how are ya?*

ELLIS: *Hello. How're you going?*

GREGSON: *The Commissioner's just rung me, he said there's a very, there seems to be a large fire around Bentley area. Can you give me some advice as to what that might be please?*

ELLIS: *We've just been told there is, uhm, somebody's lit a park up. We have trouble getting FESA at the moment, they're heavily deployed to Roleystone –*

GREGSON: *Yep.*

ELLIS: *-- and, of course, Gidgegannup.*

GREGSON: *Yep.*

ELLIS: *Uhm, I don't know if you're aware, are you aware of the Roleystone one? Significant fire. It's burnt out houses. We have ah, significant risk to life. I've got a number of cars trying to evacuate people. The [S]tate alert has gone out to evacuate, not to stay and fight.*

³³ Transcript of Proceedings, Private Examination of Mr Wayne Gregson, APM, on 14 February 2012, p.9.

GREGSON: Who's the duty AC?

ELLIS: Ah, Paul Zanetti.

GREGSON: Is he up-to-date?

ELLIS: Yes, yes, yes, [Indistinct.]

GREGSON: Okay, no worries.

ELLIS: And Steve Brown's been aware of everything, as well.

GREGSON: No worries.

ELLIS: Now [Overspeaking.] ...

GREGSON: So, in Bentley it's just a park, is it?

ELLIS: It appears to be a park [Indistinct.] at this stage. It only came in, ooh, 15 minutes ago.

GREGSON: Yep.

ELLIS: At this stage we're trying to get some resources in there policing-wise, but we don't –

GREGSON: Right

ELLIS: -- have any at the moment.

GREGSON: Okay. What about, uhm, the one at Millenden, is that under control?

ELLIS: Ah, that, it was under control. The last update I had was that ah, the water bombers had been in –

GREGSON: Yep.

ELLIS: -- and ah, it's fairly well under control now.

GREGSON: Okay, but the one down south of the river, where's that?

ELLIS: The-

GREGSON: Where there's houses lost?

ELLIS: Ah, Roleystone.

GREGSON: Okay.

ELLIS: Yeah –

GREGSON: All right.

ELLIS: -- between Roleystone, oh, off the Brookton Highway, it looks like the fire started on the highway, so someone's deliberately lit it –

GREGSON: Yep.

ELLIS: -- so we've got the Arson Squad going out there, as well.

GREGSON: Yep.

ELLIS: Uhm, and basically, it's just like uhm, trying to protect people at the moment.

GREGSON: Okay, not a problem; but there's no risk to life or, uhm, in [Indistinct.], in Bentley?

ELLIS: No, not at this stage –

GREGSON: Okay.

ELLIS: -- and it appears to be just a park and it's not far from the Cannington Police Station.

GREGSON: How many houses have been lost in Roleystone?

ELLIS: Ah, two that I've been told of, a number of sheds—

GREGSON: Yep.

ELLIS: -- and, also, there's a large number of houses at risk, and I think it's near Scott Road. Scott Road sort of crosses all this bushland.

GREGSON: Yep.

ELLIS: Uhm [Indistinct.] risk, at risk houses are at the moment.

GREGSON: Okay.

ELLIS: Uhm-

GREGSON: All right.

ELLIS: -- told ah, and none, none of this has been confirmed yet, I've just been sort of second-handing news from people, ah that the FESA water bombers are going to try and get across there too, they've been rediverted over to Brookton [Indistinct.]. Okay?

GREGSON: Okay, mate. Thank you.

ELLIS: You're welcome.

GREGSON: Bye.³⁴

³⁴ Transcript of Telephone Conversation on 6 February 2011, 2:10:40 p.m., between Mr Wayne Gregson, APM, the then Assistant Commissioner Judicial Services, WAPOL, and Inspector Jeffrey Cyril Ellis, WAPOL (Duty Officer at the Police Operations Centre on 6 February 2011) [02738-2011-0192].

[163] Mr Gregson continued in his evidence to say that he telephoned Dr O'Callaghan back and relayed the information he had obtained from Mr Ellis. There clearly was a further telephone call from Mr Gregson to Dr O'Callaghan at 2:13:31 p.m., which lasted for 60 seconds.

[164] Mr Gregson's evidence in relation to that call was as follows.

After that call what did you do?---I rang the [C]ommissioner of [P]olice back and I relayed to him the details of that situation report.

During your communication with the duty officer who was Inspector Ellis, was it not - - - ?---That's correct.

- - - did you make any notes of what he was telling you?

---No.

And during your subsequent call with the [C]ommissioner what did you tell him?---Ostensibly I relayed the details that had been told to me by Inspector Ellis.

Did you make any notes of your conversation with the [C]ommissioner?---No.³⁵

[165] Mr Gregson was asked specifically whether he informed Dr O'Callaghan as to the contents of the call from Mr Ellis. His evidence in relation to that was as follows.

And then following that at 1413 and 31 seconds, a call between you and the [C]ommissioner of 60 seconds' duration?

---That's correct.

Is that also consistent with what you have said about ringing the [C]ommissioner and passing on the information that you had received from Inspector Ellis?---That's correct.

Thank you. As you know, there is a recording of your conversation with Inspector Ellis and I think technology will permit the audio to be played and the transcript displayed at the one time ...

(Audio played)

SENIOR COUNSEL ASSISTING: Does that refresh your memory as to the conversation you had with Inspector Ellis?---Yes.

The duty officer gave you some details of the various fires. In broad terms, did you convey that information in the same detail to the [C]ommissioner?--Yes.

Was there anything that you felt that you didn't need to tell the [C]ommissioner?---No. I mean, I may not have told him absolutely everything but I relayed what I was told by the [P]olice [O]perations [C]entre to the [C]ommissioner of [P]olice in general terms.

³⁵ Transcript of Proceedings, Private Examination of Mr Wayne Gregson, APM, on 14 February 2012, p.9.

There would seem to be some significant pieces of information, particularly in relation to Roleystone.

Could I have the transcript brought back up please ...

On the first page it will assist you to remember that Inspector Ellis told you that Roleystone was a significant fire: "It's burnt out houses" - just in that last passage at the bottom of the page - "and involves a significant risk to life." Were they details that you passed on to the [C]ommissioner?---Yes.

I described them as significant. Do you agree that that information is significant, to put it literally?---Yes.

And something that you thought the [C]ommissioner should know?---Yes.

Then if I can go over to the last page, Inspector Ellis gave you a bit more detail about Roleystone when you asked how many houses had been lost in Roleystone; he told you that there were two and a number of sheds, and then "a large number of houses at risk". Did you pass that information on to the [C]ommissioner?---I believe I did, yes. I can certainly say with some certainty that I passed on that there had been some losses already, although unconfirmed. As I say, I don't remember everything specifically now that I relayed to the [C]ommissioner of [P]olice but what I relayed to the [C]ommissioner of [P]olice was based on the briefing that I'd received from Inspector Ellis.

Did you regard the information that there was a significant risk to life as important?---Yes.

Did you pass that on?---I believe so.

Did you have any expectation then as to what events would follow, particularly in terms of the role of the [C]ommissioner of [P]olice?---The [C]ommissioner of [P]olice left me with the impression that he was intending to make further inquiries, because it was still early days and the losses were unconfirmed. My view was that - my impression was that he intended to get further details.³⁶

[166] In relation to this last answer, as to his impression that Dr O'Callaghan intended to get further details, Mr Gregson was asked by a Commission Manager Investigations during an interview on 6 March 2012 whether he could recall what Dr O'Callaghan actually said to him. His response was as follows.

No. I can't. I can't -- and I've thought about this; ... it was probably, "All right; leave it with me", or something like that, or, "yep, okay, no worries" ...³⁷

[167] Dr O'Callaghan's evidence in relation to the Gregson Conversation differed from that of Mr Gregson. In that context, it was also Dr

³⁶ Transcript of Proceedings, Private Examination of Mr Wayne Gregson, APM, on 14 February 2012, pp.12-14, with Mr Peter Hastings, QC, Senior Counsel Assisting.

³⁷ Record of Interview between Mr Wayne Gregson, APM, and Commission Manager Investigations on 6 March 2012 [02738-2011-0419].

O'Callaghan's evidence that he had not recalled the telephone call until reminded of it on 3 September 2011 by Mr Gregson. Evidence given by Dr O'Callaghan during a private examination conducted by the Commission on 29 February 2012 was as follows.

... on 3 September, as I said, I got a - this is seven months after the event - I had a phone call from Wayne Gregson, who asked me, "Do you remember having a call with me on that day and we had a discussion about a fire," which was a fire that I'd seen from the WACA which I believed was in Bentley. That was the only conversation we had on that day. Sometime after that, and I'd say that was within a number of days, I believe Mr Gregson went to the [P]olice [O]perations [C]entre to listen to the recording of that conversation. I mean, what happened, I would have phoned him at 2.06 pm. He would have phoned somebody at the [P]olice [O]perations [C]entre. In fact, last week for the first time I listened to that tape, so I know what was said on the tape, or on the recording. When he went some days after 3 September to check the tape, he then came back to me and said, "Look, on that tape is some material about the other fires that were going on around Perth, and I relayed them to you." I was very clear that I don't recall that conversation occurring at the WACA on 6 February. I don't recall - I didn't recall it then, and I don't recall it now.³⁸

[168] In relation to the information contained in the call between Mr Gregson and Mr Ellis, Dr O'Callaghan gave the following evidence.

In the light of what Gregson apparently has - not apparently, has said to the Commission that he conveyed this information to you, what do you say about that? ---Well, I did not get that information and I notice from Gregson's phone calls that that's a lot of information to cram into a 60-second phone call that he made back to me at 1416. He did not - or let me put it this way: I did not get that information from that phone call. I did not hear Wayne Gregson tell me much more than the issue of the scrub fire at Bentley. We had a discussion about where it was and he may have mentioned that somebody had the issue under control. Now, can I just give you a bit of an idea about the environment that I was operating in at the time because I've thought about this for quite a while now. How is it that Wayne Gregson claims to have told me something and I claim not to have heard it, or I claim not to have understood it or I claim not to have got it? The first thing is, if you listen to that particular piece of recording you will hear that there's very high ambient wind noise in the background. The [W]eather [B]ureau for that day made it very clear that the winds were 75 to 80 kilometres an hour and that ambient wind noise, and you could - you've actually got here a couple of times "indistinct" in brackets. That wind noise affects, naturally, the audibility of that conversation although it can be heard because there is somebody inside the [P]olice [O]perations [C]entre. When Wayne Gregson rings me back he's at Heathcote, I'm in the middle of the West Australian cricket ground watching a one-day international. So I'm sitting out in 70 to 80 kilometre winds and this is not a test match, this is not some sort of Sheffield Shield [M]atch. This is a one-day international with a hell of a lot of noise going on. Now, it's half possible that some of the information that Wayne Gregson was talking about on that day was

³⁸ Transcript of Proceedings, Private Examination of Dr Karl Joseph O'Callaghan, APM, Commissioner of Police, on 29 February 2012, p.9, with Mr Peter Hastings, QC, Senior Counsel Assisting.

indistinct, inaudible: I didn't get the information. But what I can say and what I've maintained is I did not get the information that's contained in this. The only thing I remember from that phone call and only after being reminded in September was the issue to do with the Bentley scrub fire and something about commanders having it under control ...³⁹

[169] When asked by Senior Counsel Assisting why “[i]f it were the fact that you were having hearing difficulties, wouldn't you have moved to an area where you could have heard from Mr Gregson without interference”, Dr O’Callaghan replied that:

... It's not as simple as that, because to move from where I was would have required a whole raft of people to stand and shift, so people were - had food, they had drinks. I was not at a place where I could just disappear up an alley or into a corridor, so I would have had to get a whole row of people to move. Now, Mr Gregson's phone call only goes for 60 seconds.⁴⁰

[170] The seating in the Prindiville Stand (in the area adjoining the President’s Room) at the WACA is not unduly restrictive. However, the Commission is not aware of the circumstances (that is, number of spectators in the area and their activities) at the time of call which could have affected Dr O’Callaghan’s freedom of movement.

[171] It was necessary for the Commission to consider two distinct issues in relation to the content of the Gregson Conversation:

- (1) firstly, whether Mr Gregson in fact communicated information in relation to the Roleystone Fire in that conversation; and
- (2) if so, whether Dr O’Callaghan heard or appreciated that information.

[172] In that regard there is, of course, no recording of the Gregson Conversation and the content of that conversation, therefore, cannot be determined precisely. Nor is it likely that all of the information provided to Mr Gregson by Mr Ellis was communicated to Dr O’Callaghan by Mr Gregson.

[173] There are three principal reasons for this as outlined below.

- (1) On his own evidence Mr Gregson could not recall everything he relayed to Dr O’Callaghan, and indeed, had his own recollection of the circumstances aided by the recording of the conversation with Mr Ellis.
- (2) Mr Gregson did not take notes of the information provided by Mr Ellis, which contained a number of items of detail.
- (3) While both conversations were relatively brief, the Gregson Conversation, between Mr Gregson and Dr O’Callaghan (which

³⁹ Transcript of Proceedings, Private Examination of Dr Karl Joseph O’Callaghan, APM, Commissioner of Police, on 29 February 2012, p.14, with Mr Peter Hastings, QC, Senior Counsel Assisting.

⁴⁰ *Ibid*, p.19.

lasted 60 seconds) was shorter than the conversation between Mr Gregson and Mr Ellis (which lasted 141 seconds, commencing at 2:10:40 p.m.). It is likely to be the case that less was communicated in the Gregson Conversation than in the conversation between Mr Gregson and Mr Ellis.

[174] In addition, it is clear from the recording of the conversation between Mr Gregson and Mr Ellis that Mr Gregson's initial enquiry related to a fire at Bentley, being the fire about which Dr O'Callaghan had requested information. This is consistent with Dr O'Callaghan's evidence as to the circumstances of his enquiry.

... I contacted him because I knew he lived in ... [the Perth Hills]. I wondered if he could see the fire that I could see from where he lived because I've been to his house. He's got a good view of the city and he's got a good view down towards Perth, and what I said is, "Can you see the fire down near the WACA from where you are?" not - I didn't ring him to find out whether he was safe.⁴¹

[175] Accordingly, in the opinion of the Commission, it is likely that if any information in relation to the Roleystone Fire was communicated by Mr Gregson in the Gregson Conversation, it would have been less extensive than that provided by Mr Ellis.

[176] Nevertheless, in the opinion of the Commission, it is highly unlikely that Mr Gregson would not have communicated any information about the Roleystone Fire in the Gregson Conversation. In particular:

- (1) the information was obviously important, including the fact that it included "significant risk to life" and loss of property;
- (2) it is apparent from the recording that Mr Gregson took an active interest in the information in relation to the Roleystone Fire (enquiring, for example, twice in relation to the loss of houses);
- (3) the only reason for Mr Gregson's call to Mr Ellis was to obtain information for Dr O'Callaghan; and
- (4) a very short period of time elapsed between the telephone conversation between Mr Gregson and Mr Ellis and the subsequent call to Dr O'Callaghan, and indeed, given the timing and duration of the telephone calls, the most likely conclusion is that Mr Gregson called Dr O'Callaghan immediately after the call to Mr Ellis.

[177] In those circumstances, in the opinion of the Commission, it would be extraordinary for Mr Gregson, having been informed of additional fires, including a significant fire in Roleystone, to have said nothing about it to Dr O'Callaghan. There was no reason for him not to include such information and obvious reasons why he should do so.

⁴¹ Transcript of Proceedings, Private Examination of Dr Karl Joseph O'Callaghan, APM, Commissioner of Police, on 29 February 2012, p.12, with Mr Peter Hastings, QC, Senior Counsel Assisting.

[178] Accordingly, the Commission is satisfied, on the balance of probabilities, that Mr Gregson in fact communicated some information in relation to the Roleystone Fire during the Gregson Conversation. While it is not possible to conclude precisely what was communicated, in the Commission's view it would have included at least that there was a significant fire (in addition to the fire at Bentley) that was being attended to by the authorities.

[179] Indeed, Dr O'Callaghan, in his evidence to the Commission did not discount the possibility that Mr Gregson provided information in relation to the Roleystone Fire during the Gregson Conversation.

[180] During a private examination conducted by the Commission on 1 May 2012, for example, Dr O'Callaghan gave the following evidence in answer to questions from his Legal Advisor.

... Did it cross your mind that you may indeed have to suggest that Mr Gregson was either wrong or lying, or how does it work?---Well I guess I've always maintained and still maintain that I did not get the information about the Roleystone fires in any phone call from Mr Gregson at any time ever, particularly on 6 February 2011. That only leads to two possibilities in my mind: (1) that he is not telling the truth, or (2) that there has been some other thing - - -

Can I just stop you there. I don't want now, it [sic: I] want when you were thinking about it and putting in what you put, so that led to the two possibilities?---That led to the two possibilities.

Thank you?---And in deference to Mr Gregson and in respect for him, one other explanation, apart from the fact that the truth has not been told, is that I didn't get the communication somehow or I misheard it or it was obscured or something like that, and in working through that thought process I offered to the Commission at my original evidence on 29 February a possibility that something else could have happened.⁴²

[181] This exchange highlights the second distinct issue arising in relation to the content of the Gregson Conversation, that is, whether Dr O'Callaghan heard or appreciated the information provided in relation to the Roleystone Fire.

[182] In that regard, Dr O'Callaghan in his evidence to the Commission identified a number of possible explanations for why he may not have heard or appreciated the information communicated by Mr Gregson. Some of those have been referred to in the evidence reproduced above, including:

- (1) ambient noise from wind and crowd noise at the cricket ground; and
- (2) the effect of winds on mobile telephone reception and transmission.

⁴² Transcript of Proceedings, Private Examination of Dr Karl Joseph O'Callaghan, APM, Commissioner of Police, on 1 May 2012, p.87.

[183] It must be stressed (as reflected in the evidence reproduced above) that, while mooted as possible explanations for not having received information from Mr Gregson, Dr O'Callaghan did not profess to have a particular recollection of experiencing difficulties during communications with Mr Gregson. Rather the matters he identified were possibilities he had considered in light of the Commission investigation, as is apparent from the following evidence given by Dr O'Callaghan.

I take it from what you have just said, and also from the parts of the transcript that I have taken you to, that it is not your evidence that you recall any particular difficulty with audibility or effect of the wind conditions but simply that you identify that as being one of the possibilities for why, if he did convey the information, you didn't receive it?---Well, I do - I'm trying to work out whether I know this now or know this since but I do definitely recall there was a lot of wind noise on the day. It was a very windy day, it was a high fire danger day, but I can't say specifically what it was like now over a year later.

And that those matters - I'm not being critical in asking the question in this way. Those matters that you raise as to the things which may have impacted on your receipt of the information are matters which you have considered may be an explanation, not matters that you recall at the time being a particular problem?---I think I said that in my evidence before, that, you know, one possible explanation for this could be exactly that.⁴³

[184] Mr Gregson, in information provided to a Commission Manager Investigations during an interview on 6 March 2012, stated that he had no difficulty with reception during the telephone conversations with Dr O'Callaghan, although, as he stated: "I wasn't at his end of the phone".⁴⁴

[185] Similarly, the wind speeds recorded at the time of the Gregson Conversation by the Bureau of Meteorology (BOM) at local Weather Stations were not as high as those described by Dr O'Callaghan in his evidence (that is, 75–80 kilometres per hour). Average wind speed on 6 February 2011 measured by BOM at the Perth Metropolitan Weather Station (PMWS) in Mount Lawley (the Weather Station located closest to the WACA), for example, was between 21 and 22 kilometres per hour at the time of the Gregson conversation (2:13:31 p.m. to 2:14:31 p.m.), with the highest wind speed being between 28 and 30 kilometres per hour. At the same time the average wind speed measured by BOM at the Perth Airport Weather Station was between 39 and 44 kilometres per hour, with the highest wind speed being 50 kilometres per hour. Although in the Commission's view the relevance of wind speed is doubtful, it is possible that the wind speeds, and the speeds of any wind gusts, at the WACA differed from those recorded by the Bureau of Meteorology at the Mount Lawley and Perth Airport Weather Stations. The Commission did not undertake an analysis of the likely impact that orientation of the Prindiville

⁴³ Transcript of Proceedings, Private Examination of Dr Karl Joseph O'Callaghan, APM, Commissioner of Police, on 1 May 2012, p.10.

⁴⁴ Record of Interview between Mr Wayne Gregson, APM, and Commission Manager Investigations on 6 March 2012 [02738-2011-0419].

Stand at the WACA, and other factors (such as height above ground), may have had on wind speed and direction at the time of the Gregson conversation to determine whether or not this was the case.

- [186] Nevertheless, in the opinion of the Commission, ultimately any attempt to determine, after the events, the likelihood that any of the explanations given by Dr O'Callaghan (as to why he could not adequately hear or appreciate the information relayed by Mr Gregson during the telephone call on 6 February 2011 at 2:13:31 p.m.) are in fact correct is likely to be unproductive. The circumstances of the telephone conversation cannot be recreated, either as to the precise words used, the order in which information was conveyed or the nature or duration of any interference during the call. What can be said is that they remain possible explanations for why Dr O'Callaghan did not receive the information (if that be the case).
- [187] One matter which may impact upon the assessment as to what information Dr O'Callaghan did in fact receive from Mr Gregson is the evidence provided by Mr Butcher, during a private examination conducted by the Commission on 13 February 2012, in relation to a telephone call that he made to Dr O'Callaghan at 2.28:28 p.m. on 6 February 2011, that is, the call in which Dr O'Callaghan indicated he was first advised of fires and the potential for an SECG to be called later in the day.
- [188] There is no question as to the fact of this telephone call at 2.28 p.m. on 6 February 2011. Again, this telephone call was relatively brief, lasting, according to the telephone records, 68 seconds.
- [189] The evidence given by Mr Butcher during the private examination on 13 February 2011 in relation to his contact with Dr O'Callaghan at 2.28:28 p.m. on 6 February 2011 was as follows.

If I could take you specifically to your call to Karl O'Callaghan at 1428 or 2.28[:28 p.m.], can you tell the Commission in detail what you told the [C]ommissioner of [P]olice in relation to what fires were burning at that stage?---I only spoke to the [C]ommissioner of [P]olice about the Roleystone [F]ire.

Yes?---My - my comments to him were that there was a fire at Roleystone, that the details were a bit sketchy at that stage but houses would or - sorry, have or would be lost, that there was a high likelihood of the need for a state emergency coordination group meeting in the afternoon, and that - also that he would be contacted by FESA throughout the afternoon with further details.

Further details in relation to an SECG?---In regard to the fire and potential SECG.

Did the [C]ommissioner of [P]olice have an existing knowledge of the fires at that stage, at the time you called him?---The [C]ommissioner of [P]olice advised me that he could see the smoke from his vantage point and that he

was - had already been made aware of the fires by people from within his own organisation.⁴⁵

(emphasis added)

[190] Dr O'Callaghan, in his evidence to the Commission, agreed with certain aspects of Mr Butcher's account of what was discussed during the 2:28:28 p.m. telephone call on 6 February 2011. For example, evidence given by Dr O'Callaghan during a private examination on 1 May 2012.

... My question was about when he made the phone call did he convey that information, that is, that there was a likelihood for the need for an SEG coordination group meeting in the afternoon and that you would be contacted by FESA with further details in relation to the first in the SECG?-- He certainly said that - that there were sketchy details of a fire. We did discuss the possibility of an SECG. He did say that someone would contact me later on in the afternoon to give me an update, and the next thing I heard - actually the next phone call was I made one to him after 4.30 [at precisely 4:40:40 p.m. (from CCRs)].⁴⁶

(emphasis added)

[191] However, Dr O'Callaghan also disagreed with certain aspects of Mr Butcher's account.

... I don't like the words "high likelihood"; I think that's an inaccurate interpretation. I don't like the fact that he's suggested that houses "would be" lost because one of the points I made when I went to the SECG, which was at 6.30 and I've pointed this out, was that I didn't even know any houses that had been lost at that stage and the [P]remier was sitting next to me when I asked the question; and I put that in my evidence previously too, so I don't like either of those statements in there and don't agree with them.⁴⁷

[192] Given the passage of time and the subsequent events, these differences are, in the opinion of the Commission, not significant and are consistent with differing recollections of the same conversation. In relation to the first matter, the accounts are consistent in as much as the potential for an SECG meeting was definitely discussed; the difference is only as to the emphasis on the likelihood of that occurring. Secondly, regardless of precisely when Dr O'Callaghan was aware of when houses had been lost (whether at 4:33:38 p.m. or 6.30 p.m.), the fact that he only became aware later in the day is not inconsistent with advice received earlier in the day that houses "would" be lost.

⁴⁵ Transcript of Proceedings, Private Examination of Mr Richard John Butcher, Executive Director Emergency Management Western Australia, Fire and Emergency Services Authority of Western Australia, on 13 February 2012, p.52.

⁴⁶ Transcript of Proceedings, Private Examination of Dr Karl Joseph O'Callaghan, APM, Commissioner of Police, on 1 May 2012, p.13.

⁴⁷ *Ibid*, p.14.

- [193] Both accounts are also consistent in confirming that Dr O'Callaghan was advised that he would be contacted by FESA throughout the afternoon with further details in relation to the fire and potential SECG.
- [194] As noted above (refer [189] above), Mr Butcher also gave evidence that Dr O'Callaghan advised him that "he [Dr O'Callaghan] could see the smoke from his vantage point and that he was – had already been made aware of the fires by people from within his own organisation". Although Mr Butcher referred to "fires" during that part of his evidence, he stated specifically in earlier evidence that he "only spoke to the [C]ommissioner of [P]olice about the Roleystone [F]ire" (refer [189] above).
- [195] This is clarified by Mr Butcher in response to a question from Counsel Assisting.

You said "fires". Does that suggest that there was more than one fire?---I'm - I've used "fires" but I'm unaware as to whether he was aware of - because we spoke only about Roleystone so I'm unaware if he knew of the Red Hill fires.

So didn't mention any other fires besides Roleystone to you?---Not to my recollection.⁴⁸

- [196] Dr O'Callaghan gave evidence to the Commission during a private examination on 29 February 2012, in response to a question from Senior Counsel Assisting, that it was not correct that when Mr Butcher contacted him he advised Mr Butcher that he was aware of the fire.

... the allegation, if I can put it that way, was that when presumably Mr Butcher contacted you, you advised that you were aware of the fires. Did you regard that as a correct statement?---No. No ...⁴⁹

- [197] In the opinion of the Commission Mr Butcher's evidence is to be preferred as to the general substance of this matter, namely, that Dr O'Callaghan referred to seeing smoke and having spoken to people within his own organisation (that is, leaving aside the issue of the detail of the smoke or the fire being discussed).
- [198] In that regard, it is correct that Dr O'Callaghan could see smoke from his vantage point (*albeit* that Dr O'Callaghan identified that as the smoke in the Bentley area). In addition, there is no doubt that Dr O'Callaghan had, shortly prior (approximately 15 minutes) to the call from Mr Butcher at 2:28:28 p.m. discussed the issue of fire with a person from his own organisation (that is, Mr Gregson at 2:13:31 p.m.). It would be an unlikely coincidence, in the opinion of the Commission, for Mr Butcher to be mistaken about references to such matters.

⁴⁸ Transcript of Proceedings, Private Examination of Mr Richard John Butcher, Executive Director Emergency Management Western Australia, Fire and Emergency Services Authority of Western Australia, on 13 February 2012, p.52.

⁴⁹ Transcript of Proceedings, Private Examination of Dr Karl Joseph O'Callaghan, APM, Commissioner of Police, on 29 February 2012, p.31, with Mr Peter Hastings, QC, Senior Counsel Assisting.

[199] Similarly, it would, in the opinion of the Commission, not be surprising for Dr O'Callaghan, in the context of a telephone call in relation to a fire, to make reference to the fact that he could see smoke or that he had already sought and received information from his organisation in relation to a fire.

[200] Accordingly, on the balance of probabilities, the Commission is satisfied that Dr O'Callaghan, in his telephone conversation with Mr Butcher at 2:28:28 p.m., did make reference to being able to see smoke and made reference to his telephone conversation with Mr Gregson.

[201] The significance to be attached to that conclusion, however, is another matter. Part of the difficulty with the telephone call from Mr Butcher at 2:28:28 p.m. is the generality with which it was expressed, that is, it simply referred to the existence of a fire, in relation to which details were "sketchy" (refer [189]-[190] above), and the potential for an SECG meeting later in the day. Indeed, while the events which occurred later in the day make clear that the telephone call was in relation to a fire at Roleystone (and all witnesses have referred to the telephone call in that context, although Dr O'Callaghan may not have understood that to be the case at the time of the call on 6 February 2011), that is not necessarily reflective of the actual content of that telephone call.

[202] In evidence to the Commission during a private examination, for example, in the context of later discussions between Mr Butcher and Dr O'Callaghan, Mr Butcher stated the following.

And so I went through and said that the telephone call at 14.28 that I advised the [C]ommissioner that houses may - or have or would be lost.

Yes?--And that he would be contacted later by FESA and that an SECG was likely, and it was in that context about an SECG being likely.

*Did you tell him where the fires were?--No, I don't - I can't recall us talking about it but I think it was obvious that we're talking about the Roleystone [F]ire.*⁵⁰

(emphasis added)

[203] This evidence provides, in the opinion of the Commission, a further illustration of the generality of the telephone call at 2:28:28 p.m. No doubt it was obvious later in the day (and is obvious now) that the telephone call at 2:28:28 p.m. related to the Roleystone Fire. However, if neither person during the telephone call actually referred to Roleystone, it is not apparent how it could have been "obvious" at 2:28:28 p.m. when Mr Butcher first made contact with Dr O'Callaghan.

[204] Therefore, in the Commission's assessment, it is difficult to reach any clear conclusion as to the significance of Dr O'Callaghan referring to advice from his own organisation.

⁵⁰ Transcript of Proceedings, Private Examination of Mr Richard John Butcher, Executive Director Emergency Management Western Australia, Fire and Emergency Services Authority of Western Australia, on 13 February 2012, p.67.

2.7 Events of 6 February 2011 after 2:30 p.m.

[205] It is clear that, following the telephone call from Mr Butcher at 2:28:28 p.m. (which concluded at 2:29:36 p.m.), there was no further contact with or involvement by Dr O'Callaghan in relation to the Roleystone Fire until 4:33:38 p.m., when he received a telephone call from Mr Dawson, Deputy Commissioner, WA POL.

[206] Mr Dawson, during a private examination conducted by the Commission on 13 February 2012, gave evidence, as follows, that he telephoned Dr O'Callaghan at 4:33:38 p.m. after being notified about the Roleystone Fire at around 4:20 p.m. by Mr Gary John Budge, APM, Assistant Commissioner Metropolitan Region.

Did you ring the [C]ommissioner?---Yes, I did.

Did the [C]ommissioner - did you know where the [C]ommissioner was at that stage?---Not until he told me.

What did he tell you?---The [C]ommissioner told me that he was at the WACA ground, at the cricket, and when I outlined to him the nature of the information I had just got from Gary Budge that there were media reports of up to 40 homes destroyed, the [C]ommissioner told me he could see smoke in the hills and I relayed that the fire was being widely reported in the media. I said the situation was serious. There was some discussion about some other fires in which I said there had been some discussion I'd had earlier in the day with Assistant Commissioner Duane Bell regarding FESA and their coordination, or lack of, regarding sending our liaison home at 0600 hours that morning, a Sergeant Toppender, and I recall writing that down at the time or thereafter because I felt that was an important matter given the nature of the reports that were coming through that our [L]iaison [O]fficer had been sent away from FESA. So to the best of my recollection I told the [C]ommissioner of that issue at the time of the initial phone call but I did stress to him that we needed to activate an SECG. The main concern was [E]mergency management coordination. I mentioned it was like the Victorian [B]ushfire emergency and I asked that he contact Jo Harrison-Ward and convene an SECG.

Did the [C]ommissioner say that he was aware of the fires at that stage?---I recall him saying that he could see smoke. I can't recall him responding to my initial call about his awareness other than saying he could see smoke from the WACA.

Did you discuss whether he had been advised by anybody else about the fires prior to your call?---I don't recall that discussion at all, no.

Did the [C]ommissioner indicate what he would be doing during that call after you advised him about - - -?---Yes, he did. We had a discussion over the SECG. There had been some history between - I'm actually not saying what - the conversation we had. I'm explaining why I said it. There had been some history between WA POL and FESA over locations of where these meetings should take place. I specifically recall asking the [C]ommissioner to have the meeting at the Leederville [S]tate [C]oordination [C]entre and I suggested - I think we had a brief discussion over what time. I suggested at 1800, 6 pm, and that was really the

substance of what we actually said to each other. I do remember the [C]ommissioner - because I actually said - I was actually coincidentally at police headquarters at the time. By the time I had made these phone calls I had arrived at [P]olice [H]eadquarters, and I remember him saying, "Well, I'll come over to [H]eadquarters and we'll go to the meeting together".⁵¹

[207] Mr Dawson made a contemporaneous Journal Entry of his telephone conversation with Dr O'Callaghan, between 4:33:38 p.m. and 4:40:19 p.m. (that is, 6 minutes and 41 seconds in length) on 6 February 2011, which reads as follows.

TPC [Telephone Call] to Commissioner O'Callaghan — sitrep on Gidgegannup and Roleystone [F]ires. Main concern re Emergency management and coordination re fires — particularly in open source reports of up to 40 homes destroyed — Commissioner will liaise with CEO FESA J Harrison-Ward.⁵²

[208] Dr O'Callaghan's evidence in relation to that telephone call was as follows.

What was the additional information that you received which in the end caused you to summons a [S]tate [E]mergency [C]oordination [G]roup?--- Well Chris Dawson when he called me at 4.33 said they were - and I think the term he used was that there was open source reports, and I don't quite know what he meant by that, but media open source reports that some homes may have been lost, up to - I can't remember what number he said, but up to a certain number of homes might be lost. What's really interesting in this, and I think it's interesting for me to put the point forward, is when I went to the SECG one of the first questions I asked is, "Is there any confirmation that any property has been lost"? The [P]remier was at that particular meeting and so was the [P]olice [M]inister, and the [P]remier looked at me as if I had two heads and I was actually embarrassed by the fact that I'd asked the question. What it - what it means to me is I still didn't have any confirmed reports of property loss when I turned up to the SECG at 1830, and in fact Craig Haynes [sic: Hynes] and the [P]remier answered that question for me. I would not have asked that question in front of the [P]remier and embarrassed myself if I already knew there was substantial property loss.⁵³

[209] In light of Mr Dawson's contemporaneous Journal Entry, in the opinion of the Commission, Dr O'Callaghan's evidence as to being told that a certain number of homes may have been lost is a reference to Mr Dawson's evidence (refer [206] above) "that there were media reports of up to 40 homes destroyed".

[210] A series of telephone calls and SMS (Short Message (or Messaging) Service) messages were then made and received by Dr O'Callaghan

⁵¹ Transcript of Proceedings, Private Examination of Mr Christopher John Dawson, APM, Deputy Commissioner, Western Australia Police, on 13 February 2012, pp.26-27.

⁵² Journal Entry by Mr Christopher John Dawson, APM, Deputy Commissioner, Western Australia Police [02738-2011-0301].

⁵³ Transcript of Proceedings, Private Examination of Dr Karl Joseph O'Callaghan, APM, Commissioner of Police, on 29 February 2012, pp.22-23, with Mr Peter Hastings, QC, Senior Counsel Assisting.

between 4:40:40 p.m. and 6:16:02 p.m. on 6 February 2011, which are summarised on the following table:

Mobile Telephone Call Charge Records for Dr O'Callaghan

Call Start Time	Call End Time	Call Duration (Seconds)	Direction	Other Party Name
16:40:40	16:40:58	18	Outgoing	John BUTCHER
16:41:48	16:44:23	215	Outgoing	Jo HARRISON-WARD
16:43:09	16:43:34	25	Incoming - Diverted to 101.	John BUTCHER
16:43:35	----	SMS	Incoming	Telstra MessageBank.
16:45:38	16:45:53	15	Outgoing	Chris DAWSON
16:47:23	16:48:19	56	Incoming	Chris DAWSON
16:49:06	16:49:27	21	Outgoing	Telstra MessageBank.
16:55:03	16:55:18	15	Incoming - Diverted to 101.	FESA
16:55:21	----	SMS	Incoming	Telstra MessageBank.
16:55:44	16:55:47	SMS (2)	Incoming	Jo HARRISON-WARD
16:59:23	17:00:13	50	Outgoing	Jo HARRISON-WARD
17:00:58	17:01:14	16	Outgoing	Telstra MessageBank
17:01:30	17:01:37	7	Outgoing	John BUTCHER
17:02:00	17:02:37	37	Outgoing	Chris DAWSON
17:02:50	17:03:22	32	Outgoing	John BUTCHER
17:34:23	17:34:27	4	Incoming - Diverted to 101.	Family Member.
17:38:13	17:39:02	49	Outgoing	Family Member.
17:45:58	14:46:18	20	Incoming - Diverted to 101.	Jo HARRISON-WARD
17:46:21	----	SMS	Incoming	Telstra MessageBank.
17:49:20	17:49:22	SMS (2)	Incoming	Jo HARRISON-WARD
17:52:10	17:53:29	79	Outgoing	Jo HARRISON-WARD
18:15:50	18:16:02	12	Outgoing	Jo HARRISON-WARD

- [211] The first telephone call, from Dr O'Callaghan to Mr Butcher at 4:40:40 p.m., in the Commission's assessment, was not a substantive conversation but a message to message bank.
- [212] The telephone call to Ms Harrison-Ward at 4:41:48 p.m. was a more substantive call. Ms Harrison-Ward's evidence during a private examination conducted by the Commission on 30 April 2012 in relation to that conversation was as follows.

Do you recall that telephone call?---Yes, I do.

As best as you can, can you just tell the Commission who started the call and what was said between you and Mr O'Callaghan?---The [C]ommissioner of [P]olice had called me. I was on a previous phone call so had - had hung up. Karl's first one was about the fires, "We need to have an SECG". I asked him whether or not John Butcher had briefed him and he said yes, he had. I was - at that time I was just sitting at the lights on the corner of Irwin Street and Hay Street and I said, "Look, just let me

get in the office. I'm just about in the office. I'll find out what time the ... [Operational Area Support Group] is going to finish and I'll give you a call back". He wanted to have an SECG, wanted to set a time for that. Because I'd been getting the information in and I really had the fears that it was, I made the statement that if we continued to lose houses the way we were we'd be having a [S]tate [D]isaster [C]ouncil meeting.

What did he say to that?---He said that he didn't really care what we called it. We just had to have a meeting and he needed to tick the box.

Did you say anything in response to that?---Yes. I was quite taken aback so I said, "I beg your pardon" and he didn't repeat that again. He just said we need to have a meeting.

And then what happened?---Then I said - "I'm just" - again I repeated, "I'm just about in the office. Let me find out what time the operations area support group [sic: Operational Area Support Group] would finish and we would convene a meeting straight after that".

Right. So was a time referred - other than him saying he wanted the [S]tate [E]mergency [C]oordination [G]roup meeting, was there a time referred to at that point?---Not - not at that conversation.⁵⁴

[213] Dr O'Callaghan's evidence during a private examination conducted by the Commission on 1 May 2012 in relation to the above evidence by Ms Harrison-Ward was as follows.

She says, "Karl's first one was about the fires: 'We need to have an SECG.' I asked" - do you recall saying that to her?---Yes, and that was after my phone call with Deputy Commissioner Dawson that we had that - we had that conversation.

Was that the first thing that you, in effect, raised with her when you got on that call, that you needed an SEC [sic: SECG]?---I don't recall, you know, the details of that; you know, the order. So that certainly would have been discussed.

"I asked him whether or not John Butcher had briefed him and he said yes, he had". Do you recall - - -?---I don't recall the question but I could have interpreted that or she could have in fact interpreted that as "he called you", which he had done at 2.28.

So you don't discount that that exchange, that you had had contact with John Butcher before - - -?---Yeah. I think it's a bit rich to call it a briefing, but.

Then she said she was at the corner of the lights. She said, "Look, let me just get to the office. I'm about to get into the office. I'll find out what time the ...". He wanted to have an SECG, wanted to set a time for that?---Yep.

Can you comment on that part of the conversation; namely, that she said she'll get back to you and you said you wanted to have an SECG?---Not

⁵⁴ Transcript of Proceedings, Private Examination of Ms Josephine Charlotte Harrison-Ward, Management Consultant, Public Sector Commission, on 30 April 2012, p.35. At the relevant time (that is, 6 February 2011) Ms Harrison-Ward was Chief Executive Officer of the Fire and Emergency Services Authority of Western Australia.

really. We discussed an SECG certainly, but I don't - I don't know the machinations or where she was or what she was doing at the time.

Right. Do you remember her making a statement that if we continue to lose houses, we'd be having a [S]tate [D]isaster [C]ouncil meeting?---No, and what makes me nervous about that is I still raised the issue when I got to the meeting in front of the [P]remier that had we - have we lost any houses. I mean, it would seem an incongruent thing to do, to sit next to the [P]remier as the [C]hair of the [S]tate [E]mergency [M]anagement [C]ommittee, "Have we lost any houses"? when I'd already been told that we had. Why would I ask a question like that?

One explanation for that can I suggest that has been referred to, at least by one other, is that in situations like this there can often be quite a divergence between what reports are coming in as to what has happened and what has in fact been confirmed as having happened. Do you understand what I mean by that? That it might be that you could ask whether or not there has been any confirmed loss of houses, even though there might have been an unconfirmed report before?---Could be. Look, I certainly - my recollection of that phone call was really about the SECG, the organising of it and the timing of it.

Okay. She was then asked, "What did he" - that is you - "say to that"? and her answer was:

He said he didn't really care what we called it, we just had to have a meeting and he needed to tick the box.

Did you say anything in response to that?---Yes, I was quite taken aback so I said, "I beg your pardon"? He didn't repeat that again, he just said we needed to have a meeting -

and then she said she's just about in the office. Do you recall any statements or exchange along those lines?---No. I certainly said we needed to have a meeting. That came out of a long conversation I had with the [D]eputy [C]ommissioner. Both of us were concerned enough at that stage to call the SECG.

Could you have said something such as, "We just have to have a meeting. I don't care what it's called"?---No. I know what it's called. It's called an SECG. It's always called an SECG.⁵⁵

[214] In relation to Ms Harrison-Ward's evidence, on the balance of probabilities, the Commission is satisfied that Ms Harrison-Ward did refer to houses being lost and to the possibility of an SDC meeting. In that regard the following points are made by the Commission.

- (1) As Dr O'Callaghan acknowledged, there is no necessary inconsistency about being advised of losses of homes and later [at the SECG meeting at 6:30 p.m. on 6 February 2011] seeking confirmation of that fact. Ms Harrison-Ward when asked during a private examination about whether she recalled the question being

⁵⁵ Transcript of Proceedings, Private Examination of Dr Karl Joseph O'Callaghan, APM, Commissioner of Police, on 1 May 2012, pp.15-17.

asked by Dr O'Callaghan at the SECG meeting, that is, "Is there any confirmation that any property has been lost"? (refer [208] above), gave evidence as follows.

Not that I recall, but even if he had I wouldn't have taken that as a strange question because when you've got such a massive fire going on quite often you have to wait for 24 hours later to confirm exactly what has happened.

Yes?---So I wouldn't have taken it as odd.⁵⁶

(2) An SDC meeting being discussed between Dr O'Callaghan and Ms Harrison-Ward is also supported by the recollection of and a Journal Entry (refer below) made by Mr Dawson following a telephone conversation with Dr O'Callaghan (which according to the telephone records was at 5:02 p.m. and outgoing from Dr O'Callaghan to Mr Dawson).

TPC:ex Commissioner O'Callaghan. Advised he had discussed the fire situation with CEO FESA J. Harrison-Ward. (received earlier TPC ex J. Butcher). SDC meeting scheduled @ FESA [H]ouse 1830. Will attend [P]olice HQ.

(3) It is further supported by evidence given by Dr O'Callaghan during a private examination on 29 February 2012 when responding to questions from Senior Counsel Assisting about telephone calls made and received by him on 6 February 2011 in relation to organising an SECG meeting, namely:

... I also remember a conversation, although I can't remember the sequence of it, with the executive officer, sorry, the CEO, Jo Harrison-Ward, about possibly calling a state disaster council.⁵⁷

[215] Dr O'Callaghan later said that the matter was not raised during a telephone conversation on 6 February 2012 (between 4:41:48 p.m. and 4:44:23 p.m.), a view of course not shared by Ms Harrison-Ward. Ultimately, however, in the opinion of the Commission, little turns on the precise terms of the telephone conversations between Dr O'Callaghan and Ms Harrison-Ward. Clearly, by 5:00 p.m., however, an SECG meeting had been arranged for 6:30 p.m.

[216] As noted earlier, the records of Dr O'Callaghan's "Swipe Card" indicate that he entered WAPOL Headquarters, Adelaide Terrace, East Perth, at 6:00 p.m. Dr O'Callaghan's explanation, during a private examination

⁵⁶ Transcript of Proceedings, Private Examination of Ms Josephine Charlotte Harrison-Ward, Management Consultant, Public Sector Commission, on 30 April 2012, p.45. At the relevant time (that is, 6 February 2011) Ms Harrison-Ward was Chief Executive Officer of the Fire and Emergency Services Authority of Western Australia.

⁵⁷ Transcript of Proceedings, Private Examination of Dr Karl Joseph O'Callaghan, APM, Commissioner of Police, on 29 February 2012, pp.33-34, with Mr Peter Hastings, QC, Senior Counsel Assisting.

conducted by the Commission on 29 February 2012, in relation to his statement to the media that he left shortly after the telephone call from Mr Dawson (at 4:40:19 p.m.) was as follows.

Do you recall when it was that you did leave the WACA?---Well, I thought - I thought it was sometime around about after - at about 5.00 or after 5 o'clock when I completely cleared the WACA. My swipe card access actually shows that I went through the gates at [P]olice [H]eadquarters at 6.00. So there were some other things going on in terms of "SMSing" and phone calls in that time, but I certainly wasn't watching the cricket at that time.

If we go please back to the CCR [Call Charge Records] ...

Do they assist you recalling when it was that you would have left [sic: left] the WACA?---Well, look, I made a call at 1702 to Chris Dawson, I made a call at 1702 to John Butcher and then I made a call at 1734 to [an] immediate family member Now, I think it's probably worth explaining one other aspect of what was going on that afternoon, which [is] not in the public domain, because it will to some degree explain why I was actually so late moving away.

...

There are quite a few SMSs shown there?---All right, let me talk about them ... [Dr O'Callaghan gave evidence in relation to a personal issue involving a close member of his family to explain some of the CCRs (that is, calls and SMSs) for 6 February 2011.]

Yes. Yes, I think this arose because I was asking you whether these records would assist you in specifying when it was that you left the WACA?---Well, again, I spoke to Jo Harrison-Ward at 1745, so I was still trying to sort things out then, 1746, something goes to [m]essage [b]ank, 1749, Jo Harrison-Ward again, so it would have been sometime, you know, sometime between 5.00, 5.30, 5.40, I've left the WACA, left the vicinity of the WACA, let's put it that way. I wasn't in the WACA, but left the vicinity of the WACA to go back to [P]olice [H]eadquarters.

If you go to the next page please, the call at 1752.10, there's a further call to Jo Harrison-Ward of 79 seconds?---Mm.

Does that jog your memory as to where you were when that conversation took place?---No, but if you look at the call location name it says "Waterloo" and I see that the one underneath says "Adelaide Terrace West", so I'm assuming that the phone towers had changed between 1752 and 1815, which would also coincide with my swipe card access to [P]olice [H]eadquarters at 1800; so it seems to me - I mean, I can't guarantee that the phone towers didn't change, but given that most of the calls have come off the "Waterloo" phone tower all afternoon, the last one to do that is at 1752, and then the next one that isn't there is at 1815, so somewhere in that gap I go to [P]olice [H]eadquarters, or I change my location, so the phone goes to a different tower.

Was there any reason why you stayed near the WACA and didn't go back to [H]eadquarters across the road in order to do whatever you had to do?---

No, I think it was just preoccupation with what [was] going on probably, and I lost track of time.

...

SENIOR COUNSEL ASSISTING: *Commissioner, can I go back then to the response that was sent to Mr DeCeglie on 26 August 2011 to the effect that you were at the WACA between 1100 hours and 1640 hours on 6 February?---Yes.*

...

Thank you ... at the risk of going over the same ground again, do you see in the second paragraph the response:

The [C]ommissioner did request the meeting to start at 6.30 pm but this was because he was not advised of the threat level of the fire until 4.30 pm and did not arrive back at [P]olice [H]eadquarters until 4.40 to 4.45 pm?

---Which is consistent with what we told "The Sunday Times" based on my recollection, yes.

But now something that seems to be inaccurate to you?---Yes, it is. It's - it's true that I - well the question of course is what did I recall from that day and it's - and I went through the doors of [P]olice [H]eadquarters, and I didn't realise this until January, until 6.00, but what happened on that day - there was a lot of stuff going on, a lot of phone calls being made, both business phone calls and private SMSs as I have already explained, and in the intervening seven months I got that wrong.⁵⁸

[217] The effect of this evidence is dealt with below.

⁵⁸ Transcript of Proceedings, Private Examination of Dr Karl Joseph O'Callaghan, APM, Commissioner of Police, on 29 February 2012, pp.37-42, with Mr Peter Hastings, QC, Senior Counsel Assisting.

CHAPTER THREE

ASSESSMENT, OPINIONS AND CONCLUSION

3.1 Introduction

[218] As mentioned previously, the general scope and purpose of the Commission investigation was amended at various times during the course of the investigation, and that for the purpose of this report it is sufficient to identify the scope and purpose of the investigation by reference to that which applied during the examinations of 28 and 29 February 2012, and 30 April 2012, which is outlined below.

To determine whether any public officer may have engaged in misconduct or serious misconduct in relation to evidence given, material provided or statements made about the Perth Hills Bushfires of 6 February 2011, to any Inquiry thereinto, the media, or in relation to any other function in their capacity as a public officer.

[219] As is apparent from the scope and purpose, the investigation was concerned with the provision of evidence, material and statements relating to the Perth Hills Bushfires, and in particular whether that evidence, material and those statements were false or misleading in such a way as to fall within the definition of either “serious misconduct” pursuant to section 3 of the CCC Act or “misconduct” pursuant to section 4 of the CCC Act.

[220] In this chapter assessments are made as to whether or not an opinion can be formed by the Commission that Dr O’Callaghan, as a public officer, engaged in either misconduct or serious misconduct in relation to the Perth Hills Bushfires of 6 February 2011 by:

- (1) giving false or misleading evidence on 14 March 2011 to the Keelty Inquiry by intentionally withholding evidence of the Gregson Conversation;
- (2) making false or misleading statements to the media by intentionally withholding evidence of the Gregson Conversation;
- (3) making false or misleading statements to the media by indicating that he left the WACA to return to WAPOL Headquarters, Adelaide Terrace, East Perth, at 4:40 p.m. on the day of the Perth Hills Bushfires when he did not in fact return until 6:00 p.m.; or
- (4) Giving false or misleading evidence on 28 September 2011 to the CDJSC Inquiry by intentionally withholding evidence of the Gregson Conversation.

[221] In relation to matters (1), (2) and (4), the assessments which follow proceed upon the basis that the Commission is satisfied, on the balance of probabilities, that Mr Gregson in fact communicated some information in relation to the Roleystone Fire during the Gregson Conversation. While it

is not possible to conclude precisely what was communicated, in the Commission's view it would have included at least that there was a significant fire (in addition to the fire at Bentley) that was being attended to by the authorities (refer [178] above).

3.2 Evidence to the Keelty Inquiry

3.2.1 Assessment of Evidence

[222] Dr O'Callaghan gave unsworn evidence as part of the Keelty Inquiry on 14 March 2011 and was asked by Mr Keelty at the commencement of his questioning:

Can you clarify for me your first involvement in the fires on the day?

Dr O'Callaghan replied:

Well, I would have got a call from FESA and specifically from John Butcher, sometime around 3 pm in the afternoon. I actually remember that because I was at the cricket and it was - and I got a call, just advising me that there were fires at Roleystone, and that they may call an SECG later in the day.

[223] As stated earlier (refer [116] above), in the Commission's view nothing turns on the difference between 2:28 p.m. and 3:00 p.m.

[224] In evidence to the Commission during a private examination on 29 February 2012 Dr O'Callaghan was asked whether he regarded this evidence as accurate and adequate, and responded as follows.

... Well it's absolutely true. Firstly, the question from [Mr] Keelty is, "What was your first involvement"? It wasn't anything to do with, "When was your first advice"? In any event, I hadn't recalled the phone call from Gregson, but the question was not about when I was first advised. I never took it to be that. I took it that it was my first involvement, in other words, my first interaction with the [H]azard [M]anagement [A]uthority. In fact when that was first put to me my first response was going to be to talk about talking to Chris Dawson and Jo Harrison-Ward after 4.30 because I thought what he was trying to do was ask me a question about when was my first involvement in organising the SECG, not - there was no question there about advice.

With the benefit of hindsight do you think it might have been preferable to say that you had been given an early indication by Mr Gregson shortly after 2.15?---I hadn't remembered that phone call. Remember that I was - I went into the Keelty [I]nquiry without any notes, without any diary, without any running sheet, and I did it from recall and you can see from my recall that I actually also got the time that I got a call from John Butcher wrong by 30 minutes. I did say earlier in my evidence that I was not reminded about the Wayne Gregson phone call until 3 September, but in any event this doesn't ask about advice.⁵⁹

⁵⁹ Transcript of Proceedings, Private Examination of Dr Karl Joseph O'Callaghan, APM, Commissioner of Police, on 29 February 2012, pp.25-26, with Mr Peter Hastings, QC, Senior Counsel Assisting.

[225] In the Commission's view three issues arise in relation to this explanation:

- (1) what Dr O'Callaghan took Mr Keelty's words "first involvement in the fires on the day" to mean;
- (2) whether Dr O'Callaghan recalled the Gregson Conversation; and
- (3) whether Dr O'Callaghan heard or appreciated the information provided by Mr Gregson in relation to the Roleystone Fire.

[226] The first issue, namely, what Dr O'Callaghan took Mr Keelty's question to mean (or to be directed to), is a technical one, that is, in the sense that Dr O'Callaghan should not be taken to be suggesting that he consciously withheld information in relation to advice from Mr Gregson because of the way he interpreted the question. It is clear from Dr O'Callaghan's answer to the Commission, as a whole, that he maintained that he had not remembered the telephone call from Mr Gregson at the time of the Keelty Inquiry.

[227] The nature of the question from Mr Keelty, however, is relevant to understanding Dr O'Callaghan's response in this sense, that is, it is clear that Mr Keelty did not direct Dr O'Callaghan's attention to precisely when he became aware of a fire on 6 February 2011 or to communications from persons other than Mr Butcher.

[228] The more significant issues are those outlined in (2) and (3) above, that is: whether Dr O'Callaghan recalled the Gregson Conversation; and whether Dr O'Callaghan heard or appreciated the information provided by Mr Gregson in relation to the Roleystone Fire.

[229] In order to conclude that Dr O'Callaghan intentionally withheld the Gregson Conversation in his answers to the Keelty Inquiry, it would be necessary to be satisfied, to the required standard, both that he had heard and appreciated the information provided in relation to the Roleystone Fire in the Gregson Conversation and that he remembered that at the time of the Keelty Inquiry. It necessarily follows that, to be so satisfied, the Commission would have to reject the evidence from Dr O'Callaghan that he did not get the information in relation to the Roleystone Fire.

[230] The Commission has already set out at [58] the approach to this question described in Briginshaw v Briginshaw (1938) 60 CLR 336. In this context Miller J in Hewett v Medical Board of Western Australia [2004] WASCA 170 added the following useful observations at [119]:

It may be tempting in disciplinary proceedings for a tribunal to look to see who is telling the truth and who is lying, but there is a danger in following this path. It overlooks the fact that the ultimate question for a tribunal in these circumstances is whether the tribunal of fact is persuaded on the balance of probability that the allegations contained within the Notice of Inquiry have been made out.

...

... There is a danger that in looking first to see who was telling the truth and who was lying, the Board may have obscured what was the essence of its inquiry.

- [231] There is in the present case no direct evidence that Dr O'Callaghan heard and also appreciated the information in relation to the Roleystone Fire, as for example an unequivocal statement to that effect to Mr Gregson or Mr Butcher (in that regard the generality of the conversation between Dr O'Callaghan and Mr Butcher at 2:28:28 p.m. on 6 February 2011 and of evidence given by Mr Butcher to the Commission on 13 February 2012 is set out at [201]-[204] and [189]-[190] above respectively).
- [232] Necessarily a conclusion that Dr O'Callaghan did hear and also appreciate the information must be based on inference. In that regard, there are competing inferences available on the evidence.
- [233] On one hand is the fact that, as set out at [221] above, it is likely that Mr Gregson communicated information in relation to the Roleystone Fire and, also, that Dr O'Callaghan clearly heard part of the Gregson Conversation (in relation to the Bentley Fire).
- [234] On the other hand common experience shows that portions of conversations (particularly by telephone) can be obscured, misheard or misunderstood. Similarly, while the likelihood of any of the explanations for Dr O'Callaghan's not adequately hearing or appreciating the information from Mr Gregson cannot now be adequately tested, they remain possible explanations for why Dr O'Callaghan did not receive the information. Added to that is the possibility that, at the time of the Keelty Inquiry, Dr O'Callaghan did not recall or did not turn his attention to the detail of the Gregson Conversation.
- [235] In the present case, in the Commission's assessment, there is no clear factor to enable one of the competing inferences to be preferred over the other. In those circumstances it would be difficult for the Commission to conclude on the balance of probabilities, having regard to the seriousness of the allegation, both that Dr O'Callaghan had heard and appreciated the information provided in relation to the Roleystone Fire in the Gregson Conversation and that he remembered that at the time of the Keelty Inquiry.

3.2.2 Commission Opinion as to Misconduct

- [236] Accordingly, in the opinion of the Commission, the available evidence in the present case does not support a finding that Dr O'Callaghan engaged in either serious misconduct or misconduct, as defined by sections 3 and 4 of the CCC Act, by giving false or misleading evidence to the Keelty Inquiry on 14 March 2011 by intentionally withholding evidence of the Gregson Conversation.

3.3 False or Misleading Media Statements in Relation to Withholding Evidence of the Gregson Conversation

3.3.1 Assessment of Evidence

[237] Dr O'Callaghan made a number of statements to the media (in person and by way of a news release) in relation to the events of 6 February 2011, in particular on 28 August 2011 and 3 September 2011, and are referred to as "the Media Statements" in this report (refer [111]). The Media Statements contained essentially the same information as that provided to the Keelty Inquiry, for example the News Release of 3 September 2011 which, in part, stated:

Police Commissioner Karl O'Callaghan stands by the evidence he gave to the Keelty Inquiry that the first time he was contacted about the fire by FESA was 1430hours on Sunday, February 6, 2011.⁶⁰

[238] Again, from a literal perspective, the News Release is accurate in as much as it refers to the first contact "by FESA". Nevertheless, were it the case both that Dr O'Callaghan had heard and appreciated the information provided in relation to the Roleystone Fire in the Gregson Conversation and that he remembered that at the time of the Media Statements an issue would arise as to whether the statement was misleading by not referring to the Gregson Conversation.

[239] The evidence in relation to those issues, however, is identical to that in relation to the Keelty Inquiry. Indeed, the time that had elapsed since 6 February 2011 was significantly greater when the Media Statements were made by Dr O'Callaghan.

3.3.2 Commission Opinion as to Misconduct

[240] Accordingly, in the opinion of the Commission, the available evidence in the present case does not support a finding that Dr O'Callaghan engaged in either serious misconduct or misconduct, as defined by sections 3 and 4 of the CCC Act, by making false or misleading statements to the media by intentionally withholding evidence of the Gregson Conversation.

3.4 False or Misleading Media Statements in Relation to Departure from the Western Australian Cricket Association

3.4.1 Assessment of Evidence

[241] Dr O'Callaghan, in light of the records from his "Swipe Card", accepted that he was wrong in relation to a statement to the media in late August 2011 that he had left the WACA ground at approximately 4:40 p.m. on 6 February 2011 (refer [216] above). Given that he travelled the short

⁶⁰ Western Australia Police News Release, Statement from the Commissioner, 3 September 2011, by Ms Suzanne Louise Short, Media Advisor to the Commissioner of Police [02738-2011-0112] and as set out at [119] of this report.

distance to arrive at Police Headquarters at 6:00 p.m., in the Commission's view Dr O'Callaghan's departure from the WACA is likely to have been closer to 6:00 p.m. than 4:40 p.m.

- [242] It is not possible to reach any conclusion as to precisely what Dr O'Callaghan's movements were in the vicinity of the WACA between 4:40 p.m. and 6:00 p.m. Clearly, by 5.00 p.m. Dr O'Callaghan was aware that the SECG meeting would be held at 6:30 p.m. and there were few telephone calls between 5:00 p.m. and 6:00 p.m. (refer [210] above).
- [243] In that regard, Dr O'Callaghan gave evidence, as set out at [216] above, that the error was explained by the passage of time and that he was simply working from memory. Dr O'Callaghan had not checked the records from his "Swipe Card" at the time that the statement was made to the media, and only did so just prior to giving evidence at a private examination conducted by the Commission on 29 February 2012, after becoming aware that the Commission has obtained "Swipe Card" records as part of the Commission investigation. In relation to that, Dr O'Callaghan gave evidence as follows in response to a question from Senior Counsel Assisting.

How did you know that the Commission had obtained the swipe card records?---A good question. I think it was the security officer downstairs that mentioned that somebody had been in to look at the swipe card records, not necessarily the Commission, but those sorts of things make me suspicious. There's a hell of a lot of things that the Commission has done in this process which are very obvious to me so - just the way they go about their business.⁶¹

- [244] However, there is no evidence that Dr O'Callaghan made or arranged for any inquiries to be made so as to confirm the time that he arrived at WAPOL Headquarters prior to that time. Accordingly, there is no evidence to enable the Commission to be satisfied that when Dr O'Callaghan made the statement to the media in late August 2011 in relation to the time of his departure from the WACA Dr O'Callaghan knew that it was inaccurate.

3.4.2 Commission Opinion as to Misconduct

- [245] Accordingly, in the opinion of the Commission, the available evidence in the present case does not support a finding that Dr O'Callaghan engaged in either serious misconduct or misconduct, as defined by sections 3 and 4 of the CCC Act, by indicating that he left the WACA to return to WAPOL Headquarters at 4:40 p.m. on the day of the Perth Hills Bushfires when he did not in fact return until 6:00 p.m.

⁶¹ Transcript of Proceedings, Private Examination of Dr Karl Joseph O'Callaghan, APM, Commissioner of Police, on 29 February 2012, p.43, with Mr Peter Hastings, QC, Senior Counsel Assisting.

3.5 Evidence to the CDJSC Inquiry

3.5.1 Assessment of Evidence

[246] On 28 September 2011 Dr O'Callaghan gave evidence before the CDJSC Inquiry and read from a prepared statement (refer [121]-[122] above). Relevantly, the substance of the statement to the CDJSC Inquiry, for the purposes of the Commission investigation, is the same as that provided in evidence to the Keelty Inquiry on 14 March 2011 and in relation to statements to the media that did not include reference to the Gregson Conversation, that is, that Dr O'Callaghan's first contact in relation to the fires was when he received the telephone call from Mr Butcher at 2.28:28 p.m. on 6 February 2011.

[247] Similarly, from a literal perspective, the statement is accurate in as much as it refers to the first contact "from FESA". Nevertheless, again, were it the case both that Dr O'Callaghan had heard and appreciated the information provided in relation to the Roleystone Fire in the Gregson Conversation and that he remembered that at the time of the statement an issue would arise as to whether the statement was misleading by not referring to the Gregson Conversation

[248] The additional matter that arises in the context of whether or not Dr O'Callaghan gave false or misleading evidence on 28 September 2011 to the CDJSC Inquiry by intentionally withholding evidence of the Gregson Conversation is that, by the time of the CDJSC Inquiry, Dr O'Callaghan had been reminded of the Gregson Conversation by Mr Gregson.

[249] The evidence of both Mr Gregson and Dr O'Callaghan confirms that there were discussions in which Mr Gregson reminded Dr O'Callaghan of their telephone conversations of 6 February 2011. Dr O'Callaghan's evidence, during a private examination conducted by the Commission on 29 February 2012, in that regard is set out at [167] above.

[250] Dr O'Callaghan in his evidence indicated that he was contacted by Mr Gregson on 3 September 2011 about their calls of 6 February 2011. Dr O'Callaghan's evidence coincides with a written statement that he provided to Senior Counsel Assisting at the end of his examination on 29 February 2012, in which he said as follows.

The point of me making these observations is that on Saturday September 3 2011 at 8.16am I received a telephone call from Wayne Gregson. Gregson asked me whether I remembered making a phone call to him on the afternoon of February 6. I made it clear that I did not. He should be able to confirm this. He further elaborated that I had called him to ask him about a fire that I could see burning just to the south of the Causeway. This was the first time Gregson had raised the issue with me and certainly did not contact me after the previous weekend's Sunday Times article.

I had not remembered making that phone call, however after being prompted by Gregson (this was seven months after the fires) I agreed

that I did have some memory of that detail. On checking my telephone records sometime after September 3, I established that I made a call to Gregson's number at 2.06pm on February 6. It seems, however, that the information that was conveyed in his return call to me about 2.17pm is in dispute. I do not agree with Gregson's interpretation of the content.

It is important to [sic] for me to make clear that, notwithstanding any subsequent discussions I had with Wayne Gregson about what was or what was not the content of the telephone call, I had completely forgotten the existence of the call up to the point of Gregson calling on that Saturday morning. To my knowledge the detail was not asked for, in any event.

In the call made to me on September 3 by Gregson, he mentioned only two points. It should be remembered that he was acting entirely on memory without the benefit of listening to the recording. He mentioned that I had called him about a fire just south of the Causeway because I could not contact the Duty Assistant Commissioner and that he had told me; on returning my phone call, that there was a fire in Bentley. I agree with this interpretation. I am not sure that I did, in fact, try to call the Duty Assistant Commissioner. There is nothing evident on my telephone records, which should have registered a call if connected to message bank.

Gregson did not mention in that conversation that he had advised me of anything else. I understand that he now alleges that I was given more information by him during that call, however, he did not seek to remind of it at the time he first called me in response to the newspaper articles, which I find curious.

The first time that Gregson mentioned to me that he thought that there was more to the telephone call than just a discussion about the scrub fire was several days later after he alleges he went to the POC to listen to his call to the Duty Inspector on February 6 ...⁶²

- [251] It is indeed correct that on 6 September 2011 at 5:00 p.m. Mr Gregson attended POC to listen to the audio-recording of his telephone conversation with Inspector Ellis, WAPOL, who was Duty Officer at POC on 6 February 2011 (refer [162] above).
- [252] Accordingly, when Dr O'Callaghan attended the CDJSC Inquiry on 28 September 2011 he was at least aware, having been reminded by Mr Gregson, that Mr Gregson and himself had had telephone conversations on 6 February 2011 prior to the call from Mr Butcher at 2:28 p.m. on that day. Both gave evidence to the Commission, however, that they professed different recollections of the Gregson Conversation (at 2:13:31 p.m.) when Dr O'Callaghan was first reminded of it by Mr Gregson. Dr O'Callaghan, in particular, stated that he was at the time of the CDJSC

⁶² Statement by Dr Karl Joseph O'Callaghan, APM, provided to Senior Counsel Assisting, Mr Peter Hastings, QC, at the conclusion of a private examination conducted by the Commission on 29 February 2012, p.6 [07238-2011-0407].

Inquiry, and remains, of the recollection that he was not provided with information in relation to the Roleystone Fire. It should also be noted that it is Dr O'Callaghan's evidence that he did not listen to the recording of the conversation between Mr Gregson and Inspector Ellis (Duty Officer at POC on 6 February 2011) until February 2012, shortly prior to giving evidence to the Commission. Dr O'Callaghan's evidence to that effect is detailed below.

In fact, last week for the first time I listened to that tape, so I know what was said on the tape, or on the recording.

...

... I only have heard the recording in the last week.⁶³

[253] In those circumstances Dr O'Callaghan gave the following evidence to the Commission during a private examination 29 February 2012.

... The point was, did you feel the need to bring to the [S]tanding [C]ommittee's attention the fact that Mr Gregson had recently, prior to your appearance before the [I]nquiry, prompted you or suggested that there had been communications between you which had provided you with information about the fire on 6 February?---Not at all. (1) because Mr Gregson's phone call to me, and I still maintain that that didn't contain any information about what this [C]ommittee [CDJSC] was looking at, and neither was it to do with the inter-operability between two agencies. As I have said before, I could just as easily, if that was the case, have raised a whole issue, raft of issues, about our own internal communications problems.⁶⁴

[254] The above evidence by Dr O'Callaghan highlights an additional difficulty in relation to determining whether or not Dr O'Callaghan gave false or misleading evidence to the CDJSC, and that difficulty is that Dr O'Callaghan was never asked a direct question by the CDJSC about his first knowledge of the fires. In light of the terms of reference of the CDJSC Inquiry, which concerned the interoperability of agencies for the then coming fire season, there is an insufficient basis for concluding that there was an obligation to positively raise that matter. The terms of reference were consistent with evidence given by Dr O'Callaghan during a private examination on 29 February 2012 that the Chairman of the Committee, Mr Anthony Patrick O'Gorman, MLA, stated as follows.

"Look, we're not really interested in all that controversy to do with the phone calls. I just want to get to the inter-operability issues".⁶⁵

[255] Nevertheless, it remains the case that, when appearing before the CDJSC Inquiry Dr O'Callaghan volunteered the following statement.

⁶³ Transcript of Proceedings, Private Examination of Dr Karl Joseph O'Callaghan, APM, Commissioner of Police, on 29 February 2012, pp.9 and 47, with Mr Peter Hastings, QC, Senior Counsel Assisting.

⁶⁴ *Ibid*, pp.49-50.

⁶⁵ *Ibid*, p.60.

It has been suggested that telephone records would resolve any claims and counter claims about what advice was provided to me on the day and whether that would have led to an earlier calling of an SECG. My best recall of the timing of calls that day is already in the public domain ...⁶⁶

[256] The telephone call from Mr Gregson at 2:13:31 p.m., however, was not in the public domain and, while Dr O'Callaghan and Mr Gregson have given evidence of different recollections of that telephone call, it would be reasonable to expect, in the interests of transparency, in the Commission's view, that both Dr O'Callaghan and Mr Gregson would make known to the CDJSC Inquiry (or otherwise make it known publicly) their recollections of that telephone call. That information was at least relevant to the controversy that had arisen in the public domain at the time of the Media Statements.

[257] Dr O'Callaghan was asked during a private examination conducted by the Commission on 1 May 2012, more generally, whether, in light of the conversations with Mr Gregson in September 2011 concerning the 6 February 2011 conversations, he considered taking positive steps to make known the telephone conversation with Mr Gregson on that day. Below is an extract from the transcript of proceedings of that examination.

Certainly you gave a brief statement prior to the - at the beginning of the [P]arliamentary [I]nquiry - - -?---I did, yes. Yes.

- - - in relation to your recollection and you gave evidence on the last occasion here that you didn't make reference to any phone conversations with Mr Gregson because, apart from anything else, it wasn't relevant to the terms of their [I]nquiry which was about the relationship between the police and FESA?---True, yes.

My question is: in light of what he said, did you consider taking any positive step to make it known that in fact you had spoken to one of your officers about "a fire" prior to it?---No. No, because I believed and I still believe to this day there was no conversation about the Roleystone [F]ires that were relevant to anything that was going on at the time in that original phone call. Notwithstanding what Gregson claims.

You said on the last occasion that you disagreed with Gregson, Mr Gregson, then as to what his recollections of the events were or his account of the events were. Did you nevertheless consider the possibility that his recollection may have been correct?---No.⁶⁷

3.5.2 Commission Opinion as to Misconduct

[258] In the opinion of the Commission, for the reasons identified at [256] above, while it would have been prudent and more open, and in the interests of

⁶⁶ Community Development and Justice Standing Committee Bushfire Examinations, Transcript of Evidence, Dr Karl Joseph O'Callaghan, APM, Commissioner of Police, Taken at Perth on Wednesday 28 September 2011, p.2 [02738-2011-0117].

⁶⁷ Transcript of Proceedings, Private Examination of Dr Karl Joseph O'Callaghan, APM, Commissioner of Police, on 1 May 2012, p.21.

transparency, for Dr O'Callaghan to have made public the existence of the Gregson conversation, together with his and Mr Gregson's differing recollections of it, there was not a positive obligation to raise the matter before the CDJSC Inquiry. In the absence of such an obligation, the failure to make reference to the Gregson Conversation to the CDJSC Inquiry could not be regarded as misconduct as defined by sections 3 and 4 of the CCC Act.

- [259] Accordingly, in the opinion of the Commission, the available evidence in the present case does not support a finding that Dr O'Callaghan engaged in either serious misconduct or misconduct, as defined by sections 3 and 4 of the CCC Act, by giving false or misleading evidence to the CDJSC Inquiry on 28 September 2011 by intentionally withholding evidence of the Gregson Conversation.
- [260] In relation to Mr Gregson, and in fairness to him, it should be noted that he had drawn the fact of the conversation of 6 February 2011 at 2:13:31 p.m. (or the Gregson conversation) to the attention of his immediate superior, that is, Dr O'Callaghan, and others prior to either Dr O'Callaghan or himself giving evidence to the CDJSC Inquiry (that is, on 28 and 30 September 2011 respectively). In the Commission's view, Mr Gregson had, therefore, endeavoured to correct misinformation that was in the public domain.
- [261] Nonetheless, in the opinion of the Commission, for the reasons identified at [256] above, it would still have been prudent and more open, and in the interests of transparency, for Mr Gregson to have made public the existence of the Gregson conversation, together with his and Dr O'Callaghan's differing recollections of it. However, there was not a positive obligation to raise the matter before the CDJSC Inquiry and in the absence of such an obligation, the failure to make reference to the Gregson Conversation to the CDJSC Inquiry could not be regarded as misconduct as defined by sections 3 and 4 of the CCC Act.

3.6 Conclusion

- [262] The investigation by the Commission was concerned with the provision of evidence, material and statements relating to the Perth Hills Bushfires by any public officer, and in particular whether that evidence, material and those statements were false or misleading in such a way as to fall within the definition of either "serious misconduct" pursuant to section 3 of the CCC Act or "misconduct" pursuant to section 4 of the CCC Act.
- [263] Having considered and assessed the material and evidence gathered during the investigation the Commission has concluded that it is unable to form an opinion that any public officer engaged in either serious misconduct or misconduct (as set out in sections 3 and 4 of the CCC Act) in relation to:

... evidence given, material provided or statements made about the Perth Hills Bushfires of 6 February 2011, to any Inquiry thereinto, the

*media, or in relation to any other function in their capacity as a public officer.*⁶⁸

[264] In particular, in the opinion of the Commission, the available evidence does not support a finding, for reasons set out in this report, that Dr O'Callaghan engaged in either serious misconduct or misconduct as defined by sections 3 and 4 of the CCC Act, by:

- (1) giving false or misleading evidence on 14 March 2011 to the Keelty Inquiry by intentionally withholding evidence of the Gregson Conversation;
- (2) making false or misleading statements to the media by intentionally withholding evidence of the Gregson Conversation;
- (3) making false or misleading statements to the media by indicating that he left the WACA to return to WAPOL Headquarters, Adelaide Terrace, East Perth, at 4:40 p.m. on the day of the Perth Hills Bushfires when he did not in fact return until 6:00 p.m.; or
- (4) giving false or misleading evidence on 28 September 2011 to the CDJSC Inquiry by intentionally withholding evidence of the Gregson Conversation.

⁶⁸ Scope and Purpose of the Commission Investigation (refer [20] and [70] of this report).