



Corruption and Crime Commission Report on Behalf of the Procedure and Privileges Committee of the Legislative Assembly

Report on Issues Relating to Record Keeping in the Ministerial Office of the Hon John James Mansell Bowler MLA

Report No. 7 of 2008

Presented by the Speaker of the Legislative Assembly
Laid on the Table of the Legislative Assembly
6 November 2008

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CORRUPTION AND CRIME COMMISSION

Hon Fred Riebeling MLA
Speaker of the Legislative Assembly
Legislative Assembly
Parliament House
Harvest Terrace
PERTH WA 6000

Dear Mr Speaker

CORRUPTION AND CRIME COMMISSION REPORT ON BEHALF OF THE PROCEDURE AND PRIVILEGES COMMITTEE OF THE LEGISLATIVE ASSEMBLY

In accordance with section 27B(6) of the *Corruption and Crime Commission Act 2003* ("the Act"), I present the *Corruption and Crime Commission Report on Issues Relating to Record Keeping in the Ministerial Office of the Hon John James Mansell Bowler MLA*, resulting from an inquiry conducted on behalf of the Procedure and Privileges Committee of the Legislative Assembly of the Parliament of Western Australia pursuant to sections 27A and 27B of the Act.

Section 27B(7) of the Act requires that the report be presented to the House, in the form in which it was received, on the sitting day next following its receipt.

Yours faithfully

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

**The Hon Len Roberts-Smith RFD QC
COMMISSIONER**

7 August 2008

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ABBREVIATIONS AND ACRONYMS

“the Act”	<i>Corruption and Crime Commission Act 2003</i>
“the Code”	<i>Government of Western Australia Ministerial Code of Conduct March 2005</i>
“the Commission”	Corruption and Crime Commission
DPC	Department of the Premier and Cabinet, Government of Western Australia
FMG	Fortescue Metals Group
“the FOI Act”	<i>Freedom of Information Act 1992</i>
“the Plan”	<i>Department of the Premier and Cabinet, Government of Western Australia, Part 1 – The Recordkeeping Plan, 15 December 2004</i>
“the Program”	<i>Department of the Premier and Cabinet, Government of Western Australia, Recordkeeping Program for Ministerial Offices, 8 November 2006</i>
“the Privileges Committee”	Procedure and Privileges Committee of the Legislative Assembly of the Parliament of Western Australia
“the PSM Act”	<i>Public Sector Management Act 1994</i>
“the Records Act”	<i>State Records Act 2000</i>
“the Speaker”	Speaker of the Legislative Assembly of the Parliament of Western Australia
“the SD Act”	<i>Surveillance Devices Act 1998 (WA)</i>
SD	Surveillance Device(s)
TI	Telecommunications Intercept (or Interception)
“the TI Act”	<i>Commonwealth Telecommunications (Interception and Access) Act 1979</i>
“the Western Australia Act”	<i>Telecommunications (Interception) Western Australia Act 1996</i>

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EXECUTIVE SUMMARY

- [1] The Corruption and Crime Commission (“the Commission”) has been conducting an investigation into possible public officer misconduct as a result of certain lobbying activities. The Commission will be tabling reports on that investigation in due course. However, one issue which arose in the course of that investigation calls for separate consideration. That issue is the subject of this report.
- [2] The issue is in relation to record keeping processes in the Ministerial Office of the Hon John James Mansell Bowler MLA who at the relevant time in 2006 (3 February to 13 December 2006) was Minister for:
- Resources and Minister Assisting the Minister for State Development;
 - Employment Protection;
 - Goldfields-Esperance; and
 - Great Southern.
- [3] The information received by the Commission suggested that Mr Bowler had made arrangements to avoid any documentary or electronic record being kept of contacts and communications with Mr Julian Fletcher Grill and Mr Brian Thomas Burke. The object of this report is to determine whether there was misconduct by any public officer in relation to those record keeping processes.
- [4] The report notes the particular statutory definition of “misconduct” which the Commission must apply. That is contained in section 4 of the *Corruption and Crime Commission Act 2003* (“the Act”).
- [5] Taken at its highest, the information which initially became available to the Commission concerning the arrangements made by Mr Bowler in his Ministerial Office to avoid any documentary or electronic record of contacts with Mr Grill or Mr Burke being generated or kept, could have indicated “serious misconduct” under section 4(a), (b) or (c) of the Act. However, upon further information and in the process of assessing the information then available, the Commission formed the opinion that although the circumstances might still constitute misconduct under section 4 of the Act, it could not be “serious misconduct”. That is because the term “serious misconduct” is defined in a particular way in section 3 of the Act. It means (only) misconduct of a kind described in section 4(a), (b) or (c) of the Act.
- [6] In that circumstance, and at that point, the allegation of misconduct became one which fell within section 27A of the Act, and so had to be referred by the Commission to the applicable “presiding officer” of the Parliament of Western Australia.
- [7] Accordingly, on 26 May 2008 the Commission wrote to the Hon F Riebeling MLA referring the allegations to him as Speaker of the Legislative Assembly and, therefore, the applicable “presiding officer” as defined in section 27A(4) of the Act. Section 27A(4) of the Act defines the “presiding officer” as the

President where the allegation relates to a member or officer of the Legislative Council, or the Speaker in relation to a member or officer of the Legislative Assembly.

- [8] By letter from the Speaker dated 18 June 2008 the Procedure and Privileges Committee of the Parliament of Western Australia (“the Privileges Committee”) referred the inquiry to the Commission in accordance with section 27B(2) of the Act. A copy of that letter is Attachment A to this report.¹
- [9] This report also necessarily contains reference to the actions of Mr Simon John Corrigan, Chief of Staff to Minister Bowler, who was acting on the Minister’s instructions, and to his evidence given² in the course of the Commission’s own investigation under section 26 of the Act.

Mr John James Mansell Bowler

- [10] On the information available, the Commission is satisfied that Mr Bowler took the following actions in an attempt to hide his contact and communication as a Minister with Mr Grill and Mr Burke. Mr Bowler:
- asked Mr Burke not to send emails to his Ministerial email address because he believed that they could be the subject of Freedom of Information (FOI) requests;³
 - confirmed to Mr Grill that he did not want Mr Grill to send information to him by email, suggested it be sent by fax, and agreed to a suggestion that the client send it direct;⁴
 - asked Mr Grill not to officially request meetings with him at his office, but said that he would meet him, and Mr Burke, at Mr Grill’s residence;⁵
 - organised on several occasions to attend either Mr Grill’s residence or a venue other than his office to discuss issues relating to clients of Mr Grill and Mr Burke;⁶
 - stopped Mr Grill from discussing a client (Echelon Mining) on the phone and arranged to meet Mr Grill at his residence;⁷
 - asked Mr Grill not to attend a meeting he (Mr Bowler) was having with representatives of a company, Croesus Mining, which was Mr Grill’s client;⁸
 - said to Mr Grill that if he wanted to discuss anything he should phone him (Mr Bowler) and invite him for afternoon tea;⁹
 - instructed Mr Corrigan not to log correspondence from Mr Grill or Mr Burke on the correspondence system;¹⁰ and

- instructed administrative staff not to email messages about phone calls from Mr Grill or Mr Burke but to write them on a piece of paper.¹¹

[11] The reasons Mr Bowler gave for this conduct can be summarised as detailed below.

- If the media and opposition made FOI requests to his office and obtained the records of his contacts with Mr Grill and Mr Burke, it might look bad.¹²
- The Premier, the Hon Alan John Carpenter MLA, had made it clear that he did not want Mr Bowler to meet with Mr Grill and Mr Burke, and as the Premier had an office in the same building he was concerned that they might bump into him.¹³
- He did not want to discuss commercial matters on the phone.¹⁴
- If he met with clients of Mr Grill and Mr Burke and gave them relief, and Mr Grill was there, it would look bad in the eyes of Cabinet and the Premier, and make it harder for their next client.¹⁵

[12] The Commission is satisfied that the actions listed above were taken by Mr Bowler with the purpose of ensuring that no records were being kept of his contacts with Mr Grill and Mr Burke, and that his contacts with them would not become known to the Premier, the Cabinet, the Parliament nor at all.

Mr Simon John Corrigan

[13] On the information available to the Commission it appears that Mr Corrigan took the following actions to assist Mr Bowler in hiding his contacts with Mr Grill and Mr Burke. Mr Corrigan:

- advised Mrs Lesley Grill (wife of Mr Julian Fletcher Grill) on how she should make appointments with Mr Bowler without there being an official record, said “no emails” and then met with Mrs Grill to “go through it more fully”,¹⁶
- agreed to “stand-by” a fax machine so that he could receive a document from Mr Burke for Mr Bowler, and did not “log” the fax;¹⁷ and
- deleted at least one email from Mr Grill or Mr Burke from his official electronic mail-box so as to avoid its possible retrieval.¹⁸

Commission Opinion on Misconduct

Mr Bowler

- [14] The meaning of “misconduct” is set out in section 4 of the Act. Paragraphs (a), (b) and (c) are defined (in section 3 of the Act) as “serious misconduct”. Paragraphs (a) and (b) both require that a public officer has acted “corruptly”. Paragraph (c) applies if a public officer has committed “an offence punishable by 2 or more years’ imprisonment”.
- [15] On the material available to the Commission, the Commission accepts that there was a political dimension to Mr Bowler’s desire to keep secret his contacts with Mr Grill and Mr Burke. In other words, evidence of this in the hands of the opposition or the media, or of some of his party colleagues, could be used to damage him politically, and Mr Bowler was at pains to avoid this. The Premier had made it very clear to Mr Bowler that he did not want Mr Bowler to meet with Mr Grill or Mr Burke, and finally he was concerned that any decision he made which benefited the clients of Mr Grill and Mr Burke might be viewed askance by members of Cabinet.
- [16] The Commission is separately preparing reports on several matters which were the subject of lobbying by Mr Grill and Mr Burke, and on which Mr Bowler made decisions.
- [17] The Commission considered whether there is evidence that Mr Bowler wanted to hide his contacts with Mr Grill and Mr Burke because he intended to improperly make decisions which were to the benefit of their clients. However, the evidence does not show that he had that specific intention. Accordingly, the evidence does not sustain an opinion that this conduct of Mr Bowler, with respect to concealing his contacts with Mr Grill and Mr Burke, constitutes “serious misconduct” under paragraphs 4(a) or (b) of the Act.
- [18] However, in the Commission’s opinion, by treating Mr Grill and Mr Burke differently to all other lobbyists and business representatives (who did not have this type of access to him), and by effectively subverting the normal procedures for record keeping, and involving his staff in this, Mr Bowler engaged in misconduct. This conduct fell within section 4(d)(i) in that it “adversely affects, or could adversely affect, directly or indirectly, the honest or impartial performance of the functions of a public authority or public officer ...”, section 4(d)(ii) of the Act, in that it “constitutes or involves the performance of his or her functions in a manner that is not honest or impartial”, and section 4(d)(iii) of the Act in that it “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”.
- [19] The Commission is not satisfied that the conduct of Mr Bowler could constitute an offence against section 78 of the *State Records Act 2000* (“the Records Act”), a written law, and therefore it would not meet the criteria of misconduct set out in section 4(d)(v) of the Act.

- [20] That is because the only possible offences under the Records Act would be not keeping a government record in accordance with the *Department of the Premier and Cabinet, Government of Western Australia, Part 1 – The Recordkeeping Plan* (“the Plan”), 15 December 2004, contrary to section 78(1) of the Records Act, or destruction of a government record otherwise than as authorised by the Plan, contrary to section 78(3) of the Records Act, and neither would appear to apply to these circumstances. Section 78(1) of the Records Act states: “A government organization employee who does not keep a government record in accordance with the record keeping plan of the organization, commits an offence”. Section 78(3) of the Records Act states: “A government organization employee who destroys a government record commits an offence unless the destruction is authorized by the record keeping plan of the organization”.
- [21] The Commission has also considered whether or not what Mr Bowler did, in conjunction with Mr Grill and Mr Burke, could potentially have constituted a criminal conspiracy. In the Commission’s opinion, the information available is not capable of supporting such a conclusion.
- [22] Section 558 of *The Criminal Code* makes it a crime for a person to conspire with another to commit an indictable offence. Relevantly here, such a conspiracy would be punishable by half of the penalty which would apply to the indictable offence. The circumstances here do not involve an agreement to commit any indictable offence.
- [23] Under section 560 of *The Criminal Code* it is an offence for a person to conspire with another to commit a simple (i.e., summary) offence. A conspiracy of that kind is punishable by a penalty equal to the maximum applicable to the simple offence. In the present circumstances, therefore, even if there had been an agreement to commit an offence under section 78 of the Records Act, the maximum punishment for that conspiracy would have been a \$10,000 fine – which still would not have made it “serious misconduct” within section 4(c) of the Act. Also, because the particular circumstances did not give rise to an offence contrary to section 78 of the Records Act in any event, nor would the conduct fall within section 4(d)(v) of the Act.
- [24] The conduct of Mr Bowler and Mr Corrigan can be divided into two categories:
1. attempts to ensure that Mr Grill and Mr Burke did not directly contact Mr Bowler’s office in a way which might leave a record; and
 2. attempts to ensure that any contacts made were not recorded within the office.
- [25] The Plan does not seem to prohibit conduct of this type. While Mr Bowler and Mr Corrigan were clearly attempting to prevent records being created, there does not seem to be anything in the Plan to prohibit this conduct. Most of Mr Bowler’s conduct was of this type.

- [26] It is difficult to see how this conduct would breach the Records Act. Records of the type in question (had they been created) would most likely have been properly characterised as “ephemeral” or “temporary” – which the Plan did not require be either created or kept respectively.
- [27] However, the Commission is satisfied that Mr Bowler’s conduct meets the criteria of section 4(d)(vi) of the Act in that it is of sufficient seriousness that if he had been a public service officer it could constitute a “disciplinary offence”.
- [28] Paragraph 4(d)(vi) of the Act states that: “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)”.
- [29] Although as a Minister at the relevant time Mr Bowler was a public officer, he was not a member of the public service. It is, therefore, the notional test in paragraph 4(d)(vi) which must be applied to his conduct.
- [30] General principles of official conduct are set out in section 9 of the *Public Sector Management Act 1994* (“the PSM Act”), which states that:

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

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

(emphasis added)

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

An employee who –

- (a) *disobeys or disregards a lawful order;*

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

commits a breach of discipline.

- [32] A breach of discipline may be a minor breach or a serious breach.
- [33] A minor breach may be punished by a reprimand or a fine not exceeding 1 days pay or both, pursuant to section 83(1)(a)(i), (ii) or (iii) of the PSM Act.
- [34] If a departmental investigating authority is of the opinion that a serious breach of discipline appears to have been committed, that authority shall cause the public officer to be charged with that alleged breach pursuant to section 83(1)(b) of the PSM Act.
- [35] The procedure for dealing with a charge of a serious breach of discipline is set out in section 86 of the PSM Act.
- [36] The punishments which may be imposed where a charge of a serious breach of discipline is admitted and proved are set out in section 86(3)(b) of the PSM Act. Section 86(3)(b) states that:

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

- (b) *may –*
 - (i) *reprimand the respondent;*
 - (ii) *transfer the respondent ...;*
 - (iii) *impose on the respondent a fine not exceeding an amount equal to the amount of remuneration received by the respondent in respect of the period of 5 days during which he or she was at work immediately before the day on which the finding of a breach of discipline was made;*

- (iv) *reduce the monetary remuneration of the respondent;*
- (v) *reduce the level of classification of the respondent; or*
- (vi) *dismiss the respondent.*

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

(emphasis added)

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

[38] In the Commission's assessment, Mr Bowler's actions could constitute a serious breach. The reasons for this conclusion include the following factors.

- Mr Bowler was a Minister of the State presiding over a very important portfolio. There is considerable public interest in this role being performed honestly and transparently. This is set out in the *Government of Western Australia Ministerial Code of Conduct March 2005* ("the Code").
- The conduct was not inadvertent nor confined to a single instance, but was deliberate, was intended to defeat or circumvent a statutory regime going to transparency and good governance, was designed to conceal his dealings as a Minister with Mr Grill and Mr Burke, and was a sustained course of conduct.
- The matters Mr Bowler was discussing with Mr Grill and Mr Burke were, in most cases, related to decisions on mining or development projects which potentially had very serious commercial and social consequences.
- Mr Bowler was in a position of authority over his staff, whom he used to avoid the making or retention of records which would otherwise have been made or kept to conceal his dealings with Mr Grill and Mr Burke.
- The actions Mr Bowler took were to protect his relationships and his political career.

[39] As (notionally) a serious breach of discipline, that is conduct for which dismissal (that is, termination of office) would be an option. Having regard to the factors identified above, the conduct is of sufficient seriousness that, were Mr Bowler a public service officer, it could constitute a disciplinary offence

providing reasonable grounds for the termination of office or employment under the PSM Act.

Mr Corrigan

- [40] The Commission is satisfied that, for the reasons given above, the conduct of Mr Corrigan could not constitute an offence against section 78 of the Records Act, a written law, and therefore would not meet the criteria of misconduct set out in section 4(d)(v) of the Act.
- [41] The Commission is of the opinion that Mr Corrigan's conduct, in assisting Mr Bowler to hide his contacts with Mr Grill and Mr Burke, met the criteria of section 4(d)(i) of the Act, in that it adversely affected the impartial performance of Mr Bowler's functions as a public officer.
- [42] However, the Commission does not consider that Mr Corrigan's conduct is sufficiently serious to constitute a disciplinary offence providing reasonable grounds for the termination of his office as a public servant under the PSM Act.
- [43] This is essentially because Mr Corrigan did not initiate the measures taken, and he did not appear to stand to receive any benefit from them. In the Commission's assessment Mr Corrigan does not appear to have had any motivation for the actions he took other than to protect the reputation of Mr Bowler, to whom he reported as Chief of Staff. Mr Corrigan also said that he had expressed the view to Mr Bowler that contact with either Mr Grill or Mr Burke could jeopardise his position.¹⁹
- [44] In the Commission's assessment, on the information available, Mr Corrigan only did the minimum to assist Mr Grill and Mr Burke, and his cooperation with them appeared to be only out of loyalty to Mr Bowler.
- [45] In the Commission's opinion Mr Corrigan's conduct does not meet the criteria set out in section 4(d)(vi) of the Act, and accordingly the information available does not establish misconduct on his part within the meaning of section 4 of the Act.
- [46] In this circumstance the Commission does not propose to provide a separate report under section 84 of the Act in respect of Mr Corrigan.

Recommendations

- [47] Mr Bowler gave evidence to the Commission in a public hearing on 26 and 27 February 2007. On the afternoon of 27 February, the Premier, the Hon Alan John Carpenter MLA, demanded his resignation from Cabinet and the Australian Labor Party.
- [48] In Parliament on 28 February 2007, the day following the demand by the Premier that Mr Bowler resign, Mr Bowler announced his resignation as a Government Minister and member of the Australian Labor Party. A later

inquiry by the Privileges Committee into Mr Bowler's leaking of a privileged draft parliamentary committee report made a number of recommendations which were accepted by the Parliament. Mr Bowler was disqualified "from membership of any Parliamentary Committee for the remainder of the 37th Parliament", suspended from "the House for a period of 7 sitting weeks or 21 sitting days", whichever was longer, and was not permitted "to enter the parliamentary precincts" during the suspension period.²⁰ On 20 June 2007 Mr Bowler made an unreserved apology to the Parliament accepting the ruling of the Privileges Committee.

[49] On 13 November 2007 Mr Bowler returned to Parliament after completing his period of suspension. Mr Bowler remains on the Back Bench as an Independent Member of the Parliament.

[50] In the circumstances the Commission does not consider it necessary to make any recommendation as to any further possible disciplinary action with respect to Mr Bowler, although that is, of course, a matter for the House.

[51] This inquiry has not identified any deficiency or lacuna in the Records Act, the *Freedom of Information Act 1992* ("the FOI Act"), the Code, the Plan, or the *Department of the Premier and Cabinet, Government of Western Australia, Recordkeeping Program for Ministerial Offices November 2006* ("the Program"). Mr Bowler's misconduct involved a failure to comply with the standards of the Code. The Commission accordingly makes no recommendation in respect of these matters.

1. INTRODUCTION

[52] The purpose of this report is to examine one aspect of the material gathered in the course of a Corruption and Crime Commission (“the Commission”) investigation into possible public officer misconduct as a result of lobbying activities. The Commission will be tabling reports on that investigation in due course. However, one issue which arose in the course of that investigation calls for separate consideration. That issue is the subject of this report.

[53] The issue is in relation to record keeping processes in the Ministerial Office of the Hon John James Mansell Bowler MLA who at the relevant time in 2006 (3 February to 13 December 2006) was Minister for:

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

[54] The information received by the Commission suggested that Mr Bowler had made arrangements to avoid any documentary or electronic record being kept of contacts and communications with Mr Julian Fletcher Grill and Mr Brian Thomas Burke. The object of this report is to determine whether there was misconduct by any public officer in relation to those record keeping processes.

2. DEFINITION OF MISCONDUCT

[55] The term “misconduct” has a very particular and specific meaning in the *Corruption and Crime Commission Act 2003* (“the Act”) and it is that meaning which the Commission must apply. Section 4 of the Act states that:

Misconduct occurs if –

- (a) *a public officer corruptly acts or corruptly fails to act in the performance of the functions of the public officer’s office or employment;*
- (b) *a public officer corruptly takes advantage of the public officer’s office or employment as a public officer to obtain a benefit for himself or herself or for another person or to cause a detriment to any person;*
- (c) *a public officer whilst acting or purporting to act in his or her official capacity, commits an offence punishable by 2 or more years’ imprisonment; or*
- (d) *a public officer engages in conduct that –*
 - (i) *adversely affects, or could adversely affect, directly or indirectly, the honest or impartial performance of*

the functions of a public authority or public officer whether or not the public officer was acting in their public officer capacity at the time of engaging in the conduct;

- (ii) constitutes or involves the performance of his or her functions in a manner that is not honest or impartial;*
- (iii) constitutes or involves a breach of the trust placed in the public officer by reason of his or her office or employment as a public officer; or*
- (iv) involves the misuse of information or material that the public officer has acquired in connection with his or her functions as a public officer, whether the misuse is for the benefit of the public officer or the benefit or detriment of another person,*

and constitutes or could constitute –

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

3. REPORTING BY THE COMMISSION

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

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

[57] However, this report is presented in accordance with section 27B(3)(f) and (6) of the Act. As it is not a report under section 84 or 85 of the Act, the notification requirements under section 86 do not apply to it. Section 86

requires that before reporting any matters adverse to a person or body in a report under section 84 or 85, the Commission must give the person or body a reasonable opportunity to make representations concerning those matters.

- [58] Notwithstanding that section 86 does not apply here, the Commission takes the view that it reflects the general obligation of an administrative body to act with procedural fairness. That obligation must apply to reports under section 27B of the Act, and the Commission has accordingly adopted that process here.
- [59] In accordance with that obligation, Mr Bowler was notified by letter dated Thursday 19 June 2008 of possible adverse matters which it was proposed to include in the report. Mr Bowler was invited to make representations about those matters by Friday 4 July 2008, and was advised that he and his legal adviser could inspect the transcript of hearings before the Commission and evidentiary material going to matters identified and any other matters about which he might wish to make representations. Mr Bowler's solicitors, by letters dated 2 and 3 July 2008, requested an extension of time by a further six weeks to the due date for submission of representations, citing the need for files to be obtained from counsel who previously represented Mr Bowler and the court commitments of his current counsel. The Commission extended the time for submission of representations to Friday 18 July 2008. Mr Bowler's solicitors provided extensive representations by this date and the Commission has taken all of those into account in finalising this report.
- [60] Despite the investigation being confined to the conduct of public officers, and the Commission making no assessment of, nor expressing any opinion about the conduct of Mr Grill or Mr Burke in its report, the Commission accepts that the words "any matters adverse to a person" in section 86 of the Act have a meaning wider than merely the Commission's assessments and opinions. The Commission considers it should take an approach consistent with that, to reports under section 27B of the Act.
- [61] As it was possible that the matters considered in this report may be regarded as matters adverse to Mr Grill and Mr Burke, the Commission has notified them of those matters and afforded them an opportunity to make representations if they wished.
- [62] Mr Grill's lawyers, Freehills, provided representations on his behalf in a one-page fax on 4 July 2008. The matters there raised have been taken into consideration by the Commission.
- [63] By letter dated 4 July 2008 Mr Burke's lawyers, Fairweather and Lemonis, advised that Mr Burke did not propose to make any representations. However, the Commission notes that Mr Burke was not called as a witness in respect of the inquiry specifically into the issue of Mr Bowler's Ministerial record keeping and none of the matters included in this report were put to him.

4 OPINIONS OF MISCONDUCT: STANDARD OF PROOF

- [64] The Commission fully appreciates that any expression of opinion by it in a published report, that a public officer has engaged in misconduct, is serious. The publication of such an opinion or any adverse matter against a public officer, or any other person, may have serious consequences for the public officer, or person, and their reputation.
- [65] The Commission is careful to bear these matters in mind, when forming opinions, when conducting inquiries and when publishing the results of its investigations.
- [66] The Commission may form an opinion as to misconduct on the evidence before it only if satisfied of misconduct on the balance of probabilities. The seriousness of the particular allegation and the potential consequences of the publication of such an opinion by the Commission, also go to how readily or otherwise it may be so satisfied on the balance of probabilities.
- [67] 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.²¹
- [68] The Commission has borne all of the foregoing considerations in mind in forming its opinions about matters the subject of the inquiry. Any expression of opinion in this report is so founded.

5. TELECOMMUNICATIONS INTERCEPTION MATERIAL

- [69] The Commonwealth *Telecommunications (Interception and Access) Act 1979* (“the TI Act”) contains strict controls and safeguards in relation to telecommunications interception and dealing with information gathered from lawfully intercepted telecommunications. Section 63 of the TI Act prohibits the communication of lawfully intercepted information unless given particular restricted circumstances.
- [70] Section 67(1) of the TI Act allows certain intercepting agencies, including the Commission,²² to make use of lawfully intercepted information and interception warrant information for a “permitted purpose”. “Permitted purpose”, as defined in section 5(1) of the TI Act, in the case of the Commission “means a purpose connected with ...: (i) an investigation under the Corruption and Crime Commission Act into whether misconduct (within the meaning of that Act) has or may have occurred, is or may be occurring, is or may be about to occur, or is likely to occur; or (ii) a report on such an investigation”.²³

6. PRIVACY CONSIDERATIONS

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

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

7. DRAMATIS PERSONAE (AT THE RELEVANT TIME IN 2006)

[73] The Hon John James Mansell Bowler MLA Minister for:

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

Mr Brian Thomas Burke, Lobbyist and Consultant, who conducted business in partnership with Mr Julian Fletcher Grill.

Mr Simon John Corrigan, Chief of Staff to the Hon John James Mansell Bowler since August 2005, and during the relevant time in 2006 (3 February to 13 December 2006).

Ms Lisa Davenport, Appointments Secretary to Minister Bowler.

Mr Julian Fletcher Grill, Lobbyist and Consultant, who conducted business in partnership with Mr Brian Thomas Burke.

Mrs Lesley Grill, wife of Mr Julian Fletcher Grill, who also acted as Mr Grill’s Secretary in 2006.

Mr Timothy John Walster, Principal Policy Advisor (Resources and State Development), Office of the Hon John James Mansell Bowler (March to December 2006).²⁴

8. BACKGROUND

[74] Taken at its highest, the information which initially became available to the Commission concerning the arrangements made by Mr Bowler in his

Ministerial Office to avoid any documentary or electronic record of contacts with Mr Grill or Mr Burke being generated or kept, could have indicated “serious misconduct” under section 4(a), (b) or (c) of the Act. However, upon further information and in the process of assessing the information then available, the Commission formed the opinion that although the circumstances might still constitute misconduct under section 4 of the Act, it could not be “serious misconduct”. That is because the term “serious misconduct” is defined in a particular way in section 3 of the Act. It means (only) misconduct of a kind described in section 4(a), (b) or (c) of the Act.

[75] In that circumstance, and at that point, the allegation of misconduct became one which fell within section 27A of the Act. That section relevantly provides –

27A. Allegations involving parliamentary privilege

(1) *Despite any contrary provision in this Act, an allegation of misconduct, not being serious misconduct —*

(a) *made against a member of the Legislative Council or the Legislative Assembly in the performance by him or her of the functions of that office; or*

(b) *made against an officer liable to be removed from office under section 35 of the “Constitution Act 1889”,*

is to be referred by the Commission to the presiding officer.

[76] A referral under section 27A is to be dealt with in accordance with section 27B, which relevantly provides –

27B. Dealing with referrals under s. 27A(1)

(1) *The presiding officer, on receipt of a referral made under section 27A(1), must —*

(a) *where the allegation is made under paragraph (a), require a committee of the House whose functions include considering matters relating to the practice, procedure and privileges of the House (the “Privileges Committee”), to inquire into the matter;*

(b) *where the allegation is made under paragraph (b), require the Commission to conduct an inquiry.*

(2) *If the Privileges Committee resolves to carry out its own inquiry, it must do so by directing the Commission to act on its behalf.*

[77] Accordingly, on 26 May 2008 the Commission wrote to the Hon F Riebeling MLA, Speaker of the Legislative Assembly of the Parliament of Western Australia, referring the allegations to him as the applicable presiding officer as

defined in section 27A(4) of the Act. Section 27A(4) of the Act defines the “presiding officer” as the President where the allegation relates to a member or officer of the Legislative Council, or the Speaker in relation to a member or officer of the Legislative Assembly.

[78] On 11 June 2008 Commissioner the Hon Len Roberts-Smith RFD QC, attended before the Procedure and Privileges Committee (“the Privileges Committee”) of the Legislative Assembly to answer questions about the referral.

[79] By letter from the Speaker dated 18 June 2008 the Privileges Committee referred the inquiry to the Commission in accordance with section 27B(2) of the Act. A copy of that letter is Attachment A to this report.²⁵

[80] This report also necessarily contains reference to the actions of Mr Corrigan, who was acting on Mr Bowler’s instructions, and to his evidence²⁶ given in the course of the Commission’s own investigation under section 26 of the Act.

9. EXAMINATION OF THE INVESTIGATIVE MATERIAL

[81] The relevant telephone intercept material is described below, in chronological order, with relevant extracts from Commission public hearings, interviews and statements.

[82] In an intercepted call on 2 March 2006 Mr Burke called Mr Bowler and, after discussing political matters, they had the following conversation.

BURKE: *The only other thing I wanted to mention to you is that [name deleted], you know [name deleted]?*

BOWLER: *Yep.*

BURKE: *Mate it’s desperate to get him a job in Worksafe.*

BOWLER: *Okay uhm look yeah I okay well I’ll I’ll have a word to ah*

BURKE: *The request has gone through to Ian,*

BOWLER: *Yep.*

BURKE: *from Julian. Now I don’t want you to take this the wrong way but I’ll just tell you for what it’s worth. Ian said to someone oh it’s difficult things coming through from Julian or Brian etcetera. Mate that just upsets Julian you know.*

BOWLER: *Yeah. Look you know we’re we’re, emails are FOIable.*

BURKE: *Yep.*

BOWLER: *Right.*

BURKE: *Yep.*

BOWLER: *So lets do lets we ah we ah try and do the right thing by [name deleted]. If we do get him the job you know then the West get that then there it is.*

BURKE: *Well lets lets let me explain.*

BOWLER: *You know it.*

BURKE: *Let me explain to you that emails aren't FOIable. I'll send you an opinion from the Information Commissioner which I'll*

BOWLER: *Well*

BURKE: *put.*

BOWLER: *Okay.*

BURKE: *Well I've provided it to Alannah MacTiernan when she was the r, received FOIable. They're only FOIable in certain circumstances where they relate to an agency under your control. But I mate I'll get it out for ya and I'll send it to you.*

BOWLER: *Right.*

BURKE: *Have you got a personal email address?*

BOWLER: *Nah I've got the I've got my electorate one. Which is okay cause I know it is definitely not FOIable.*

BURKE: *Okay what's that address?²⁷*

[83] This call was played to Mr Bowler at a Commission public hearing on 26 February 2007.²⁸ Mr Bowler was asked why he was concerned that a communication from Mr Burke might be available under the *Freedom of Information Act 1992* ("the FOI Act"). Mr Bowler said:

... Just the perception that, you know, I'm doing a special deal for him but, you know, I didn't mind doing it in a way because if I can help someone get a job where we need jobs I'll do it. That's my job.²⁹

[84] When he was asked what his concern was about "FOIable", Mr Bowler said:

Well, you know, reports don't always deal with fact - you know, I'm a former reporter but perception in politics can become reality and I thought, you know, if the media had got onto that and they're getting - and so are the opposition, after FOI all the time, that may look bad but, you know, I personally didn't think it was bad.³⁰

[85] In an intercepted telephone call on 9 March 2006 Mr Grill told Mr Burke that he had met Mr Bowler at a function the previous night. Mr Grill said that Mr Bowler had asked them not to request meetings, but had said that he (Mr Bowler) would visit them at Mr Grill's place.

GRILL: *Now the other thing I'll talk to you about John. I'm going to see John again tonight. I didn't talk to him about the Finance Brokers matter, by the way.*

BURKE: *Yeah.*

GRILL: *What happened was he just said I was a little bit late to this show but uhm, not really late just a little bit, and John grabbed me and said look I want to talk to you, so err after the speeches we sort of sat down near the pool which was away from other people, it didn't deter other people from coming up and sitting with us but he just wanted to sit down there and talk and quite frankly I was quite happy for people to see that he just wanted to sit down there and*

BURKE: *Sure.*

GRILL: *talk with me. Ah now ah I did*

BURKE: *And he's positive to me as well is he?*

GRILL: *Yeah well, what he's saying is this that Alan has told him that he would prefer that he didn't see us. He's, Alan's view and, and John feels very guilty about this, he said I haven't rung you for a couple of weeks he said because I just feel so guilty about it but he said what I'm going to have to ask you to do is ah not to request meetings with me.*

BURKE: *Oh fuck.*

GRILL: *However he said uhm, that is the official line and you, on that basis I can't concede to meetings in my office but he said you and Brian will have better access to me he said it will be on, on a social basis uhm but he said whenever you ring*

ah he said what I'll do is I'll then make the time to come across to your place and sit down and talk with you both.

BURKE: *Mm.*

GRILL: *So*

BURKE: *Mate is he, is Carpenter going to say this to all the others too?*

GRILL: *No it's only to him³¹*

(emphasis added)

[86] Mr Bowler confirmed this arrangement at a Commission public hearing on 26 February 2007.

... Although the Premier relaxed the previous ban on the lobbyists, the Premier made it clear that he didn't have any time for Julian Grill or Brian Burke and it would have been an embarrassment I think if he had met Julian Grill in the lobby or in the lift because the Premier's office is just above mine and so therefore if I wanted to have a meeting with Julian Grill I'd - once every one or two months - I don't know how often, you know, I'd go to his house or meet him - meet him for a coffee.³²

[87] Earlier on 9 March 2006, in an intercepted call, Mrs Lesley Grill, wife and secretary to Mr Julian Fletcher Grill, telephoned Mr Corrigan, Chief of Staff to Minister Bowler, to discuss how Mr Grill and Mr Burke should contact Mr Bowler.

LESLEY GRILL: *Oh hello is that John Bowler?*

CORRIGAN: *No it's uhm Simon Corrigan.*

LESLEY GRILL: *Oh Simon*

CORRIGAN: *Lesley Grill, how are you?*

LESLEY GRILL: *(laughs) Simon, how are you?*

CORRIGAN: *Good.*

LESLEY GRILL: *I may as well talk to you actually. Uhm, this is something, that a conversation that Julian had with John. This is confidential alright?*

CORRIGAN: *Mm m.*

LESLEY GRILL: *Uhm, last night.*

CORRIGAN: Yep.

LESLEY GRILL: Uhm.

CORRIGAN: Is it the conversation about, about how you

LESLEY GRILL: about me dealing with any appointments and I have to ring him. Now err that's what Julian said to me and I said to Julian should I not ring Simon.

CORRIGAN: Yeah.

LESLEY GRILL: He said no John wants you [to] deal through him directly, so I was just ringing John to check.

CORRIGAN: No you can, you can deal with me.

LESLEY GRILL: Yeah, but no emails.

CORRIGAN: No emails and err you know preference I think the preference would be in, in, in person as well, that I know

LESLEY GRILL: rather than going to the, rather than phoning?

CORRIGAN: Yeah.

LESLEY GRILL: So walk down to your office. Sorry (laughs).

CORRIGAN: Or oh I can come and see you I don't I'm happy to come and see you.

LESLEY GRILL: Yeah but I would have to ring you wouldn't I?

CORRIGAN: Yeah, yeah.

LESLEY GRILL: Yeah, yeah. But if I for instance, if I'm making an appointments like you know for another company it's, like I have been doing with Griffin.

CORRIGAN: Yeah.

LESLEY GRILL: Do you still want you, you would rather come and see me?

CORRIGAN: Uhm either yeah, either that or, or have someone from Griffin contact me. I mean

LESLEY GRILL: Yeah.

CORRIGAN: You know I uhm that would be err

LESLEY GRILL: Yeah well I will have a talk to Julian

CORRIGAN: you know

LESLEY GRILL: about that.

CORRIGAN: Yeah. It would never be a situation where, where we wouldn't

LESLEY GRILL: Yeah.

CORRIGAN: see Griffin, like you know, for, for example.

LESLEY GRILL: Yeah. See the situation has come up where, obviously this is just a John thing, other, other offices are saying to me you have to email me.

CORRIGAN: Yeah.

LESLEY GRILL: You know, I won't do anything without email

CORRIGAN: Well yeah,

LESLEY GRILL: so obviously John

CORRIGAN: Other, other offices can, can do, I think John is in a different situation.

LESLEY GRILL: Yeah. Alright well I'll have a talk to Julian. I just don't think he wants to be completely cut out you know

CORRIGAN: Nah and yeah.

LESLEY GRILL: Because he, he sort of, works for

CORRIGAN: and we don't and that's not yeah absolutely not where we want

LESLEY GRILL: Yeah.

CORRIGAN: where we want to go

LESLEY GRILL: Yeah.

CORRIGAN: but uhm

LESLEY GRILL: So you'll just

CORRIGAN: *Shall we catch up err shall we catch up some point and uhm*

LESLEY GRILL: *Yeah. We'll have lunch or something.*

CORRIGAN: *have a bite and uhm, and go through it more err more fully.*

LESLEY GRILL: *Yep okay.*³³

[88] This call was played to Mr Bowler at a Commission public hearing on 26 February 2007. Mr Bowler was asked several questions and responded, as detailed below.

What's the problem with emails arranging appointments between you and Mr Grill being FOIable?---It was a stigma about Julian Grill and Brian Burke going back to the first term of our government.

But all it does by stopping email appointments and making them verbally is conceal the fact that you are in fact making appointments to see Mr Grill, doesn't it?---Yes.

You said last year you did nothing to - - -?---I gave you the reasons why.

*You said last year you did nothing to conceal the nature of your relationship with Mr Grill and Mr Burke?---I've made it quite open, you know. As I've said to you, the two reasons why I didn't want Julian bumping into the Premier and I didn't want to discuss matters of a commercial confidentiality on the telephone.*³⁴

(emphasis added)

[89] On 9 April 2006 Mr Grill called Mr Bowler and, in the course of discussing a meeting Mr Bowler was having with representatives of a mining company, which was a client of Mr Grill, they had the following conversation.

GRILL : *Probably, oh Robert will be down for the meeting and uhm, err probably I would say uhm someone like uhm, err Brian Hughes or Vince, Vincent Smith from Pitcher Partners would uhm would also attend because they'll have err mostly financial stuff at their fingertips by then.*

BOWLER: *Okay.*

GRILL: *Now, you'd prefer me not to be there?*

BOWLER: *Well you know that's what I, I have said to you before that you know you can organise meetings you can get your clients there*

GRILL: *Yep*

BOWLER: *The only thing is you know if, if I give them relief, you know the Libs are going to start asking, you know and I, err if you have you have but you know you err, its going to be harder*

GRILL: *Oh, that's okay.*

BOWLER: *You know what I mean, its just you, err know Julian Grill*

GRILL: *That's alright*

BOWLER: *represented at the meeting, you gave them what they wanted, uhm you know.*

GRILL: *Yeah*

BOWLER: *Uhm, it will just make it harder for your next client.*

GRILL: *Yep, okay, err*

BOWLER: *You know in the eyes of Cabinet, that's all err not my eyes but in the eyes of Cabinet.*

GRILL: *Yeah, sure*

BOWLER: *Uhm and you know the other thing as I said to you, you know with Alan's attitude err you know I just think its err, you, what do you think you need to be there?*

GRILL: *No, no that's okay, no trouble, no sweat.³⁵*

[90] On 27 April 2006 Mr Grill telephoned Mr Bowler and discussed sending some information to Mr Bowler concerning Mr Grill's client, Fortescue Metals Group (FMG).

BOWLER: *So you fax that through to Simon and I, I'll get Paula to give you a buzz.*

GRILL: *Now I'll tell you what, you're not keen for stuff to come through to your office on my, on my computer, are you?*

BOWLER: *No.*

GRILL: *So if I get this sent through by FMG*

BOWLER: ... or internal fax.

GRILL: What's that?

BOWLER: Yeah, yeah get, get FMG to send it.

GRILL: I'll get FMG to send it through.

BOWLER: Yep.

GRILL: Ah and then I can ring up Paula and talk to her and to Simon and talk to them?

BOWLER: Yep.³⁶

[91] About 10 minutes later Mr Grill called Mr Julian Tapp of FMG and asked him to send the information to Mr Bowler.

GRILL: Err, but we'll need to get the information through to him and uhm I've got an arrangement with him, I don't send him stuff directly from my.

TAPP: Okay.

GRILL: Uhm.

TAPP: I understand (laughs).

GRILL: Err my computer.³⁷

[92] On 26 July 2006 Mr Bowler and his wife attended a dinner at Mr Grill's residence. Mr Burke and his wife were also present. On the following morning, 27 July 2006 at 8.58 am, Mr Burke telephoned Mr Corrigan.

BURKE: Simon?

CORRIGAN: Right, how are you going?

BURKE: Yeah good Simon. I was just with John last night and I promised to fax him through something.

CORRIGAN: Yep.

BURKE: But I didn't know, I didn't want to fax it until someone who was there who could take it off the fax, it hasn't got any identification on it or anything it's nothing contentious or anything I was just err something he asked me to remind him about.

CORRIGAN: *Yeah uhm I'm, uhm err just coming, coming to the car park now so I'll be about uhm you know six minutes away or so.*

BURKE: *Oh good, if you could ring me with a fax number, I'd rather send it by fax than email that's all.*

CORRIGAN: *Okay no worries*

BURKE: *good.*

CORRIGAN: *I'll ah, I'll give you a bell when I get in.³⁸*

[93] Twelve minutes later, at 9.10 am on 27 July 2006, Mr Corrigan called Mr Burke.

BURKE: *Brian Burke speaking.*

CORRIGAN: *Oh Brian, Simon here. I'm uh*

BURKE: *Oh giddy Simon.*

CORRIGAN: *I'm standing next to the fax*

BURKE: *Are ya. Okay what's the uhm, what's the number Simon?*

CORRIGAN: *Uh that's a good question.*

(Aside) Uhm what's the fax number ...?

FEMALE: [Suppressed]

CORRIGAN: [Suppressed]

BURKE: *Okay. I'm just shoved it through now. It's just storing the fax. I just want to make sure it goes off and you get it, you know*

CORRIGAN: *Yeah*

BURKE: *Is your fax busy at the moment?*

CORRIGAN: *No, no it should uhm come straight through.*

BURKE: *It's dialing now.*

CORRIGAN: *Okay. Yeah here it comes.*

BURKE: *Is it? Okay. It's just an aide memoire that I sent, John asked me to send in about some matters he and Julian discussed.*

CORRIGAN: *Okay no worries.*³⁹

[94] On 30 August 2006, in the course of a visit by Mr Bowler to Mr Grill's residence, Mr Bowler said:

BOWLER: *So, as the guy said, he said you got a permanent Everything I say, well I expect that, come out an open theatre to the triple C one day, and I think that's the way you gotta treat your phone. So, anything you and I want to discuss, you ring me up, and say come over for afternoon tea, ... do you want to have breakfast, whatever, I'll I'll go ... and that's the way, sadly with phones now that you treat ...*

GRILL: *Yeah.*⁴⁰

[95] On 18 October 2006 Mr Bowler called Mr Grill. After discussing another of Mr Grill's clients, Mr Grill mentioned another client, Echelon Resources.

GRILL: *Okay then. Uhm did you talk to Simon about uhm e, Echelon?*

BOWLER: *Yeah I did uhm, err, uhm I*

GRILL: *I've spoken to*

BOWLER: *I don't, I don't want to talk about that over the phone.*

GRILL: *Alright okay.*

BOWLER: *Uhm.*

GRILL: *That's alright.*

BOWLER: *I'll uhm. You know uhm, but I'll err talk to I'll try and see you at lunch time tomorrow or something?*

GRILL: *Lunchtime tomorrow I can't do 'cause I'll be up North. What about later say around err oh I don't know, uhm five o'clock?*

BOWLER: *Uhm I'm*

GRILL: No good?

BOWLER: flying out I think tomorrow night.

GRILL: What time?

BOWLER: Uhm, uhm, Thursday. When are you going up North?

GRILL: Oh not, ah I, I meant Northern Suburbs.

BOWLER: Oh okay.

GRILL: Yeah. Uhm so I'll be up at uhm I think Wanneroo. At, at ah lunchtime.

BOWLER: Uhm.

GRILL: What time do you have to leave?

BOWLER: Oh, do you want me to drop in tomorrow morning at on your house about eight o'clock?

GRILL: Yeah that'll be excellent.

BOWLER: I'll see you then.⁴¹

[96] In the submissions made on behalf of Mr Bowler, it is said that the reference to Echelon Resources in this telephone conversation did not relate to the Shovelanna lease but involved access to infrastructure.⁴² It is not necessary for the Commission to reach any view about that in this report.

[97] Information available to the Commission verifies that Mr Bowler attended Mr Grill's residence the following morning, and they discussed several of Mr Grill's clients.⁴³

[98] Mr Corrigan gave the following evidence at a Commission public hearing on 27 February 2007.

Had you ever received any instructions from the minister in regards to correspondence from Mr Burke and Mr Grill?

---Yes.

What?---I believe shortly after I became chief of staff in August of last year - of 2005, sorry, the minister instructed me not to log correspondence from either Mr Burke or Mr Grill.

You took that to mean not to log it on the record keeping system in the office?---Yes.

*Did that instruction apply to the whole office in your understanding?---That was my understanding, yes.*⁴⁴

[99] Mr Corrigan was asked whether he was aware of any instruction that Minister Bowler had given to administrative staff in the office. Mr Corrigan said:

*Yes. One of the administrative staff informed me that the minister had instructed them not to email phone messages from Brian Burke or Julian Grill but rather to write them on a piece of paper.*⁴⁵

[100] Mr Corrigan was then asked several additional questions and responded, as detailed below.

Did you become aware at some point that there had been a discussion with Mr Bowler and Mr Grill in regards to communications between them?---Yes.

*How did you become aware of that?---I believe the minister told me that he had asked Julian Grill not to email the office and that if he wanted to - if he wanted to talk about something, to give him a ring - him, myself or Tim Walster a ring and arrange to meet up.*⁴⁶

[101] Later Mr Corrigan was asked several questions and responded, as detailed below.

Are you aware of where it was that Mr Bowler and Mr Grill met?---My understanding was that - at his house, at Julian Grill's house.

Did you ever attend there?---Yes.

*On how many occasions?---On one occasion that I can recall.*⁴⁷

[102] Mr Corrigan made a statement to the Commission on 26 February 2007.⁴⁸ In that statement he made the following comments.

*I recall being instructed by the Minister to not log correspondence from Brian Burke or Julian Grill. I believe the instruction was given verbally sometime shortly after I commenced as Chief of Staff.*⁴⁹

*The instruction applied to the whole office, and it was clear in that no correspondence from Julian or Brian was to be recorded in the correspondence system.*⁵⁰

*I was also aware that John had given an instruction to the administrative staff directly, that phone messages from Julian or Brian weren't to be emailed, they were to be written on a piece of paper and handed to him.*⁵¹

*The normal practice, which was adopted for others, was to email messages to the Minister or his appointment secretary.*⁵²

*Once again, this method was adopted to circumvent potential FOI requests, as he didn't want that contact subject to FOI.*⁵³

*In other discussions with John he told me that he had asked Julian not to email the office. John told me that he had spoken to Julian, and if he wanted to tell him (John) something that they could meet up.*⁵⁴

*John said that he had told Julian to also ring Tim or me to arrange to meet up.*⁵⁵

*From what John has told me, I am aware that he has met up with Julian face to face and discussed certain matters that were before him.*⁵⁶

*Generally speaking a Minister would meet with a company or lobbyist with a policy officer or officer from an agency. This would ensure that the process of decision-making is documented.*⁵⁷

*I have received emails from Julian and Brian that I have deleted from my system. I can only recall one specifically, but I think there may have been others.*⁵⁸

*I recall having a conversation with the Minister about one email, and the discussion that followed was how to avoid possible retrieval of that email. I don't recall whether it was a direct instruction or not, but I felt that after the discussion deleting the email was the thing to do.*⁵⁹

[103] On 28 February 2007 Commission Investigators spoke with Ms Lisa Davenport, Appointments Secretary to Minister Bowler in 2006. Ms Davenport said that while she was in this role she had received an office instruction that messages from Mr Grill, Mrs Grill, or Mr Burke should not be sent by email to other people in the office. Ms Davenport said that this was contrary to the normal mode of messaging, which was done by email. Ms Davenport could not remember who had made the instruction.⁶⁰

[104] Information available to the Commission verifies that Mr Bowler visited Mr Grill's residence on a number of occasions during 2006. Some of these were social visits at which matters relating to clients of Mr Grill and Mr Burke were also discussed, but at least four of these meetings appear to have been purely for the purpose of discussing issues before Mr Bowler in his official capacity which were relevant to the commercial interests of clients of Mr Grill and Mr Burke. Mr Bowler requested the meetings on three of these occasions.⁶¹

10. RELEVANT LEGISLATION AND GUIDELINES

10.1 Freedom of Information Act 1992

[105] The FOI Act does not direct when records should be created. The closest to a direction is section 110, which states:

110. Destruction of documents

A person who conceals, destroys or disposes of a document or part of a document or is knowingly involved in such an act for the purpose (sole or otherwise) of preventing an agency being able to give access to that document or part of it, whether or not an application for access has been made, commits an offence.

Penalty: \$6,000.

- [106] There is no doubt that Mr Bowler and Mr Corrigan took action to ensure that official records of Mr Bowler's contact with Mr Grill and Mr Burke were not kept, and that this was for the purpose of ensuring that they could not be accessed under the FOI Act. However, the fact that they prevented documents being created does not seem to fall within the scope of "... *conceals, destroys, or disposes ...*" as per section 110 of the FOI Act.
- [107] The Information Commissioner has considered the applicability of section 110 of the FOI Act on several occasions, but not in any case analogous to this. The question before the Information Commissioner has generally been whether an agency had been justified in destroying an existing document.
- [108] In the Commission's opinion section 110 of the FOI Act does not apply to a situation where documents were prevented from being created, as was the case in Mr Bowler's Ministerial Office.

10.2 State Records Act 2000

- [109] Section 78(1) of the *State Records Act 2000* ("the Records Act") states:

78. Offences

- (1) *A government organization employee who does not keep a government record in accordance with the record keeping plan of the organization, commits an offence.*

Penalty: \$10,000.

10.3 Ministerial Code of Conduct March 2005

- [110] The introduction to the *Government of Western Australia Ministerial Code of Conduct* ("the Code") March 2005 states:

Ministers have significant discretionary power and make decisions that can greatly affect individuals and the community. Consequently, it is necessary to set higher standards of conduct for them than for other categories of elected office holders.

Being a Minister of the Crown demands the highest standards of probity, accountability, honesty, integrity and diligence in the exercise of their public duties and functions. They must ensure that

*their conduct does not bring discredit upon the Government or the State.*⁶²

[111] Section 3 of the Code states:

*... In addition, Ministers are accountable to both the community and Parliament for the administration of their departments, authorities and statutes. Ministers should be as open as possible, and give reasons for, their decisions and actions to ensure they are working in the public interest.*⁶³

[112] Section 13 of the Code, relating to record keeping responsibilities, states:

*The "State Records Act 2000" came into effect in March 2001. The [Records] Act governs how government records are created, maintained, destroyed or permanently preserved as State archives. A Minister of the Crown is defined as a government organisation under the [Records] Act and therefore Ministers are required to keep records that properly and adequately record the performance of the Ministers' functions, in compliance with the provisions of the [Records] Act.*⁶⁴

[113] Appendix E of the Code, relating to the recordkeeping responsibilities of Ministers and their employees under the Records Act, states:

The Department of the Premier and Cabinet is the agency designated with recordkeeping responsibility for Ministers and Parliamentary Secretaries. Ministers, their Parliamentary Secretaries and employees and contractors providing services to or on behalf of Ministers, are required to comply with the Department's recordkeeping plan.

The Department's plan establishes recordkeeping policy and programs for ministerial records and provides a framework for systematic and consistent recordkeeping. The ministerial recordkeeping program, prepared in accordance with the recordkeeping plan, establishes the minimum recordkeeping requirements for the government records of Ministers and Parliamentary Secretaries.

...

Under section 78 of the [State Records] Act it is an offence [Penalty: \$10,000]:

- *Not to keep a record in accordance with the recordkeeping plan;*
- *To transfer government records to unauthorised persons;*

- *To destroy government records unless authorised by the recordkeeping plan; and*
- *To have unauthorised possession of government records.*⁶⁵

(emphasis added)

[114] At the time of the relevant conduct, and before November 2006, the applicable recordkeeping plan for Ministerial Offices was the *Department of the Premier and Cabinet, Government of Western Australia, Part 1 – The Recordkeeping Plan* (“the Plan”), 15 December 2004.⁶⁶ A copy of relevant extracts from the Plan is Attachment B to this report.

[115] Almost two years later the document entitled *Department of the Premier and Cabinet, Government of Western Australia, Recordkeeping Program for Ministerial Offices November 2006* (“the Program”) was published.⁶⁷ However, as the conduct under examination occurred before that, the Program does not apply.

10.4 The Recordkeeping Plan, December 2004

[116] Section 3(2) of the Records Act states that: “a reference to keeping records or record keeping includes a reference to creating ... records”.

[117] At page 11 of the Plan it is stated that its purpose is to ensure ... “Records are created adequately to meet accountability requirements ...”.

[118] “Types of recorded information” are described at pages 13-14 of the Plan. These include: administrative records; Cabinet records; functional records; investigative records; Ministerial records; operational records; and secretarial records. “Ministerial records are government records relating to portfolio business ...”. Personal or political party records are specifically excluded, as they are not subject to the Records Act. However, it is stated in the Plan that “Any records of a political nature created or received as part of government or ministerial business are government records and subject to the Department’s recordkeeping plan”.

[119] At page 15 of the Plan, significant records and working papers are defined.

- *Significant records are documents of continuing or temporary value retained as evidence of business and must be captured into approved records systems.”*
- *Working Papers are usually considered documents of temporary value not required as evidence of business, however occasionally it may be necessary to rely on working papers as business evidence.*

[120] At page 16 of the Plan different types of documents are categorised according to how long they should be retained. The categories are: archival records; temporary records; and ephemeral records.

- *Archival records are significant records of continuing value that reflect the activities of government organisations and Ministers.*
- *Temporary ... records are only kept for as long as they retain significance.*
- *Ephemeral records are temporary records with no continuing value and generally are needed only for a few hours or a few days.*

[121] At page 28 of the Plan it is stated that, “Electronic documents become government records when they provide evidence of business decisions or transactions”. It is also stated that, “Email of a facilitative nature is ephemeral and destruction of ephemeral records may take place routinely during the normal course of business”.

11. ASSESSMENT

11.1 Mr Bowler

[122] On the information available, the Commission is satisfied that Mr Bowler took the following actions in an attempt to hide his contact and communication as a Minister with Mr Grill and Mr Burke. Mr Bowler:

- asked Mr Burke not to send emails to his Ministerial email address because he believed that they could be the subject of Freedom of Information (FOI) requests;⁶⁸
- confirmed to Mr Grill that he did not want Mr Grill to send information to him by email, and suggested it be sent by fax, and agreed to a suggestion that the client send it direct;⁶⁹
- asked Mr Grill not to officially request meetings with him at his office, but said that he would meet him, and Mr Burke, at Mr Grill’s residence;⁷⁰
- organised on several occasions to attend either Mr Grill’s residence or a venue other than his office to discuss issues relating to clients of Mr Grill and Mr Burke;⁷¹
- stopped Mr Grill from discussing a client (Echelon Mining) on the phone and arranged to meet Mr Grill at his residence;⁷²

- asked Mr Grill not to attend a meeting he (Mr Bowler) was having with representatives of a company, Croesus Mining, which was Mr Grill's client;⁷³
- said to Mr Grill that if he wanted to discuss anything he should phone him (Mr Bowler) and invite him for afternoon tea;⁷⁴
- instructed Mr Corrigan not to log correspondence from Mr Grill or Mr Burke on the correspondence system;⁷⁵ and
- instructed administrative staff not to email messages about phone calls from Mr Grill or Mr Burke but to write them on a piece of paper.⁷⁶

[123] The reasons Mr Bowler gave for this conduct can be summarised as detailed below.

- If the media and opposition made FOI requests to his office and obtained the records of his contacts with Mr Grill and Mr Burke, it might look bad.⁷⁷
- The Premier, the Hon Alan John Carpenter MLA, had made it clear that he did not want Mr Bowler to meet with Mr Grill and Mr Burke, and as the Premier had an office in the same building he was concerned that they might bump into him.⁷⁸
- He did not want to discuss commercial matters on the phone.⁷⁹
- If he met with clients of Mr Grill and Mr Burke and gave them relief, and Mr Grill was there, it would look bad in the eyes of Cabinet and the Premier, and make it harder for their next client.⁸⁰

[124] The Commission is satisfied that the actions listed above were taken by Mr Bowler with the purpose of ensuring that no records were being kept of his contacts with Mr Grill and Mr Burke, and that his contacts with them would not become known to the Premier, the Cabinet, the Parliament nor at all.

11.2 Mr Corrigan

[125] On the information available to the Commission it appears that Mr Corrigan took the following actions to assist Mr Bowler in hiding his contacts with Mr Grill and Mr Burke. Mr Corrigan:

- advised Mrs Lesley Grill (wife of Mr Julian Fletcher Grill) on how she should make appointments with Mr Bowler without there being an official record, said "no emails" and then met with Mrs Grill to "go through it more fully";⁸¹
- agreed to "stand-by" a fax machine so that he could receive a document from Mr Burke for Mr Bowler, and did not "log" the fax;⁸²

- deleted at least one email from Mr Grill or Mr Burke from his official electronic mail-box so as to avoid its possible retrieval.⁸³

12. COMMISSION OPINION ON MISCONDUCT

12.1 Mr Bowler

- [126] The meaning of “misconduct” is set out in section 4 of the Act. Paragraphs (a), (b) and (c) are defined (in section 3 of the Act) as “serious misconduct”. Paragraphs (a) and (b) both require that a public officer has acted “corruptly”. Paragraph (c) applies if a public officer has committed “an offence punishable by 2 or more years’ imprisonment”.
- [127] On the material available to the Commission, the Commission accepts that there was a political dimension to Mr Bowler’s desire to keep secret his contacts with Mr Grill and Mr Burke. In other words, evidence of this in the hands of the opposition or the media, or of some of his party colleagues, could be used to damage him politically, and Mr Bowler was at pains to avoid this. The Premier had made it very clear to Mr Bowler that he did not want Mr Bowler to meet with Mr Grill or Mr Burke, and finally he was concerned that any decision he made which benefited the clients of Mr Grill and Mr Burke might be viewed askance by members of Cabinet.
- [128] The Commission is separately preparing reports on several matters which were the subject of lobbying by Mr Grill and Mr Burke, and on which Mr Bowler made decisions.
- [129] The Commission considered whether there is evidence that Mr Bowler wanted to hide his contacts with Mr Grill and Mr Burke because he intended to improperly make decisions which were to the benefit of their clients. However, the evidence does not show that he had that specific intention. Accordingly, the evidence does not sustain an opinion that this conduct of Mr Bowler, with respect to concealing his contacts with Mr Grill and Mr Burke, constitutes “serious misconduct” under paragraphs 4(a) or (b) of the Act.
- [130] However, in the Commission’s opinion, by treating Mr Grill and Mr Burke differently to all other lobbyists and business representatives (who did not have this type of access to him), and by effectively subverting the normal procedures for record keeping, and involving his staff in this, Mr Bowler engaged in misconduct. This conduct fell within section 4(d)(i) in that it “adversely affects, or could adversely affect, directly or indirectly, the honest or impartial performance of the functions of a public authority or public officer ...”, section 4(d)(ii) of the Act, in that it “constitutes or involves the performance of his or her functions in a manner that is not honest or impartial”, and section 4(d)(iii) of the Act in that it “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”.

- [131] The Commission is not satisfied that the conduct of Mr Bowler could constitute an offence against section 78 of the Records Act, a written law, and therefore it would not meet the criteria of misconduct set out in section 4(d)(v) of the Act.
- [132] That is because the only possible offences under the Records Act would be not keeping a government record in accordance with the Plan⁸⁴ contrary to section 78(1) of the Records Act, or destruction of a government record otherwise than as authorised by the Plan, contrary to section 78(3) of the Records Act, and neither would appear to apply to these circumstances. Section 78(1) of the Records Act states: “A government organization employee who does not keep a government record in accordance with the record keeping plan of the organization, commits an offence”. Section 78(3) of the Records Act states: “A government organization employee who destroys a government record commits an offence unless the destruction is authorized by the record keeping plan of the organization”.
- [133] The Commission has also considered whether or not what Mr Bowler did, in conjunction with Mr Grill and Mr Burke, could potentially have constituted a criminal conspiracy. In the Commission’s opinion, the information available is not capable of supporting such a conclusion.
- [134] Section 558 of *The Criminal Code* makes it a crime for a person to conspire with another to commit an indictable offence. Relevantly here, such a conspiracy would be punishable by half of the penalty which would apply to the indictable offence. The circumstances here do not involve an agreement to commit any indictable offence.
- [135] Under section 560 of *The Criminal Code* it is an offence for a person to conspire with another to commit a simple (i.e., summary) offence. A conspiracy of that kind is punishable by a penalty equal to the maximum applicable to the simple offence. In the present circumstances, therefore, even if there had been an agreement to commit an offence under section 78 of the Records Act, the maximum punishment for that conspiracy would have been a \$10,000 fine – which still would not have made it “serious misconduct” within section 4(c) of the Act. Also, because the particular circumstances did not give rise to an offence contrary to section 78 of the Records Act in any event, nor would the conduct fall within section 4(d)(v) of the Act.
- [136] The conduct of Mr Bowler and Mr Corrigan can be divided into two categories:
1. attempts to ensure that Mr Grill and Mr Burke did not directly contact Mr Bowler’s office in a way which might leave a record; and
 2. attempts to ensure that any contacts made were not recorded within the office.
- [137] The Plan does not seem to prohibit conduct of this type. While Mr Bowler and Mr Corrigan were clearly attempting to prevent records being created, there

does not seem to be anything in the Plan to prohibit this conduct. Most of Mr Bowler's conduct was of this type.

- [138] It is difficult to see how this conduct would breach the Records Act. Records of the type in question (had they been created) would most likely have been properly characterised as "ephemeral" or "temporary" – which the Plan did not require be either created or kept respectively.
- [139] However, the Commission is satisfied that Mr Bowler's conduct meets the criteria of section 4(d)(vi) of the Act in that it is of sufficient seriousness that if he had been a public service officer it could constitute a "disciplinary offence".
- [140] Paragraph 4(d)(vi) of the Act states that: "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)".
- [141] The words in brackets are important. They make it clear that where the public officer concerned is not an officer of the public service, 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 *Public Sector Management Act 1994* ("the PSM Act"), as if that person were a member of the public service.
- [142] Although as a Minister at the relevant time Mr Bowler was a public officer, he was not a member of the public service. It is, therefore, the notional test in paragraph 4(d)(vi) which must be applied to his conduct.
- [143] General principles of official conduct are set out in section 9 of the PSM Act, which states that:

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

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

- (c) *are to exercise proper courtesy, consideration and sensitivity in their dealings with members of the public and employees.*

(emphasis added)

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

An employee who –

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

commits a breach of discipline.

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

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

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

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

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

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

- (b) *may –*

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

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

(emphasis added)

[150] Where the public officer concerned is a Chief Executive Officer and the recommendation is for dismissal, the Minister shall so recommend to the Governor (section 89 of the PSM Act).

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

[152] In submissions on behalf of Mr Bowler it is put that because there was a political dimension to Mr Bowler's decision to keep secret his contacts with Mr Grill and Mr Burke, and no opinion or "finding" that his conduct did in fact result in outcomes more beneficial to the clients of Mr Grill and Mr Burke, or corrupt favouritism by him, it could not be said to be conduct that could adversely affect the honest and impartial performance of his functions in a manner that was not honest and impartial, nor that it constituted or involved a breach of trust within section 4(d)(iii) of the Act.⁸⁵

[153] The Commission does not accept these submissions.

[154] The fact that Mr Bowler's motivation for engaging in this subterfuge and concealment, from the Premier, his Ministerial and Party colleagues, and the Parliament generally, was political, is hardly surprising. That motivation does not change nor lessen the nature of his conduct. The breach of trust was not in continuing to meet with Mr Grill and Mr Burke in relation to matters within his portfolio, contrary to the Premier's expressed wishes, but in the steps he

took to actively conceal those contacts. Further, these clandestine arrangements gave at the very least the appearance of opportunity to Mr Grill and Mr Burke (and hence their clients) to influence Mr Bowler in a way that would not come to the knowledge of the Premier, the Cabinet or the Parliament. In the circumstances, that constituted the performance of his functions in a manner that was not honest. Nor was it impartial. The arrangements favoured Mr Grill and Mr Burke (and their clients) over persons who did not have that type of access to him.

[155] Mr Bowler's expressed concern that any decision he might make which benefitted clients of Mr Grill and Mr Burke might be viewed askance (even) by members of Cabinet, were they to know of such contacts, itself reveals a breach of his Ministerial obligation of "probity, accountability, honesty, integrity and diligence". Likewise, his apprehension about that and his reasons for concealing his contacts with Mr Grill and Mr Burke, and the clandestine way in which he continued to meet with them, was likely to bring discredit upon the Government. In both respects, these could constitute breaches of the Code.⁸⁶

[156] In the opinion of the Commission, the conduct described above could constitute a breach of a public sector standard or code of ethics contrary to section 80(b)(ii) of the PSM Act or an act of misconduct contrary to section 80(c) of the PSM Act.

[157] In ordinary use, "misconduct" means –

"unacceptable or improper behaviour, especially by a professional person."

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

"1 improper or unprofessional behaviour. 2 bad management ..."

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

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

(Macquarie Dictionary, Fourth Edition, p.914)

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

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

[158] The use of the word in a section of an Act regulating matters to do with the public service of the State and public officers specifically, obviously means the misconduct referred to in section 80(c) must relate to, or bear upon, the

conduct of the person as a public officer. It would clearly include unlawful conduct but relevantly here must necessarily also encompass unacceptable, improper or unprofessional or wrong conduct less than that which is unlawful. For the reasons already given, the steps taken by Mr Bowler to conceal his contacts and dealings with Mr Grill and Mr Burke about matters within his portfolio, in the circumstances was capable of constituting “unacceptable, improper or wrong” conduct.

[159] The matters set out at [154] – [158] above meet the representations made by Mr Grill’s lawyers in their fax of 4 July 2008, submitting that it is inappropriate for the Commission to suggest that the holding of Ministerial meetings with Mr Grill, other than in the Ministerial Office, was itself inappropriate or otherwise suggestive of the fact that the subject-matter of the meetings was improper.

[160] In the Commission’s assessment, Mr Bowler’s actions could constitute a serious breach of discipline. The reasons for this conclusion include the following factors.

- Mr Bowler was a Minister of the State presiding over a very important portfolio. There is considerable public interest in this role being performed honestly and transparently. This is set out in the Code.⁸⁷
- The conduct was not inadvertent nor confined to a single instance, but was deliberate, was intended to defeat or circumvent a statutory regime going to transparency and good governance, was designed to conceal his dealings as a Minister with Mr Grill and Mr Burke, and was a sustained course of conduct.
- The matters Mr Bowler was discussing with Mr Grill and Mr Burke were, in most cases, related to decisions on mining or development projects which potentially had very serious commercial and social consequences.
- Mr Bowler was in a position of authority over his staff, whom he used to avoid the making or retention of records which would otherwise have been made or kept to conceal his dealings with Mr Grill and Mr Burke.
- The actions Mr Bowler took were to protect his relationships and his political career.

[161] As (notionally) a serious breach of discipline, that is conduct for which dismissal (that is, termination of office) would be an option. Having regard to the factors identified above, the conduct is of sufficient seriousness that, were Mr Bowler a public service officer, it could constitute a disciplinary offence providing reasonable grounds for the termination of office or employment under the PSM Act.

[162] In their submissions, Mr Bowler’s lawyers contend that in this case his conduct had no prejudicial consequence to any person, and so could not

constitute a serious breach of discipline. They rely upon the decision of the Full Court of the Supreme Court of Western Australia in *Titelius v Public Service Appeal Board and Ors.*⁸⁸ They submit that –

In that case the Court was determining whether the provision of a restraining order by a court officer to Mr Viner constituted a serious breach of discipline.

The Court determined at paragraph 108:-

*Thus, the Applicant's conduct – even if a breach of an instruction – had no prejudicial consequence to any person, and in all the circumstances could not give rise to a serious breach of discipline.*⁸⁹

[163] The quotation is in fact from the judgment of Ipp J. The principal judgment was delivered by Malcom CJ, with whom Ipp and Wallwork JJ agreed. Ipp J made some additional observations. The reference to prejudicial consequences was not suggested to be a general requirement for a finding of a “serious breach of discipline” under section 83(1)(b) of the PSM Act. The Court was dealing with a charge of a serious breach of discipline in that the officer was negligent in the performance of his functions contrary to section 80(d) of the PSM Act. The circumstances were that, whilst serving as a clerk in the public office of the Court, he had provided a copy of a restraining order to Mr Viner QC. Details of that were subsequently published for political purposes. Ipp J pointed out⁹⁰ the principal particulars of negligence were based on the “confidential nature” of the information and the “possible effects of its public release” (which was presumably thought to be harmful to some). All members of the Court agreed the information was not confidential and as Mr Viner was entitled to a copy of the order anyway, the applicant’s conduct had no prejudicial consequence. What was said by the Court in that case bore on the facts involved there and has no application to Mr Bowler’s conduct here.

12.2 Mr Corrigan

[164] The Commission is satisfied that, for the reasons given above, the conduct of Mr Corrigan could not constitute an offence against section 78 of the Records Act, a written law, and therefore would not meet the criteria of misconduct set out in section 4(d)(v) of the Act.

[165] The Commission is of the opinion that Mr Corrigan’s conduct, in assisting Mr Bowler to hide his contacts with Mr Grill and Mr Burke, met the criteria of section 4(d)(i) of the Act, in that it adversely affected the impartial performance of Mr Bowler’s functions as a public officer.

[166] However, the Commission does not consider that Mr Corrigan’s conduct is sufficiently serious to constitute a disciplinary offence providing reasonable grounds for the termination of his office as a public servant under the PSM Act.

- [167] This is essentially because Mr Corrigan did not initiate the measures taken, and he did not appear to stand to receive any benefit from them. In the Commission's assessment Mr Corrigan does not appear to have had any motivation for the actions he took other than to protect the reputation of Mr Bowler, to whom he reported as Chief of Staff. Mr Corrigan also said that he had expressed the view to Mr Bowler that contact with either Mr Grill or Mr Burke could jeopardise his position.⁹¹
- [168] In the Commission's assessment, on the information available, Mr Corrigan only did the minimum to assist Mr Grill and Mr Burke, and his cooperation with them appeared to be only out of loyalty to Mr Bowler.
- [169] In the Commission's opinion Mr Corrigan's conduct does not meet the criteria set out in section 4(d)(vi) of the Act, and accordingly the information available does not establish misconduct on his part within the meaning of section 4 of the Act.
- [170] In this circumstance the Commission does not propose to provide a separate report under section 84 of the Act in respect of Mr Corrigan.

13. RECOMMENDATIONS

- [171] Mr Bowler gave evidence to the Commission in a public hearing on 26 and 27 February 2007. On the afternoon of 27 February, the Premier demanded his resignation from Cabinet and the Australian Labor Party.
- [172] In Parliament on 28 February 2007, the day following the demand by the Premier that Mr Bowler resign, Mr Bowler announced his resignation as a Government Minister and member of the Australian Labor Party. A later inquiry by the Privileges Committee into Mr Bowler's leaking of a privileged draft parliamentary committee report made a number of recommendations which were accepted by the Parliament. Mr Bowler was disqualified "from membership of any Parliamentary Committee for the remainder of the 37th Parliament", suspended from "the House for a period of 7 sitting weeks or 21 sitting days", whichever was longer, and was not permitted "to enter the parliamentary precincts" during the suspension period.⁹² On 20 June 2007 Mr Bowler made an unreserved apology to the Parliament accepting the ruling of the Privileges Committee.
- [173] On 13 November 2007 Mr Bowler returned to Parliament after completing his period of suspension. Mr Bowler remains on the Back Bench as an Independent Member of the Parliament.
- [174] In the circumstances the Commission does not consider it necessary to make any recommendation as to any further possible disciplinary action with respect to Mr Bowler, although that is, of course, a matter for the House.
- [175] This inquiry has not identified any deficiency or lacuna in the Records Act, the *Freedom of Information Act 1992* ("the FOI Act"), the Code, the Plan, or the

Department of the Premier and Cabinet, Government of Western Australia, Recordkeeping Program for Ministerial Offices November 2006 (“the Program”). Mr Bowler’s misconduct involved a failure to comply with the standards of the Code. The Commission accordingly makes no recommendation in respect of these matters.

ATTACHMENTS

ATTACHMENT A

Letter of 18 June 2008 to Commissioner, the Hon L W Roberts-Smith RFD QC, from the Speaker of the Legislative Assembly, Parliament of Western Australia, the Hon F Riebeling MLA



PROCEDURE AND PRIVILEGES COMMITTEE

18 June 2008

The Hon L W Roberts-Smith RFD QC
Commissioner
Corruption and Crime Commission
PO Box 7667
Cloisters Square
PERTH WA 6850

Dear Commissioner

I refer to your letter dated 26 May 2008, regarding the referral of allegations of misconduct pursuant to s.27A(1) of the *Corruption and Crime Commission Act 2003* (your ref 0899/2006).

The Committee now refers the inquiry into this matter to the Corruption and Crime Commission, in accordance with s.27B(2) of the *Corruption and Crime Commission Act 2003*.

The Procedure and Privileges Committee has grave concerns that it should be involved in allegations involving members in their Ministerial capacity when the matter does not involve parliamentary privilege of the members' actions as members. However, the Committee has received advice that the Act in its current form suggests that a referral from the Corruption and Crime Commission to the Procedure and Privileges Committee is required, and that the Procedure and Privileges Committee must refer the matter back to the Corruption and Crime Commission for investigation. It is on this basis that the Committee makes this reference. The Committee points out that had the matter been referred to it by any means other than the Commission, it would not have been investigated by the Committee, as it falls outside its jurisdiction.

Should you have any queries regarding this referral, or any other related matters, please initially contact Peter McHugh, the Clerk of the Legislative Assembly, on 9222 7222.

Yours sincerely



HON. F RIEBELING, MLA
SPEAKER OF THE LEGISLATIVE ASSEMBLY; AND
CHAIRMAN OF THE COMMITTEE

ATTACHMENT B

Relevant extracts from the *Department of the Premier and Cabinet, Government of Western Australia, Part 1 – The Recordkeeping Plan*, December 2004



Department of the Premier and Cabinet
Government of Western Australia

Part 1 - The Recordkeeping Plan

Foreword

As a central agency, the Department of the Premier and Cabinet has a significant role to play in providing leadership and direction across government.

We are responsible for providing strategic advice and support to the Premier and the Cabinet, leadership and coordination within the public sector and a range of services direct to the community.

These responsibilities are undertaken with one ultimate goal – to ensure the best policy and outcomes for the people of Western Australian.

Consistent with this goal, the Department strives to meet high standards in all areas of internal administration.

This recordkeeping plan has been prepared in accordance with the *State Records Act 2000* and for the first time, articulates in one document the way the Department meets its recordkeeping responsibilities.

The Plan clarifies the Department's recordkeeping policies and programs and will assist in ensuring that staff are well informed about recordkeeping requirements.

In endorsing this Plan, I am confident that we are well equipped to meet the recordkeeping requirements of the *State Records Act 2000*.

M C Wauchope
DIRECTOR GENERAL

24 December 2003

<i>Revision No:</i>	3 (11231-v.11)
<i>Revision Date:</i>	15 December 2004
<i>Prepared By:</i>	Lesley Ferguson Manager Corporate Information

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Part 1 - The Recordkeeping Plan

Introduction

The *State Records Act 2000* provides for the keeping of government records. Section 19 of the Act requires government organisations to have a recordkeeping plan approved by the State Records Commission.

The Department's recordkeeping plan includes recordkeeping programs that provide for the creation of policy and procedures for implementing records management in the Department and certain other government organisations described in Section 10(4) of the *State Records Act 2000*:

Section 10(4):

The chief executive officer of the department principally assisting the Premier is responsible for ensuring that the government organizations described in items 3, 4, 5 and 6 of Schedule 1 comply with this Act.

An extract of Schedule 1:

3. *The Executive Council*

4. *The Cabinet*

5. *A Minister of the Crown*

6. *The parliamentary secretary of the Cabinet or a parliamentary secretary holding office under section 44A of the Constitution Acts Amendment Act 1899.*

The State Records Act defines what are State records and requires organisations to identify the matters about which records are to be created. Identifying and defining records is achieved through records management practices. These practices include subject or activities based classification, scheduling the retention and disposal of records, and documenting business processes and are used to achieve the State's Records Commission Standards and Guidelines (*SRC Standards & Guidelines*) for recordkeeping.

Recordkeeping refers to the responsibility to create, maintain, index, organise, store, preserve, secure, retain and manage records.

Records created or received by a government organisation or an employee in the course of the employee's work for the organisation are Government records. (*State Records Act 2000*). The Act defines a record as:

Record – means any record of information however recorded and includes -

- a) *any thing on which there is writing or Braille;*
- b) *a map, plan, diagram or graph;*
- c) *a drawing, pictorial or graphic work, or photograph;*
- d) *any thing on which there are figures, marks, perforations, or symbols, having a meaning for persons qualified to interpret them;*
- e) *any thing from which images, sounds or writings can be reproduced with or without the aid of anything else; and*
- f) *any thing on which information has been stored or recorded, either mechanically, magnetically, or electronically.*

What constitutes a record is discussed in detail later in *Part 1 – Recordkeeping Plan, Arrangement of Records, page 13.*

Recordkeeping Responsibilities and Authorities

Recordkeeping responsibilities are assigned, and promulgated throughout the Department so that the need to create and capture records is identified in output areas and Ministers' offices. Specific leadership responsibility and accountability for recordkeeping is assigned below:

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this report have been removed
from this page.*

Chiefs of Staff

Chiefs of Staff are the officers responsible for ensuring the government records of Ministers' offices are captured and retained in accordance with the recordkeeping plan.

Employees

Employees and contractors are to create, collect and retain records relating to the conduct of business activities. They are to identify and capture significant records into approved records systems and ensure all records are handled according to recordkeeping programs.

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this report have been removed
from this page.*

About the Recordkeeping Plan

The recordkeeping plan establishes recordkeeping policy and programs for government records. This plan includes:

- Information about government records identifying the major features and management of government records;
- Training programs to ensure recordkeeping principles and practices are adopted by all employees and contractors;
- Records management performance measures, audit and monitoring activities;
- Classification of records using a controlled vocabulary;
- Security classification and access protocols for restricted records; and
- Retention and disposal policy applied to different categories of records.

Recordkeeping Plan Implementation

The purpose of the plan is to provide a framework for systematic and consistent recordkeeping across all the Department's areas of responsibility to ensure that:

- Employees and contractors create full and accurate records;
- Records are created adequately to meet accountability requirements;
- Records are captured into approved records systems;
- The authoritative versions of documents are identified;
- Records are maintained within business and recordkeeping timeframes; and
- Responsibilities are assigned for all aspects of recordkeeping.

The recordkeeping plan is designed to accommodate the Department's changing administrative and recordkeeping responsibilities and covers record collections for the following business activities:

- Agent General
- Cabinet
- Commissions of Inquiry
- Executive Council
- Government Boards and Committees
- Ministerial Inquiries, Committees and Taskforces of Review
- Offices of Ministers of the Crown:
- Output Areas of the Department
- Royal Commissions
- Salaries and Allowances Tribunal

Record Collections are discussed in detail later in *Part 1 – Recordkeeping Plan, Arrangement of Records, page 13 & Recordkeeping Programs, page 21*.

Arrangement of Records

A well organised program for managing records will facilitate the retrieval of information and help to protect State and community interests in documenting any decision or action that becomes the subject of scrutiny. The plan identifies three broad categories of records; record types, record values and record disposition. Further categorisation of records is discussed in detail later in *Part 1 – Recordkeeping Plan, Classification, page 24*.

Types of Recorded Information

The recordkeeping plan encompasses a wide range of recorded information received, created and managed by the Department's output areas and Ministers' offices. Not all types of recorded information are subject to the *State Records Act 2000* and some recorded information is dealt with by other recordkeeping plans. The following recorded information types identify whether the information is subject to the Act and if so the recordkeeping plan applicable.

The Department's Recordkeeping Plan applies to:

Administrative Records:

Records relating to administration including financial management, human resources, information management and technology are administrative records. Some administrative records will be copies of the Department's Corporate Services support records and are identified as ephemeral records.

Cabinet Records

Cabinet records includes Cabinet submissions, decision sheets, comments and attachments with respect to Cabinet proposals, agendas and decisions, and material relating to the proceedings of Committees of Cabinet. Original Cabinet records are the property of the Western Australian Government, and are governed by Premier's Circulars and the Cabinet Handbook. Also refer to State archives later in *Part 1 – Recordkeeping Plan, Recordkeeping Policy, page 19*.

Functional Records:

Functional records cover the unique functions associated with the Department's primary business activities of Executive Government and Specialist Functions. The functional record type applies to the majority of the Department's records.

Investigative Records:

Investigative records are evidential records and the most critical records of Commissions, Committees and Inquiries and consist of submissions, exhibits, witness interviews and transcripts.

Ministerial Records:

Ministerial records are government records relating to portfolio business including institutional documents with annotations made by Ministers, their Parliamentary Secretaries or staff. Ministerial records also include communications and correspondence between the Premier, other Ministers or Parliamentary Secretaries in respect of the Ministers' portfolios, and information relating to any other official assignments from the Premier outside of the Ministers' current portfolios.

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Records not subject to the State Records Act 2000:

Personal or Political Party Records

Personal or political party records (sometimes called "personal papers") are not government records and include information relating to Ministers and their Parliamentary Secretaries constituency business; their role as a Member of Parliament; party political matters such as leadership, party organisation, caucus affairs and political appointments; the private life and personal interests of Ministers and their Parliamentary Secretaries.

Any records of a political nature created or received as part of government or ministerial business are government records and subject to the Department's recordkeeping plan.

Ministers and Parliamentary Secretaries may dispose of personal papers as they wish. Many Ministers have, over the years, chosen to donate their personal papers to the Batty Library. The library continues to encourage these donations.

The Value of Records

The value of records is determined by their significance to business, the State and the community relative to their administrative, facilitative, fiscal, historical or legal value. Records subject to the recordkeeping plan will be managed according to their significance.

Significant Records

Significant records are documents of continuing or temporary value retained as evidence of business and must be captured into approved records systems. Evidence of business includes those documents that:

- Approve or authorise actions or expenditure;
- Formally communicate or transmit information relating to business;
- Signify changes in policy or policy development;
- Create precedent, such as issuing an instruction or advice;
- Relate to official correspondence;
- Document the rationale behind policy, decisions or directives;
- Involve negotiations on behalf of the Public Sector, the Premier or Ministers;
- Have historical value for the community, the Public Sector, the Premier or Ministers;
- Support the administrative affairs of government;
- Instruct or provide advice used to implement government initiatives or services; or
- Meet contractual, financial, investigative, statutory or litigation obligations.

Working Papers

Working papers are usually considered documents of temporary value not required as evidence of business, however occasionally it may be necessary to rely on working papers as business evidence. On those occasions where working papers, notes and other information becomes significant, individuals need to capture the relevant working papers into approved records systems. It is the responsibility of individual officers to determine whether working papers are of enough significance to be captured into approved records systems. For example:

- Background notes and reference material used to prepare correspondence, reports, minutes, etc are kept until the action is complete. Background notes and other material for significant activities are captured into approved records systems;
- Duplicate information distributed to staff, eg newsletters, circulars, meetings agenda, notices, copies of document extracts used to facilitate actions are captured into approved records systems;
- Routine drafts are kept until the action is complete. Significant drafts and final copies are captured into approved records systems; and
- Facilitative messages or instructions of a non-essential nature such as routine edit corrections, distribution lists, and simple administrative messages are kept until the action is complete.

The Disposition of Records

The disposition of records is the retention sentence applied to records. *SRC Standards & Guidelines* identify two dispositions, archival, temporary. These dispositions are applied to records as part of the recordkeeping plan via classification, and scheduling the disposal of records.

Archival Records

Archival records are significant records of continuing value that reflect the activities of government organisations and Ministers. Archival records are not duplicated elsewhere in State Government and are an important record of government activities. They include internal deliberations on official matters, the initiation and development of policy or records documenting official assignments and government initiatives. Further information about archives is discussed in detail later in *Part 1 – Recordkeeping Plan, Classification, page 24 & Disposal of Records, page 26*. Archival records are transferred to the Department's Archive to be retained as State Archives until eligible for transfer to the State Archive Collection.

Temporary Records

Temporary value records are only kept for as long as they retain significance. Some temporary records are retained for long periods, such as the life of employees, property or agreements. Temporary values include:

- Administrative value to finalise the affairs of government;
- Facilitative value to assist responding to recommendations, implementing policy or preparing archives;
- Fiscal value to meet the Department's financial obligations; or
- Legal value for contractual, investigative, statutory or litigation requirements.

Temporary records are transferred to the Department's Archive and will be destroyed by the Department once the retention period, as designated on the approved disposal authority, has expired.

Ephemeral Records:

Ephemeral records are temporary records with no continuing value and generally are needed only for a few hours or a few days. There is no need to place ephemeral records on official files, and destruction of ephemeral records may take place routinely during the normal course of business.

Disposing of ephemeral records is an important administrative practice as the long-term retention of all paperwork is not efficient or economic. Disposing of ephemeral records is intended to promote good recordkeeping without undermining the retention of significant records. Guidance on identifying and disposing of ephemeral records is located in *Part 4 – Disposal Authorities*.

Electronic Recordkeeping

Electronic documents form part of the Government record and will be subject to the same recordkeeping regime as other record media.

Electronic documents become government records when they provide evidence of business decisions or transactions. Significant electronic records are managed and integrated into approved records systems, and if necessary printed and attached to official files. Responsibility for capturing electronic records into approved records systems belongs to the output area or Ministers' office with responsibility for the business activity undertaken.

Employees with desktop access to approved records systems capture significant electronic documents, email and web content directly into these systems. Where employees cannot upload documents into approved records systems, significant electronic records are printed and managed according to the records management procedures for file management.

Electronic Mail

Electronic mail (email) is used extensively for both internal and external transmission of business. Email forms part of the government record and is managed according to the *SRC Standards & Guidelines*. Significant email is captured into approved records systems. Email of a facilitative nature is ephemeral and destruction of ephemeral records may take place routinely during the normal course of business. Email attachments such as word documents, spreadsheets and presentations also form part of the government record.

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this report have been removed
from this page.*

Compliance Statement

This statement has been prepared in accordance with Section 19 of the *State Records Act 2000* (the Act), and accompanies the Department's recordkeeping plan.

State Records Commission Standard 1 (*SRC Standard*) – Government Recordkeeping requires the Department to ensure that records are created, managed and maintained over time and disposed of in accordance with principles and standards issued by the State Records Commission. *SRC Standard 2 – Recordkeeping Plans* comprises six recordkeeping principles each of which contains minimum compliance requirements addressed in this compliance statement.

The purpose of the recordkeeping plan is to set out the matters about which records are to be created by the Department and how it is to keep its records. The recordkeeping plan provides an accurate reflection of recordkeeping programs within the Department, including information regarding approved records systems, disposal arrangements, policies, practices and processes. The recordkeeping plan is the primary means of providing evidence of compliance with the Act and the implementation of best practice recordkeeping within the Department. In accordance with Section 17 of the Act, the Department and all its employees are legally required to comply with the contents of the recordkeeping plan.

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this report have been removed
from this page.*

ENDNOTES

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

¹ Letter of 18 June 2008 to Commissioner, the Hon Len Roberts-Smith RFD QC, from the Speaker of the Legislative Assembly of the Parliament of Western Australia, the Hon F Riebeling MLA [CCC 58154].

² Statement of Mr Simon John Corrigan to the Corruption and Crime Commission, 26 February 2007 [E 12615] and Transcript of Proceedings, Public Examination of Mr Simon John Corrigan on 27 February 2007.

³ Telecommunications Intercept, T 1896, 2 March 2006.

⁴ Telecommunications Intercept, T 0813, 27 April 2006.

⁵ Telecommunications Intercept, T 0915, 9 March 2006.

⁶ Telecommunications Intercepts, T 0819, T 1894, T 1895 and T 0925, 14 June 2006, 28 August 2006, 5 September 2006 and 18 October 2006 respectively.

⁷ *Ibid*, Telecommunications Intercept, T 0925.

⁸ Telecommunications Intercept, T 0898, 9 April 2006.

⁹ Transcript of meeting held on 30 August 2006 at 20:32 between Mr John Bowler, Mr Sam Bowler, Mr Julian Grill and Mrs Lesley Grill at Mount Street, Perth WA [T 1118].

¹⁰ Statement of Mr Simon John Corrigan to the Corruption and Crime Commission, 26 February 2007 [E 12615], *op cit*.

¹¹ *Ibid*.

¹² Transcript of Proceedings, Public Examination of Mr John James Mansell Bowler on 26 February 2007, p.771.

¹³ Telecommunications Intercept, T 0915, 9 March 2006, *op cit*, and *Ibid*, p.758.

¹⁴ *Ibid*.

¹⁵ Telecommunications Intercept, T 0898, 9 April 2006, *op cit*.

¹⁶ Telecommunications Intercept, T 0891, 9 March 2006.

¹⁷ Transcript of Proceedings, Public Examination of Mr Simon John Corrigan on 27 February 2007, *op cit*, pp.929-930.

¹⁸ Statement of Mr Simon John Corrigan to the Corruption and Crime Commission, 26 February 2007 [E 12615], *op cit*.

¹⁹ *Ibid* and Transcript of Proceedings, Public Examination of Mr Simon John Corrigan on 27 February 2007, *op cit*, p.928.

²⁰ Legislative Assembly of Western Australia Hansard for 20 June 2007, Procedure and Privileges Committee, p.3486.

²¹ *Briginshaw v Briginshaw* (1938) 60 CLR 336 per Dixon J at 361-363; *Rejfeek v McElroy* (1965) 112 CLR 517; *Neat Holdings Pty Ltd v Karajan Holdings Pty Ltd* (1992) 110 ALR 449.

²² State legislation (the *Telecommunications (Interception) Western Australia Act 1996* (“the Western Australia Act”) gives the Corruption and Crime Commission (“the Commission”) its status as an intercepting agency. The Western Australia Act is an Act to enable the Commission to be declared an agency for the purposes of the *Telecommunications (Interception) Act 1979* of the Commonwealth and for related purposes.

²³ *Telecommunications (Interception and Access) Act 1979* (Commonwealth), p.17.

²⁴ Transcript of Proceedings, Private Examination of Mr Timothy John Walster on 30 July 2008, pp.4 and 39.

²⁵ Letter of 18 June 2008 to Commissioner, the Hon Len Roberts-Smith RFD QC, from the Speaker of the Legislative Assembly of the Parliament of Western Australia, the Hon F Riebeling MLA [CCC 58154], *op cit*.

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

²⁷ Telecommunications Intercept, T 1896, 2 March 2006, *op cit*.

²⁸ Transcript of Proceedings, Public Examination of Mr John James Mansell Bowler on 26 February 2007, *op cit*, pp.768-770.

²⁹ *Ibid*, p.770.

³⁰ *Ibid*, p.771.

³¹ Telecommunications Intercept, T 0915, 9 March 2006, *op cit*.

³² Transcript of Proceedings, Public Examination of Mr John James Mansell Bowler on 26 February 2007, *op cit*, p.758.

³³ Telecommunications Intercept, T 0891, 9 March 2006, *op cit*.

³⁴ Transcript of Proceedings, Public Examination of Mr John James Mansell Bowler on 26 February 2007, *op cit*, pp.796 – 800.

³⁵ Telecommunications Intercept, T 0898, 9 April 2006, *op cit*.

³⁶ Telecommunications Intercept, T 0813, 27 April 2006, *op cit*.

³⁷ Telecommunications Intercept, T 0904, 27 April 2006.

³⁸ Telecommunications Intercept, T 0923, 27 July 2006.

³⁹ Telecommunications Intercept, T 0927, 27 July 2006.

⁴⁰ Transcript of meeting held on 30 August 2006 at 20:32 between Mr John Bowler, Mr Sam Bowler, Mr Julian Grill and Mrs Lesley Grill at Mount Street, Perth WA [T 1118], *opt cit*.

⁴¹ Telecommunications Intercept, T 0925, 18 October 2006, *op cit*.

⁴² Submissions forwarded under cover of letter from McKenzie and McKenzie, 18 July 2008, p.1.

⁴³ Transcript of meeting held on 19 October 2006 between Mr Bowler and Mr Grill at Mount Street, Perth WA [T 0948 (8:02) and T 0949 (8:14)].

⁴⁴ Transcript of Proceedings, Public Examination of Mr Simon John Corrigan on 27 February 2007, *op cit*, p.928

⁴⁵ *Ibid*, p.929

⁴⁶ *Ibid*, p.930

⁴⁷ *Ibid*.

⁴⁸ Statement of Mr Simon John Corrigan to the Corruption and Crime Commission, 26 February 2007 [E 12615], *op cit*.

⁴⁹ *Ibid*, p.8, paragraph [42].

⁵⁰ *Ibid*, p.8, paragraph [43].

⁵¹ *Ibid*, p.9, paragraph [46].

⁵² *Ibid*, p.9, paragraph [47].

⁵³ *Ibid*, p.9, paragraph [48].

⁵⁴ *Ibid*, p.9, paragraph [51].

⁵⁵ *Ibid*, p.10, paragraph [52].

⁵⁶ *Ibid*, p.10, paragraph [53].

⁵⁷ *Ibid*, p.10, paragraph [54].

⁵⁸ *Ibid*, p.10, paragraph [55].

⁵⁹ *Ibid*, p.10, paragraph [56].

⁶⁰ Corruption and Crime Commission (“the Commission”) casenote of a meeting between Ms Lisa Davenport and a Commission Investigator on 28 February 2008 [E 17172].

⁶¹ Telecommunications Intercepts, T 0819, T 1894, T 1895 and T 0925, 14 June 2006, 28 August 2006, 5 September 2006 and 18 October 2006 respectively, *op cit*.

⁶² *Government of Western Australia Ministerial Code of Conduct March 2005*, p.1 [E 9972].

⁶³ *Ibid*, p.2.

⁶⁴ *Ibid*, p.6.

⁶⁵ *Ibid*, p.19.

⁶⁶ *Department of the Premier and Cabinet, Government of Western Australia, Part 1 – The Recordkeeping Plan*, 15 December 2004 [E 17396].

⁶⁷ *Department of the Premier and Cabinet, Government of Western Australia, Recordkeeping Program for Ministerial Offices*, 8 November 2006 [E 17397].

⁶⁸ Telecommunications Intercept, T 1896, 2 March 2006., *op cit*.

⁶⁹ Telecommunications Intercept, T 0813, 27 April 2006, *op cit*.

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- ⁷⁰ Telecommunications Intercept, T 0915, 9 March 2006, *op cit*.
- ⁷¹ Telecommunications Intercepts, T 0819, T 1894, T 1895 and T 0925, 14 June 2006, 28 August 2006, 5 September 2006 and 18 October 2006 respectively, *op cit*.
- ⁷² *Ibid*, Telecommunications Intercept, T 0925.
- ⁷³ Telecommunications Intercept, T 0898, 9 April 2006, *op cit*.
- ⁷⁴ Transcript of meeting held on 30 August 2006 at 20:32 between Mr John Bowler, Mr Sam Bowler, Mr Julian Grill and Mrs Lesley Grill at Mount Street, Perth WA [T 1118].
- ⁷⁵ Statement of Mr Simon John Corrigan to the Corruption and Crime Commission, 26 February 2007 [E 12615], *op cit*.
- ⁷⁶ *Ibid*.
- ⁷⁷ Transcript of Proceedings, Public Examination of Mr John James Mansell Bowler on 26 February 2007, p.771, *loc cit*.
- ⁷⁸ Telecommunications Intercept, T 0915, 9 March 2006, *op cit*, and *Ibid*, p.758.
- ⁷⁹ *Ibid*.
- ⁸⁰ Telecommunications Intercept, T 0898, 9 April 2006, *op cit*.
- ⁸¹ Telecommunications Intercept, T 0891, 9 March 2006.
- ⁸² Transcript of Proceedings, Public Examination of Mr Simon John Corrigan on 27 February 2007, pp.929-930, *loc cit*.
- ⁸³ Statement of Mr Simon John Corrigan to the Corruption and Crime Commission, 26 February 2007 [E 12615], *op cit*.
- ⁸⁴ *Department of the Premier and Cabinet, Government of Western Australia, Part 1 – The Recordkeeping Plan*, 15 December 2004.
- ⁸⁵ Submissions forwarded under cover of letter from McKenzie and McKenzie, 18 July 2008, *op cit*, pp.2-3.
- ⁸⁶ *Government of Western Australia Ministerial Code of Conduct March 2005* [E 9972], *op cit*.
- ⁸⁷ *Ibid*.
- ⁸⁸ *Titelius v Public Service Appeal Board and Ors* [1999] WASCA 19.
- ⁸⁹ Submissions forwarded under cover of letter from McKenzie and McKenzie, 18 July 2008, *op cit*, p.6.
- ⁹⁰ *Titelius v Public Service Appeal Board and Ors* [1999] WASCA 19, at [93], *op cit*.
- ⁹¹ *Ibid* and Transcript of Proceedings, Public Examination of Mr Simon John Corrigan on 27 February 2007, *op cit*, p.928.
- ⁹² Legislative Assembly of Western Australia Hansard for 20 June 2007, Procedure and Privileges Committee, p.3486, *loc cit*.