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MIDLAND ABATTOIR SITE

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9.1 The term of reference

9.1.1 The Commissioners are required by their Commission, as affected by the *Royal Commission into Commercial Activities of Government Act 1992*, to inquire and report whether there has been —

(a) corruption;

(b) illegal conduct; or

(c) improper conduct,

by any person or corporation in the affairs, investment decisions and business dealings of the Government of Western Australia or its agencies, instrumentalities and corporations in respect of the sale of the Midland Abattoir site in 1986 and further to report whether —

(d) any matter should be referred to an appropriate authority with a view to the institution of criminal proceedings; or

(e) changes in the law of the State, or in administrative or decision making procedures, are necessary or desirable in the public interest.

9.2 Introduction

9.2.1 Under this term of reference, the Commission is required to direct its inquiry to the circumstances surrounding the sale of the Midland Abattoir site in 1986. It has heard evidence from 40 witnesses over 19 days. Two hundred and seventeen documents were taken into evidence as exhibits. Witnesses were generally agreed on the essentials of what happened, if not always on the details. All material witnesses denied any serious wrongdoing, though a number expressed a desire to do things differently if they had their time over again.

9.2.2 The following abbreviations will be used throughout this chapter:

"Baillieu Justin Seward" — Baillieu Justin Seward Pty Ltd

"DID" — Department of Industrial Development

"GHD Dwyer" — GHD Dwyer Pty Ltd

"ILDA" — Industrial Lands Development Authority

"Justin Seward" — Justin Seward Pty Ltd

"MIWG" — Meat Industry Working Group

"Prestige Brick" — Pilsley Investments Pty Ltd

"Policy Secretariat" — Policy Secretariat of the Department of Premier and Cabinet

"Taylforth" — Taylforth and Associates Pty Ltd

"Treloar" or "Treloar Committee" — Treloar Committee of Inquiry into the Meat Industry

"WADC" — Western Australian Development Corporation

"WAMC" or "the Meat Commission" — Western Australian Meat Commission.

9.2.3 Prior to 1986, the abattoir/saleyard site was designated a Lands Department reserve, number 23917. The reserve was created in 1954 for an abattoir and saleyard and was vested in the Midland Junction Abattoirs Board, later to be styled the Western Australian Meat Commission ("WAMC" or "the Meat Commission"). The plan of the site tendered in evidence, shows that the site is an irregular, triangular shaped parcel. It is bounded on the south and west by the Helena River, by the Westrail Workshops and Railway yards on the north and by an Army facility on the east.

9.2.4 The Midland Junction Abattoir was opened in 1910 and was substantially rebuilt in 1948. It was estimated, in a study undertaken for the Government in 1985 by consulting engineers GHD Dwyer, to which reference will be made below, that the Government's investment in the abattoir by 1975 was $12.7

million. At that time, however, it was operating well below its economic potential, for reasons which are not material to this inquiry. As a result, in 1979 the abattoir, on about 8.9 hectares, was placed on a "care and maintenance basis", at a cost of some $450,000 per annum, leaving the saleyard operating on about 20 hectares. A reference to "the saleyard" in this report includes a reference to the effluent ponds, wholly contained within the abattoir site itself, without which the saleyard could not operate.

9.2.5 The future of the abattoir site was the subject of no less than six inquiries between 1981 and 1985. The committees and consultants engaged were concerned, generally, to ascertain the most appropriate use for the site and to establish a value. The inquiries included the Flack inquiry in 1981 and an evaluation of the site prepared by Justin Seward Pty Ltd ("Justin Seward").

9.2.6 The findings and recommendations of the most comprehensive exercise, the Treloar Committee of Inquiry into the Meat Industry in 1984 ("Treloar" or "Treloar Committee"), are directly material to the ultimate decision to sell the entire site and will be referred to, in some detail, below.

9.2.7 In 1981, the Government decided to close the abattoir permanently. Cabinet also decided, *inter alia*, to sell the plant and equipment by tender, and to call tenders for the sale or lease of the cold store complex. In August 1982, Cabinet approved, in principle, the transfer of the freehold of some of the land, including the abattoir/cold store complex, but excluding the saleyard, to the WAMC and the sale by tender of the same complex, either as a whole or by sections, whichever yielded the better return. At this time, August 1982, the O'Connor Government expressed an intention to leave the saleyard operating and intact, at least for the foreseeable future. The transfer approved in 1982 was not, in fact, carried out until after the sale of the abattoir site in 1986.

9.2.8 There is little doubt that the abattoir site presented a significant problem to the Government from approximately 1981. All material witnesses were agreed on that point. Although no steps were taken directly to promote a sale, anyone seeking a property of that size, approximately 8.9 hectares in an industrial location, could scarcely have avoided becoming aware of the availability of the site for purchase. The problem with the property, for disposal purposes, was the cost of demolishing the very substantial buildings if they could not be used by a purchaser. In 1982, an experienced firm of valuers, Justin Seward placed a value on the site of $500,000.

9.3 The Treloar Committee

9.3.1 The saleyard presented a quite different situation. Closure of the saleyard and disposal of the site were never seriously contemplated until the Treloar inquiry. On the contrary, in July 1983, an interdepartmental committee, chaired by an officer of the Department of Agriculture, reported its conclusions as follows:

> "Midland saleyards are important, accounting for about 45 per cent of the slaughter stock sold through saleyards in the agricultural areas of the State.
>
> The trend is towards more direct consignment to abattoirs and other forms of sale by description which will gradually reduce the importance of the Midland saleyards. This is a slow process and it is likely to be around 10 years before the viability of the Midland saleyards would be in question and result in their closure on economic grounds.
>
> Due to their current importance the Department of Agriculture would advise that the saleyards be retained at this stage with a review in five years time of their viability and importance to the livestock industry."

9.3.2 In a submission made to the Treloar inquiry, the Department of Agriculture advocated the replacement of livestock auction sales over a period of time with alternative methods of sale, leading to the eventual closure of the yard and subsequent disposal of the site. Those submissions were accepted in substance by the Treloar committee. The interim report, published in September 1984 and the final report, published in November 1984, contained conclusions and recommendations which would have led, after several years, to the orderly closure of the yard and disposal of the site.

9.3.3 It is clear to this Commission that at the heart of the problems which have given rise to this term of reference is the apparent failure of those who were charged with, or who assumed, responsibility for dealing with the Treloar report to take seriously the recommendations contained in that report about the future of the saleyard and to ensure that the Government considered those recommendations. The Treloar Committee, while recognising that retaining the saleyard in operation rendered more difficult the sale of the abattoir site, concluded and recommended, *inter alia*, as follows:

- the abattoir site should be severed from the saleyard complex and effluent ponds and transferred to a body such as the Industrial Lands Development Authority (ILDA) for immediate disposal;

- Midland saleyard should continue in operation until 1 January 1989;

- from 1 January 1989, the saleyard should be closed and the assets disposed of;

- the date of closure should be widely publicised from the earliest opportunity, to allow time for appropriate adjustment.

9.3.4 To understand how that failure arose, it is necessary to examine the role and operation of the Meat Industry Working Group ("MIWG").

9.4 The Meat Industry Working Group

9.4.1 The nature and operation of the MIWG is central to this inquiry. Members of the group over the material time were Mr Ian Johnston and Mr Quentin Harrington from the Policy Secretariat of the Department of Premier and Cabinet ("Policy Secretariat"), Mr Alex Payne from the meat industry union and Mr Brian Gabbedy, the Assistant Director, Animal Industries, Department of Agriculture. Since only Mr Payne was a foundation member of this group, its origins have remained somewhat obscure. Some assistance can be obtained from a Cabinet submission and decision, dated June 1984. It stated that the group, which originally comprised four politically appointed ministerial advisers and Mr Payne, was set up in early 1984 to resolve a problem involving the Lamb Marketing Board and Robb Jetty. The group had not been reconstituted at the time of the submission. Cabinet resolved to reconstitute the group with the Policy Secretariat as convenor to examine, *inter alia*, the interim Treloar report and report to Cabinet on the options available. It was suggested that Mr Gabbedy be included.

9.4.2 Mr Johnston, of the Policy Secretariat, became convenor. Mr Gabbedy and Mr Payne were immediately included. Mr Harrington joined the group when he transferred to the Policy Secretariat from the Department of Agriculture, in December 1984. Hereafter, a reference to the MIWG in this report means the group

comprising Mr Johnston, Mr Gabbedy and Mr Harrington. Mr Payne's interest and involvement was confined to industrial issues. He was not called to give evidence. The other members all testified that the group operated informally, did not keep minutes of meetings, had virtually no correspondence and maintained no records other than the Cabinet submissions which emerged from their deliberations. The MIWG does not appear to have been constrained by any obligation to report regularly to the Minister for Agriculture or to anyone else. The Commission has difficulty with the notion that a group of senior officers, charged with preparing recommendations about a complex set of conclusions and recommendations, could or did operate in that fashion, but that is the evidence. A letter from Mr Johnston, as convenor, to Mr Treloar concerning aspects of the interim report, dated September 1984 suggests that some correspondence, at least, was entered into by the MIWG.

9.4.3 One unfortunate consequence of the lack of notes or other records was the inability of the relevant officers, several years after the events which they were required to recall, to detail with any conviction the process of thought and conduct undertaken by them at crucial times.

9.4.4 During the hearing, the question was also raised as to why the Department of Premier and Cabinet was so heavily represented on a committee formed to consider matters pertaining to agriculture generally and, in this case, to livestock marketing. Mr Harrington and Mr Johnston denied that the Premier, Mr Brian Burke, had any personal interest in the issue, as did the Premier himself. It was explained that the formation of the Policy Secretariat within the Department of Premier and Cabinet was an initiative of the Burke Government undertaken with a view to ensure better co-ordination within Government on matters of policy. Certainly, Mr Harrington brought qualifications and experience in agriculture to the task. He held the degree of Bachelor of Agricultural Economics and, as we have noted, he was formerly an officer within the Department of Agriculture. Mr Gabbedy explained that, in practice, several decisions were taken by the two Policy Secretariat officers without reference to him. On other occasions he simply went along with proposals brought to meetings by those two officers. He appears to have readily conceded a dominant role to them, assuming that the Policy Secretariat was more aware of what the Government wanted. In theory, the MIWG was answerable directly to the Minister for Agriculture.

9.5 The GHD Dwyer report

9.5.1 The interim Treloar Report was referred to Cabinet by the Minister for Agriculture, Mr H D Evans, by minute dated 6 June 1984. The Minister recommended, *inter alia*, that the MIWG examine the interim report and report to the Cabinet by 2 July 1984 on the options available. The recommendation was approved by Cabinet on 11 June 1984. There is no record of the MIWG ever reporting back to Cabinet in accordance with that Cabinet direction. Members of the MIWG were not able to recall anything specific being done to comply with it. However, on 11 September 1984, Mr Johnston, as convenor of the MIWG, wrote to Mr Treloar enclosing the comments of the group on various aspects of the report. The final Treloar report is dated 29 November 1984 and was delivered to the MIWG.

9.5.2 The MIWG response to the Treloar recommendations about the future of the saleyard and the abattoir site was to recommend that two further studies be undertaken, this time to determine alternative uses for the entire abattoir/saleyard site. That recommendation was put before Cabinet, and approved on 11 March 1985. The Cabinet submission outlined seven particular matters to be investigated. It was put to Mr Gabbedy and Mr Harrington that the request for such studies at a time when no decision had been made on whether to give effect to the Treloar recommendations, was effectively putting the cart before the horse. Each of these officers said he thought the studies were necessary to enable the MIWG to advise Cabinet of the alternative uses before recommending whether or not to dispose of the site. Since the Commission believes this process of thought was fundamentally flawed, it is desirable to set out the contents of the cabinet submission containing the proposal in its entirety:

> "TO: HON PREMIER (IN CABINET)
>
> FROM: MINISTER FOR AGRICULTURE
>
> RE: GOVERNMENT-OWNED Saleyards (MIDLAND Saleyard)
>
> Under its terms of reference the Independent Committee of Inquiry into Government Involvement in the Meat Industry was asked to consider:
>
> · Is there a long-term requirement for a government-owned saleyard complex?

- Should this remain located at Midland, or be shifted elsewhere?

- What is the cost to the Government of maintaining a government-owned saleyard complex:

  - at Midland?

  - elsewhere?

The Committee of Inquiry concluded that:

- There is no need for Government ownership or operation of a saleyard complex.

- The current saleyard capacity of Midland saleyards is not necessary. Sales which currently take place at Midland could be handled by additional sale days at existing regional saleyards.

- Substantial costs are incurred while Midland saleyards continue to operate.

- A firm decision to close the Midland saleyard is required.

- The date of closure should be December 31, 1988, to allow time for adjustment.

The Meat Industry Working Group (MIWG) is of the opinion that, before closure of the Midland saleyards can be considered, an assessment should be made of alternative uses for the Midland abattoir/saleyard/holding paddock complex. Such an assessment was not made by the Committee of Inquiry. The MIWG recommends that the Department of Industrial Development (DID) be requested, as a matter of urgency, to assess the net benefits of establishing an industrial estate on the land currently occupied by the Midland saleyard/abattoir/holding paddock complex. The study should:

1. Estimate the salvage value and demolition costs of the fixed constructions and equipment now on the site.

2. Provide information on current and future demand for industrial lands and the possible sale value of the Midland complex for industrial purposes.

3. Report on the suitability of all or part of the Midland site for industrial use.

4. Identify the types of industry which would be likely to locate at a new industrial area in Midland and whether these are new businesses, existing businesses relocating from elsewhere in the immediate area, or existing businesses relocating from outside the Midland area.

5. Assess the likely benefits in terms of increased employment, business activity and impact on existing local industry which could result from establishment of an industrial estate at Midland.

6. Assess the impact on local industry of closure of the saleyard after three years.

7. From the foregoing, to make an overall assessment and report on the economic implications of establishing an industrial estate.

The Industrial Lands Development Authority (ILDA) would be requested to provide information on questions 1 and 2 to the Department of Industrial Development which would be responsible for producing the overall report.

Recommendations

1. A study be undertaken of the suitability of the Midland saleyard/abattoir/holding paddock complex for industrial purposes as outlined above.

2. The study to be completed by July 31, 1985.

3. The cost of the study to be borne equally by DID and ILDA.

4. Government take no further action on the Midland saleyard issue until this study has been completed.

H D Evans

February 13, 1985"

9.5.3 In the Commission's view, no further studies on the Midland abattoir or saleyard sites were needed. The Treloar recommendations appear to have been well supported and documented, certainly sufficiently to enable consideration of the options available to the Government. The first of those recommendations requiring decision was that the abattoir site be severed and transferred to a body such as ILDA for immediate disposal. No sensible argument could be made against such a proposal. As we have seen, the abattoir site itself had been an expensive, unsightly "white elephant" for years. Several inquiries had failed to find a solution. ILDA had almost 20 years of experience in dealing with industrial land and was well placed at the end of 1984 to undertake its disposal. Nothing could be gained from another inquiry, especially into alternative uses. The existence of a market could clearly have been tested by letting the site to tender, by auction or by advertisement for sale by private treaty. Although it was certainly a difficult site, the evidence suggests that there was interest in the acquisition of the site.

9.5.4 But, perhaps more importantly, the Cabinet submission was misleading in a fundamental respect. By focussing the attention of Cabinet on the saleyard as noted in the heading of the submission, and then in the substance of the recommendation incorporating the abattoir site and holding paddocks with the saleyard and referring to it as a single complex, the submission generated a basic misconception. That was that the abattoir site and the saleyard belonged together and that for disposal purposes they must inevitably be considered as a single complex. It is not surprising that this misconception, having its genesis in the Cabinet submission which established the scope of further studies that were to be done, infected the approach of those who undertook those studies. This misconception was later entrenched by a letter dated 19 December 1985 from ILDA to GHD Dwyer Pty Ltd ("GHD Dwyer"), to which reference will be made shortly. The submission does not refer to the recommendation that the abattoir site be severed and disposed of immediately.

9.5.5 The second major Treloar Committee recommendation involved the future of the saleyard. Clearly, this was an important issue which called for public discussion before the Government finally committed itself. The saleyard was still operating, and operating profitably, if one puts to one side the burden of accumulated debt resting on the whole site. The Treloar Committee had argued the case against

Government involvement in the operation of the saleyard and recommended that such involvement cease from 1 January 1989. If this recommendation were adopted, it would mean that the Midland saleyard would close from that date, just under four years from delivery of the report. Treloar recognised this and recommended that the prospective closure be announced immediately so that the livestock industry could adjust to the decision.

9.5.6 The Commission has been unable to understand how the MIWG could have failed to recognise the wisdom of taking the Treloar recommendations to Government promptly for decision. They raised clear-cut issues. If the recommendations had been adopted, the Midland Abattoir problem could have been solved once and for all, subject, of course, to industry acceptance. In any event, the issue would have been exposed publicly and determined by the Government in a manner conforming to proper principles of accountability. If, ultimately, the Government resolved to keep the saleyard operating then there was no obstacle in the way.

9.5.7 As it was, the MIWG deliberated and acted without reference to any relevant authority. In particular, it failed to consult with the WAMC (the body responsible for administering the saleyard and custodian of the entire site) or ILDA.

9.5.8 In due course the studies were commissioned. ILDA engaged GHD Dwyer, a firm of consulting engineers, to carry out its part of the assignment. Their responsibility extended to what can conveniently be described as the engineering side of the overall study. DID engaged a Melbourne firm of consultants, Wilson Sayer Core, to carry out the remaining tasks. Those items were concerned more with the economic and social aspects of the exercise. Liaison between the two authorities and consultants was neither as close nor as harmonious as had been hoped. The report from Wilson Sayer Core was delayed for some months. Eventually, GHD Dwyer's report, which incorporated a draft submission from Wilson Sayer Core, was delivered to Mr Harrington in January 1986.

9.5.9 In the meantime, several firms and companies had, of their own volition, expressed an interest in the site. By the time the report was produced, two firm proposals for the whole or part of the site and an expression of interest from an Adelaide company, Port Adelaide Freezers Pty Ltd, to purchase the area comprising the cold store and associated buildings had been made. The latter, received in a letter to the WAMC on 29 March 1985, had been passed to the Department of Agriculture and from there to

DID. Mr F B N Hodges, the General Manager of ILDA, became aware of the letter also and passed on the information to GHD Dwyer for inclusion in their report. No action was ever taken to follow up or reply to the inquiry. Since the cold store complex was situated on the abattoir site alone and was valued at $500,000 by the sworn valuer engaged to advise GHD Dwyer, such an expression of interest may have enabled the Government to rid itself of the difficult abattoir site in a satisfactory manner, retaining possession and control over the still needed and more valuable saleyard, as recommended by the Treloar Committee. In the event, the Port Adelaide Freezers proposal was never considered by the MIWG, the body charged with considering the options, or by anyone else at its behest.

9.5.10 In October 1985, ILDA received from a company called BSD Consultants Pty Ltd ("BSD Consultants") a registration of interest on behalf of its client, Prestige Brick, in acquiring the abattoir/saleyard site. Prestige Brick was the trade name adopted by Pilsley Investments Pty Ltd in respect of a proposed brick-making enterprise. Pilsley Investments Pty Ltd was controlled by Mr Peter Ellett, formerly the General Manager of Whitemans Brick Pty Ltd ("Whitemans Brick") from 1972 to June 1985. Mr Ellett wanted to build a "high technology brickworks" on the site.

9.5.11 Shortly thereafter ILDA received a second expression of interest in the acquisition of the site, this time from Taylforth and Associates Pty Ltd ("Taylforth"). Taylforth was a company primarily involved in demolition consultancy. One of its principals, Mr Kevin Taylforth, had previously been asked by GHD Dwyer to advise on the cost of demolishing and removing the buildings and other structures on the Midland abattoir site. His report in this regard was annexed to the GHD Dwyer report when it was finally submitted. Taylforth proposed the development of a "Resources Recycling Industrial Park". ILDA referred both these expressions of interest to GHD Dwyer.

9.5.12 On 3 December 1985, Mr Harold McKenzie of GHD Dwyer invited both Mr Luke Saraceni of BSD Consultants and Taylforth to lodge detailed submissions for the development and purchase of the abattoir/saleyard site (referred to in the letter as the "abattoir site"). On 12 December 1985, Mr Saraceni wrote to Mr Hodges in the following terms:

> "Dear Mr Hodges
>
> RE: MIDLAND ABATTOIR SUBMISSION - PRESTIGE BRICK

> Prior to the receipt of the letter from Mr H McKenzie of GHD Dwyer Pty Ltd dated December 3, 1985 which invited our client to lodge a submission for the Abattoir site, our client had discussions with the Department of Premier and Cabinet.
>
> That Department has confirmed its interest in the proposal and advised that they will be discussing the matter with you directly.
>
> Therefore I trust you will understand why we have provided this form of reply to your genuine and much appreciated endeavours to provide us with the opportunity to make a submission.
>
> Yours faithfully,
>
> Luke Saraceni
> Director"

9.5.13 This letter suggested, first, that a meeting or meetings had occurred between Mr Ellett and officers of the Department of Premier and Cabinet. Mr Ellett cannot recall any such discussions nor of ever having met Mr Harrington. Mr Harrington stated that any such discussions in early December 1985 would have been with him and he recalled Mr Ellett and Mr Gordon Hill MLA coming to see him. Mr Saraceni recalled a meeting at which Mr Harrington, Mr Ellett and Mr Hill were present.

9.5.14 The letter suggested, secondly, that the Department of Premier and Cabinet may have had an interest in the Prestige Brick proposal prior to Mr Ellett's contact and that the interest was confirmed at the meeting. No oral evidence supported the suggestion. The recollection of all witnesses involved was vague. Mr Saraceni recalled Mr Harrington expressing support and enthusiasm for the project, to the point where Mr Saraceni believed serious negotiations between the parties could commence. Mr Saraceni said that he was disappointed when subsequently advised by Mr Hodges that a formal submission, as requested on 3 December, was still required. It appeared clear that as at 12 December Mr Saraceni, at least, had the impression that Mr Ellett had the inside running to purchase the abattoir/saleyard site. Mr Harrington said that he simply referred Mr Ellett to ILDA. His evidence is inconsistent with Mr Saraceni's letter of 12 December 1985.

9.5.15 We referred earlier to a letter from ILDA to GHD Dwyer, dated 19 December 1985, shortly before the submission of its report. In that letter Mr Hodges

introduced what could have been a seriously erroneous premise to the GHD Dwyer study. After setting out some of the essentials of the Treloar recommendations, but without any reference to the immediate severance and sale of the abattoir site, Mr Hodges advised Mr McKenzie that the Government had accepted those conclusions and that they still represented the Government's policy in respect to the future of the Midland saleyard. No decision had, in fact, been made by the Government on the Treloar conclusions at that time, nor indeed was such a decision ever made. The advice conveyed by Mr Hodges was duly recited in the GHD Dwyer report. Presumably, GHD Dwyer took that advice as rendering unnecessary consideration of anything less than sale of the whole of the abattoir/saleyard site. The report reflects that misunderstanding.

9.5.16 When that error in the GHD Dwyer report was put to Mr Gabbedy and Mr Harrington in the course of the hearing, it was apparent that neither of them had previously appreciated the significance of the omission of any reference to the severance and disposal of the abattoir site. They each also failed to note that the first of the seven requirements of Cabinet, namely an estimation of the salvage value and demolition costs of the fixed constructions and equipment on the site, had not been carried out. GHD Dwyer had not carried out that task because they had not been asked to do so. In the event, those omissions scarcely mattered because no member of the MIWG studied the report in any detail. Mr Harrington admitted that he had not read the report; he merely "flicked through it". Mr Gabbedy says that he merely thumbed through it. Mr Johnston did not read the report.

9.5.17 The GHD Dwyer report contained no recommendations for action with respect to the abattoir/saleyard site. As instructed by ILDA, it purported to:

> "investigate and report on the suitability and economic feasibility of using all or part of the Midland site for industrial or associated purposes, including the need for any demolition which may be required on the site, and any salvage value arising therefrom."

The team which produced the material for the report was multi disciplinary. It comprised consulting engineers, planning consultants, architects, demolition experts and real estate valuers. In addition, there was the Wilson Sayer Core analysis. The latter analysis was comprised in a separate report, which did not proceed beyond a draft. A summary of the draft was annexed to the GHD Dwyer report. Wilson Sayer Core considered whether it was feasible from a market viewpoint, to create an industrial

estate out of the abattoir/saleyard site. They concluded that the proposition was not feasible in the short to medium term, up to 15 years. The GHD Dwyer report considered the feasibility and value of the site to the State when marketed in eight different ways. The net value of the site when marketed in accordance with each of those options ranged from a negative value of $910,000 for use as an industrial estate to a positive return of $915,000 when sold as a single-use industrial site, allowing for retention and use of some buildings, demolition of the remaining buildings and some preparation of the site. Values to the State for each of the options were established by Mr Philip Logan, a sworn valuer employed by Baillieu Justin Seward Pty Ltd ("Baillieu Justin Seward"). Mr Logan's valuation was annexed to the report. The architect's assessment, also annexed, contained a description of the buildings on the site and an analysis of the utility and alternative uses for those buildings. The demolition expert, Taylforth, calculated the cost of demolishing and removing the buildings and other structures on the site. We will consider Mr Taylforth's calculations below, in another context.

9.5.18 The submissions from Prestige Brick and Taylforth, supplied in response to the invitation of ILDA, were both annexed to the GHD Dwyer report. Both were specific as to the purposes and extent to which the developer proposed to put the land and buildings. Each proposal was summarised and analysed in the report and its main features compared with the other. Prestige Brick wished to purchase approximately 24 hectares, with deferral of development of the saleyard site for 3 to 5 years. Taylforth offered to purchase the site on a number of alternative bases, including a catch-all offer to negotiate terms. Two of those options were to purchase the whole of the site including the saleyard, but taking possession of the saleyard site over several periods and a third provided for purchase of the site, excluding the saleyard. GHD Dwyer were of the view that "[b]oth...proposals are ideally suited to the site as they can proceed on a progressive basis generating more and more of the site as a by-product of their operations". It must be remembered that the brief to GHD Dwyer did not include express instructions to consider, as an option, disposal of the abattoir site and retention of the saleyard.

9.6 The Western Australian Development Corporation

9.6.1 Once in possession of the GHD Dwyer report, MIWG might have been expected to make recommendations to Cabinet in the light of the Treloar recommendations to clarify the task of disposing of the abattoir site and the future of the

saleyard. But this was not so. The actions of the MIWG following receipt of the GHD Dwyer report, on or about 29 January 1986, as recounted by its members, are extremely difficult to reconcile with the qualifications and experience of those persons. Mr Gabbedy does not recall being consulted on what to do next. Mr Harrington said that he received the first copy of the report and telephoned Mr Johnston to discuss the matter. Mr Johnston had, by this time, left the Policy Secretariat to become chief executive of the Government Accommodation Unit but retained his nominal position as convenor of the MIWG. On Mr Harrington's account, which was not contradicted by Mr Johnston, it was decided between those two officers, then and there, that the report should be referred to the Western Australian Development Corporation ("WADC") for a recommendation as to which of the two firm proposals set out in the report should be accepted. It was anticipated by Mr Harrington and Mr Johnston that the resulting recommendation of WADC would be followed. Neither Mr Gabbedy nor Mr Payne was included in this decision making process, although Mr Harrington said that Mr Gabbedy was advised, some time after the event, of the referral to WADC. No attempt was made to consider or assess the substance of the GHD Dwyer report which the group had requested to enable them to consider action on the Treloar report. Mr Harrington was unable to say why they felt it necessary to obtain yet more supposedly expert advice.

9.6.2 Following the telephone conversation between Mr Harrington and Mr Johnston, Mr Harrington went to see Mr Michael Beech, an executive director of WADC who was, to the knowledge of Mr Harrington, connected with the Government Property Unit. Mr Beech's office was on another floor of the Capita Building in which the Policy Secretariat was located. Mr Harrington told the Commission that he gave Mr Beech a copy of the GHD Dwyer report and explained that, of the various options considered, "[i]t comes up with two, finally ... there's basically two firm proposals". He asked Mr Beech to "... please supply me with a decision as to which proposal should be selected and which price should be associated with that decision". According to Mr Harrington, that was the extent of the brief to Mr Beech. Nothing was provided to Mr Beech in writing other than the GHD Dwyer report.

9.6.3 While the approach to Mr Beech by Mr Harrington was the first time WADC had been involved in the proposed sale of the Midland abattoir/saleyard site, it was not the first time the Corporation had heard of Prestige Brick. The Chairman of WADC, Mr John Horgan, gave evidence that Mr Ellett was referred to him by an accountant friend, Mr Geoff Mews, some time in mid-1985. Mr Beech recalls being introduced to Mr Ellett by Mr Horgan and asked to help him find land for his proposed

brickworks. The efforts of WADC to accommodate Mr Ellett at that time came to nothing. However, it could reasonably be the case that the reference to WADC resulted from Mr Ellett having suggested that course to Mr Harrington during the discussions in early December 1985. Further, as will be seen, Mr Ellett had a friend in the person of Mr Robert Ryan who worked within the property section of WADC.

9.6.4 Evidence was taken from Mr Beech, Mr Ryan and Mr Timothy Hillyard of the Government Property Unit within WADC. Mr Beech's evidence as to the nature of the instructions or brief given to him by Mr Harrington does not differ appreciably from that of Mr Harrington himself. Mr Beech said he was asked to recommend which of the two firm proposals should be accepted and at what price. Mr Beech stated that he came away from the briefing, "with a view that the Government would like to see Ellett buy the land". He then gathered together Mr Ryan and Mr Hillyard and another WADC officer, Mr Greg Brehaut, told them what he had been asked to do and asked them to value the property. He was to look at the recycling proposal from Taylforth himself. On Mr Beech's evidence, no one was given the task of looking at the Prestige Brick proposal. No one ever did. Mr Beech's expenditure of effort on the Taylforth proposal was very limited indeed and in that respect is corroborated by Mr Taylforth himself. He telephoned Mr Taylforth on one, possibly two, occasions, only. Apart from some telephone discussion with other recycling firms, that was the extent of his research into the Taylforth proposal.

9.6.5 In Mr Beech's report to Mr Harrington, which is discussed below, he referred to the GHD Dwyer report having been carefully reviewed and the various options proposed by the real estate consultants having been thoroughly canvassed. Mr Beech agreed that he was overstating these efforts and that the latter claim was not accurate. Baillieu Justin Seward, the real estate consultants in question, did not, in fact, propose options — they simply valued options proposed by the authors of the report. Mr Beech never spoke to Mr Ellett and did not visit the Midland site. He made the decision to prefer Prestige Brick to Taylforth because he believed that Prestige Brick's initial offer for the entire site, at $305,000, was higher than Taylforth's and he had established, so he said, that Taylforth was unlikely to bid much higher. Neither he nor anyone else from WADC negotiated with Mr Ellett on price or to establish to what figure he would be prepared to raise his offer.

9.6.6 Mr Hillyard had a different view of the task of WADC, as relayed to him by Mr Beech. Mr Hillyard's recollection was that WADC was to assess the GHD

Dwyer report and the two offers contained in it and to provide an opinion on the adequacy of the price being offered by Prestige Brick. He saw the job as a review of the findings and recommendations in the GHD Dwyer report to determine whether WADC agreed with those findings, or not. This was done, he said, over a number of round table discussions between Ryan, Brehaut and himself. They did visit the site. The group decided that they fundamentally agreed with the GHD Dwyer conclusions and then proceeded to consider the question of price.

9.6.7 No attempt was made to evaluate either of the proposals from the point of view of the bona fides, character of the proposers or ability to carry out their plans. In considering the two proposals, price was the main determinant. No written report went to Mr Ryan or Mr Beech and no written record was kept of Mr Hillyard's efforts. While Mr Ryan was primarily concerned with the valuation, in approaching his own view of the price, Mr Hillyard had no hesitation in substituting his own judgment for that of both the demolition expert and sworn valuer engaged by GHD Dwyer, on several issues. He possessed no qualification in these areas. No one from WADC made any attempt to contact the sworn valuer, Mr Logan, to determine the price that might be sought from a purchaser such as Prestige Brick.

9.6.8 Mr Ryan stated that the task he and his group were given was to assess whether the price of $305,000 offered by Prestige Brick was fair and reasonable and to see whether the proposed usage by Prestige Brick complied with all necessary by-laws and regulations. In carrying out those two assessments, Mr Ryan was to have access to the GHD Dwyer report as "information to assist" him. Mr Ryan considered himself equipped and qualified to carry out that task. He was not concerned with public interest factors such as employment or capital investment. While Mr Ryan had no reason to doubt the ability or competence of Mr Logan from valuers Baillieu Justin Seward, he believed that Mr Logan's valuation was seriously flawed — in fact, completely worthless. He spent some time in evidence elaborating on a number of areas where he believed Mr Logan fell into error. While Mr Ryan could not quantify the deductions that he believed should be made from Mr Logan's figure of $915,000 to take account of these flaws, he believed that some allowance should be made and he took "a middle line view" of Mr Logan's valuation of $915,000, to arrive at his figure of $450,000. In other words, he roughly halved it.

9.6.9 In due course, Mr Beech, Mr Ryan, Mr Hillyard and Mr Brehaut met and settled the substance of the advice that was to be given to Mr Harrington. Mr Ryan said

that he had advocated strongly that the property should be offered for tender and believed that advice to that effect should have been included in Mr Beech's report. Mr Beech has no recollection of Mr Ryan taking a strong position on the issue. We did not find Mr Ryan's evidence persuasive in this regard. If there had been strong advocacy in favour of a tender, it would have been reflected in Mr Beech's letter. A one and a half page letter containing the advice of WADC was drafted by Mr Beech, dated 27 February 1986 and duly delivered to Mr Harrington. The letter recommended, "that the site be offered for sale to Prestige Brick within the price range of $450,000 to $500,000". Mr Beech agreed that the factors outlined in the report and said by him to have been taken into account, were simply lifted in substance from the GHD Dwyer report. The real determinant in making the recommendation was the perception that Mr Ellett was likely to pay a higher price. Understandably, Mr Beech's letter reflects the reality that at no time did WADC officers direct their attention to the possibility of severing the abattoir site from the saleyard site. As far as they were concerned it was just the one site.

9.7 The sale

9.7.1 On receipt of the letter, Mr Harrington said that he then telephoned Mr Johnston to advise him of the recommendation. He said that it made no particular impact on him and he was not surprised by the recommended price. Mr Johnston has no recollection of having been advised of the receipt of Mr Beech's letter. Mr Harrington then met with Mr Gabbedy to draft a Cabinet submission recommending sale of the site to Prestige Brick. It is to be remembered that the submission which resulted from this collaboration was the first response the MIWG had made to Cabinet purporting to be based on the Treloar recommendations. More than 12 months had elapsed since those recommendations were first received. In the submission, Cabinet was not presented with any arguments for or against the severance of the abattoir site or the disposal of the saleyard site nor the arguments for and against adoption of the Treloar recommendation for closure of the saleyard site. The attention of Cabinet was not drawn to the fact that if the sale to Prestige Brick was approved that course would represent a departure from the recommendations of the Treloar report. The future of the saleyard was dealt with in the submission with the following passage:

> "Although the Treloar Committee recommended the closure of the saleyard as from January 1, 1989, the Government has not yet made a decision on the matter. The saleyards continue to handle in excess of 40 per cent of all livestock sold in the State. The

> Department of Agriculture is currently examining the possibility of developing an alternative saleyard complex in the country. The recommendations from that study will be the basis of a further minute to Cabinet."

9.7.2 The reference to alternative saleyard facilities in the country is puzzling in the light of a meeting chaired by Mr Gabbedy on 5 March 1986, the same day the Cabinet submission was signed by the Minister for Agriculture, Mr Julian Grill. The note of the meeting taken by Mr J L Anderson, Principal Veterinary Officer in the Department of Agriculture, records the discussion, *inter alia*, as follows:

> "There are apparently some pressures on the Government from a land use point of view for the removal of the Midland saleyards and a Government pre-election promise to develop central saleyard facilities in Northam that have precipitated the meeting.
>
> After examining the tables prepared by RE & M [Rural Economics and Marketing, a branch of the Department of Agriculture] and attempting to assess trends from the figures, the group agreed that there was no industry reason why Midland should be relocated in the short term (at least 5 years). It plays an important role in providing strong competition for all lines of stock. Country saleyard tend to concentrate on lines for specific purposes. *Farmers are convinced that a central sale[yard] like Midland is essential* and CLASS or other computer based selling systems are unlikely to make a major impact on store sales. [our emphasis]
>
> However if Midland is to be relocated for non-industry reasons then Northam would seem to be the most suitable alternative site. Present facilities at Northam may be enough for all but pastoral cattle although trends suggest that the size of the Midland yards needs to be duplicated at any alternative site because of seasonal production peaks."

9.7.3 Nonetheless, the Cabinet submission recommended the sale of the total site, less some small areas intended for other purposes. The remainder, amounting to 24 hectares, was to be sold to Prestige Brick "with the proviso that the area occupied by the saleyard and lairage will not be involved in the brickworks development for at least five years". No reference was made to the need for a leaseback over the saleyard or of the terms to be contained in such a lease. It was also recommended that WADC act as

the Government's agent in dealing with the purchaser and, "effect sales on terms and conditions satisfactory to WADC".

9.7.4 Mr Grill had been Minister for Agriculture since 25 February 1986. On 5 March 1986, he signed the Cabinet submission. Cabinet approved the recommendations in the submission, without amendment, on 7 April 1986. At this time, the handling of the matter was again referred to Mr Ryan and Mr Hillyard, through Mr Beech. Mr Hillyard accepted that he was the person charged with carrying out Cabinet's instruction, reporting to Mr Ryan and Mr Beech. Both Mr Hillyard and Mr Ryan recall a conference telephone call to Mr Ellett to discuss the details of sale, devoted principally to price. Mr Hillyard recalls that the conversation lasted about five to ten minutes. Mr Ellett believed that a face-to-face meeting discussed terms but the other participants recall nothing beyond the telephone conversation.

9.7.5 In any event, such negotiations as were conducted resulted in an offer from Prestige Brick, dated 15 April 1986, on a standard, two-page, Real Estate Institute of Western Australia form. Mr Hillyard believed that the offer may have been received on Friday 18 April and not on 15 April, the date it bore. The offer contained, *inter alia*, the following provisions:

- Price $450,000.

- An allocation of $100,000 to chattels.

- Settlement within 30 days of approvals by all relevant authorities. The agreement was subject to such approvals being obtained within 270 days of acceptance.

- An additional condition 4, which read:

> "This offer is subject to a Walk-in/Walk-out basis provided the Vendor having 30 days to supply the purchaser with a list of chattels claimed by the Vendor as not forming part of this offer to purchase and the purchaser agreeing to that list. This list shall not include any transformers, lighting equipment, switchboards and electrical power and servicing plant and equipment and all chattels included in the said agreed list shall be removed within 30 days of the agreement of that list."

- An additional condition 8, which read:

> "The purchaser agrees to defer development marked `B' on the attached plan marked Annexure A - and designated saleyards -for a period of five (5) years from acceptance of offer." (This area constituted part only of that portion of the total site utilised for the operation of the saleyard.)

9.7.6 Mr Hillyard was nervous about the paucity of documentation but Mr Ryan overrode his objections. Nothing was done by anyone to follow up or check the contents of the offer. A meeting was arranged with the Minister for Agriculture for 4.30 pm on 18 April, in circumstances of urgency, to enable him to sign the document. The meeting was attended by at least the Minister, Mr Grill, Mr Ryan and Mr Hillyard from WADC, Mr Ellett and Mr Saraceni representing Prestige Brick and Mr Hill, who was present presumably at the invitation of Mr Ellett. It is extraordinary that an important occasion like this should have proceeded without the Minister's senior relevant departmental officer, Mr Gabbedy, being in attendance. WADC officers met with Mr Grill prior to meeting with the purchaser and those accompanying him. Several points were raised at that meeting which resulted in handwritten additions to the offer and acceptance form. The most important of those points was the inclusion of a provision for a leaseback of the saleyard. While Mr Ryan believed that he raised the question, Mr Grill was emphatic that it was left to him to raise that fundamental point. The agreement was duly executed by the Minister, for himself and for the WAMC, purportedly as vendor. The leaseback provision became condition 9, reading as follows:

> "9. The Purchaser agrees to lease the saleyards designated `B' on the attached map to the Minister for Agriculture for a period of 3 years with a 3 year option of renewal at a rental of one ($1) dollar per annum. Lease to commence on the date of settlement."

9.7.7 In compliance with Mr Ellett's wishes, for his own commercial reasons, no contemporaneous public announcement was made.

9.7.8 On or about 30 April 1986, the Minister, Mr Grill, wrote to the Chairman of the Meat Commission and other industry groups involved with the saleyard and invited them to meet him on 1 May 1986 to, "discuss a development involving the Midland Saleyard complex". Notwithstanding the importance of the decision to a wide

range of people, it must be remembered that at this time, apart from those immediately concerned with the transaction, no one — not the WAMC, the farmers' groups, stock and station agents, stock transporters, the Shire Council nor Midland businesses — had been told of the agreement. At the meeting on 1 May, the Minister announced the sale. The announcement received a very hostile reaction from the farmers' groups represented. Mr Grill said in evidence that he was surprised by that reaction. On the following day, 2 May, the Minister released a media statement announcing the sale. The public response against the sale of the saleyard and criticism of the price obtained were strong. However, at this time all the essential decisions had been made and the Government was effectively committed to the sale, perhaps (as it later emerged) not in strict legal analysis but certainly morally.

9.8 Problems emerging after the sale

9.8.1 Opposition to the sale was most vociferous from the farmers' groups. Following a deputation, the Minister met with representatives of the Primary Industry Association and the Pastoralists and Graziers Association on 20 June 1986, when he agreed to set up a Livestock Saleyards Liaison Committee. In a Media Statement from the Minister's office, issued on the same day, the task of the committee was said to be "to co-ordinate industry and government views on the future of a near-metropolitan saleyard". The first meeting of the committee, on 21 August 1986, was attended by representatives of the Department of Agriculture, Midland Chamber of Commerce, Pastoralists and Grazier's Association, Meat and Allied Trades Federation, Livestock Transporters' Association, Livestock Salesmens' Association, Primary Industry Association and the WAMC. The committee adopted the role enunciated by the Minister and added, as agreed principles, that the intention must be to retain the saleyard indefinitely and that every effort must be made to retain the entire saleyard facility. Given the wide community and industry interest represented on the committee, the adoption of those principles immediately placed the Government under considerable pressure to reach an agreement with Mr Ellett to reacquire in one way or another the very same saleyard it had just sold him. The industry groups have never wavered in their insistence on retention of the Midland saleyard or, later, the acquisition of an equivalent facility nearby, at Government expense. It very quickly became apparent following the sale that neither course was easily or cheaply achievable.

9.8.2 Negotiations for a lease over the saleyard for the WAMC were protracted but unproductive. Drafts of a lease were prepared but never signed. The saleyard has

continued in operation pursuant to the agreement for a lease contained in condition 9 of the offer and acceptance of 18 April 1986. It is accepted by both parties that the "lease", having been extended in accordance with the agreement, expires in mid-1993. Presumably the Government will then, if permitted to remain in possession of the saleyard, be liable to pay rent at commercial rates.

9.8.3 Problems with the agreement arose almost immediately. On 6 and 7 May 1986, Mr Ian Flack and Mr Frank Cooper from the WAMC met Mr Gabbedy and Mr Ryan to "clarify in detail the `nuts and bolts' of the sale agreement". Mr Ellett joined them on 7 May, to discuss the identification of the plant and equipment to be removed by the WAMC, which was the subject of condition 4 of the agreement. Mr Gabbedy had written to Mr Ryan on 6 May and he wrote again on 8 May outlining several problems which required resolution with Mr Ellett. In these letters, Mr Gabbedy raised the question of a lease over the saleyard for up to 15 years (a proposition which was to be repeatedly put by the Minister over the next few years but never agreed to by Mr Ellett), the question of access to the saleyard, the availability of the effluent ponds and the covered cattle saleyard area for WAMC use and the future of a sheep shearing school run by the Department of Agriculture on the site. All this, within three weeks of the execution of the agreement and one week of the public announcement of the sale. Mr Ryan conveyed Mr Gabbedy's concerns to Mr Ellett and received a reply dated 16 May 1986. While expressing a wish that the saleyard operate with a minimum of disruption as long as the Government wished, the letter was non-committal on both the question of a longer lease and the covered cattle saleyard area. The material paragraphs read as follows:

> "It is not known exactly when the saleyard area is required for expansion. If the area was not being used after the six years then it would be available ....
>
> It appears *at this time* that the covered cattle saleyard area is not required and therefore is available to the saleyard complex. I will however confirm this when final drawings are available." [our emphasis]

Discussion and correspondence continued, culminating in a memorandum of understanding of 12 June 1986. In that document Mr Ellett agreed to a number of matters, all of which, undoubtedly, should have been thoroughly negotiated before the signing of the agreement for sale.

9.8.4 Plant and equipment also caused serious problems. In the two years following the agreement for sale, there were a number of disputes between the WAMC and Mr Ellett over the Commission's entitlement. It is clear, from the evidence of Mr Flack, the Chief Executive Officer of the Commission and Mr Terry Dunham, the Commission Engineer, and from correspondence in evidence, that Commission staff experienced difficulty and frustration in their efforts to obtain access to plant and equipment that was needed for Commission use and which they regarded as Commission property. The Minister, Mr Grill, interceded in these disputes on more than one occasion, at the request of one or other party. One such intervention was precipitated by a letter from Mr Flack to Mr Grill, advising that the Commission had resolved to sue Mr Ellett if it could not obtain access to items which he had conceded to be Commission property. Mr Ellett agreed in evidence that he had sold scrap material, plant and equipment from the site for at least $401,522.18. On the other hand, Mr Ellett claimed that he incurred significant expense in its removal. In this regard, however, the Commission observes that it is likely the cost would have been incurred by Mr Ellett in any event, in preparing the site for development.

9.9 The conduct of the MIWG officers

9.9.1 In the Commission's opinion, the conduct of the members of the MIWG is open to criticism, on their own evidence, in a number of significant respects.

9.9.2 At no time did the MIWG, or any of its members separately, apply their minds properly to the questions confronting them when they began to work through the Treloar report. The evidence tends to a conclusion that the entire reference to GHD Dwyer may have been a smokescreen to cover the implementation of a pre-determined plan to dispose of the entire abattoir/saleyard complex as a single lot. Certainly a plan to dispose of it as a single lot to Mr Ellett would seem to have been taking shape by December 1985 at the latest. The evidence is insufficient to enable the Commission to reach a positive conclusion in this regard. But without some such conclusion the evidence presents a conundrum, namely, how senior experienced public servants constituted as an executive working group of that nature could have failed to analyse competently the relevant facts and circumstances, consider the options and make appropriate recommendations to Cabinet or at least to the Minister. We make further observations on this matter later in this chapter. Both Mr Gabbedy and Mr Harrington justified their actions on several occasions by saying that they were "just working through Treloar", or similar. In the light of the recommendations of the Treloar

Committee, as outlined above, it is clear that the MIWG were, in fact, doing no such thing.

9.9.3 It was said by its members that no record of the deliberations of the MIWG was kept and no files were maintained. The question of files and records is considered in some detail below but, for present purposes, if that evidence is accepted, it illustrates an irresponsible and reprehensible approach to the task before them.

9.9.4 The Cabinet submission of February 1985 was misleading in that it misrepresented the Treloar recommendations and failed to properly present to Cabinet the nature of the decisions that were required. The submission did not make it clear to Cabinet that the Treloar committee had recommended the severance and immediate sale of the abattoir site, or that the committee had recommended that a decision be made and announced immediately to dispose of the saleyard some years later. Nor was Cabinet ever asked to decide whether those recommendations should or should not be adopted. When the political storm broke, Cabinet could have complained, quite justifiably, that it had been badly let down by its public service advisers.

9.9.5 The GHD Dwyer study was not needed. If a policy decision to implement the Treloar recommendations were taken, the sale of the abattoir site would have been taken over by ILDA or some other qualified body. Once the decision had been taken to undertake the study, however, the MIWG should have participated in the commissioning of the study and ensured that the correct questions were asked and the correct factual position conveyed to the consultant.

9.9.6 Once the GHD Dwyer report was received, it should have been fully analysed by each member and fully discussed by the group in formal, recorded meetings. As it was, no member of the group properly read the report. It was an inadequate response for them to say that they were not technically competent to consider the findings. They were well able to absorb and make use of the findings made. Had they done so they would have become aware that Taylforth had offered to purchase the abattoir site alone for a negotiable price commencing at $5,000 per hectare, leaving the saleyard to be disposed of when it became necessary or desirable to close it, if ever. That option was one of a number of alternatives put forward by Taylforth in its proposal. As a resolution of the problem of disposing of the abattoir site, it could have been ideal and was available as an alternative to consideration of the Port Adelaide

Freezers Cold Store proposal. It is clear that neither of those options was considered by the MIWG.

9.9.7 Once the GHD Dwyer report had been received, the WAMC and Department of Agriculture should have been formally involved in the decision making process thereafter. As the body in which the site was vested, the Meat Commission had a vital interest in the future of the saleyard and should have been consulted.

9.9.8 The decision to refer the GHD Dwyer report to WADC was unnecessary and totally misguided given that Cabinet had not decided to sell. All necessary expert evaluation, opinion and recommendations were contained in the Treloar report and the GHD Dwyer report. General analysis and policy consideration were properly the function of the MIWG itself.

9.9.9 The manner in which the decision to refer the decision to WADC was taken and effected was inappropriate and unprofessional. For two members of the group to decide on such a significant step over the telephone, without reference to Mr Gabbedy and without having read the report, is disturbing in its implications.

9.9.10 The referral to Mr Beech should have been in writing, setting out clearly the terms of reference. That it was not in writing is extraordinary, in this bureaucratic context.

9.9.11 In fact, whatever might have been thought, WADC was not qualified to provide expert advice as requested. The substance of the brief confined WADC to deciding between the two contenders and recommending a price. Assuming WADC was qualified to help, it should have been asked for its advice as to the best way of marketing the property to achieve a desired result. As it was, Mr Beech said that any alternatives were precluded by the terms of his instructions.

9.9.12 Somebody should have checked the bona fides, character and capacity of each of the two contenders to carry out their plans. If it was intended by the MIWG that WADC should carry out those checks, then Mr Beech should have been asked to do so, specifically. As it was, Mr Harrington said he assumed that WADC would carry out the checks and Mr Beech said they did not do so because they were not asked. Mr Harrington agreed his attitude to the Prestige Brick proposal may have been different if he had been aware of several facts such checks would have disclosed. In the light of

the total evidence, it is likely no one ever turned his mind to those questions. The MIWG, Mr Harrington in particular, should have followed up with Mr Beech just what was done and not done.

9.9.13 The Cabinet submission of 5 March 1986 is poor. It did not present the Minister or Cabinet with the considerations for and against the principal decision they were being asked to make, namely, to sell the saleyard. The document is illogical and unpersuasive. It is a mishmash of extracts from other documents, with no coherence or thread. It is so unconvincing as a Cabinet submission that it raises squarely the question of whether the document was designed genuinely to inform the Cabinet or whether the draftsmen were simply going through the motions of decision making to achieve a pre-determined result. We have difficulty in accepting that the deficiencies would not have been readily apparent to Mr Grill, notwithstanding that he was new to the portfolio.

9.9.14 The Cabinet submission recommended that the property be sold to Prestige Brick and that WADC act as the Government's agent in dealing with the purchaser to effect a sale on terms and conditions satisfactory to WADC. It is the Commission's view that WADC was inappropriate to act as the Government's agent for this transaction, a fact which should have been apparent to those who drafted the submission. Referral to ILDA, the Government's authority for marketing industrial land in an established and orderly manner, seems to have been overlooked or ignored. In any event, the MIWG should have satisfied itself of WADC's competence to carry out the assignment and ensured that appropriate consultation would be undertaken with WAMC in order to maintain a satisfactory operation of the saleyard. The needs and requirements of the WAMC, as the operator of the saleyard, were again ignored. The WAMC and its staff were not even aware at that time that a sale was contemplated.

9.9.15 The judgment of the MIWG, as advisers to the Government, was seriously astray about the attitude of the farmers' interest groups to the future of the saleyard. Perhaps in fact the question was never addressed. If Mr Gabbedy was in touch with the farming community at all, it is difficult to see how he could not have been aware that the organisations representing rural interests would vigorously oppose the closure of the yards, in the absence of an acceptable substitute. It is not to the point for Mr Gabbedy to say, as he did, that the farmers' organisations had their opportunity to make their views known at the time they made their submissions to the Treloar Committee. There is a big difference between a general, academic inquiry and a stated

intention to sell. Indeed, as we have seen, Mr Gabbedy was reminded at the meeting on the day on which the Cabinet submission was prepared, that "farmers are convinced that a central saleyard like Midland is essential". The Government's public position, right up to the announcement on 1 May 1986, was that a decision had not been made on the Treloar recommendations. Furthermore, if the Treloar recommendations had been put into effect, the farmers would have had an opportunity to make the strength of their views known before any irrevocable step had been taken to dispose of the saleyard.

9.9.16 In general, the Commission finds that the MIWG, on the evidence of its members, acted apparently without adequate thought, method or system. We are unable to discern any rhyme or reason for their actions. When viewed in conjunction with the equally extraordinary conduct of the WADC officers in response to Mr Harrington's request, to which we now turn, the mystery is deepened.

9.10 The conduct of WADC officers

9.10.1 The Commission finds that the conduct of the WADC officers is also open to criticism, in several respects.

9.10.2 It was as unprofessional of WADC to accept oral instructions in a matter of this nature and complexity as it was for the MIWG to give them. Mr Beech should have insisted on a proper brief which set out the parameters of his instructions fully and unequivocally.

9.10.3 Mr Beech should never have accepted the task of reviewing the GHD Dwyer report, if that was part of his brief, as Mr Ryan and Mr Hillyard assert. Mr Harrington and Mr Beech say that a review was not part of the instructions but it appears that the report was read sufficiently to enable Mr Beech to adopt part of it as the basis for his recommendation. None of the WADC officers was qualified in any branch of engineering or architecture, none was a qualified valuer, none had expertise or experience in demolitions and none had any knowledge or experience in town planning or the wider economic fields addressed by Wilson Sayer Core. Mr Ryan, while lacking any formal qualifications, professed to have experience in valuing commercial property.

9.10.4 Despite the assertions in Mr Beech's letter as to the careful review of the GHD Dwyer report and the thorough canvassing of the options proposed, we do not

believe this happened. Mr Beech conceded that "the terminology may have been inappropriate". Analysis of the two proposals was so perfunctory as to be meaningless. Virtually no contact was made with Taylforth and none with Mr Ellett. While Mr Beech may have read the comments on the relative merits of the two proposals in the GHD Dwyer report, on his own evidence he took no notice of them. His only real determinant was price and Mr Ellett's price at that.

9.10.5 Further and possibly more importantly, no one in WADC checked the bona fides and character of the two contenders nor their ability to carry out their plans. Mr Beech agreed that had he been aware of a number of the facts such an investigation would have disclosed it would have made a difference to his assessment. He said that he was not specifically asked to carry out such checks and consequently did not do so. It appears that no member of his staff thought to raise the question.

9.10.6 It did not occur to WADC to ask Mr Logan to amend his valuation to take into account any peculiarities that may apply to a purchase by Prestige Bricks. Nor did it occur to WADC to resolve, with Mr Taylforth, problems seen to arise with demolition costs. No one contacted the WAMC, which maintained the abattoir site and operated the saleyard complex. No one contacted the Department of Agriculture to see whether it had any matters to raise on the future of the saleyard.

9.10.7 The view expressed by both Mr Ryan and Mr Hillyard and endorsed by Mr Beech, that it was appropriate and helpful for those officers, without wider consultation, to substitute their opinions and judgment for those of the experts, as expressed in the GHD Dwyer report, reflects an appalling lack of judgment which defies rational explanation.

9.10.8 The negotiation and execution of the agreement phase, for which WADC was instructed to act as the agent of the Government, was similarly very poorly handled.

9.10.9 Once again, and possibly more importantly than before, no attempt was made to check the needs and wishes of the vendor and occupier of the site, the WAMC. How WADC could have supposed that it was competent, of its own knowledge, to lay down the terms and conditions of the sale is beyond belief.

9.10.10 No attempt was made to take an inventory or valuation of plant and equipment on the site, much of which would technically be classified as fixtures, to be

excluded from the sale at the price recommended. It is clear from the evidence of Mr T J Dunham from the Meat Commission, that such an inventory and valuation could readily have been provided. Mr Ryan said in evidence that he looked and did not see anything of commercial value. This was a ridiculous statement, destructive of any shred of credibility that might otherwise attach to Mr Ryan. Not only did the WAMC remove a considerable amount of valuable equipment but, as we have said, Mr Ellett himself received more than $400,000 for equipment sold by him from the site. Furthermore, an amount of $100,000 was allocated to chattels on the offer and acceptance form presented by the WADC officers to Mr Grill. Mr Ryan's explanation that this amount must have been included to reduce the amount of stamp duty payable on the transaction by reducing the sale price of the land from $450,000 to $350,000, is quite remarkable, as it amounts to a recognition of a deliberate attempt to defraud the State of a considerable amount of stamp duty. It would be difficult to perceive this as evidencing anything other than the promotion of Mr Ellett's interests at the expense of the State. On the other hand, if it was a genuine inclusion in the offer and acceptance form, then it would follow that Mr Ryan misled the Commission when he said he looked around the site and did not see anything of value.

9.10.11 No attempt was made to seriously negotiate, in detail, the terms of sale. That omission, in one sense, is understandable because, until they contacted the Meat Commission and Department of Agriculture, they could have had no idea what terms of sale were appropriate. It should have been obvious to all concerned that the sale was complicated. It was made all the more complicated by the fact that the saleyard was to continue operating for a number of years.

9.10.12 It is surprising that Mr Ryan and Mr Hillyard would take the document to Mr Grill without having made provision for a leaseback over the saleyard. In the event, the hurriedly inserted, handwritten clause 9 was quite inadequate to define the rights and liabilities of the parties, even as an agreement for a lease. The most cursory inquiry or even inspection would have revealed that the saleyard was dependent on defined areas of the abattoir site for its daily operation in a number of important respects. Failure to include reference to those considerations in the agreement required the Government to go "cap in hand" to Mr Ellett almost immediately after the agreement had been signed.

9.10.13 Nor was any provision made for a performance guarantee to ensure that Mr Ellett would, in fact, build a brickworks so as to benefit the community, as he had

said he would. ILDA included such a provision in its contracts of sale of government land for development, as a matter of course. The WADC officers did not even think of it.

9.10.14 Further, Mr Ryan and Mr Hillyard failed to seek legal advice. Had they done so, it is most likely that they would have been advised of the following problems or potential problems:

(a) The simple, pro-forma offer and acceptance form was totally inappropriate and inadequate to document a complex agreement such as this.

(b) The condition relating to chattels, condition 4, was bound to ensure dispute on that topic and was, in any event, ambiguous and ineffective to define the rights and liabilities of the parties. It was pursuant to condition 4 that Prestige Brick was able to take possession of plant and equipment on the site, part of which it was able to sell for over $400,000, in addition to those items it was able to use in its own brickmaking activities.

(c) Detailed lease conditions should have been agreed, prior to execution of the agreement.

(d) Condition 8 of the agreement, by which the purchaser agreed to defer development of part of the site, did not constitute effective provision to secure continued possession of the saleyard by the Government.

(e) The Minister for Agriculture did not have the legal authority, at that time, to sign an agreement for sale of this property.

9.10.15 The problem, again, was that the WADC officers were purporting to act well beyond their qualifications, experience and abilities. Their lack of judgment was most damagingly evident in their failure to recognise that fact.

9.11 Search for an explanation

9.11.1 The question then arises about what finding or findings the Commission should make on the conduct and performance of both the MIWG (Mr Gabbedy, Mr Harrington and Mr Johnston) and WADC (Mr Beech, Mr Ryan and Mr Hillyard). It was submitted by Counsel Assisting in his closing address that when the events leading to the execution of the offer and acceptance are considered, the Commission might conclude that the dereliction of duty and incompetence displayed was so great that it raised the possibility of another agenda. Counsel submitted that the Commission must consider whether the conduct of those officers was so extraordinary as to suggest that they were subject to other pressures, most probably direction from above, to achieve a desired end, namely sale of the property to Prestige Brick on the terms and conditions agreed.

9.11.2 While the extent of the dereliction of duty and incompetence that we have found is puzzling and strongly suggests another agenda, the Commission is not prepared to find that the actions and omissions of the MIWG and WADC were consistent only with such an explanation. If any such pressures were applied to the MIWG, they would probably have been at the instance of, or at least known to the Premier, Mr Burke. Mr Burke has denied the existence of any political agenda or interference with the decisions reached by the MIWG and WADC on this issue. He had no recollection of any representations to his department on behalf of Mr Ellett and denied any involvement in the affair outside of Cabinet deliberations, until after the controversy arose. Likewise, no support for the existence of another agenda was found in the evidence of any of the officers concerned in the matter. There is no evidence which could ground a finding of corruption or illegality.

9.11.3 The question then arises whether the conduct of the officers involved was improper. The Commission believes it was. The Commission does not regard it as fruitful to pursue the general question of whether dereliction of duty and incompetence, without more, can constitute impropriety but this was not an isolated instance of carelessness or inadvertence with dire consequences. The course of action followed by the MIWG and WADC represented a disgraceful approach to public administration and the exercise of bureaucratic power which is quite unacceptable in principle and in practice. The allocation of specific responsibility to particular officers will be considered later in this chapter.

9.12 The role of the Minister

9.12.1 Mr H D Evans was Minister for Agriculture from when the Burke Government took power in February 1983 until February 1986. Mr Evans was largely responsible for the appointment of the Treloar Committee and later for the supervision of the reconstituted MIWG. Mr Evans signed the Cabinet submission recommending the undertaking of two further studies into alternative uses for the Midland site, in February 1985. It apparently did not occur to Mr Evans that the submission he was asked to sign was an entirely inappropriate response to the Treloar recommendations nor that those recommendations were misrepresented in the submission. Mr Evans accepted the advice of the MIWG that it was necessary to carry out further work before making a submission to Cabinet on the Treloar recommendations. He concurred in the decision to refer the question of alternative uses to GHD Dwyer and Wilson Sayer Core. Mr Evans did not recall being consulted over the decision of the MIWG to refer the GHD Dwyer report to WADC. Indeed, Mr Harrington confirms that no consultation occurred. Thereafter, in February 1986, Mr Evans retired from Parliament. The decision to sell the site to Prestige Brick was made after Mr Grill became the Minister for Agriculture.

9.12.2 On the assumption that Mr Evans is correct in saying that he understood the Treloar recommendations, it is difficult for the Commission to understand why he would have agreed to the submission of February 1985 going forward as a recommendation to Cabinet. It was apparent from his evidence that Mr Evans was not aware of the deficiencies in the submission.

9.12.3 Mr Grill became Minister for Agriculture on 25 February 1986. His evidence, supported by Mr Gabbedy, was that he received briefings on the matters of moment in his portfolio at the time and discussed the Midland site question with Mr Gabbedy. He signed the Cabinet submission recommending sale of the Midland site to Mr Ellett on 5 March 1986. He signed the submission because he was advised to do so and saw no reason not to accept that advice. Thereafter, he had to live with the consequences.

9.12.4 It is surprising that Mr Grill, like Mr Evans, did not pick up the fact that the background work required to support the Cabinet submission had not been performed competently and that the whole issue was being handled without adequate recognition of the Treloar Committee recommendations and indeed, independently of those recommendations. It had also been handled with precipitate haste in the latter stages. The reasons for that haste have puzzled the Commission. In a memorandum

dated 21 March 1986, from the Premier's Acting Private Secretary to the Premier, reproduced in full in paragraph 9.15.8 of this chapter, Mr Hill is said to have claimed in support of a request for urgent consideration of the Cabinet submission recommending sale to Prestige Brick, that Prestige Brick was considering pulling out of the deal because of increasing costs and delays which would affect the company's building programme on the site. In a memorandum prepared for the Premier, known as the "blue", which accompanied the Cabinet submission dated 5 March 1986, the following passage appears:

> "Prestige Bricks are pressing for a decision to be reached quickly. They are concerned about loss of confidentiality about options on clay deposits which will result in increased land prices. Moreover the onset of wet weather has made core sampling of clay deposits difficult to undertake and analyse."

9.12.5 None of those three reasons for haste appeared to us to have substance and we are struck by the lack of consistency between the basis for the approach to the Premier by Mr Hill and the reasons advanced in the "blue". It seems to us to be unlikely that Mr Ellett would be incurring finance costs at a stage where he was negotiating to acquire land for his venture. We now know, from the evidence, that he did not have finance arranged at that time and did not finalise any such arrangements until July of that year. As for the reasons contained in the "blue", if Mr Ellett had options on clay deposits we can assume that he was in a position to exercise those options at will, subject only to possible expiry. The memorandum did not refer to the danger of options expiring, however, but to "loss of confidentiality about options". The Commission is unable to see how such a reason could convince a critical reader. Finally, the memorandum talks of the onset of wet weather having made core sampling of clay deposits difficult. We simply note that the onset of wet weather in Perth does not ordinarily occur at the beginning of March. The Commission does not believe that the Minister or his advisers could reasonably have been convinced by those reasons as grounds for overlooking any normal checks and investigations required for a transaction of this size and complexity. We remain puzzled as to why the whole transaction was treated with such urgency after the letter from WADC was forwarded to Mr Harrington.

9.12.6 One further passage from the Cabinet "blue" merits inclusion, as follows:

> "If Cabinet approve the recommendations then effectively they are announcing the future closure of Midland Saleyards. PIA, PGA, and the Western Australian Livestock Transporters Association

> have not been consulted on this issue. Therefore, no public announcement should be made until WADC have completed their negotiations with Prestige Bricks."

The evidence was that, in practice, the Minister making the Cabinet submission may not always see the "blue". The document was intended for the Premier and was prepared by the Premier's advisers. Ministers did, on occasions, see them. In our opinion, however, it is a reasonable presumption that the information contained in the document germane to the Minister's portfolio, was known to the Minister. No reason was given in the memorandum as to why the affected organisations had not been consulted. The reference to the interest groups made it plain that the failure to consult was deliberate and conveyed the appearance of an intention to present those groups with a *fait accompli*, leaving them no scope for effective opposition.

9.12.7 During his examination, Mr Grill admitted to several relatively minor errors of judgment and exaggerations in media releases, all of which are explicable in the context of the political furore that followed the announcement of the sale. Mr Grill agreed that, following a meeting with representatives from rural interest groups on 1 May 1986, he was forced rapidly to reassess his and the Government's position on the future of the saleyard. He admitted to effecting a "unilateral" change of Government policy at that time, to accord more with the demands of the farmers. Where previously he had, on advice, thought he was implementing the Treloar recommendations by agreeing to the sale, he subsequently stated that the Government had not accepted those recommendations, that he could see the need for a near metropolitan saleyard for the foreseeable future and that Midland was the best location for that saleyard. Mr Grill also freely admitted that the omission to keep the WAMC informed of the Government's actions and plans prior to 1 May 1986, was a mistake. Those admissions do not, and neither does any evidence from other witnesses, demonstrate any corruption, illegal or improper conduct on the part of the Minister.

9.12.8 Mr Grill's conduct, as Minister, from the time of the sale through to his departure from the portfolio in February 1989, is consistent with that of a minister attempting to resolve a long-running, politically embarrassing situation as quickly as possible, notwithstanding that it might involve a large expenditure of public funds. It was clear from Mr Grill's correspondence and from his evidence before this Commission that he would not have shrunk from authorising or recommending the expenditure of substantial sums of public money to retrieve the position and remove from the Government the pressure being applied by the farmers.

9.13 The price

9.13.1 A question posed by Counsel Assisting the Commission in his opening address on this term of reference, was whether the sale price of $450,000 represented fair and reasonable value for the land, the buildings and the plant and equipment transferred. Since it has been alleged by several people and organisations that the property was sold at less than a fair and reasonable price, it is appropriate that the Commission should give some attention to the issue. The Commission heard a great deal of evidence on the question.

9.13.2 Mr Logan gave evidence of his valuation of the site for the GHD Dwyer study. He said that he was asked to value the site on the basis of a number of options presented to him by Mr McKenzie of GHD Dwyer. This he did, placing valuations on the various options ranging from a negative $910,000 for option 2b (subdivision of the site for use as an industrial estate) to a net gain of $915,000 for option 5b (sale of the entire site as a single industrial site). All the material witnesses agreed that, on the basis of the totality of the findings of GHD Dwyer and Wilson Sayer Core, sale of the entire site as a single industrial lot, that is, option 5b, was practicable. Both the Prestige Brick and certain of the Taylforth offers, fell into that category.

9.13.3 Mr Logan said in evidence that, had he been asked to put a value on the site for use by Prestige Brick pursuant to their proposal, he would have valued it at more than $915,000 but, without actually carrying out a detailed analysis, he was not prepared to name a figure. Factors which would have lead him to that conclusion were, first the delayed cost of demolishing some of the buildings, secondly the intended use of an existing building for the brick kiln and thirdly, certain engineering costs for which he had allowed would not have been required or not have been required until later than anticipated. Mr Logan, in fact, valued the site for Mr Ellett, in May 1986, for the purposes of his application to the bank for financial accommodation, at $915,000. Mr Logan said that he could have done a higher valuation specific to the Prestige Brick user proposal but Mr Ellett was content with the original basis which gave him a figure of $915,000.

9.13.4 Mr Ellett has no recollection of advising Mr Ian Johns of Tricontinental Corporation, that the "site and existing buildings were purchased at a bargain price", as recorded by Mr Johns in his internal memorandum to Mr Atlas, dated 7 July 1986. However it is hardly the sort of statement that Mr Johns would record in writing for

bank purposes unless it had been said by Mr Ellett. In any event we can conclude that Mr Ellett would have been very pleased after the valuation he had obtained from Mr Logan in the preceding May. Leaving aside the reservations on Mr Logan's valuation raised by Mr Ryan and Mr Hillyard of WADC, the objective factors suggest strongly that the price paid was very low.

9.13.5 On the basis of the value ascribed for chattels in the offer and acceptance form, $100,000, the net price for land and buildings was $350,000. Evidence from those present at the meeting with the Minister on 18 April 1986, suggests that little thought was given to the calculation of that figure. However, some amount must be attributed to chattels. This was expressed to be a *walk-in/walk-out* contract, whatever that meant in the light of other provisions of the agreement and the practicalities operating on the parties. The Commission has been told that Mr Ellett sold plant and equipment to a value of at least $401,000 albeit at what Mr Ellett claimed was considerable removal expense. The evidence also suggests that Mr Ellett was able to put other plant and equipment left on the site to use in his own operation. Without any regard for the latter, it appears that, in terms of value, Mr Ellett in fact paid an effective price considerably less than the nominal price of $450,000 for the land and buildings.

9.13.6 After the sale, attempts were made on behalf of the Government to account for the discrepancy between the contract price of $450,000 and the valuation placed on the site by Mr Logan, of $915,000. Mr Logan stands by his valuation and, as already mentioned, has testified that for the specific user of Prestige Brick, it is significantly understated. It is necessary to deal with the objections to Mr Logan's valuation raised by Mr Ryan.

9.13.7 First, there was the question of demolition costs. Mr Logan had accepted Mr Taylforth's expertise on this aspect and used his report to base his own calculations of value. Mr Ryan asserted that Mr Logan's valuation was flawed on this ground, in two respects. First, he said, in making his calculations Mr Logan had adopted the wrong cost of removing the rubble. To establish the cost of removing rubble, Mr Taylforth had ascertained three alternative disposal sites, which he had investigated. In his view the best and cheapest option was in the middle range of cost, namely disposal at a near, off-site location. Mr Taylforth made it clear in his report that the site was available and stipulated a unit price. In evidence before the Commission, Mr Taylforth stated that two landfill sites across the road would have taken the material.

9.13.8 Mr Ryan said that his information, gleaned orally from either Mr Hillyard or Mr Brehaut, was that there were no such sites. Mr Taylforth and Mr Logan should consequently have allowed for disposal of rubble in the most expensive manner, namely off-site government landfill. This factor was not mentioned in Mr Beech's report of 27 February as having a bearing on the price recommended. Mr Ryan was unable to say how much he deducted from Mr Logan's figure of $915,000 for this factor, though the effect of the substitution was readily calculable. The Commission can see no reason to doubt the evidence of Mr Taylforth. It should also be noted that Mr Logan could see some scope for on-site disposal of rubble, that option being the cheapest of the three alternatives. While Mr Logan did not allow for that possibility in his calculations, it makes his valuation more conservative and further weakens the argument raised by Mr Ryan.

9.13.9 Secondly, Mr Ryan asserted that Mr Logan was wrong in not making separate allowance for underground demolition costs. This is a more difficult issue. Mr Taylforth, in his demolition report, made an assumption that "the general scope of work being to remove the structures down to surrounding ground level, if floor slab is at that level to leave it, if slab above ground to remove it". In evidence, Mr Taylforth said that he had so little hard information as to the subterranean foundations that it would have been impossible to give an estimate for below ground work. Mr Logan accepted that expert conclusion and incorporated it into his own valuation calculations. In Mr Logan's view it was a realistic assumption in the circumstances. Without specific information as to intended user, "in the general scope of what we were looking at, it was just reasonable to wipe off the unwanted structures down to floor level". It was to be expected that the majority of prospective purchasers of this industrial site would not require expensive underground work to be undertaken to realise the full potential of the site for their purposes. In those circumstances, it was entirely reasonable for Mr Logan to base his calculations on the assumption he adopted. It was also in accordance with accepted valuation practice.

9.13.10 It should be kept in mind that, throughout his evidence, Mr Ryan insisted that he undertook his valuation as a general valuation. He did not have the specific user of Prestige Brick in mind. Nonetheless, Mr Ryan stated that he made allowance for subterranean demolition costs in arriving at his recommended figure of $450,000. He even went so far as to say that, in his view, Mr Logan's failure to take account of those costs rendered his valuation worthless. Once again, Mr Ryan did not attempt to put a

figure on the difference in price the alleged miscalculation would represent. He agreed that he was not in a position to even attempt the task of quantifying those costs.

9.13.11 In determining whether the price was fair and reasonable, the Commission can see no grounds on which the evidence of Mr Taylforth and Mr Logan concerning the proper basis for treating underground demolition costs should be ignored and the views of Mr Ryan preferred.

9.13.12 Mr Ryan then raised the cost of relocating below-ground power services, which he claimed had been omitted from Mr Logan's valuation. He was referred to the relevant passage of the GHD Dwyer report where the engineering costs of preparing the site for sale pursuant to the various options considered, are listed. The passage refers to a provision for Electric Power (Overhead). Mr Ryan then stated that he was referring to a 132KVA power line that goes below the site. He insisted that the line went under the site and was, consequently, not the line referred to in the list of engineering costs. However, other witnesses, including Mr Ellett, confirmed that the power line in fact passed over the site. It is clear, from the evidence, that this is a matter on which Mr Ryan was mistaken. Again, no firm value was ascribed to this factor by Mr Ryan for deduction from Mr Logan's valuation.

9.13.13 Mr Ryan's next perceived flaw in Mr Logan's valuation was the value Mr Logan placed on three buildings on the site. Mr Logan allowed $500,000 for buildings numbered 11, 12 and 23 by the architect engaged by GHD Dwyer to examine the buildings and $245,000 on the administration building, numbered 6. Mr Ryan accepted that No 23, the carcase freezing stores, referred to elsewhere in this report as the cold store, might have a positive value. The others, he said, had a negative value, the cost of their demolition. The architect stated that the integrity and condition of buildings 11 and 12 was generally good. They should be retained only if compatible with other recommended uses of the site but could be used for general or refrigerated storage. Mr Logan noted that they were useful buildings but may have only an "adaptable" use to one purchaser. Building 6, the administration building, was, in fact, remodelled by Mr Ellett and serves as his administration building today. Mr Ryan was asked the basis for his assessment and stated that it was based on a visual assessment at the time. Mr Ryan's criticism on this aspect was a straight case of Mr Ryan substituting his judgment for that of the architect and valuer engaged by GHD Dwyer. Mr Ryan thought they were wrong and that he was right. He said that he thought he would have calculated an amount to deduct for this factor but could not recall whether

he did or not. In the Commission's view, no basis has been established for varying Mr Logan's valuation, on this ground.

9.13.14 Then Mr Ryan sought to defend his valuation of $450,000.00 by reference to the fact that the area for sale was subsequently reduced from 29 hectares to approximately 24 hectares. He said he knew at the time that the boundaries would need to be adjusted though he did not know by how much. Mr Ryan agreed with the evidence given by Mr Logan to the effect that an excision of a small portion of a large site should not result in a pro rata reduction in the price. Sound valuation practice requires a reassessment of the price per hectare of the reduced area, a reassessment to a higher price per hectare. However, it is obvious that some allowance should be made for the fact that the sale was of a 24 hectare site. Mr Logan's evidence was that it was of minor significance.

9.13.15 Then Mr Ryan suggested that Mr Logan's base figure of $40,000 per hectare was significantly overstated. Mr Ryan suggested that a figure of $17,000 per hectare was more appropriate. It seems that Mr Ryan obtained the figure of $17,000 per hectare from Mr Logan's own report. In that report, with respect to a different issue altogether, Mr Logan observed that his firm currently had three rural lots on the market at $17,000 per hectare. The land was zoned rural and was south of the Helena River. The two locations were not in any way comparable. The Midland site was zoned industrial and the sites referred to by Mr Logan were zoned rural. The basic premise for Mr Ryan's comparison was incorrect. In the Commission's view, no basis exists for impugning the base figure of $40,000 adopted by Mr Logan.

9.13.16 After the sale had taken place and queries had been raised as to the adequacy of the price obtained, it was suggested that a deduction from Mr Logan's figure of $915,000 should be made for the fact that there was a leaseback of the saleyard or, at the very least, that the total site was subject to a significant encumbrance. Mr Grill raised this argument in evidence. In July 1986 one of his officers asked the Valuer-General's office to supply a market rental value and capital value of a six year leasehold interest in the saleyard. The Valuer-General considered the former to be $105,000 per annum and the capital value to be $410,000. Mr Logan was also asked by the Minister's office to carry out the same exercise but he declined on the professional grounds set out in his letter to Mr McKenzie, namely:

"1. The complex was not sold in line with the recommended option proposed in the "Seward" submission.

2. In the GHD Dwyer report, the assessments assumed that the saleyards would cease therefore it is erroneous to have regard for their commercial rental value and then adjust such rental savings from the capital value of the property."

In evidence, Mr Logan said that the use to which Prestige Brick intended to put the site did not involve development of the saleyard until a date beyond that when the Government would have been obliged to relinquish possession. The purchaser was consequently not going to suffer loss and no adjustment of the purchase price was necessary.

9.13.17 Several points may be made about the evidence relating to the possible value of the encumbrance. First, the evidence from the MIWG and WADC makes it clear that the price negotiated with Mr Ellett was based entirely on the WADC recommendation. That recommendation, in turn, came from Mr Ryan's assessment. Mr Ryan's assessment was a general valuation unrelated to the Prestige Brick user. He was valuing the site without reference to the leaseback. Secondly, as Mr Logan appears to recognise, an air of unreality surrounds a situation where the annual rental value of portion of a property is accepted at $105,000 and the total value of the whole property is said to be $450,000. On a conservative interest rate of 10%, such an annual rental rate would suggest a capital value for the saleyard site alone of in excess of $1 million. It seems sensible to us to view the value of the purchaser's financial loss in terms of what he is actually losing, as Mr Logan suggests. The Valuer-General, Mr J B Duncan, stated that his office was not asked to consider or comment upon the appropriateness or otherwise of making a deduction for that factor, in the circumstances of this particular transaction. His office was simply asked to do the sums involved.

9.13.18 Perhaps the most significant evidence on this aspect of the matter is the valuation prepared by Mr Logan on Mr Ellett's instructions on 15 May 1986. Mr Logan was then fully seized of all elements of the transaction, including the leaseback. He was prepared in that context to fix a value of more than $915,000.

9.13.19 It may have been appropriate for a qualified valuer determining a fair and reasonable price for this site on a general basis to make some allowance for underground demolition, for the existence of the encumbrance over the saleyard and for the reduced

size of the site actually sold. On the other hand, Mr Logan refers to factors particular to Mr Ellett's proposed user which would have justified a higher price. Furthermore, Mr Logan's valuation of a minimum of $915,000, undertaken for Mr Ellett in May 1986, takes no account of the salvage value of plant, equipment and materials, which Mr Ellett admits having sold for more than $400,000. Finally, Mr Ryan's qualification to express a useful opinion on a question of value in the circumstances is rejected.

9.13.20 Even if one allows for some costs of extracting the plant, equipment and materials, it is clear to the Commission that the value of the site in the hands of Mr Ellett was more than $1 million. It follows that, in our opinion, the $450,000, obtained for the site by the Government, was far below a fair and reasonable price. It was grossly inadequate. What the Commission is unable to understand is how a process was initiated whereby, in preparation for the sale of Government property, an expert valuation of that property, provided to the Government, should have been deliberately halved. Such a process could only serve the interests of a potential purchaser at the expense of the State.

9.14 The relationship between Mr Ellett and Mr Ryan

9.14.1 In the light of allegations that have been made elsewhere since this transaction became a matter of public comment, the Commission was obliged to investigate thoroughly the relationship between Mr Ellett and Mr Ryan. Once the matter had been referred to WADC in early February 1986, of all the participants in this transaction for or on behalf of the Government, Mr Ryan was probably in the best position to influence the outcome. Mr Ryan and Mr Ellett have always maintained, and continued to maintain before this Commission, that beyond a mutual membership of a yacht club and a loose association through a hunt club, they barely knew each other. Counsel for Mr Ryan called four witnesses, Miss Robin Kilburn and Mr Brent Morfesse, Mr John Rossi and Mr Dale Deeks to give evidence to that or similar effect. However, the evidence of Miss Julie Parkinson and Mrs Irene Ryan established that the relationship was somewhat closer than that. Miss Parkinson said that she had been with Mr Ryan on "maybe half a dozen times" when he had either gone on to Mr Ellett's boat or received Mr Ellett on to his boat in the pens at the yacht club. Mrs Ryan said that, while she and Mr Ryan were together, "[w]e were all boating people in the summertime and if we ever ran into them at Rottnest, we would go on their boat and have a drink or *visa versa* and we did have a meal. I can recall one at least together at Rottnest ... I would say we were friends but not very close friends".

9.14.2 It is also apparent that Mr Ellett and Mr Ryan had dealings together between February and July 1986 after Mr Ryan's boat sank at its moorings at the East Fremantle Yacht Club and was subsequently repaired in Mr Ellett's boatyard. The boat sank on Friday, 21 February 1986. According to evidence from Mr John Sweeney, the proprietor of Sweeney Marine Services, the boat was refloated and left in the pen on the Friday night. On Saturday morning, 22 February, Mr Ellett came to the boat and cursorily examined the damage. When it was decided that the boat would need to be moved to Fisherman's Harbour the following day, Mr Sweeney offered his services and a boat. Mr Ellett said that he would lend a hand. On Sunday, 23 February, Mr Sweeney towed Mr Ryan's boat to Fisherman's Harbour, as arranged. Mr Ellett and a woman friend named Robin (presumably Miss Kilburn) were on the towing boat with Mr Sweeney. Mr Ryan travelled on his own boat. The boat was subsequently lifted out of the water and transported to a boatshed at Myaree which at that time was leased by Mr Ellett in order to house his own boat.

9.14.3 Work was subsequently carried out on Mr Ryan's boat by Mr Mel Baker, who was employed to work on Mr Ellett's boat. Material for the two boats were ordered jointly. The documentary evidence indicates that Mr Ellett invoiced Mr Ryan for services and material supplied and that the account was paid by Mr Ryan's insurance company. Invoices from a company called Kabra Investments Pty Ltd, a company operated by Mr Ellett's accountants, Pearce and Cook, were also received. Those invoices record charges to Mr Ryan for shipwrighting work carried out by Mr Baker between 26 February and 8 July 1986. Although recruited from the Whitemans Brick organisation where he had worked under Mr Ellett and subsequently again employed directly by Mr Ellett, it appears that Mr Baker was employed by and paid through Kabra Investments Pty Ltd at the material times. The period from February to July coincided closely with the period during which the sale of the Midland site to Mr Ellett was effected with a good deal of help from Mr Ryan and in a manner most advantageous to Mr Ellett.

9.14.4 Then there is the question of the bricks supplied in August 1983 to Mr Ryan by Mr Ellett at what was described as "mates rates", while Mr Ellett was manager of Whitemans Brick. The documents tendered in evidence establish that in August 1983, Mr Ryan was invoiced by Whitemans Brick for bricks supplied, *inter alia*, to a total value of $895.24, including cartage. The invoice made no provision for any reduction in price. However, a credit note dated 21 October 1983 was produced to the Commission. The credit note reduced the price charged for the bricks by $244.80,

amounting to a discount of 30%. On its face there was a handwritten note which read, "Special rate as agreed by PE". The note was signed by Mr Ellett. Other documents, obtained from the liquidator of Whitemans Brick and put into evidence, establish that in several other instances, at least, where a credit note was raised after a customer had been invoiced for bricks, a complete explanation of the reason for the credit accompanied the note where the reason was not apparent on its face. Where there was any fault with the bricks delivered or those delivered were of a different type, that fact was carefully noted by reference to attached documents. The credit note in question carried no indication of any fault with the bricks.

9.14.5 Mr Ryan and Mr Ellett maintained that the bricks were "seconds" or "specials" for which a lesser price was charged as a matter of practice. Some time was spent examining witnesses on this aspect, including Mr George Cugley, then General Manager of Midland Brick Company Pty Ltd ("Midland Brick"), Mr Martin Mullen, an employee of Mr Ellett but one time office manager of Whitemans Brick and Mr Kenneth Thomas, then as now, Plant Manager for Whitemans Brick. It might be thought that the whole question of the bricks was a relatively minor matter which occurred a long time ago and concerned a small amount of money. But the transaction is significant. The endorsement on the credit note affords strong evidence of the personal intervention of Mr Ellett to provide a special deal for Mr Ryan. The credit note is simply not consistent with the allowance of a discount in the ordinary way for bricks which were irregular, being classified in the trade as either seconds or specials. The transaction is indicative of a friendly relationship, something rather more than the mere acquaintance professed by both.

9.14.6 In the light of all the evidence on this question, the Commission finds that Mr Ryan did receive a gratuitous discount from Whitemans Brick, at the instance of Mr Ellett, on his brick purchase. When that finding is considered with the evidence from Miss Parkinson and Mrs Ryan on the extent of their social relationship and the undoubted business arrangement that existed between them in connection with Mr Ryan's boat repairs, the Commission is led to the further conclusion that Mr Ryan, in undertaking the assignment from Mr Beech, involved himself in a situation which led to a conflict of interest.

9.14.7 No evidence before the Commission suggested that any benefit corruptly changed hands from Mr Ellett to Mr Ryan or to any other person in connection with the Midland abattoir site transaction.

9.14.8 Nevertheless, Mr Ryan's own integrity, and the appearance of integrity surrounding WADC's handling of the matter, demanded either that Mr Ryan should have withdrawn from any involvement in the transaction or that at the very least he should have made known to Mr Beech the nature of his relationship to Mr Ellett. Thereafter, he should have ensured that his conduct was competent, professional, generally above criticism and that its propriety was evidenced in adequate records. Regrettably, the Commission is bound to find that Mr Ryan did none of these things. He said nothing of his relationship with Mr Ellett. His approach to valuing the site did not impress the Commission. Apparently, Mr Ryan contented himself with a general inspection of the site and then, without making any detailed calculations, without entering into any consultation with a qualified valuer or other relevant authority, he halved the value placed on the property by an expert valuer. No written notes are on record of anything he did and no written report came from him. In all the circumstances it was highly improper for Mr Ryan not to declare his friendship with Mr Ellett. The impropriety was compounded by the unprincipled manner in which he performed the work.

9.15 Mr Ellett's support for the electoral campaigns of Mr Hill and Mr Troy, 1988/89

9.15.1 Evidence on this aspect of the Commission's investigation was given by Mr Ellett, Mr Donald Rowe, Mr Gordon Hill and Mr Gavin Troy. There was substantial agreement between all those witnesses as to the essentials of the matter under inquiry, though there were some important inconsistencies and differences on details. The evidence was as follows.

9.15.2 Up until some time in 1990, Mr Rowe conducted an advertising and communications business known as Rowe & Co. At all material times the business operated from offices in Midland. Rowe & Co had been involved in election campaigns for the Labor Party and Labor Party candidates in a number of States and Territories, over a number of years. Mr Rowe stated that he had been involved in "dozens" of election campaigns, sometimes on a minor, ad hoc basis and on other occasions responsible for organising entire campaigns. Before the 1988/89 election campaign, he had carried out about 90% of the campaign work for Mr Troy and somewhat less for Mr Hill.

9.15.3 Mr Rowe recalls being contacted prior to July 1988 by Mr Troy who asked him to ring Mr Ellett at Prestige Brick in relation to funding. Mr Rowe duly met

with Mr Ellett, on 25 July 1988. Mr Ellett asked Mr Rowe for an estimate of the amount that would be required to fund Mr Troy's campaign for the newly created seat of Swan Hills in the coming election. Mr Rowe's estimate was $20,000—$30,000. Mr Ellett's concern was to defeat and be rid of Mr Neil Oliver, a Liberal member of the Legislative Council, who was to be Mr Troy's opponent in the election. Mr Oliver was perceived by Mr Ellett to be the mouthpiece of Mr Ric New, of Midland Brick, in the State Parliament. Mr Rowe said that Mr Ellett also indicated that he would like to put money into Mr Gordon Hill's campaign for the seat of Helena. Mr Rowe told Mr Ellett that Mr Hill's campaign would cost in the order of $15,000—$22,000. Mr Ellett was content with that.

9.15.4 Mr Rowe also testified that at the meeting Mr Ellett explained the procedure to be followed in effecting payment. His evidence was as follows:

> "What was to happen was I would make out normal invoices for the various work that was done and send those invoices to Gavan Troy and Gordon Hill. At the end of each month, I was to send a statement to him at Prestige Bricks, marked `Advertising and Consulting fees for the month of' — whatever it happened to be, and for the total amount. He would then check with the candidates that the total amount on the list was as per their billing and pay the account."

Mr Ellett did not say why he wanted things done that way at the time but later suggested that he did not want staff and other people knowing that he was paying for "blue" campaigns.

9.15.5 Mr Rowe subsequently followed the procedure required, with one exception. On one occasion, in September or October 1988, he mistakenly included an itemised invoice with the monthly statement to Mr Ellett. Mr Ellett rang Mr Rowe and let him know, in no uncertain terms, that it was not to happen again. He was very angry. A bundle of invoices and statements were produced and Mr Rowe verified their authenticity. He confirmed that the itemised accounts had been sent to the two candidates respectively. He also confirmed the accuracy of a summary of expenditure that was produced to him. That summary shows that Mr Ellett paid Rowe & Co for expenses incurred by Mr Hill of $26,567, by Mr Troy $16,074 and by either or both, $1,850. The procedure adopted, the extent of the financial assistance and the amount supplied as a proportion of the candidates' total campaign fund were all unique in

Mr Rowe's experience. The proportion was more than 70% of the two candidates' total campaign expenses.

9.15.6 Mr Ellett essentially confirmed the arrangements outlined by Mr Rowe. He said he chose to contribute to the campaigns of the two candidates because he believed that, "Midland Brick was doing the same for the other two", a reference to the opponents of Mr Troy and Mr Hill. Mr George Cugley has told the Commission that Midland Brick donated only $5000 to the Liberal candidate's campaign fund. Mr Ellett emphatically denied that the payment was connected with the bargain he had obtained from the government in purchasing the abattoir/saleyard site or that he had obtained a bargain. In the past, Mr Ellett had been an active supporter of the Liberal Party and had financially supported the campaigns of Liberal candidates. He made no contribution to the campaign funds of any candidates in 1988/89 other than Mr Hill and Mr Troy. He was still constructing his brickworks at the time and had not started repaying the loan.

9.15.7 In 1985, Mr Hill was the member for Helena in the Legislative Assembly while Mr Ellett was looking for land for his proposed high-technology brickworks. Mr Hill thought Mr Ellett's proposed development had merit and would be a good thing for the State. He supported Mr Ellett's efforts to buy the Midland site, though he did not recall with any precision the form of that support. Mr Hill was able to say only what his normal practice would have been. His recollection of events was poor. It was unfortunate, and indeed extraordinary, that Mr Hill apparently did not sufficiently familiarise himself with the proposal to which he was lending support to learn that Mr Ellett wanted to purchase the saleyard as well as the abattoir site. He said he was not aware of the fact that Mr Ellett wanted the saleyard site as well, until "much later", possibly not until the offer and acceptance was signed. Of course, it must be remembered that the abattoir site was in Mr Hill's electorate and that it was neither unusual nor in any way improper for him to be enthused by the prospect of the utilisation of the site, bringing added prosperity and employment to Midland. However, Mr Hill's failure to appreciate that the saleyard was under threat carried serious implications for his electorate, the interests of which Mr Hill would naturally have been jealous to protect. No doubt he was attracted by the prospect that Mr Ellett's proposal could lead to increased employment in Midland and certainly no criticism is levelled at him for lobbying on Mr Ellett's behalf so far as the abattoir site was concerned.

9.15.8 The evidence showed that Mr Hill introduced Mr Ellett and Mr Saraceni to Mr Harrington in late 1985. In March 1986, while the Cabinet submission recommending the sale to Mr Ellett was awaiting consideration of Cabinet, Mr Hill made representations to the Department of Premier and Cabinet seeking an early decision. Although Mr Hill does not remember the incident, the Commission has received a minute directed to the Premier by the latter's Acting Private Secretary, as follows:

> "21 March 1986
>
> URGENT
>
> PREMIER
>
> Gordon Hill would like you to bring forward the Cabinet minute on the Midland Abattoir site sale and deal with the subject next Monday (24th).
>
> Gordon claims that Prestige Bricks are considering pulling out of the deal because of increasing costs and delays which will affect the Company's building programme on the site.
>
> I understand the minute has been circulated to Ministers but is not scheduled to come before Cabinet until April 7th.
>
> Gordon will be at his electorate office (274 2374) if you wish to speak to him.
>
> Policy Secretariat (Quentin Harrington) also believes the matter is urgent and should be brought forward. For your direction please.
>
> Sgd R Spencer
> ACTING PRIVATE SECRETARY"

The minute carries the endorsement of the Premier, approving the matter for urgent consideration. Mr Hill attended the signing of the agreement in Mr Grill's office on 18 April 1986.

9.15.9 Mr Hill's evidence was that Mr Ellett offered to fund the electoral campaigns of Mr Troy and himself because the local chamber of commerce was intending to campaign against them. Mr Ellett asked him for the name of his advertising agent and Mr Ellett made an approach directly. He was not aware of the arrangements

that were made between Mr Ellett and Mr Rowe. At one point, Mr Hill stated that he recalled seeing some invoices and, at another, that he did not recall receiving invoices in his office. He said that he did not know why he was sent the invoices. He denied that the arrangements for payment amounted to a deception.

9.15.10 It is difficult to understand why Mr Hill said he did not know why he was sent the invoices. The reason appears to the Commission to be obvious. Scrutiny of the invoices by Mr Hill or his staff was the only check in the system to ensure that the work for which Mr Ellett was paying was actually performed by Rowe and Co. The statements on which Mr Ellett acted contained no detail of work done and in any event only Mr Hill or his staff would know that the work was done.

9.15.11 Mr Troy stated in evidence that he had not been involved at all with the sale of the Midland abattoir/saleyard site. He said that in May 1988 Mr Hill told him that Mr Ellett was prepared to support their campaigns and that he then approached Mr Ellett. Mr Ellett indicated very strongly his dislike for Mr Neil Oliver and saw Mr Oliver as receiving significant support from Midland Brick. He consequently wanted to support Mr Hill and Mr Troy. The sum of $25,000 was discussed, to be shared between Mr Hill and Mr Troy. Mr Troy said that he and Mr Ellett discussed the method of payment and agreed that Mr Rowe would undertake the work, the content would be approved by Mr Troy's office and the invoicing was to be direct to Mr Ellett. Importantly, Mr Troy said that it was he who proposed the procedure for payment, rather than simply by a cheque from Mr Ellett into his campaign account. He first said that method was proposed because it was an unusually large amount of money. When pressed, he said that the reason was that he wished to keep the identity of his donors confidential. When pressed further, he stated that the reason he wanted this donation kept particularly confidential was that he had criticised donations from other brick manufacturers to other candidates in the past and did not want to be seen receiving a large donation from a brick manufacturer.

9.15.12 Mr Troy denied that his office received all the invoices. He claimed to be unaware that he had received invoices for work done which were not paid, while Mr Ellett was receiving statements for advertising and marketing consultancy fees. It appears to the Commission that Mr Troy may be mistaken in this regard, simply because if the detailed invoices were not sent to his office, there would be no check on the accuracy of the statements being paid direct to Mr Rowe by Mr Ellett. Mr Troy had never before and has not since, dealt with a campaign contribution in that fashion. He

would not accept that the method adopted created a misleading impression. Like Mr Hill and Mr Ellett, Mr Troy rejected the suggestion that the payment was in any way linked with the Midland abattoir sale transaction.

9.15.13 What is the Commission to make of this evidence? We have already concluded that Mr Ellett received a bargain with his purchase from the Government. Mr Ellett stoutly denies that proposition though he may not have always done so, as witness the notation made on the bank file by Mr Johns. But, certainly, Mr Ellett was not at the time of the election in a financial position to make large donations to anyone. He was, on his own account, a Liberal Party supporter. The payments for the benefit of Mr Hill and Mr Troy were therefore extraordinary. Mr Ellett explained his dealings with Mr Rowe as getting back at Mr Oliver. A desire to see Mr Oliver defeated may explain some support for Mr Troy, but not Mr Hill. None of the witnesses suggested that his donation to Mr Hill was out of gratitude for Mr Hill's support at the time of the purchase. Mr Ellett explained it by saying that Midland Brick was supporting the "other two". The total amount involved, $44,600, particularly given Mr Ellett's circumstances, was out of all proportion to the stated objective. No satisfactory explanation was given of why the payments were made to Mr Rowe and not directly into the candidates' campaign funds or even to the Labor Party. A payment to each campaign fund could have been made anonymously and confidentially, in each case. The witnesses are in conflict as to whose idea it was to do things that way. Mr Troy recollects that it was his idea, to prevent people discovering that he was receiving a donation of this size from a brick manufacturer. Mr Ellett saw nothing unusual in donating in that way; that was the way Midland Brick supported the other side. According to Mr Cugley, Mr Ellett was wrong about that. Midland Brick donated $5000 directly to Mr Troy's opponent in the 1989 election and approximately $30,000 directly to the Liberal Party head office. Mr Rowe says it was Mr Ellett's idea to pay through Mr Rowe. Mr Rowe, with his extensive experience in political campaigning, had never seen donations made in that way.

9.15.14 Mr Hill and Mr Troy have never received donations in that way although each made reference to having heard of others who might have done it that way. The method of the payments were clearly designed deliberately to conceal the true circumstances of the work performed and the payments made. The subterfuge would not, of course, have withstood a determined investigation but none of the parties had any reason to expect such an inquiry. It would not have been apparent to any observer of Mr Ellett's books of account that he was paying the bills for Mr Hill and Mr Troy.

Records of Mr Hill and Mr Troy contained itemised invoices for the work done by Rowe & Co, as one would expect. On Mr Rowe's books there were copies of those invoices and copies of statements sent to Prestige Brick describing services performed as simply advertising and consultancy work for the relevant period. The impression to be gained from scrutiny of Mr Ellett's books was that the expenses were incurred in normal business operations. Save, of course, that the business had not yet begun operating.

9.15.15 No direct link has been established between the payments and any other material act or event. More specifically, it has not been established that the payments were made in return for any favoured treatment meted out to Mr Ellett by Mr Hill or Mr Troy or by any other person or body that might wish to see those two candidates returned. Mr Ellett's dislike of Mr Oliver and a belief as to the electoral support being extended by Midland Brick, coupled with an understandable gratitude on his part towards Mr Hill for his earlier support and encouragement, may have relevance. What is left are two large donations, made in a most unusual manner. The Commission is left with a grave sense of unease.

9.16 Departmental files and records

9.16.1 Something should be said on the question of files and records, if only to form part of the composite picture which may emerge on this question from this and other terms of reference.

9.16.2 The Commission has already stated its conclusions on the failure of the MIWG to maintain minutes or keep records and the manner in which it otherwise conducted its affairs. Evidence was also given by Mr Harrington about two of the files of the Policy Secretariat on the Midland Abattoir/saleyard affair. Mr Rodney Spencer, a clerk with that department, also gave evidence. A number of facts were established:

(a) There remains in existence only one file in the department concerned with the Midland abattoir issue. There was another, formally registered file, numbered 850166, entitled "Meat Marketing Policy", which is noted in the Records Section of the department as "file held by Quentin Harrington". Mr Harrington said he could not recollect ever seeing it nor having it in his possession.

(b) With insignificant exceptions, the one remaining file contains no documentation dated between 13 November 1985 and 4 June 1986, a period of major activity in this matter.

(c) With the exception of one file note by Mr Harrington dated 26 August 1986, concerning evidence given to one of the Select Committees of Parliament, not one of the documents refers to Mr Harrington by name.

(d) There are no notes of telephone conversations, file notes of action taken, memoranda between officers, notices of meetings or agenda. There is very little correspondence. One letter to Mr Harrington, of which the Commission is aware, namely Mr Beech's letter recommending that the site be offered to Prestige Brick, was not on the file. A letter from Mr Johnston as convenor of the MIWG, to the Treloar Committee with comments on the Committee's interim report, was also not there. A third letter, dated 19 December 1985, from Mr Saraceni of BSD Consultants Pty Ltd to Mr Hodges of ILDA and Mr Harrington, submitting further details of the offer, was also not on the file.

(e) Mr Spencer gave evidence of a directive that mail addressed to certain officers in the Policy Secretariat was not to be opened by clerical staff of the department. Mail addressed for the attention of officers on that list was forwarded to the addressee, unopened. Mr Harrington's name was on the list at the material time.

9.16.3 Mr Harrington's explanation for this state of affairs was that papers might have been on other files which he thought were with the Royal Commission. The Commission is satisfied that no such files exist. He also said that the documents remaining on the file were all that were generated over the relevant period. That explanation is difficult to accept, particularly in view of the existence of the three letters, a record of which would have been expected to be there. The state of the one remaining file and the lack of further records in the department, strongly suggests that the records have been tampered with and documents removed. The Commission can only assume that the point of that exercise was to remove documents that reflected badly on or somehow incriminated some person or persons. This practice, which unfortunately has become familiar to the Commission, has been described as

"sanitising" the files. All the evidence suggests that this is what has happened here. Once again, the Commission can only speculate as to why this should have been done in this case and by whom. As a practice, it is inimical to proper, accountable public administration and is to be deplored.

9.17 Conclusion

9.17.1 The Midland abattoir/saleyard transaction has been an unfortunate, time wasting and expensive affair for the Government and one which has occasioned unnecessary anxiety for the rural interest groups affected by the sale.

9.17.2 Whether or not there is truth in the allegations made by Mr Ellett, Mr Grill and Mr Saraceni, during the hearing, to the effect that opposition to the sale was largely a "beat up", orchestrated by Mr New in an attempt to stifle the threatened competition from Prestige Brick, is not to the point of this inquiry.

9.17.3 The fact remains that, since the announcement of the sale to the farmers' groups on 1 May 1986, the Government has attempted, on the one hand, to justify the sale as desirable and necessary, and on the other, to negotiate an indefinite or longer lease or to buy back the saleyard or acquire an alternative site. At the time of writing, the Government is still exploring alternatives, all of them expensive.

9.17.4 **Improper Conduct**. During the inquiry, the Commission discussed with counsel the content of the words "improper conduct". We have dealt with the term in detail in the Introduction (Chapter 1 of this report). It was recognised that the words are chameleon-like, their meaning varying with circumstances. A degree of consensus emerged, at least in the context of the Public Service, that improper conduct would be established where there was a gross departure from those standards of public administration the public are entitled to expect and which is otherwise inexplicable. The Commission adopts this interpretation.

9.17.5 **The Meat Industry Working Group**. The handling of the Midland abattoir/saleyard site by the MIWG was so extraordinary as to leave the Commission frustrated in its search for an explanation. The Treloar Committee conducted an extensive inquiry; its recommendations deserved to be considered by the Government. They presented a straightforward proposal, namely, on the one hand, to sever the abattoir site and proceed to its immediate disposal, and on the other, to resolve to close

the saleyard at a date some years ahead and announce the decision immediately so the industry might prepare for the change.

9.17.6 Whether or not the MIWG agreed with those recommendations is not to the point, it was essential for a decision to be made to clarify the way ahead. The recommendation to Cabinet leading to the engagement of GHD Dwyer and Wilson Sayer Core was misconceived. It served only to obfuscate the process.

9.17.7 The decision, made by Mr Harrington and Mr Johnston during a telephone communication, to refer the GHD Dwyer report to WADC for a recommendation as to which of the two offers contained therein should be accepted, was ill-advised and irresponsible. No decision had then been made by the Minister or the Government that there should be any sale at all of either the abattoir site or the saleyard. The Minister was not consulted before the decision was taken. WADC was not briefed in writing and there is no record of the communication between Mr Harrington and Mr Beech.

9.17.8 When the recommendation came back from WADC, on the advice of Mr Harrington and Mr Gabbedy, the new Minister for Agriculture, Mr Grill, signed a Cabinet minute recommending that substantially the entire site, abattoir and saleyard, be sold to Prestige Brick on terms and conditions satisfactory to WADC. The minute was badly drafted, with the result that it lacked clarity and coherence and was devoid of rational argument in support of the recommendation. There was no inquiry by the MIWG to satisfy itself that WADC was capable of performing the functions requested of it. The only explanation offered in evidence was that WADC was "the business arm of the Government". Yet ILDA had long experience in the disposal of industrial land.

9.17.9 The MIWG did not appear to have been involved in the actual sale to Prestige Brick nor in the negotiations that followed. The conduct of Mr Harrington, Mr Johnston and Mr Gabbedy fell to be evaluated in the light of the facts that we have described.

9.17.10 **Mr Harrington**. Mr Harrington played a key role in decisions of the MIWG. He is a senior and experienced public servant. There was no suggestion that he is other than honest and ordinarily competent. As mentioned in our report, the Commission explored whether there might be some alternative agenda, namely, action

undertaken deliberately to achieve a pre-determined result, in this case, a wish to ensure that Mr Ellett acquired the whole site at a bargain price.

9.17.11 Notwithstanding that Mr Saraceni felt that he and Mr Ellett had received considerable encouragement from Mr Harrington when they visited him in early December 1985 and that, in briefing Mr Beech orally on the GHD Dwyer report, Mr Harrington left Mr Beech with the impression that the Government would be pleased if the decision favoured Mr Ellett, the evidence did not establish that Mr Harrington acted other than in the free exercise of his own judgment and without any commitment to a pre-determined result.

9.17.12 Nevertheless, applying to the facts as we have outlined them the definition of impropriety that the Commission has adopted, we have found that Mr Harrington's conduct was improper.

9.17.13 **Mr Johnston**. Mr Johnston was the convenor of the MIWG. Although he moved out of the Policy Secretariat to another position in the Public Service during 1985, he continued his involvement with the group. He remained, at least in a nominal sense, its convenor. He described his continuing role as that of a "consultant" to the group.

9.17.14 In the early stages, it was no doubt Mr Johnston's responsibility, as convenor, to establish the record-keeping procedures that were to operate during its life. The Commission has held Mr Johnston responsible, with Mr Harrington and Mr Gabbedy, for the incompetence that characterised the actions of the MIWG that we have described in this chapter. He was intimately involved with the failure to evaluate the recommendations of the Treloar report and take appropriate action and again with the key decision to refer the GHD Dwyer report to WADC, a decision which the Commission believes defies any rational explanation. The Commission has found that his conduct was improper.

9.17.15 **Mr Gabbedy**. While Mr Gabbedy played a different role in the deliberations of the MIWG, the Commission cannot absolve him from responsibility for the debacle that occurred. As the Director of the Animal Services Section of the Department of Agriculture and as adviser to the responsible Minister, he should have involved himself more in the decision making process.

9.17.16 It was not good enough for him to surrender the dominant decision-making role to the Policy Secretariat officers, in the belief that those officers were more aware of what the Government wanted. It was his responsibility to know the likely response of the industry to relevant decisions of the Government and to ensure that his Minister, particularly when new to the portfolio, was fully briefed and protected, so far as he was able, from the kind of embarrassment that accompanied the ill-conceived decision to sell the site to Mr Ellett. In all the circumstances, as outlined in section 9.9 of this chapter, the Commission has found that Mr Gabbedy's conduct was improper.

9.17.17 **WADC**. As "the business arm of Government", WADC was anything but businesslike in its handling of the brief it received from Mr Harrington. Mr Beech should have insisted on a written statement of the task that was required and he should have satisfied himself that the task was within the competence of the officers that he assigned to it.

9.17.18 The Commission recognises that WADC did not play an initiatory role and might be said to have done what was asked of it. Had Mr Beech received comprehensive instructions in writing, the Commission has no doubt that his report back to Mr Harrington would have been more adequate. The recommendation in favour of Prestige Brick was flawed by reason of the absence of adequate supporting argument. No check was made of the financial standing and personal details concerning Mr Ellett. Virtually no consultation or negotiation occurred with either Mr Taylforth or Mr Ellett. The suggested price range was little more than half the value given to the site by an expert valuer in a general valuation.

9.17.19 These deficiencies may be explained in part by the seeming arrogance of Mr Hillyard and Mr Ryan that encouraged them to make sweeping judgments based on inadequate or non-existent material.

9.17.20 While Mr Beech and Mr Hillyard must bear some responsibility for the manner in which the assignment was handled by WADC, the primary responsibility lies elsewhere. Consequently, we have concluded that their respective contributions were not such as to warrant a finding of improper conduct.

9.17.21 **Mr Ryan**. Mr Ryan played the major role in the recommendation on price. As we have said, he should have disclosed to his employer the personal

relationship he enjoyed with Mr Ellett. His failure to do so rendered his conduct in that regard improper.

9.17.22 That failure was compounded by the incompetent and reckless manner in which he went about forming an opinion as to the value of the site. The Commission was unable to accord any credit at all to his conclusion. Of course, it may be said in his favour that he was given a task for which he was not qualified. It is a pity he did not surrender the task or at least consult with persons possessed of adequate qualifications.

9.17.23 Further, the Commission has found that in the performance of the task assigned to him, he allowed himself, perhaps unwittingly, to be influenced by his friendship with Mr Ellett and this has rendered his conduct in that respect also improper.

9.17.24 Not the least disturbing aspect of this inquiry was the shoddy way in which the contract came into being, the inadequacy of its terms, and the degree of haste that surrounded the event. The evidence did not enable the Commission clearly to allocate blame for these serious deficiencies.

9.17.25 Certainly, Mr Ryan must bear substantial responsibility. It was most unfortunate that Mr Grill did not recognise the dangers that existed and halt the proceedings until a proper agreement had been prepared by lawyers who had been properly briefed. Undoubtedly, Mr Ellett, backed by Mr Hill, was pressing for an early resolution of the matter and this must account in some measure for the lack of any mature consideration by Government officers preceding the meeting in the Minister's office on 18 April 1986 when the offer and acceptance form was signed.

9.17.26 **Mr Evans and Mr Grill**. The Commission concluded that the evidence did not support a finding of improper conduct by either of these Ministers.

9.17.27 **Mr Hill, Mr Troy and Mr Ellett**. Despite the grave sense of unease created by the devious way in which Mr Ellett contributed to the campaign expenses of Mr Hill and Mr Troy in the 1989 election, the Commission was unable to find any corruption, illegal or improper conduct in relation to the matter.

9.17.28 **Government records**. Finally, the Commission has found that the irregularities exposed in relation to the records of the MIWG seriously impair the

integrity of such records and reflected improper conduct by a person or persons unknown.

9.17.29 The absence of any record of the activities of the MIWG, apart from the Cabinet minutes, has merely compounded the succession of administrative failures that constituted the history of this matter. The Commission did not accept that no records, even of a minimal kind, were kept and so was left with the conclusion that they have either been mislaid or deliberately destroyed. The suggestion that all the records had been mislaid was so inherently improbable as to leave the Commission with no choice but to find that such records as were kept had been deliberately placed beyond the scrutiny of any monitoring authority.

9.17.30 From time to time in this chapter, the Commission has confessed its inability to understand how competent, experienced officers of the Public Service could have handled this matter as they did. Reference has been made to the possibility of a hidden agenda as offering a plausible explanation. That agenda, of course, might point to the officers acting in the pursuit of Government policy or ministerial direction. In the absence of evidence the possibility must be dismissed as speculation. The consequence of that dismissal is that the officers we have mentioned, particularly Mr Harrington, must bear the burden of our criticism and finding of impropriety.

9.17.31 The Commission had no hesitation in concluding that the saleyard should not have been sold when and in the manner it was. The whole property should not have been sold for the price obtained. Implementing the Treloar report recommendations was one thing. What was done in the name of Treloar, was quite another. While this inquiry has not exposed any corruption or illegal conduct by any person or corporation, it has found that the whole exercise was a bureaucratic and political blunder of impressive proportions.

9.17.32 **Further matters**. Finally, reverting to the term of reference, the Commission reports:

(a) There are no matters addressed in this chapter which should be referred to an appropriate authority with a view to the institution of criminal proceedings; and

(b) Several matters addressed in this chapter render changes in the law or in administrative or decision-making procedures necessary or desirable in the public interest. They are open government, accountability, integrity in government, the collective responsibility of Cabinet, political donations, and record keeping. They are addressed in Part II of our report.

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8.1 The term of reference

8.1.1 The Commissioners are required by their Commission, as affected by the *Royal Commission into Commercial Activities of Government Act 1992*, to inquire and report whether there has been —

(a) corruption;

(b) illegal conduct; or

(c) improper conduct,

by any person or corporation in the affairs, investment decisions and business dealings of the Government of Western Australia or its agencies, instrumentalities and corporations in respect of the Burswood Island Casino and further to report whether —

(d) any matter should be referred to an appropriate authority with a view to the institution of criminal proceedings; or

(e) changes in the law of the State, or in administrative or decision making procedures, are necessary or desirable in the public interest.

8.2 Early days

8.2.1 In the run-up to the State election held on 19 February 1983, the Australian Labor Party ("ALP") did not focus a lot of attention on the question of a casino or casinos for Western Australia because of the political sensitivity surrounding the topic. Nevertheless, it was well known that if a Labor Government led by Mr Brian Burke was elected to office, it intended to explore the question. The ALP won the election and Mr Burke formed a government.

8.2.2 On 28 March 1983 the Cabinet appointed two Committees. The Cabinet Casino Sub-committee consisted of the Minister for Tourism, the Attorney-General, the Minister for Police and the Minister for Administrative Services. The sub-committee as originally established was comprised of Mr Burke (Minister for Tourism), Mr J M Berinson (Attorney-General), Mr J P Carr (Minister for Police) and Mr D C Parker (Minister for Employment and Administrative Services). In December 1983 Mr D

K Dans became Minister for Administrative Services and hence a member of the sub-committee, and in April 1984 Mr P M Dowding, then the Minister for Planning, joined the sub-committee. Mr Parker remained a member of the Committee.

8.2.3 The Government Casino Advisory Committee consisted of the Commissioner of Police, the Crown Solicitor, the Director of the Department of Tourism and the Director of the Department of Employment and Administrative Services. Its members were:

> Mr K G Shimmon, Acting Executive Director of the Department of Employment and Administrative Services (Chairman);
> Police Commissioner, represented by Sergeant Brian Illingworth;
> Crown Solicitor, represented by Mr D Brown;
> Mr N J Semmens, Director of the Department of Tourism.

8.2.4 On 16 May 1983, Cabinet determined the Government's broad objectives and settled the terms of reference of the Advisory Committee. It adopted a recommendation as follows:

> "2. It is suggested that the guidelines under which the Government Advisory Committee should operate, be as follows:
>
> > Having cognisance of the Western Australian, Australian and International Enquiries which have taken place to advise the Government on —
> >
> > (a) the social and economic implications of the introduction of casinos into WA,
> >
> > (b) the conditions under which a casino licence or licences should be granted,
> >
> > (c) the location and type of complex for casino operations.
> >
> > (d) the forms of gambling to be conducted in casinos,
> >
> > (e) the control of licensed casinos, and

(f) the legislative procedures necessary to provide for casino operations.

3. It is recommended that press advertisements be placed Australia wide inviting submissions on the establishment of casino operations, stating that the broad objectives of the Government are:

(a) public control of the facility(ies)

(b) the highest standard of casino facilities and operation,

(c) the maximum enhancement of the tourist industry and contribution to the area in which it is located including —

(i) the best site for outlook and accessibility,

(ii) possible additional international class tourist facilities including facilities such as accommodation, convention centres, sporting amenities, restaurants, indoor/outdoor entertainment complexes,

(d) related community benefits.

RECOMMENDATION :

That Cabinet approve:

(a) the guidelines detailed in paragraph (2) above,

(b) the broad objectives detailed in paragraph (3) above, and

(c) the Government Casino Advisory Committee proceeding with press advertisements inviting expressions of interest."

8.2.5 The next step occurred on 11 June 1983, when an advertisement was published in "The West Australian" in the following terms:

"PROPOSALS FOR CASINOS
IN WESTERN AUSTRALIA

The Government of Western Australia has appointed a Cabinet Sub Committee and a Government Casino Advisory Committee to examine and report on the implications of the establishment of Casinos in Western Australia.

The Committee's Terms of Reference are:

(a) the social and economic implications of the introduction of casinos in W.A.,

(b) the conditions under which a casino licence or other gaming licences should be granted,

(c) the location and type of complex for casino operations,

(d) the forms of gambling to be conducted in casinos,

(e) the control of licensed casinos, and

(f) the legislative procedures necessary to provide for casino operations.

The Government invites expressions of interest and/or submissions for the establishment and operation of Casinos in Western Australia within the terms of reference and the following broad objectives:

(a) public control of facility(ies)

(b) the highest standard of casino facilities and operation,

(c) the maximum enhancement of the tourist industry and contribution to the area in which it is located, including —

(i) the best site for outlook and accessibility.

(ii) possible additional international class tourist facilities including facilities such as accommodation, convention centres, sporting amenities, restaurants, indoor/outdoor entertainment complexes,

(d) related community benefits.

SUBMISSIONS SHOULD BE ADDRESSED TO THE EXECUTIVE OFFICER, GOVERNMENT CASINO ADVISORY COMMITTEE, DEPARTMENT OF EMPLOYMENT AND ADMINISTRATIVE SERVICES, 15TH FLOOR, 251 ADELAIDE TERRACE, PERTH, NO LATER THAN JULY 31, 1983."

8.2.6 There appears to have been considerable public confusion as to the exercise upon which the Advisory Committee had embarked. Even the Committee appeared to have been confused. Nothing in the Cabinet resolutions or the advertisement suggested that the Committee was being required to consider whether there should be a casino or casinos at all. On our interpretation of its terms of reference, the Committee was required to assume the establishment of one or two casinos and to report, *inter alia*, on the consequential social and economic implications. It is quite plain that the Committee's charter was

> "to establish guidelines and formulate legislative procedures for the establishment and control of casino operations in Western Australia."

8.2.7 The advertisement invited "expressions of interest and/or submissions for the establishment and operation of Casinos in Western Australia ... ." It also emphasised that submissions should be addressed to the Advisory Committee at the Department of Employment and Administrative Services "NO LATER THAN JULY 31, 1983".

8.2.8 The Advisory Committee presented its report to the Cabinet Sub-committee in November 1983.

8.2.9 Notwithstanding the Committee's charter, two of the four members of the Committee recommended against the establishment of any casino. In reaching that conclusion, they were supported by 300 (58 from organisations, 242 from individuals) of the total of 367 responses received to the advertisement.

8.2.10 The other members of the Committee recommended that an open-type casino incorporated into a large tourist/convention-type hotel complex should be

established in the metropolitan area. Nineteen proposals to build or operate a casino in the metropolitan area had been received, some of them very detailed and, in the view of the Committee, worthy of further consideration by any authority established to license casino operations. Thirteen proposals related to the possible establishment of a casino in a country centre.

8.2.11 The Committee's Report proceeded to recommend the legislative and control measures that should be adopted if the Government made the policy decision to establish a casino.

8.3 The selection process

8.3.1 The report of the Advisory Committee was presented to Mr Parker, the Minister for Employment and Administrative Services, in November 1983. It was then passed to Mr Bill Thomas to prepare a recommendation to go, eventually, to the Cabinet Casino Sub-committee. Mr Thomas was then a ministerial officer in the office of Mr Parker. He was elected to Parliament in 1986 and at the time of giving evidence in June 1991 he was a member of the Legislative Assembly and was Parliamentary Secretary to the Cabinet. Mr Thomas discussed with a number of people the form of the casino legislation and compared the various expressions of interest. By Christmas 1983, he had reached the view that the proposal by Tileska Pty Ltd ("Tileska") was the most desirable. He communicated that view to Mr Parker and Mr Parker concurred. Shortly afterwards, when Mr Parker was moved to a different portfolio, the Premier, Mr Burke, arranged for Mr Thomas to continue to work on the matter.

8.3.2 Mr Thomas' work found fulfilment in a draft Cabinet minute dated 30 March 1984 prepared for signature by the Premier and Minister for Tourism. Both these portfolios were held by Mr Burke. The Cabinet Sub-committee adopted the minute. The minute discussed the difference of opinion in the Advisory Committee on whether there should be any casino and disposed of the negative view. The recommended policy and control guidelines were adopted with one minor qualification.

8.3.3 The minute then examined the possible river-front sites which were suggested in submissions and recommended Burswood Island as "by far the most preferable". Attention was then directed to the only two submissions which proposed Burswood as a possible site. The first was that submitted by Swan River Park Pty Ltd ("Swan River Park"), which "proposed a ‘stand alone’ facility inconsistent with some

of the recommendations of the Advisory Committee". A comment was added that "Some of the parties involved with the proposal would not be suitable for association with a casino".

8.3.4 The second submission, that from Tileska, was then described in detail, leading to the recommendation that the Tileska proposal be approved in principle and the Cabinet Sub-committee be reconstituted and be responsible for negotiating an agreement. A draft Bill embodying the necessary legislation was appended to the minute.

8.3.5 The course of events which followed the adoption of the draft minute by the Sub-committee was quite extraordinary. A fairly clear picture has emerged. It may be summarised as follows:

(a) The draft minute as adopted by the Cabinet Sub-committee went in that form to Cabinet on Monday, 2 April 1984. It retained the heading "Draft Cabinet Minute for consideration by Cabinet sub-committee on casinos".

(b) After lengthy discussion, which included a canvassing of the question whether to establish a casino at all, the recommendations were adopted.

(c) Late in the morning of 2 April, Mr Tony Lloyd, then Director of the Policy Secretariat in the Premier's Department, approached Mr Les Smith, an Executive Officer in that Department, with documentation relating to the casino proposal and an instruction from the Premier for Mr Smith to co-ordinate the implementation of that proposal over the ensuing weeks. Mr Lloyd advised that no formal Cabinet decision had yet been made, but that Cabinet had in fact decided that a casino licence should be awarded to Tileska and that the Premier would want Mr Smith to draft a letter to Mr Dempster informing him of this.

(d) Mr Smith contacted the Premier and observed that the Government could be subject to criticism from those organisations which had submitted expressions of interest nominating other sites and which therefore had not been given the opportunity to prepare a proposal specific to Burswood Island.

(e) Following that discussion the Premier sent Mr Smith a draft Cabinet minute dated 2 April 1984 which purported to modify the Government's position, as Mr Smith understood it to have been, so as to make no commitment to Tileska beyond entry into negotiations, with private advice to Tileska that the Government retained the right to invite alternative bidders to submit proposals for Burswood Island.

(f) Mr Smith then prepared two draft Cabinet minutes, based on the Premier's draft. Both were intended to reflect the Premier's currently expressed attitude, but, on his own initiative, Mr Smith included several conditions in one of them, including approval by Caucus at a meeting on 3 April 1984 and Cabinet confirmation at the next Cabinet meeting on 9 April 1984.

(g) The Premier signed the draft with conditions and returned it to Mr Smith, without alteration. Mr Smith then approached the Premier again and reiterated his concerns, expressing the view that the decision as expressed still did not open up the selection process.

(h) The Premier then agreed that Mr Smith should prepare another minute of the Cabinet decision deleting all reference to Tileska and resolving to invite submissions from all existing applicants to be made specifically referable to the Burswood site. This was done.

(i) The proposal contained in the final draft was put to a Caucus meeting on 3 April, and adopted. The intention had been for the matter to be reconsidered by Cabinet at its next meeting on 9 April 1984, but media speculation caused the Premier to expedite the process and make an earlier announcement. On 4 April 1984, Mr Burke conferred with the Cabinet Sub-committee and secured its confirmation and then made the announcement.

(j) The matter was not referred back to Cabinet.

(k) No record at all of any discussion or decision on the establishment of a casino appears in the bound volume entitled "Cabinet Record" of the

Burke Government, February 25, 1983 to February 24, 1986, in respect of the Cabinet meetings on 2 April and 9 April 1984.

The only record contained in other Cabinet records is the decision as finally settled following the Caucus discussion.

8.3.6 The position as described in the previous paragraph is as explained to the Commission when evidence was received on this term of reference in June 1991. However, on 22 June 1992 the Commission received a communication from Mr Thomas, who still held the position of Parliamentary Secretary of the Cabinet, advising that the Cabinet Record had been amended to record what purported to be a recommendation to Cabinet dated 30 March 1984 and the terms of Cabinet's approval given on 2 April 1984. The amendment is a composite of material contained in two documents received as exhibits by the Commission. The truth is that the amendment to the Cabinet Record is wholly inaccurate. The recommendation therein is not the recommendation that went to Cabinet and does not correspond with the decision made by Cabinet on 2 April 1984. Mr Thomas assisted the Commission with further evidence on 4 August 1992. He reluctantly acknowledged that the fresh entry in the Cabinet Record of 2 April 1984 "doesn't represent the decision making at the time the Cabinet meeting closed on the 2nd of April but what it does do is accurately reflect the decision of Cabinet in relation to that matter, which is what it intends to do".

8.3.7 Unfortunately, even that definitive statement by Mr Thomas is not correct. The course of events is set out clearly in paragraph 8.3.5 of this chapter. It shows that the matter was never returned to Cabinet after the meeting was closed on 2 April 1984.

8.3.8 This latest attempt to obfuscate the true events of the time is quite discreditable. It is also unnecessary because there is little ground for serious criticism of the actual course of events. The Cabinet Sub-Committee recommended to Cabinet that the Tileska proposal be approved in principle, believing that it was clearly superior to the other proposals, and Cabinet accepted that recommendation. When Mr Smith, a loyal and courageous public servant, pressed the Premier with the unfairness of the procedure that had been adopted, Mr Burke accepted the criticism and changed direction. Notwithstanding the number of irregularities that occurred, the end result was defensible and probably above criticism.

8.3.9 Following the events we have outlined, the 32 persons who had expressed interest in establishing a casino were invited to make submissions on the establishment of a casino on Burswood Island, and to do so by 31 May 1984. The invitation was conveyed in letters dated 11 April 1984. They were each supplied with a copy of the report of the Advisory Committee and were informed that a report prepared for the Government by Interlake Pty Ltd dealing with aspects of the possible development of Burswood Island would be made available on request. They were assured that they were welcome to make any further inquiry of Mr Shimmon, the Executive Director of the Department of Administrative Services.

8.3.10 Twelve persons responded to the invitation to address the question of a casino on Burswood Island. In early June 1984 the Cabinet Sub-committee met and reached a short list of six applicants. These were Burswood Ltd (with a proposal valued at $125 million), Swan River Park Ltd ($120 million), Bond Corporation Holdings Ltd ($65 million), Cord Holdings Ltd ($53 million), Pennant Holdings Ltd/Sun International Pty Ltd ($200 million), Tileska Pty Ltd/D Dempster ($300 million). Each of these applicants was then invited to make a presentation to the Cabinet Sub-committee on 3 July 1984. The Premier was indisposed and unable to attend. Five Ministers were present: Mr Dans (acting as chairman) and Mr Berinson, Mr Carr, Mr Dowding and Mr Parker. Following on the interviews, the Sub-committee narrowed the selection process down to two finalists — Swan River Park and Tileska/Dempster.

8.3.11 On 9 July 1984 Mr Dans issued a media statement announcing the two finalists and the establishment of the Casino Control Committee ("CCC") pursuant to the *Casino Control Act 1984*. The Act had come into operation on 1 July 1984. The CCC's first task was to examine all aspects of the submissions of the two finalists and to make a recommendation to the Government. The Committee initially comprised Mr H H Jarman (the Chairman and former General Manager of the TAB — in the chair), Mr W Martin (an executive with the TNT-Ansett Group), Mr Shimmon (Executive Director of the Department of Administrative Services) and Mr F A Forgan (State Manager of Mobil Oil Australia Ltd).

8.3.12 In November 1984, the CCC recommended that the Government enter into an agreement with Tileska/Dempster for development of a casino and related complex on Burswood Island. On 19 November 1984 Cabinet adopted the recommendation subject to Mr Dans circulating suggested guidelines to Cabinet before the beginning of any negotiations and further subject to any Government land provided

being leasehold not freehold and there being discussion with Perth City Council before any public statement. On 26 November 1984, Cabinet approved Mr Dans entering into an agreement on behalf of the Government for construction and establishment of casino premises subject to guidelines set out in his recommendation. The successful contenders for the development formed a new company, Burswood Management Limited ("BML"), to manage the project. The *Casino (Burswood Island) Agreement Act 1985* came into operation on 25 March 1985.

8.4 Issues raised by the selection process

8.4.1 An important question which this term of reference raises for consideration is whether the selection process improperly favoured Mr Dempster.

8.4.2 Tileska is a company registered in Sydney. It is part of the Kien Huat group of Malaysian origin which controls the Genting Berhad company ("Genting"). Genting operates a major resort in Malaysia, including a casino.

8.4.3 The original expression of interest from Tileska proposed a consortium involving a Western Australian component but did not nominate Mr Dempster nor any particular site. Mr Dempster said in evidence that he had a general discussion about it with Tileska at that time.

8.4.4 By letter of 6 September 1983, addressed to the Casino Advisory Committee, Mr K T Lim, a Director of Genting, advised that Mr Dempster would be the joint venture partner. The letter also conveyed the suggestion that land to the north-eastern side of the Causeway would be suitable, but offered two alternative river-front sites. In this regard, the letter followed wording suggested by Mr Dempster in a telex to Mr Lim dated 31 August 1983. The telex concluded with a comment that might suggest that some consultation had occurred between Mr Dempster and the Government:

> "There are specific reasons for this alteration that I am confident will assist us in having the large site approved."

Mr Dempster said the specific reasons included the need to have sufficient land to build a golf course.

8.4.5 On 17 November 1983, Mr Dempster wrote to the Premier, Mr Brian Burke, enclosing details of the proposed development, with a copy to

Mr Parker. The letter began with the phrase "[f]ollowing my letter to you dated September 6, 1983, ...". Unfortunately, the letter of 6 September has not been produced to the Commission despite the service on all relevant parties of a subpoena to produce all such correspondence. Mr Burke and Mr Dempster said they had no recollection of the letter. Its contents could have been of critical importance in revealing the true relationship between Mr Dempster and the Premier.

8.4.6 These communications were followed in December 1983 with the delivery to the Premier of an impressive, glossy brochure entitled "Goodwood Gate" outlining the proposed project. It might be wondered how these communications came to be made when the advertisement of 11 June 1983 stipulated that all expressions of interest or submissions were to be in the hands of the Advisory Committee no later than 31 July 1983. Mr Dempster explained that it was his view "that you continually follow up any business arrangement you enter into ... there is nothing in there that says you can't continue to supply information". That may be so, but why divert it to the Premier rather than direct it to the Advisory Committee?

8.4.7 Mr Dempster's explanation for not sending the letter of 17 November 1983 to the Advisory Committee is not persuasive. It was simply that Mr Burke was the Premier of Western Australia and Minister for Tourism and Mr Parker at this stage appeared to be the responsible Minister. "[s]o we believed tactically the best thing to do was to write to the Premier to ensure that he was aware of our proposal and secondly a copy to the Minister". Yet he did not provide a copy to the Advisory Committee which, for all Mr Dempster then knew, was still handling the matter. The letter concluded with the hope that, should the proposal be accepted, the legislative procedure would be accelerated so that work could get underway at the earliest possible date.

8.4.8 Mr Burke penned a draft reply in his own hand addressed "Dear Dallas" and reading:

> "Thank you for your note. I appreciate the need to expedite this matter but am conscious of the need to ensure mistakes are not made.
>
> Best wishes.
>
> Yours sincerely

Brian Burke, M.L.A.
PREMIER."

The letter when typed was dated 21 November 1983 and a copy was sent to Mr Parker.

8.4.9 The terms of Mr Burke's response suggest a hidden agenda. On the other hand, it may be that the friendly, personal tone of the Premier's reply to Mr Dempster is explained by the fact that Mr Dempster had continued as a member of the Rottnest Island Control Board since Mr Burke had assumed the chairmanship on his becoming Minister for Tourism. There had been no significant acquaintanceship between the two men before Mr Burke became Premier.

8.4.10 It has been suggested also that an indication of some possibly improper liaison existing between Mr Dempster and some members of the Government rests in the fact that Tileska's proposal seems at all times to have been close to the Government's own objectives.

8.4.11 Certainly, a number of disappointed applicants for the project expressed the view that the Government should have provided a clearer idea of its thinking to guide those who were interested in bidding for the prize. All there was, so the complaint went, was a rather bland advertisement which invited "expressions of interest and/or submissions" with no mention of a site and no suggestion that any selection would be made from the responses without express invitation for the supply of further, more detailed material. Of course, as we know, a further opportunity was given to such people once the favoured site became known but a complaint then made by some was that insufficient time was allowed for adequate preparation of a submission, particularly when the peculiar difficulties of the development of Burswood Island were considered.

8.4.12 On reflection, however, we do not find this particular complaint to be of substance. While it would certainly have been helpful if the favoured site had been announced earlier so that the general scope and nature of the development envisaged by the Government was always known, the advertisement of 11 June 1983 made it plain that the maximising of the tourist potential of a casino was a primary objective from the beginning. It expressly listed as an objective:

"the maximum enhancement of the tourist industry and contribution to the area in which it is located, including —

(i) ...

(ii) possible additional international class tourist facilities including facilities such as accommodation, convention centres, sporting amenities, restaurants, indoor/outdoor entertainment complex ... ."

8.4.13 Nor were Tileska and Mr Dempster the only contenders who followed up their expression of interest with further submissions. Mr Graham Emery, Chairman of Insel Pty Ltd, testified to a longstanding interest in the development of Burswood Island. He had tried unsuccessfully to interest the previous Government in his proposals in 1982. He wrote to Mr Burke on 25 February 1983, the very day on which the Burke Ministry was sworn in, commending, *inter alia*, a project involving the establishing of a casino of international calibre on the shore of Burswood Island. He told the Commission that he did not receive a reply to that letter. He then wrote on 21 March 1983 to Mr Parker along the same lines. He foreshadowed that a preliminary casino proposal would be submitted to Mr Parker "as soon as possible" by Swan River Park — a new company whose formation was then under discussion with Federal Hotels Ltd. He also approached Mr Julian Grill, then a Minister in Mr Burke's Government.

8.4.14 Independently of Mr Emery's casino proposal, later in 1983 Mr Parker secured Cabinet approval for another project advanced by Mr Emery. This was a project on behalf of Interlake Pty Ltd whereby the company would undertake a major survey of the Burswood Island area with a view to making recommendations for its further development.

8.4.15 Swan River Park Pty Ltd was one of the parties who responded to the advertisement of 11 June 1983, and was eventually chosen as one of two finalists by the Cabinet Sub-committee on 3 July 1984.

8.4.16 In April 1984, when decisions were being made on a casino for Burswood Island, Mr Dowding, then the Minister for Planning, pressed Mr Emery to conclude the Interlake report urgently. This was done and, as we have said, the report was available to those who were invited to submit proposals for a casino on the island.

8.4.17 On 28 December 1983 Mr Emery wrote to Mr Parker to congratulate him on his new portfolios but also to follow up "a recent discussion" on "key issues related to the Casino proposal". And on 2 April 1984 he addressed a letter to the Premier which began —

> "Dear Mr Burke,
>
> Thank you for the invitation to discuss the Casino proposal presented by Swan River Park Pty. Ltd. ... ."

8.4.18 Then, following the meeting with the Cabinet Sub-committee on 3 July 1984 when Mr Burke was unable to be present, Mr M de Nicola, a director of Swan River Park, wrote to him outlining enthusiastically the advantages of its proposal.

8.4.19 Some curiosity is aroused by the fact that a copy of a list of the names and addresses of persons who had expressed interest in being involved in the development of a casino complex which had been drawn up by Mr Les Smith of the Premier's Department was found among Mr Dempster's papers. Mr Dempster is unable to explain how he came to be in possession of the list and there is no other evidence to account for it. Further, Mr Emery has testified that at Mr Parker's suggestion he met Mr Dempster in November 1983 and that Mr Dempster's remarks suggested that he had already seen the submission lodged by Swan River Park. Mr Dempster denied seeing any submission other than that of Tileska and the evidence does not enable the Commission to make a positive finding on the matter. In any event, neither such an allegation nor the finding of the list in Mr Dempster's possession of themselves could, without more, justify any finding of impropriety.

8.4.20 Nor do the repeated revisions of the Cabinet decision in early April 1984 lead to a conclusion of favouritism towards Mr Dempster. There is no reason to doubt that anyone who considered the different submissions would readily conclude that the Tileska proposal involved the greatest outlay of money and therefore offered most promise to the State in terms of employment and ultimate benefit. Mr Emery is probably correct when he says that Mr Parker told him in November 1983 that the Dempster submission had received some favour from the Government. Mr Thomas said that by Christmas 1983 his view favoured Mr Dempster. By then, he had the benefit of lunch with Mr Dempster when the proposal was discussed. By the end of March 1984 the Cabinet Sub-committee was united in support of the Tileska application. The decision to approve Tileska "in principle" was understandable. Mr Carr, the then Police

Minister and Sub-committee member, noted that "the Tileska application was an excellent application, the application that offered more facilities for the State than any of the other applications ... it was seen fairly early as a sort of yardstick by which others were judged and, if any other applicant was to be successful, it had to be better than that one."

8.4.21 Mr R J Pearce, Minister for Education, recalled participation at the 2 April 1984 Cabinet meeting in a "legitimate discussion" leading to a conclusion "(a) that (the casino) should be at Burswood and (b) that Mr Dempster's proposition had the most to offer of the two Burswood proposals." Mr Grill observed that at the 2 April 1984 Cabinet meeting "the overwhelming view coming forward from the Cabinet Sub-committee looking into the matter was that the Tileska proposal was head and shoulders above the others and that was the one that should be accepted. Now I think, at the end of the day there was a general agreement that was the case."

8.4.22 Mr Berinson, a member of the Cabinet Sub-committee, commenting on the whole decision-making process leading to the success of the Tileska/Dempster proposal, said "the Tileska bid was a mile ahead of the others in terms of its being at least equal in respect of background experience in the industry, but offering a great deal more in terms of the facilities that it was prepared to develop. Our interest at that stage was in both immediate and long-term job opportunities in particular, and to the best of my memory the Tileska bid offered something like 50 percent above Federal Hotels, which I would have ranked as second on the list".

8.4.23 Reference has already been made to the circumstances attending the decision to proceed with the casino. The Premier was undoubtedly sensible to follow the advice of Mr Smith and revise the original decision of the Cabinet made on 2 April 1984. Bearing in mind that the majority of members of the Cabinet were present at the meeting of Caucus and that following the Caucus discussion the revised decision was approved by the Cabinet Sub-committee, it would be unrealistic to criticise too much the failure to hold the matter over until the next meeting of Cabinet on 9 April 1984, especially as the parliamentary and media interest was so great. But what is not so forgivable is the absence in the bound "Cabinet Record" of any record of any decision at all and the deliberate distortion of file records. Even though the decision of Caucus and the subsequent confirmation by the Cabinet Sub-committee had been acted upon, the history of the matter should have been formally reported to the following meeting of Cabinet held on 9 April 1984. The evidence of Mr Burke that Cabinet was

really only a sub-committee of the Caucus and that therefore it was unnecessary to take the matter back to Cabinet after Caucus had made a decision is extraordinary. The integrity of Government records generally is a question that will be addressed in Part II of this report.

8.4.24 The evidence of the interviews conducted by the Cabinet Sub-committee on 3 July 1984 followed by the selection of Swan River Park and Tileska as the two finalists does not reveal any inappropriate bias in favour of Mr Dempster or other impropriety.

8.4.25 Mr A Neilson, presenting the Swan River Park proposal expected more of the interview but since his proposal survived scrutiny at that point it is difficult to draw a great deal from his evidence. With respect to the four unsuccessful applicants, their lack of success is readily understandable. Mr B T D Conway and Mr T J Perrott attended on behalf of Caesar's Perth consortium. They expressed reasonable satisfaction with the conduct of the meeting. The inevitable association of the name "Caesar's" with Las Vegas may have caused a problem, apart from the intrinsic merit of the proposal.

8.4.26 The Pennant Group's Mr B Johnson was disappointed with the behaviour of the Sub-committee. He and his colleagues thought that they were "the most disinterested bunch of Cabinet members that you could possibly imagine" and that "they had obviously decided to give the licence to someone else". Viewed objectively, however, the association of Pennant Holdings in a joint venture with a company with South African interests, Sun International Pty Ltd, must have dimmed its chances of success enormously, notwithstanding that Mr Johnson earlier had been encouraged by Mr T Burke to believe that the South African connection would not provide any impediment.

8.4.27 Mr B Buckley and his colleagues attended from Bond Corporation. They were not dissatisfied. Their submission did not compare favourably with the others and, as Mr Buckley confessed, they lacked enthusiasm for Burswood.

8.4.28 Finally, Mr D Wieringa spoke of the reception accorded to the representatives of Cord Holdings Ltd. For them the interview was "a disaster", the members of the Sub-committee appearing not to have read the submission. With all respect to Mr Wieringa, we did not find his evidence to be of great assistance.

8.4.29 Mr Arthur Tonkin, alone of all the members of Mr Burke's Government, expressed the view that Tileska had the "inside running" from the beginning and that everything that was done was simply a charade. Several witnesses, ministers and former ministers, have testified to the contrary and we find ourselves unable to accept Mr Tonkin's view. Of course, if the Premier's response to Mr Dempster's letter of 17 November 1984 (referred to in paragraphs 8.4.8 and 8.4.9 above) does suggest a hidden agenda, known only to Mr Burke, Mr Parker and Mr Dempster, then the subsequent history simply falls into place, confirming that the foundation was well and truly laid and that "mistakes were not made". Thereafter the competition could be open and above board because the Tileska proposal was unbeatable.

8.4.30 The subsequent history of the selection process lends support to the view that the odds at all times were overwhelming in favour of Tileska. The CCC was given the task of examining the credentials of the two finalists and making a formal recommendation. It was not until 14 September 1984 that then Detective Sergeant Les Ayton, attached to the Company Fraud Squad, was assigned the task ostensibly of investigating the backgrounds of persons associated with the finalists to ensure the suitability of either of them to become the casino developer.

8.4.31 It may be said at once that it was strange that the CCC should not have enlisted the support of the Commissioner of Police earlier. It must have been obvious from the start that, in addition to the development concepts and financial resources associated with each of the proposals, the personal integrity and reputation of those persons who would, if chosen, be responsible for the development of a casino was of primary importance. Yet several weeks were allowed to elapse before an investigator was appointed.

8.4.32 Preliminary inquiries made by Mr Ayton, although not substantiated, were such as to cause him concern as to the integrity of those associated with both applicants. He compiled a supplementary questionnaire to be answered by the applicants and delivered it to the CCC on 27 September 1984. However, within a day or two thereafter, he was asked by Mr M Cocker, the Secretary of the CCC, if he could have his report completed and available for consideration by the CCC at a meeting scheduled for 8 days later. Mr Ayton replied that it was absolutely impossible for him to complete his investigation so quickly and mentioned a minimum period of three months. However, he undertook to provide an interim report detailing matters which he considered to warrant further investigation. This was completed on 11 October 1984

and handed to the Commissioner of Police. The report disclosed several matters which, if established by further investigation to be true, would render both applicants unsuitable to hold a casino licence.

8.4.33 Leading up to this time, the work of the Committee was surrounded with an air of urgency. As Mr Cocker, the Secretary of the CCC, testified "they were trying to bring the whole matter together in time for the America's Cup". There is evidence which suggests that arrangements had been made some time before 12 October 1984 for a meeting between the CCC and the Minister, Mr Dans, to be held on that date so the CCC could formally present its recommendation. There was an entry in the Minister's diary for a meeting with the CCC that day. Mr Dans acknowledged in evidence that it was possible that the meeting was arranged for him to receive a recommendation. He also acknowledged that by this time the concentration was on Tileska because it was the preferred applicant. Mr Cocker informed the Commission that the CCC had favoured Tileska as the preferred applicant from around late August, early September.

8.4.34 The focus on 12 October is made clear by the course of events. At 6.00 pm on 11 October 1984, the Commissioner of Police, Mr J H Porter, said Mr Cocker rang him at home asking for the report but was told that Mr Porter had not yet read it and would make it available to the Minister at 9.00 am the following day. About five minutes later Mr Cocker rang back saying the Minister wanted the report that evening. Mr Porter then arranged for its immediate delivery to the Minister. Mr Dans was told that the report contained unsubstantiated intelligence and he was asked not to copy the report and to treat the contents in the strictest confidence. Although neither Mr Cocker nor Mr Dans has any recollection of the events as we have just described them, there is no reason to doubt the accuracy of Mr Porter's evidence.

8.4.35 On the next day, 12 October 1984, Mr Ayton and Mr Porter met the CCC. Each of the members was armed with a copy of the interim report. They were obviously upset by its contents. The Chairman, Mr Jarman, revealed that the CCC had formed a view favouring Tileska and wished to make a recommendation without delay. He asked if the CCC could announce its approval of the Tileska/Dempster application while the police inquiry continued. The Commissioner advised against such action. Mr Jarman then asked the Commissioner to concentrate on the investigations into the suitability of Genting Berhad and Mr Dempster and leave the Swan River Park investigation to one side. The Commissioner expressed his concern over the Committee's desire for haste.

8.4.36 According to Mr Porter, Mr Dans rang him later that day and asked him to attend the office of the Premier. He did so. Mr Dans was present. The Premier had a copy of Mr Ayton's interim report. He conveyed to Mr Porter his displeasure at certain of the contents. Mr Dans was also annoyed by the report. He had already travelled to Macau, Hong Kong and Malaysia and said he had found Genting Berhad to be highly respected in Malaysia. It was resolved that the inquiry should continue and that Mr Dans should accompany Mr Ayton to Malaysia to further the investigation. They left Perth on 27 October 1984, returning a few days later.

8.4.37 Mr Dans and the Premier have a different recollection of the circumstances surrounding Mr Porter's meeting with the Premier on 12 October 1984. Mr Dans said he did not arrange the meeting, that he was told by a secretary that the Premier wanted to see him and that when he got there Mr Porter was already with the Premier. For his part, Mr Burke said the meeting was sought by Mr Porter who contacted him by telephone. Mr Porter's version of the incident might be thought to be implicitly supported by Mr Ayton, who accompanied Mr Porter after being told by him that "he and I were required in the office of the Premier". Mr Dans' recollection may not be very different from that of the police officers if it be the case that the Premier took the initiative in arranging the meeting. The objective circumstances would seem to point to the fact that the Premier was taking a close interest in the work of the CCC and was being kept well informed. If he was given a copy of Mr Ayton's interim report, perhaps by Mr Jarman or another member of the Committee — and of course the evidence of Mr Porter confirms that he had a copy — then it would be understandable that being upset by its contents he should have summoned Mr Porter and Mr Dans to his office and is simply mistaken in his present recollection. It would be extraordinary for the Commissioner of Police to by-pass his own Minister and approach the Premier directly, particularly when the subject-matter involved an operational matter as to which the Commissioner was required to act independently of the Government. Mr Porter also testified that the Premier telephoned him on 17 October 1984 to say that Mr C Au, a director of Genting Berhad, had seen Mr Jarman, had possession of information contained in the interim report and was threatening to withdraw from the whole project. The Premier urged Mr Porter to have the final report completed as soon as possible. For his part, Mr Burke had no recollection of making such a telephone call and considered that he would recall the incident if he had done so. We accept Mr Porter's evidence in this regard.

8.4.38 On his return from Malaysia, Mr Ayton reported to the Commissioner of Police. His inquiries concluded at that point. The Commissioner summed up the result of the inquiries in a report dated 5 November 1984 to the Minister for Police. The material parts of the report were:

> "Detective Sergeant Ayton has now reported to me that most of the information supplied of an adverse nature in respect of the Genting Berhad Group was unfounded but, because of the time limits imposed on him, he is unable to make a categoric statement that the company is completely beyond reproach ...
>
> In balance, the reputation of the Genting Berhad Group is in their favour but, for the reason set out above, no public statement should be made to indicate a police clearance.
>
> Should it be decided that the Genting Berhad Group be granted a casino licence, strict provisions should be put in place to ensure adequate control of the casino operations ..."

8.4.39 On 9 November 1984 the CCC reported its conclusions. The Committee was unanimous in recommending the Tileska/Dempster proposal. The report outlines the principal reasons for the recommendation. No criticism can be levelled at the reasoning disclosed in the report except that although the Committee put on record its thanks to the Commissioner of Police it failed to mention that a police clearance was not able to be obtained in the time available. There is no evidence to show whether Mr Dans was aware, when he received and acted on the recommendation of the CCC, that a police clearance had not been given.

8.4.40 On 19 November 1984 Cabinet resolved to select the Tileska/Dempster application. At that time, it favoured the necessary land being leased to the developer rather than sold. However, on 19 February 1985 Cabinet approved provision being made for the sale of 12.5 hectares of Crown land to the developers for $25 million, it being noted that the CCC had originally recommended this course "as vital to secure borrowing arrangements entered into by the developers and to provide incentive for the public to subscribe to the Property Trust provided for in the Agreement between the Minister and the developers".

8.4.41 However, evidence has been received which tends to suggest that such a freeholding arrangement had been the Government's preferred course even before

receipt of the CCC's report. It is not surprising that the offer of a substantial sum of money for the freehold of part of Burswood Island was a feature of the Tileska/Dempster proposal which commended it to the Cabinet in the first place. Mr Dans testified that during discussions with Mr Ayton in October 1985 "it could well be that, in general conversation, I had said ... that we wanted to get a decision as quickly as we could. After all, there was $25 million — actually $30 million hanging on the end of it ...".

8.4.42 This evidence may take on significance in the context of considering the true nature of the CCC's mandate in preparing the report of 9 November 1984, particularly when combined with Mr Ayton's claim that in those discussions in October Mr Dans observed that "the Premier had said that unless the police can show that they are involved in something criminal, the Genting Group will get the Casino". In evidence, Mr Dans' reaction to this assertion was "I don't dispute it, but I can't recall it" and later that "it would be pretty common knowledge that at that time Tileska was probably leading the field ... I formed that opinion when we selected the two finalists, that it would be very, very hard for anyone to knock them off".

8.4.43 This evidence would tend to support a conclusion that the CCC's real charter was to ensure that a decision in favour of Tileska could not be subjected to any serious criticism, with Federal Hotels being available as an alternative nominee if some such basis for criticism were discovered. This scenario receives some support from Mr Berinson's evidence that:

> "I think the advantage of being satisfied that the Federal Hotels application could reasonably be pursued was in the event that anything emerged to prevent us proceeding with the Tileska application. My own recollection of — of my view of the applications at that time was that Federal Hotels were really in the final short list on the basis of being a very suitable reserve if the Tileska application could not be proceeded with for one reason or another."

8.4.44 However, it must be said that this is not the way in which the CCC claims to have understood its task. All members of the Committee testified that they kept an open mind as to which of the two finalists should be preferred until their investigation was well advanced.

8.5 The constitution and financial structure of the project

8.5.1 On 20 February 1985 the Burswood Property Trust ("BPT") was constituted under the trusteeship of West Australian Trustees Ltd and the management of Burswood Management Ltd ("BML"), the directors of which were Mr Dempster (Chairman), Tan Sri Lim, Mr Lim Goh Tong (Deputy Chairman), Mr Colin Au (alternate to Tan Sri Lim), Mr Lim Kok Thay and Mr John Hughes. Mr Dempster and Tileska held separate classes of shares in BML, each class conferring on its holder the right to appoint two directors to the board. While the trustee held the assets of BPT on behalf of the unit holders, BML was responsible for the management of the resort's development and operations. The Trustee was to hold the gaming licence when granted.

8.5.2 A prospectus dated 23 April 1985 was released for the issue of 100 million units in the Trust to members of the public at an issue price of 50c each. It noted that in addition Dempster Nominees Pty Ltd would acquire 60 million units as trustee for the Dallas Dempster Family Trust and Genting (WA) Pty Ltd would acquire 60 million units as trustee for the Genting group. Hence, the prospectus contemplated that a total of $110 million would be raised by the allotment units in BPT. Further, one free option to acquire an additional unit for 50c was granted for every two units allotted. The total cost of the project was estimated at $210 million, requiring debt facilities of $100 million. Within this total cost estimate, construction costs were estimated at $146.5 million, and a report from Rider Hunt and Partners, Quantity Surveyors, was enclosed to that effect. The public issue was a clear success.

8.6 The construction phase

8.6.1 Once the developer was chosen, every effort was made to enable the work to proceed without delay. By this time, the defence of the America's Cup was little more than two years away and there was a natural eagerness by everyone concerned, including the developer and the Government, to have the resort functioning before then.

8.6.2 Multiplex Constructions Pty Ltd ("Multiplex") was engaged, without tenders being called, to build the resort. This is not surprising, bearing in mind that the principal of Multiplex was Mr John Roberts, who had agreed in April 1984 to be associated as builder with Mr Dempster's application. Arrangements were made to "fast-track" the development with the builder's remuneration being determined on a cost-plus basis. The agreement between the developer and the Government, ratified by the *Casino (Burswood Island) Agreement Act 1985*, provided for the State to arrange the

formation of a committee called the Burswood Park Technical Committee to ensure that all necessary approvals and authorities would be obtained without delay; it comprised representatives of all relevant statutory authorities together with a representative of the developer and one of the CCC.

8.6.3 A serious problem soon arose over costs. This matter was first raised with the CCC on 20 September 1985. By this time Mr Ayton had been promoted to the rank of Inspector and seconded to assist the CCC generally. Mr Dempster attended a meeting of the CCC on that day and advised that due to inflation and expansion of the project, additional capital would be sought through a rights issue to raise $35 million and an increased bank facility of $40 million. On 27 September 1985, the CCC agreed to Mr M Egan, the Chief Casino Officer ("CCO"), discussing the cost estimates of the complex with the Building Management Authority. On 24 October 1985, the Executive Director of the Building Management Authority reported in writing that "most cost increases are due to the omission in the original budget estimates of a number of significant items". The costs could not be attributed to any upgrading in standards. The meeting of the CCC held on that same day received oral reports to the same effect and resolved to inform the Minister of the view of the Authority. The minutes of the meeting disclosed a 45-minute adjournment during which Mr Jarman and Mr R J Chapman, the Executive Director of the Office of Racing and Gaming and a member of the Committee since April 1985, met the Minister. The adjournment was recorded as occurring after the resolution to advise the Minister concerning this matter and, while neither Mr Jarman nor Mr Chapman could recall the event, both expressed the view that they would have advised the Minister of the BMA's opinion and provided him with a copy of the latter's report. Mr Dans did not recall such a meeting but conceded it may well have occurred. On the following day the CCC met again and discussed the contents of a report to the Minister. It was resolved to advise him, *inter alia*:

(a) that the extra spending on the complex would not produce additional revenue and the projected return to unit holders had been reduced;

(b) that the overall integrity of the project had not been improved;

(c) that it was the Committee's unanimous opinion that there had been no upgrading of the complex in terms of return to unit holders;

(d) that if the rights issue were to be approved, a statement should be made that the approval was given notwithstanding the reduced return to unit holders; and

(e) to consider reference of its report and that of the Building Management Authority to the Attorney-General for the attention of the Commissioner for Corporate Affairs.

8.6.4 Unfortunately, the sequel to the resolutions at this meeting is surrounded with confusion. A number of drafts were prepared. A resolution was actually passed at the meeting on 1 November 1985 to recommend approval to the Minister, but there is no record of a letter of recommendation going to the Minister. Nor is such a letter recorded under outwards correspondence in the minutes of a subsequent meeting. Neither an original nor a file copy has been located. Yet the Commission has located a draft dated 1 November 1985 recommending approval and including, *inter alia*, the contents of (e) above but with a line drawn through it. Mr Dans could not recall receiving a memorandum recommending that he refer the matter to the Attorney-General. Mr Chapman, a member of the CCC, testified that the paragraph suggesting a reference to the Attorney-General was deleted as a result of discussion at the meeting of 1 November 1985 because of fear of a leak and that he informed the Minister orally of the Committee's view. It seems that no action was taken in that regard by the Minister through his Department.

8.6.5 There is no doubt that the CCC had cause to be concerned as to the veracity of the reasons advanced by BML to account for the rights issue. It was not for the Committee itself to investigate the matter, but rather, as it resolved to do, to recommend to the Minister that the matter be referred to the Attorney-General. It is unfortunate, however, that it refrained from making that recommendation in writing.

8.6.6 During the course of our investigations, a number of serious allegations were made concerning the cost of construction. Notwithstanding the apparent importance of these matters, the Commission did not pursue them because the absence of any indication of involvement with Government placed them beyond its terms of reference.

8.6.7 It is clear that the advice of the Building Management Authority placed the CCC in a difficult position so far as approval of the rights issue was concerned. If

that approval had been withheld the developers might well have been left without access to funds which were essential to completion of the project. At this point the interests of the State were inseparably bound up with the interests of the developers. It was imperative for both that the rights issue be approved, regardless of the reasons which had provided the occasion for it. In recommending approval, the Committee made a pragmatic decision which, although favouring the developers, is not suggestive of any lack of integrity.

8.7 The Gaming Licence

8.7.1 The agreement, ratified by the *Casino (Burswood Island) Agreement Act 1985*, allowed for the building programme to proceed in stages. The casino was to be operating by 30 June 1986 and the balance of the resort, including the hotel, was to be completed by 30 December 1986: agreement, clause 7.

8.7.2 When Mr Dempster attended the CCC meeting of 20 September 1985, he informed the CCC that it was proposed to have the casino ready to open to the public on 21 December 1985. On 8 November 1985, the CCC discussed an outline supplied by Mr Dempster of proposed events and dates for the opening. The CCC resolved to advise Mr Dempster that all requirements of the agreement and the *Casino Control Act* 1984 had to be met before opening. It was further resolved to consult the Crown Law Department on the obligations of the developer in relation to the grant of a gaming licence.

8.7.3 Clause 21 of the agreement provided that the Minister was obliged to approve the application for a gaming licence if and when, *inter alia*, the casino had been "completed, fitted out and commissioned in accordance with the provisions of this agreement to the satisfaction of the Minister".

8.7.4 The advice sought from the Crown Law Department was provided and the Crown Law Conveyancer, Mr B Saunders, attended the meeting of the CCC on 22 November 1985. Following the discussion at that meeting, further questions were addressed in writing to Mr Saunders and were duly answered. It is unnecessary to go into the detail of these exchanges which reflect a somewhat complex inter-relationship between the Agreement and the *Casino Control Act 1985*. It suffices to say that the Crown Law advice emphasised:

(a) that while the words "to the satisfaction of the Minister" seemed to imply a measure of discretion in the Minister, the Committee, in making a recommendation to the Minister, was obliged to express an objective opinion as to whether the casino was completed, fitted out and commissioned;

(b) that the VIP Room was inextricably part of the casino and therefore that area, as well as the other areas, had to satisfy the condition precedent; and

(c) that conditions additional to those contained in clause 21 of the agreement might be attached by the Minister to the grant of a licence, although the applicant still must have complied with the preliminary requirements.

8.7.5 The question of the VIP room had arisen because it was not intended to operate that section of the casino for several weeks after the opening in order to ensure that staff were sufficiently experienced, and it was not likely to be completed in December 1985.

8.7.6 Consequent on the advice from the Crown Law Department, steps were taken by the developer to bring the room to a sufficient state of readiness to enable the grant of a licence although not intending to bring it into use and proposing later to replace the carpet and ceiling and carry out other finishing touches to provide the superior state appropriate to a VIP room.

8.7.7 As matters progressed, it became obvious that the proposed opening date could not be met. In consultation with the members of the CCC on 18 December 1985, the developer proposed Monday, 30 December 1985 as the target date. Because of the Christmas break and the weekend that followed, attaining this target required the issue of the gaming licence not later than 24 December 1985.

8.7.8 Activity on the site before 24 December 1985 was feverish. Likewise, the CCC was meeting frequently. On 10 December the CCC wrote to the developer enclosing a schedule entitled "Schedule of Minimum Requirements of the Casino Control Committee for the Checking, Testing and Commissioning of the Burswood Casino". The accompanying letter advised that a minimum of seven days would be

required by the Committee for the checking, testing and commissioning of the casino. This period did not eventuate, simply because the systems were not ready for testing by 24 December 1985, much less seven days before that date. Mr Chapman, a member of the CCC explained that, although on 24 December 1985 much of a minor nature remained to be done, the Committee made "a pragmatic decision" to grant the licence, on the understanding that the testing and checking could best be done under operating conditions and would be done before real gambling commenced on 30 December 1985.

8.7.9 Considerations which led to this decision were that the casino was substantially complete and that if the licence were not granted on 24 December, it might not be possible to grant it for several weeks because the workers were entitled to holidays after the Christmas break. The public interest in the casino was considerable and it was obviously advantageous to the operators, the public revenue and the unitholders if the casino could be functioning over the holiday period. Further, the persons who were to staff the casino had been trained and were ready waiting to be employed.

8.7.10 The evidence tendered to the Commission makes it quite obvious that the grant of the licence by the CCC on 24 December 1985 was irregular. The casino could not on any view be said to have been completed, fitted out and commissioned in accordance with the agreement.

8.7.11 The extent of the irregularity is illustrated by the undertakings given in writing by BML on 19 and 20 December 1985 to the following effect:

(a) the game of keno will not be operated until the computer system has been checked, tested and accepted by the CCC and Price Waterhouse, who were the auditors acting on behalf of West Australian Trustees Limited and Burswood Management;

(b) the various video games, the active data system and the dynamic reporting system will not be operated until they have similarly been checked, tested and accepted; and

(c) no legal tender will be used in gaming operations until such time as the CCC and Price Waterhouse are satisfied that —

(i) at least 50% of the gaming tables are in operational readiness; and

(ii) the operational procedures have been checked, tested and accepted.

Rather than purporting to attach these undertakings to the gaming licence as conditions of its grant, the Committee contemplated that the power it possessed to issue directions to the licence holder could be utilised to preclude an opening on 30 December 1985 in the event of non-compliance.

8.7.12 The scope of the Commission's inquiry with respect to the grant of the gaming licence was shaped by the evidence of Superintendent Ayton. It will be remembered that Mr Ayton returned to his normal duties after his return from Malaysia in early November 1984. In August 1985, Mr Dans, the Minister responsible for the casino development, requested the Commissioner for Police to second an officer to work with the CCC to oversee the establishment and operation of the casino. In particular, he was to check the bona fides of casino employees and to monitor the operation of the video machines. The Commissioner by this time was Mr Brian Bull. With the approval of Mr Dans, he nominated Mr Ayton to this task with the rank of Inspector. Up to the grant of the gaming licence, Mr Ayton was actively involved in events as they involved the CCC. His evidence reflected the following concerns:

(a) On 24 December 1985 the casino was nowhere near fitted out sufficiently to be granted a gaming licence;

(b) the Minister approved in writing the granting of the gaming licence on 23 December 1985, before any recommendation was made by the CCC;

(c) the Committee prepared and backdated a letter of recommendation to the Minister to create the impression that the licence had been granted according to law;

(d) the early grant of the licence was motivated by a willingness to assist Mr Dempster's private financial position;

(e) the minutes of the meetings of 23 and 24 December 1985 do not accurately relate the events of those meetings.

It is convenient to consider these concerns together in the light of the evidence.

8.7.13 Mr Ayton, whose recollection was refreshed by notes made by him more or less contemporaneously, gave the Commission a detailed description of his perception of events in December 1985 leading up to the grant of the licence. In early December, he considered it "absolutely unrealistic" for the management to plan to open the casino for gaming on 23 December. However, during a visit to the site on 6 December 1985 with members of the CCC, he heard a Building Management Authority inspector offer the opinion that the builder would make the opening date on 23 December 1985. There followed the communication of 10 December 1985 from the CCC to BML, to which we have already referred, outlining the minimum requirements to be satisfied before the licence could be issued. Between the 18 and 20 December 1985, there was much discussion within the CCC and with BML concerning the state of readiness. Clearly, some of the computer controls and other technical aspects would not be in operating condition and, of course, the VIP room would not be in its final state. The discussions gave rise to the guarantees offered by BML to which we have referred. Eventually, what Mr Ayton described as the dilemma that confronted the CCC was resolved by the members agreeing to accept the guarantees and to permit the testing to take place after the grant of the licence.

8.7.14 Mr Egan, the CCO, made known his disagreement with the view taken by the CCC, believing that it could not be said, at least with respect to the VIP room, that the casino was finished in accordance with the requirements of the *Casino Control Act 1984*. However, the consequences of taking that view were serious. As Mr Egan frankly told the Commission the casino would have sat idle for two months if the CCC had taken his view of the agreement. He thought the Committee genuinely believed that it was right to allow the opening.

8.7.15 Nevertheless, it was decided that the CCC and the Minister would need to inspect the site to satisfy themselves of the operational readiness of the casino and arrangements were made for that to take place on 23 December 1985. Mr Ayton inspected the site at 9.30 am on that date and considered that the building work was still far from complete. The Minister, Mr Dans, visited the site early in the afternoon with

Mr Chapman, who was his permanent head and a member of the CCC. Mr Dans gave the Commission a graphic description of what he saw:

> "I don't think I'd ever seen such a hive of activity anywhere else in my life, the numbers of people that were scuttling around laying carpet under my feet and hammering and gluing and doing all the other things."

His inspection left him with the impression that the preliminary requirements were not going to be met by 23 December, nor even by 24 December. Nevertheless, he had 100% confidence in the CCC and he believed that if the Committee recommended that he approve the grant of the licence, then he would do so. He took the view that the health and fire brigade clearances were particularly important and upon returning to his office he personally acted to expedite the latter clearance.

8.7.16 The CCC met again at 3.00 pm on 23 December 1985. According to Mr Ayton, there was considerable tension, with Mr Jarman and Mr Martin having difficulty with the proposition that the preliminary requirements had been sufficiently met to allow the grant of the licence. Mr Jarman and Mr Martin both lacked any recollection of adopting such positions during that afternoon's deliberations, but conceded that they might have done so. Mr Chapman flatly disagreed that such a division of opinion arose at that meeting. However, the fourth member of the Committee, Mr Shimmon, testified that he could recall Mr Jarman and Mr Martin "holding out" against granting the licence whilst he and Mr Chapman favoured doing so and that the general discussion ultimately led to a unanimous decision to recommend the grant. Later in his evidence, Mr Shimmon said:

> "Mr Martin and Mr Jarman were against the recommending under conditions. Myself and Mr Chapman were in favour of recommending subject to conditions. That's the way it went up to the Minister and it came back signed on the 24th. That's my appreciation of the circumstances."

We accept the evidence of Mr Shimmon in this regard. Mr Cocker, the Secretary of the Committee, while disavowing any clear recollection considered that it might be "fair to say that two (Committee members) were more inclined to grant and two were still weighing up the issues". Mr Egan could not recall the events of that afternoon.

8.7.17 During the meeting, again according to Mr Ayton, Mr Chapman disclosed that he already had a document in his possession, signed by Mr Dans, approving of the grant. Mr Ayton said Mr Chapman took a piece of paper out of his pocket and tabled it but Mr Ayton did not see it again nor did he seek to do so. Mr Chapman added that Mr Dempster had spoken to Mr Dans that day in his presence and had explained that his financial arrangements made it imperative for the licence to be granted that day.

8.7.18 There is no corroboration of Mr Ayton's evidence about a letter of approval and a conversation between Mr Dempster and Mr Dans. On the contrary, every person who might have been in a position to confirm that Mr Chapman did and said what he was alleged to have done and said at the meeting either expressly denied it or has no recollection of it. In particular, Mr Chapman denied it. Mr Chapman gave evidence that he left a CCC meeting just before noon on 23 December 1985 to accompany Mr Dans on an inspection of the Casino. Then, at the 3.00 pm CCC meeting, he recalled reporting to the meeting that the Minister's attitude during the inspection earlier that day had been, "if you're prepared to recommend it, he is prepared to accept it". Mr Dans has testified that he signed only one approval and that took the form of a notation on a letter of recommendation from the CCC which was dated 23 December 1985 and which came to him early on the morning of the following day. He signed his approval without delay and it was faxed back to the Committee. The gaming licence was granted later that day. The letter of recommendation bearing date 23 December 1985 together with Mr Dans' endorsement dated 24 December 1985 has been produced in evidence.

8.7.19 The Commission is unable to find any support in the evidence for Mr Ayton's allegation. It is quite possible that Mr Chapman said words generally to the effect that Mr Dans had said that he would approve the grant if the CCC recommended it. Likewise, there is no confirmation in the evidence that Mr Dempster had personally pleaded his financial circumstances to the Minister as underlining the necessity for the licence to issue before the Christmas break. But it would not be surprising, nor in itself deserving of condemnation, if the financial implications to everyone concerned, including Mr Dempster, of the casino lying idle for two months were not included in the extensive discussion that went on that day. Mr Dans and Mr Chapman had been met by Mr Dempster and other representatives of BML when they visited the site that afternoon. Viewed in isolation, and bearing in mind that Mr Ayton did not sight any document bearing Mr Dans' approval and dated 23 December 1985, it could readily be

concluded that Mr Ayton has simply misunderstood Mr Chapman's comment to the meeting. Counsel given leave to appear for Mr Dempster and for the CCC have each attacked Mr Ayton's credit generally and have argued for a more sinister interpretation of his evidence about the meeting on 23 December 1985. We will deal generally with that question towards the end of this chapter.

8.7.20 The remaining allegation against the CCC touching this period related to the accuracy of the minutes of the Committee's proceedings on 23 and 24 December 1985. Mr Cocker acted as secretary to the Committee and in that capacity was responsible for preparing the minutes. He says that he did not get time to compile them until some time after the meetings they recorded, probably in the new year. He now realised that he made two mistakes.

8.7.21 The first was to record Inspector Ayton as being present at all three meetings of the CCC on 23 and 24 December 1985 when he was not in attendance at the meeting held between 11.15 am and 11.50 am on 23 December 1985. Mr Ayton testified that he did not attend any meeting on 24 December 1985 either. The second mistake was to record item 5, the presentation of a report of inspection by a Sergeant Barber, as having occurred at the reconvened meeting on 24 December 1985 when in fact it was the first item of business at the 3.00 pm meeting on 23 December 1985. The report concerned the casino's surveillance and alarm systems and was the result of an inspection undertaken by Sergeant Barber, accompanied by Inspector Ayton, which commenced at 11.30 am on 23 December 1985. Of course, Mr Ayton's principal ground for concern was that the minutes failed to record the alleged receipt of the Minister's approval during the afternoon session of the meeting of 23 December 1985; but as we have said, all the other evidence available confirms the accuracy of the minutes in this regard. It may be wondered how the mistake with respect to Sergeant Barber's report could have occurred and not have been discovered when the minutes were confirmed, but in our view there is no serious implication to be drawn from the incident. It must be remembered that the CCC was working under enormous pressure during this period.

8.7.22 It may be said, as Mr Ayton said in effect, that the Committee had only itself to blame. The agreement did not require the casino to be commissioned before June 1986 and the CCC had the power to stop the rush. On the other hand, the grant of the licence before Christmas had been on the agenda, rightly or wrongly, for many weeks and there would have been great disappointment, not confined to the developers, if the project had been stopped.

8.7.23 Particular steps were taken to ensure that health and fire brigade clearances were obtained before the licence was issued and for the rest, the CCC did not act unreasonably in accepting the special guarantees provided by BML and the Trustee as a sufficient safeguard to ensure the proper functioning of the casino from 30 December 1985 when normal gaming began. In reality, the Committee's confidence was vindicated. There were more teething problems than would have been expected had the systems been tested beforehand as required by the Committee's letter to BML of 10 December 1985 and the enclosed schedule, but the casino operation was substantially free of difficulty and has continued to be so. The VIP room remained closed until the latter part of February, and was further inspected by the CCC in its upgraded state before opening. Mr Chapman testified that the CCC would probably have prevented the opening of the VIP room by direction until such time as it was finished to a higher standard than that attained on 23 December 1985, had the developers wished to open it then. However he considered this was unrelated to the statutory obligation in question on 23 December 1985.

8.7.24 In the result, therefore, we find that while the grant of the gaming licence was technically in contravention of the Agreement and the *Casino Control Act 1984* because at the time of the grant the casino had not been "completed, fitted out and commissioned", the decision was motivated by *bona fide* practical and commercial reasons and there is no evidence of corruption or impropriety by any person or corporation.

8.8 Grant of Key Employee Licences

8.8.1 The *Casino Control (Burswood Island) (Licensing of Employees) Regulations* 1985 prescribed the procedure for the licensing by the CCC of a person as a "casino key employee" or a "casino employee". These terms are defined in section 3 of the *Casino Control Act* 1984. Any person who works in either of these capacities in the casino without a licence or a provisional licence commits an offence.

8.8.2 In essence, the procedure was as follows:

(a) an applicant for a licence must submit the application in writing to the CCC. The prescribed form provides for detailed information to be submitted touching the suitability of the applicant for such a licence;

(b) the CCO must submit particulars of the application to the Commissioner of Police who shall cause to be made an investigation to be made as to the character and suitability of the applicant to hold the licence;

(c) the Commissioner of Police may report to the CCO the result of his investigation but must in any case report his opinion of the suitability of the applicant for the employment in question;

(d) the CCO must cause any other investigation that he considers necessary and then make his own assessment of the suitability of the applicant and recommend to the CCC either that the application be granted, with or without conditions, or that it be refused;

(e) the CCC must consider the recommendation of the CCO together with any other information it thinks fit and may, in its absolute discretion, grant, with or without conditions, or refuse the application;

(f) pending the decision of the CCC in respect of an application, the CCO may grant to a person a provisional licence in the circumstances prescribed by regulation 19.

8.8.3 Complaint was made to the Commission by Mr Ayton that the Burswood CCC had erred in the exercise of its discretion to grant casino key employee licences to Mr Dempster and Mr J Hughes, both of whom were directors of Burswood Management Limited. Mr Dempster applied for a licence on 16 December 1985 and on 23 December 1985 was issued with a provisional licence. It was made permanent on 23 January 1987.

8.8.4 Mr Ayton alleged that it was open to find that the grant of the licence to Mr Dempster was improper. It was said that, on the basis of the information available to it, the CCC could not be satisfied of his suitability to hold the licence and that it afforded him privileged treatment.

8.8.5 There is no doubt that the CCC was in a dilemma over this matter. On the one hand, Mr Dempster played a key role in the management of the casino, yet held only a provisional licence. This was subject to renewal for successive periods of six weeks until September 1986. In August 1986, he pressed for the grant of a full licence,

pointing out the embarrassment suffered by him and Mr Hughes as they were the only directors of BML who had not been granted full licences. On the other hand, the cause of the delay was simply that the Commissioner of Police had not yet reported to the CCO his opinion on the suitability of either applicant. From August 1986, the CCC pressed Mr Ayton for a report. On 31 December 1986, the CCO addressed a memorandum to Mr Ayton, pointing out that the application had been lodged on 16 December 1985 and asking specifically that the CCC be provided with a report on the current status of his inquiries before its meeting on 9 January 1987. The CCO received a prompt response to his request, forwarded to him by the Commissioner of Police and reporting in substance that inquiries were continuing and were not likely to be concluded in the short term, and that there were a number of serious allegations which required examination before a police clearance could be given.

8.8.6 A further report was requested and received through the Commissioner from Mr Ayton. This report detailed inquiries into matters touching Murray Inlet Developments Pty Ltd, a company wholly owned by Mr Dempster. These matters went back to the early 1980s and were the subject of charges against Mr Dempster laid under the *Companies Act* in 1984 and determined under section 669 of the *Criminal Code*, resulting in no convictions being recorded.

8.8.7 The report was considered by the CCC on 23 January 1987. Mr Ayton also advised the Committee on that occasion that further charges over the matters outlined in the report were unlikely. The CCC had been informed by Mr Ayton at its 9 January 1987 meeting that a final report from the Commissioner on Mr Dempster would not be available for at least another six months. At the time of the 23 January 1987 meeting Mr Cocker was Acting CCO. Following discussion he recommended that the CCC grant a full licence to Mr Dempster. Acting on that recommendation, the Committee did so. There was no attempt to hide the fact that no opinion had been received from the Commissioner of Police on the suitability of the applicant. The relevant minute of the decision read as follows:

> "The Committee granted the licence notwithstanding that the Commissioner of Police had not reported on the suitability of the applicant."

8.8.8 In our opinion, the CCC was justified in making the decision. Our interpretation of the regulations is that the reference in regulation 8 to "in its absolute discretion" confers power on the CCC to grant the licence, notwithstanding the absence

of the opinion of the Commissioner of Police. While the regulation makes the existence, but not the substance, of a recommendation from the CCO a condition precedent to the exercise of the Committee's discretion, regulation 7 does not render the Police Commissioner's report a condition precedent to the making of such a recommendation.

8.8.9 More than a year had elapsed since the application had been received and the applicant was entitled to a decision one way or the other.

8.8.10 In view of the outcome of the Court proceedings over the Murray Inlet Developments affair, the CCC was entitled to look to more recent information. The possibility of charges being laid over the prospectus and rights issues remained but the prospect of many further months' delay before any definitive consequential action could be taken in this regard no doubt encouraged the CCC to take comfort in the existence of its power to cancel the licence if any future developments rendered Mr Dempster unsuitable to hold the licence. It may also be noted that the other directors of BML — Tan Sri Lim, Mr K T Lim and Mr Colin Au — were also liable to be implicated in any charges that might arise out of the prospectus and rights issue, and yet they had received a police clearance during 1986 and so qualified for casino key employee licences.

8.8.11 Finally, it is apparent that Mr Dempster's conduct as a casino key employee holding a provisional licence throughout 1986 had given no major cause for concern. Mr Ayton informed the Commission that he formed the view that the casino's gaming operation was well run and presumably Mr Dempster can take some credit for this.

8.8.12 The grant of a full licence to Mr Dempster left Mr Hughes in the invidious position of being the only director holding a provisional licence. That licence was eventually granted by the CCC on 26 June 1987. Mr Ayton made similar allegations about the grant of this licence to those made about Mr Dempster's licence.

8.8.13 Mr Hughes was granted a provisional licence in May 1986. Twelve months later he complained about the delay in granting a full licence. Mr Chapman raised the matter at the meeting of the CCC on 1 May 1987, whereupon Mr Ayton informed the Committee that while the current investigation into the prospectus and rights issue was in progress, the Commissioner of Police could not express an opinion

on his suitability to hold the licence. He testified in evidence that his investigation had disclosed nothing to the personal discredit of Mr Hughes.

8.8.14 The minutes of the meeting of the CCC on 26 June 1987 contained a full record of the discussion leading to the grant of a full licence to Mr Hughes. It is helpful to cite the complete minute:

> "Mr R J Chapman advised the Committee that he had been contacted by Mr Hughes concerning his casino key employee licence.
>
> Mr Hughes had informed Mr Chapman of his concern that he remained the only director of Burswood Management Ltd not fully licensed.
>
> Mr Chapman expressed the view that the length of time which had expired since the lodgement of Mr Hughes' application could lead to criticism of the Committee.
>
> Mr Egan reminded the Committee of Inspector L Ayton's advice minuted on 1 May, 1987, that the Commissioner of Police would not be in a position to report on the suitability of the applicant until the Corporate Affairs inquiry into the issue of a prospectus by Burswood Management Ltd has been completed.
>
> The Committee considered that the inquiry may not be completed for some time and resolved to proceed with the application.
>
> Mr Egan suggested that in view of the Committee's concern regarding the delay, the appropriate course, rather than consider Mr Hughes' licence application at this time, would be for the Committee to convey its concern to the Commissioner of Police.
>
> The Committee sought a recommendation from the CCO prior to considering the grant of a licence.
>
> Mr Egan advised that it was his opinion the licensing regulations required the CCO to consider a report from the Commissioner of Police prior to assessing the suitability of an applicant for a licence and making a recommendation to the Committee in respect of an application. The CCO informed the Committee that as he had not received a report from the Commissioner of Police, he was not in a position to make a recommendation. He further advised he did not consider the Committee could grant the

application without the CCO making a recommendation as required by the regulations.

The CCO was requested to answer the following questions:

1. Was he aware if the applicant had any criminal record?

2. Did he know of any reason why the applicant was not a suitable person to hold a licence?

Mr Egan answered "no" to both questions.

The Committee resolved to grant a casino key employee licence to Mr John Hughes."

8.8.15 Mr Ayton was not present at the meeting. As in the case of Mr Dempster, there was no attempt to hide the discussion which led to the decision. The detailed record supports a conclusion that the CCC was honestly doing its best to resolve a difficult situation. The circumstances differed from those applicable to Mr Dempster in that in the case of Mr Hughes the CCO (Mr Egan) considered that he was unable to make a recommendation in the absence of a report from the Commissioner of Police. It is clear from the terms of regulation 8 that, notwithstanding the breadth of its discretion, the CCC was not empowered to grant the licence in the absence of a recommendation from the CCO. The CCC is not bound by the CCO's recommendation, but it must consider a recommendation before it can exercise a discretion to grant or refuse a licence. Technically, therefore, the decision probably was *ultra vires*. Mr Chapman recognised this in conceding that the Committee "bent the rules a little". On the other hand, it could be argued that in answering the specific questions put to him by the CCC, Mr Egan was in effect making a recommendation favouring the grant of the licence. In any event, in our opinion, the conduct of the Committee is not deserving of any censure. There is certainly no evidence of corrupt or improper conduct by any person or corporation.

8.9 Corporate Affairs investigation — share purchases prosecution

8.9.1 Between November 1980 and October 1982 several share purchase transactions occurred between companies associated with Mr Dempster.

8.9.2 Investigation into possible breaches of the Companies Code by virtue of these transactions was undertaken by the Corporate Affairs Commissioner in April 1983. On 21 May 1984 the Commissioner laid nine complaints, involving 107 breaches of the Code against Mr Dempster, Dallas R Dempster Pty Ltd, Mallina Holdings Ltd and Katanning Holdings Limited. The company bearing Mr Dempster's name later became Tilden Holdings Pty Ltd.

8.9.3 These charges were due to be heard in the Court of Petty Sessions in Perth in February 1985. On 18 February 1985, Parker and Parker, acting as solicitors for Mr Dempster and Tilden Holdings Pty Ltd and with the knowledge and approval of the solicitors acting for Katanning Holdings Limited and Mallina Holdings Pty Ltd, wrote to the then Crown Counsel, Mr M J Murray QC. The letter outlined several matters of defence to the charges together with several matters going to mitigation and proposed a compromise whereby in substance the three companies would plead guilty to most of the charges and the charges against Mr Dempster personally would be withdrawn.

8.9.4 In addition to receiving and considering the matters raised in the letter, Mr Murray held a conversation with counsel for all defendants, Mr M J McCusker QC.

8.9.5 On 20 February 1985, Mr Murray wrote to Parker and Parker. He mentioned his meeting with Mr McCusker and advised that as the Crown was not itself handling the prosecution he had conveyed their letter to Mr K Ratneser of the Corporate Affairs Department. He noted that he had discussed the matter with Mr Ratneser.

8.9.6 The proposal advanced by Parker and Parker was rejected but in the days just preceding the trial date Mr Alan Smith, the Commissioner for Corporate Affairs, put to Mr Ratneser a proposal which "had obviously come from lawyers of the other side or Mr Dempster himself". This proposal involved Mr Dempster and each of the companies pleading guilty to four of the charges and the others being withdrawn. Mr Smith asked Mr Ratneser whether he thought there was anything wrong with this proposal. Mr Ratneser said he did not. Hence the proposal was implemented. In the result the four charges were proceeded with against all defendants. They pleaded guilty to those charges and Mr Ratneser outlined to the Court the whole of the facts which had led to the laying of all the charges. The remaining charges were withdrawn. Submissions were then advanced on behalf of the defendants that notwithstanding the pleas of guilty the four charges should be dismissed without recording a conviction under the "first offenders" provision, section 669 of the *Criminal Code* (WA). To the disappointment of the prosecutor and Mr Smith, the Court acceded to this submission and the charges were dismissed.

8.9.7 Both Mr Ratneser and the Commissioner Mr Smith denied that there had been any political interference in the matter. There has also been no suggestion in any of the evidence that the investigation and court proceedings were affected by any illegal, corrupt or improper conduct on the part of any person. The compromise of the court proceedings in the manner described was not unusual and cannot be regarded as improper.

8.10 Katanning loans inquiry

8.10.1 The Katanning loans inquiry concerned a series of financial transactions that took place between June 1980 and June 1982. A company called Murray Inlet Developments Pty Ltd borrowed funds from Katanning Holdings Ltd in order to finance

the purchase of land. Several related transactions followed involving those two companies and two other entities. All these parties were associated with Mr Dempster in one way or another.

8.10.2 Detective Sergeant Ayton mentioned this matter in his report prepared in October 1984. He said that it was then under investigation by the Corporate Affairs Department. Mr Ayton gave evidence that he was aware of such an investigation being on foot in 1984 as a result of making inquiries of the Corporate Affairs Department at that time, and that he thought Mr G Heppekausen was the person undertaking it. While he may be mistaken in the latter recollection, his 1984 report provided strong evidence that some form of inquiry was being pursued within the Corporate Affairs Department prior to March 1985. However, Mr Heppekausen's report to the Corporate Affairs Commissioner dated 11 June 1985 contained clear indication that the particular investigations from which it resulted began in March 1985, when the attention of the Corporate Affairs Department was stimulated by the activity of Mr Martin Saxon, a journalist attached to *The Western Mail*, a newspaper then circulating in Western Australia on weekends.

8.10.3 On 14 March 1985 Mr Saxon submitted to the Corporate Affairs Department papers alleging irregularities relating to the affairs of Katanning Holdings Ltd and Murray Inlet Developments Pty Ltd. Then on 16 March 1985 *The Western Mail* published a front page article by Mr Saxon headlined "Dempster loan at centre of inquiry". The first paragraph stated that Mr Dempster was under investigation for alleged misuse of shareholders' funds in one of his public companies. The article proceeded to speak of the Corporate Affairs Commission investigating a loan of almost $290,000 from Katanning Holdings Ltd to a Dempster family company.

8.10.4 The Commissioner, Mr Smith, was concerned that *The Western Mail* appeared to be trying to use his office improperly for its own purposes. He therefore issued a media release on (Sunday) 17 March 1985 challenging *The Western Mail* report as misleading. The release outlined the circumstances in which the information was given to the Office by a reporter and added:

> "It is important to note that no investigation has been started and that the only allegations involved were those of the reporter from *The Western Mail*."

The release continued:

> "Mr Smith said he would be very concerned if the activities of his office were being used to give credibility to any public allegation against a company, whether or not those allegations were proved to be correct ...
>
> "He went on to say that he would make a further statement as soon as his consideration of the matter had been completed."

8.10.5 On 18 March 1985 a meeting was convened by Mr Smith in his office attended by Mr Ratneser, Mr Heppekausen and persons representing Mr Dempster, following which detailed representations were made in writing to Mr Heppekausen by Freehill, Hollingdale and Page, solicitors acting for Murray Inlet Developments Pty Ltd and Katanning Holdings Ltd. Mr Smith himself responded to that communication by letter dated 19 March 1985. The letter included this sentence:

> "In this instance I am prepared to accept your explanation of the transactions dealing with inter company and personal accounts relating to Mr Dempster, Murray Inlet Developments Pty Ltd and Katanning Holdings Ltd."

8.10.6 On the same day Mr Smith faxed a news release to the Attorney-General to be released through the Minister's news secretary. It is convenient to cite the entire release, reading as follows:

> "Mr. Alan Smith, Commissioner for Corporate Affairs said today that his Office had now examined the material provided by a `Western Mail' reporter. He said that his Office had in addition considered representations from solicitors acting for Mr. Dempster, Katanning Holdings Ltd and Murray Inlet Developments Pty Ltd.
>
> He said that he is satisfied that there is no evidence that the Companies Act 1961 had been breached with respect to a loan of almost $290,000 by Katanning Holdings to Murray Inlet. He also said the apparent discrepancy between the accounts of Katanning Holdings Ltd. and Murray Inlet Developments Pty Ltd is explained by the different balance dates adopted by the companies. The companies' solicitors had provided full information reconciling the loan accounts."

8.10.7 It may be noted that the contents of this release correspond substantially with a draft release found on the departmental file faxed to Mr Smith from outside the department. Although Mr Smith had very little memory of the entire investigation, he agreed that the draft release had been faxed to him and volunteered the statement that it had probably come from the parties' solicitors. There was no independent indication of the source of the fax because it did not carry the customary notation evidencing its origin. That had been cut off the top of the page, presumably to protect its source from disclosure.

8.10.8 *The Western Mail* published on the following weekend reported "A clean sheet for Dempster" and quoted Mr Smith as saying: "It's all above board and clean. I am quite satisfied there is no breach ... We examined documents, we've now had further representations. There's no offence, fullstop."

8.10.9 Surprisingly, that was not the end of the matter. Mr Smith directed that a complete investigation be undertaken. Mr Ratneser sought legal advice from the Crown Counsel and Mr Heppekausen investigated the facts. Mr Heppekausen reported the result of his investigation on 11 June 1985. He recommended that Katanning Holdings Limited and its directors be prosecuted for two breaches of section 125 of the *Companies Act*. He also reported his opinion that "a very technical breach" of section 126 of the *Securities Industry Code* had been committed.

8.10.10 Following Mr Heppekausen's report, Mr Smith addressed a report to the Attorney-General. Section 34 of the *Companies and Securities (Interpretation and Miscellaneous Provisions) Code* required the consent of the Attorney-General to the institution of any proceedings after the lapse of three years from the date of an alleged offence. Mr Smith outlined the circumstances and then informed the Attorney-General that he had decided not to seek consent to prosecutions of the section 125 offences because no parties appeared to have suffered, the loans were for relatively short periods, the affairs of each of the companies involved had been put in order and because, notwithstanding the opinion of the Crown Counsel, there was a body of opinion that the loans did not constitute an offence. Also of relevance to the decision not to prosecute was the existence of the three-year rule. Born out of experience, this sensible rule requires that there must be exceptional circumstances to justify the institution of a prosecution more than three years after the date of the alleged breach.

8.10.11 On the evidence before the Commission, the whole episode is bizarre. A complaint was made to the Department. Without any investigation, a conference was held with persons representing Mr Dempster, including his legal representatives. Their explanations were accepted and a news release issued by the Commissioner in terms, presumably supplied by the alleged offenders themselves, emphatically absolving them of any offence. Then, notwithstanding that absolution and the additional consideration that the alleged offences were already more than four years old and therefore subject to the three-year rule, an investigation was undertaken involving two senior officers of the Department.

8.10.12 Added to this, the Commission's efforts to discover a rational explanation of events were rendered fruitless by an almost total lack of memory on the part of the Commissioner. As to his motive for instituting the investigation after his news release and in full knowledge that the matter was more than three years old, Mr Smith said:

> "I suppose because it involved Dempster and it was in the public domain and he had the casino that I had second thoughts and said 'Well, if something goes wrong at a later date, we should be seen to have done the right thing'."

8.10.13 Notwithstanding all this, there is a complete absence of evidence to ground any suspicion, much less a finding, of illegal, corrupt or improper conduct by any person or corporation. Mr Smith acknowledged that Mr Dempster was very much in the public eye because of the publicity surrounding the casino and the interests of the

State were closely aligned with its successful establishment, but these considerations cannot of themselves postulate impropriety. Mr Smith denied any intervention or any improper pressure from any quarter. Of course, it may be acknowledged that Mr Dempster was not slow to act to protect his interests and was well served by vigorous advocacy.

8.11 The prospectus and rights issue investigation

8.11.1 In November 1986 a complaint was lodged with the Corporate Affairs Department by Mr John Samuel alleging that offences had been committed in connection with the issue of the Burswood Property Trust prospectus dated 23 April 1985 and with the letter of offer to the unit holders of the Trust dated 22 November 1985. In short, it was alleged that false statements were knowingly made in each of these documents. In the case of the prospectus, the statement that the construction cost of the project would be $146.5 million was said to be a deliberate understatement intended to mislead prospective investors. In the case of the letter of offer associated with the rights issue, the reasons given to account for the increased costs of construction that made the rights issue necessary were said to be incorrect.

8.11.2 Mr Ayton has told the Commission that he had first become concerned about the matter in October 1985 when the CCC had the question of a rights issue on its agenda. He had raised the matter with the Commissioner of Police at that time. However, it was not until Mr Samuel's complaint in late 1986 that any serious investigation commenced. It was undertaken by Mr R Jacobs, a senior investigator with the Corporate Affairs Department with assistance from Mr Ayton. Many people were interviewed and many statements were taken and following consultations with the Senior Assistant Crown Counsel, Mr J R McKechnie, a brief to prosecute was delivered to Mr Smith on 8 June 1987. The alleged offenders were four directors of BML — Mr Dempster, Mr K T Lim, Mr Au and Mr Hughes — and Mr Wright and Mr Game, members of the firm Rider Hunt, the quantity surveyors engaged on the project. Mr McKechnie had advised that if the matter were to proceed the alleged offences should be prosecuted by way of indictment rather than summarily and had expressed the opinion that there was a reasonable likelihood that a jury would convict.

8.11.3 There followed an extraordinarily long period of indecision on the part of Mr Smith until on 29 October 1987 he decided against launching a prosecution. He held many discussions, including conferences with the Solicitor General. He solicited and received written advice from the Solicitor General, Mr K Parker, on more than one occasion. He kept the Attorney-General, Mr Berinson, informed of the course of his thinking on the matter. Both the Attorney-General and the Solicitor General listened to him and the latter gave him all the professional assistance he could. But there could be no question of anyone else making the decision for him. He was left under no illusion that the decision whether or not to prosecute was a matter for him and for him alone. Both the Senior Assistant Crown Counsel and the Solicitor General gave advice that in their respective views there was a clear prima facie case that would warrant prosecution, though they differed in their assessment of the strength of that case. Mr McKechnie

positively favoured prosecution, assessing the prospectus allegation as a fraud type of offence of significant dimensions. He supplied a lengthy memorandum of advice under cover of a letter to the Commissioner dated 18 May 1987. The Solicitor General became involved subsequently to the delivery of the brief for prosecution. At all material times, the solicitors for the alleged offenders, including Mr Dempster, were most active in seeking a favourable resolution of the inquiry and plied Mr Smith with further statements and representations. No criticism can be levelled at them for maintaining the pressure in this way and Mr Smith said he was not worn down by it. Whether the additional material that had been received affected any assessment of the chances of a successful prosecution, the fact remains that the Solicitor-General was not as confident as Mr McKechnie. He observed that the Crown would have to rely on witnesses who could be expected to be sympathetic to the accused persons and there was already some evidence of inconsistency between earlier and later statements supplied by some prospective witnesses. While conceding that a decision to prosecute was supportable, the Solicitor-General assessed the chances of success at a little less than 50%.

8.11.4 Both Mr McKechnie and Mr Parker recognised that there were other factors beyond strictly legal considerations that the Commissioner could properly take into account in exercising a prosecutorial discretion whether or not to prosecute. Such factors could include the effect of a prosecution on the share market and consequently on the interests of the unitholders and the damaging effect on the standing of the National Companies and Securities Scheme if the prosecution were to fail.

8.11.5 As time went on, Mr Smith found the task of making a decision did not become any easier. He continued to vacillate and agonise over it. Towards the end, it seemed that he had decided to prosecute. The charges were drafted and approved by counsel and awaited signature. Mr McKechnie busied himself seeking senior counsel to undertake the prosecution for the Crown.

8.11.6 Towards the end of October 1987 the share market crashed. On the morning of 29 October, Mr Smith spoke to Mr P Marfleet and Mr Lester James, both stockbrokers, to gain their views on the volatility of the market and the impact that his decision might have. The Commission received a statement from Mr James. He informed the Commission that the advice he gave Mr Smith was that "the mounting of a prosecution would have a negative effect on first, the price of units in the BPT, and secondly, the general confidence of local and overseas investors in Western Australia". Mr Smith returned to his office, phoned the Solicitor General and then prepared and sent a memorandum to the Attorney-General informing him that he had decided not to institute proceedings in the matter. He announced his decision by news release on the same day.

8.11.7 It is not within the terms of reference of this Commission to determine whether the alleged offenders were guilty of fraudulent conduct. Our brief was to inquire whether there was any corruption or illegal or improper conduct associated with the decision not to prosecute them. That is a different question from the question of

guilt or innocence. In view of the controversy that has surrounded this particular decision of Mr Smith, it should be emphasised that every opportunity has been given to members of the public to provide relevant information to the Commission. It can now be said categorically that no evidence has been found to support a finding of corruption or illegal or improper conduct so far as Mr Smith is concerned.

8.11.8 The Commission accepts unreservedly the professional opinions expressed by Mr McKechnie and Mr Parker that the Commissioner's decision not to prosecute fell within the bounds of a proper prosecutorial discretion.

8.11.9 Mr Smith had rejected any suggestion of improper pressure and swore that his decision was made honestly and conscientiously. He expressly rejected any suggestion that his memorandum of 29 October 1987 might not have been prepared until some considerably later time. That rejection was supported by the Attorney-General. The memorandum itself bore a notation written by Mr Berinson and dated 29 October 1987. Finally, there is a plausibility about the memorandum itself which leads us to cite its contents in full. The content of the document reads as follows:

> "**INVESTIGATION INTO BURSWOOD MANAGEMENT LIMITED**
>
> Further to my earlier advice I confirm that following receipt of further documentation from the parties, and further discussion with the Solicitor-General, I have now decided not to institute proceedings in the matter. That decision has been taken after careful consideration of the very thorough investigation, of legal advice received by me and of public interest issues.
>
> The primary focus of this investigation centred around the inclusion in the prospectus of a report by Rider Hunt, a firm of quantity surveyors. That report estimated the cost of construction of the complex at $146.4 million.
>
> The investigation disclosed that before the issue of the prospectus it was known to Burswood Management Ltd. that Rider Hunt had prepared a draft cost indication estimating construction cost for the complex at $180 million.
>
> The draft cost indication of $180 million was prepared about a week before the prospectus issued but it is said to have been reduced to the previous budget figure of $146.5 million a few days before the prospectus issued after a meeting and conversations involving Messrs Dempster, Lim and Au of Burswood Management Ltd. and Messrs Wright and Game of Rider Hunt.

It is said that the reduction was possible because of design changes agreed at the meeting and by removing the allowances for rise and fall and contingencies.

The investigation disclosed that much of the reduction was not reflected in subsequent costings or achieved in actual construction.

This required consideration as to whether assessed reductions were bona fide.

Legal advice indicated there is a ‘prima facie’ case of breach of Section 108 of the Companies Code. But that case relies heavily on inference — it is a circumstantial case. It has not been possible, despite thorough investigation, to entirely exclude other views of the facts consistent with the genuineness of the reduction.

In these circumstances, I had been forced to conclude that there would be little, if any, chance of a prosecution ultimately succeeding as the case must be proved beyond reasonable doubt. I note the very considerable costs to the public should an unsuccessful action be taken.

The Solicitor-General has gone so far in further discussion as saying that despite the good prima facie case there would never be a conviction.

Another focus of the enquiry was on the `right's issue'. The investigation suggested the letter of offer contained misleading statements but if, these were considered separately from the prospectus enquiry, they appeared to be more technical in their nature and not material.

I have also had discussions with leading market analysts. They have indicated that a major prosecution of this type would further damage the market in its present vulnerable state. The Trust units could be severely affected. I am also informed that the Hotel sale has not been finalised. It would be a disaster for the unitholders if this sale did not proceed. The present market crash could well affect the completion of this sale and if action was taken this would exacerbate the position.

The analysts also expressed the view that having regard to two notable losses with respect to market orientated offences, the credibility of the Corporate Affairs Departments investigatory capacity would be questioned. They were of the view that the

next offence targeted must succeed. This causes me grave concern, as you are aware both the Solicitor-General and myself are nowhere near as confident in this matter as is the Crown Prosecutor handling the case. A loss in this matter would seriously affect confidence in the administration of Corporate Law. I propose to discuss these issues with the Senior Director, Investigation and Litigation Division and the incoming Commissioner. You will be advised further on this matter.

In all of the above circumstances I have concluded that no useful purpose will be served in pursuing the matter.

I attach a copy of a press release which I propose to issue.

(A.D. Smith)
COMMISSIONER FOR
CORPORATE AFFAIRS"

8.12 Sale of hotel

8.12.1 This transaction gave rise to yet another investigation under the supervision of the Commissioner for Corporate Affairs, Mr Smith.

8.12.2 In April 1987 BML accepted from two Japanese companies, the Yunan Development Co Limited and Kanematsu Trading Company Ltd, an offer to purchase the newly completed hotel for $110 million. Heads of agreement were signed by the two parties on 4 May 1987. The offer had been made on the basis that the purchaser would be permitted to acquire a 20 per cent interest in the Burswood Property Trust. Accordingly, clause 9 of the agreement was as follows:

"ACQUISITION OF EQUITY IN THE TRUST

The purchaser wishes to acquire a minimum of 20 per centum of the units issued in the Burswood Property Trust (`the Equity'). BML shall use its best endeavours to arrange for approval of the acquisition by the Purchaser of the Equity. Dempster Nominees Pty Ltd shall sell 60 million of such units for $1.00 each (namely $60 million) to enable this condition to be met."

8.12.3 On 12 May 1987, BML announced details of the transaction by a news release and by telex to the Stock Exchange of Perth. However, the announcement of that part of the transaction which related to the acquisition of units in the BPT differed from that described in the agreement of 4 May 1987. The telex advised that Dempster Nominees Pty Ltd had agreed to sell 30 million units at $1.00 each and 30 million options 50 cents each. The announcement continued:

> "Under this arrangement the purchasers will acquire 60 million units for a total consideration of $60 million of which $15 million will be deposited into the trust fund. The purchasers have indicated that they wish to acquire additional units from the market."

8.12.4 The agreement in respect of the units was expressed to be conditional on the sale of the hotel and both limbs of the agreement were conditional on the securing of all necessary consents and approvals, including the consent of the Minister for Racing and Gaming.

8.12.5 Also on 12 May 1987, the Minister for Racing and Gaming, Mrs Beggs, in her capacity as Minister for Tourism, welcomed the announcement. But the news release did not purport to be an announcement of her formal approval of the transaction. This approval was not sought until the following day when Mr Dempster as Chairman of Directors of BML advised her by letter of the proposal with copies to the CCC and the Trustee.

8.12.6 A question then arose as to whether the proposed sale of units and options in the trust by Dempster Nominees Pty Ltd would involve a breach of section 229(4) of the *Companies Code*. The matter was taken up by the Corporate Affairs Department and Mr Jacobs was assigned to investigate. At the same time the CCC gave consideration to both the legality and the merits of the sale and, after consultation with the Crown Law Department, Mr Chapman informed the meeting on 29 May 1987 that he had cautioned Mrs Beggs, the Minister, against giving her approval to the transaction until the question of possible offences had been clarified.

8.12.7 In the meantime, Mr Jacobs' investigation had broadened to include a possible breach of section 564(1) of the *Companies Code*, having regard to the accuracy of the statement of BML to the Stock Exchange about the number of units to be sold by Dempster Nominees Pty Ltd.

8.12.8 At the same time, the possible impact of section 229(4) of the *Companies Code* was receiving the attention of BML's solicitors. In due course, Mr Jacobs was informed that the units and options sought to be acquired by the purchasers of the hotel would now come, not from Dempster Nominees Pty Ltd, but from a proportional bid to all unitholders, with the Dempster company acting as an underwriter to make up any shortfall.

8.12.9 On 17 June 1987, Mr Smith instructed Mr Jacobs to cease his investigation into the hotel sale transaction. His reasons were twofold: the substitution of the proportional bid rectified any possible irregularity, and the continuing investigation could jeopardise the much more important ongoing investigation into the alleged prospectus and rights issue fraud.

8.12.10 There is no evidence to suggest that Mr Smith's instruction to Mr Jacobs to discontinue his investigation was other than a proper decision, made without undue pressure being exerted from any quarter.

8.12.11 Legislative steps were necessary before the hotel sale could be finalised. Mr Chapman testified that Mrs Beggs asked him to ascertain what steps were necessary to approve the hotel sale, she having discussed it within the Government and the conclusion having been reached that the sale should be approved. Crown Law advice to the CCC expressed doubt as to whether the Minister had authority to grant such an approval, because one interpretation of the legislation was that it viewed the resort as indivisible. The Minister therefore submitted a minute to Cabinet seeking approval for amending legislation, which ultimately took the form of the *Acts Amendment (Casino Control) Act* 1987. The Act was deemed to come into operation on 13 September 1987: section 2.

8.12.12 On 21 September 1987 Mr Jarman, Chairman of the CCC, sent a memorandum to the Minister recommending that she give her approval to the hotel sale and detailing the terms in which it should be given pursuant to the newly amended legislation. The Minister accepted the recommendation.

8.13 Consumer Affairs investigation arising out of sale of hotel

8.13.1 By letter dated 6 October 1987, Mr Saxon, a journalist then employed by *The Daily News*, a newspaper then circulating in Western Australia, requested the Consumer Affairs Office to investigate the circumstances surrounding the payment of a commission fee of $6 million by BML, the vendor of the Burswood Casino Resort Hotel, to Tosh International (1981) Pty Ltd ("Tosh International") in consideration of its role as agent for the vendor in the transaction of sale of the hotel to Japanese interests.

8.13.2 The issue raised by Mr Saxon's request centred on whether it could be proved that Tosh International as a matter of law was carrying on a business as a real estate agent in Western Australia within the meaning of the relevant legislation notwithstanding that the hotel sale was the only transaction in which the company had been involved within the State.

8.13.3 After preliminary consideration of the request within the Department, Mr N R Fletcher, the Commissioner for Consumer Affairs, arranged for a full investigation. In due course, counsel from the independent Bar in Perth was briefed to advise whether there existed a prima facie case for prosecution.

8.13.4 Counsel's opinion had not been given when, early in June 1988, Mr Saxon contacted the office of Mr G Edwards, the Minister for Consumer Affairs, seeking an explanation for the lengthy duration of the investigation. Consequent on this inquiry Mr Edwards spoke to Mr Fletcher on the telephone. He was angry because the matter had not been brought to his attention previously and told Mr Fletcher that he

expected to be briefed about matters which had the potential to embarrass the Government. Apparently, Mr Fletcher responded with some heat, because he believed that in the exercise of his statutory discretion the Commissioner for Consumer Affairs was independent and therefore not obliged to keep the Minister informed. Whatever the reason, the conversation was acrimonious. Mr Fletcher recalled that Mr Edwards instructed him to drop the investigation, saying something to the effect of:

> "It's only a damned reporter. You are to drop the matter."

8.13.5 In the same conversation, according to Mr Fletcher, the Minister told him that he had spoken to Mr Dowding, the Premier, and that the Premier too was very annoyed and wanted the matter dropped. The Minister then asked for a briefing note as a matter of urgency. That briefing note was sent to the Minister by facsimile transmission at 3.45 pm on 7 June 1988. Mr Fletcher says that there was a further conversation on the following day or the day after, in the course of which Mr Edwards was critical of the Department seeking a legal opinion from the independent Bar and instructed Mr Fletcher to consult the Crown Law Department. Mr Fletcher felt that this instruction raised an ethical difficulty because counsel had already been briefed and asked that the instruction be given to him in writing. This was done by facsimile transmission to Mr Fletcher's office at 10.56 pm on 9 June 1988. The message requested that a preliminary opinion be furnished to him by mid-morning the following day. The outcome of that instruction was that two opinions were furnished by the Crown Law Department, one from Mr Murray QC and the other by Mr Scott QC, as they then were. Both opinions were to the effect that it could not be said that the involvement of Tosh International in a single transaction amounted to carrying on a business. Counsel from the independent Bar delivered his opinion on 15 June 1988, coming to a different conclusion. Ultimately, it was decided not to prosecute, that decision being made at a time after Mr Fletcher had retired.

8.13.6 In addition to Mr Fletcher, the Commission has heard evidence from Mr Edwards and Mr Dowding. There are many discrepancies between the evidence of Mr Fletcher and that of the two Ministers but it is unnecessary to determine the precise course of events. Evidence touching the single issue that concerns the Commission is clear enough. That issue is whether Mr Edwards or Mr Dowding or both instructed Mr Fletcher to drop the investigation. Both Ministers denied any such instruction and Counsel pointed to the inherent inconsistency in Mr Fletcher's recollection of the events. It was inconsistent for Mr Edwards to instruct Mr Fletcher to drop the investigation and at the same time to call for a briefing note and later to require him to seek a Crown Law opinion on the matter. It is also most unlikely that two Ministers, one of whom was the Premier, would have attempted to stifle an investigation after learning that an investigative journalist had laid the original complaint and was planning to do, in Mr Edwards' words, "a bit of a job on the Government" in *The Daily News*. Again, in Mr Edwards' words:

> "... it frankly would not have made any political sense whatsoever to have attempted to get an inquiry squashed ... ."

8.13.7 Under examination by counsel assisting the Commission, Mr Fletcher conceded that in the heat of the moment his impression that Mr Edwards instructed him to drop the investigation could well have been mistaken. He made a similar concession with respect to his evidence of what Mr Edwards told him that Mr Dowding wanted.

8.13.8 Under cross-examination, those concessions were repeated and Mr Fletcher also agreed that in 1989, in the course of a conversation with Mr R Harrison, a senior public servant, about his relationships with Ministers of the Crown he had said that on only one occasion had a Minister ever tried to influence him in relation to a matter, and it was not a Minister in a Labor government.

8.13.9 Counsel assisting the Commission has submitted that the decision not to institute a prosecution in respect of the payment of a fee to Tosh International was clearly a proper one in light of the two definite opinions from senior Crown Law officers and the absence of credible evidence suggestive of ministerial intervention in the decision. The Commission accepts that submission.

8.14 Access to artesian water

8.14.1 Attention was given during the inquiry to the circumstances in which Mr Chapman was asked by Mr Dans to contact the Water Authority of Western Australia with the request to facilitate the grant of the necessary licence to sink bores into the artesian water basin in order to provide the water necessary to develop the golf course which formed part of Burswood Park.

8.14.2 There is no serious dispute about the facts. Mr Dans was contacted by Dr T Riggert on behalf of BML and he then gave the instruction to Mr Chapman. He in turn made the appropriate representation to the Water Authority.

8.14.3 The appearance of irregularity lies in the fact that the licence did not actually issue until two years later by which time the bores had long since been dug and a considerable quantity of water used in order to establish the golf course. Again, there was irregularity in the process but the evidence has failed to reveal any impropriety.

8.14.4 The direct approach to the Minister was not attended with any serious implications and, according to Mr Chapman, was quite consistent with the fast-track approach taken to the construction programme, given that the Water Authority was not represented on the Burswood Park Technical Committee. Similarly, Mr Chapman's response to the Minister's instruction was consistent with this fast track approach. It emerges from the documentation on the file of the Water Authority that the licence was in fact approved much earlier than the date of its formal issue, the delay being explained by the fact that the Authority was still waiting for BML to supply information that had been requested. No money was payable in respect of the grant of the licence nor in respect of the use of the water but it was important that the licensee provide information about the amount of water used in order for the Authority to be in a position to monitor the extent of the draw on the aquifer.

8.14.5 The failure to apply for the licence in good time and the subsequent failure to provide the information sought reflects adversely on the persons responsible and cannot be readily condoned but there is no evidence to suggest that any improper influence was brought to bear on any person.

8.15 Mr Ayton's 1987 report

8.15.1 It is necessary to refer briefly to the matter of the so-called disappearing report. This was a copy of Mr Ayton's report dated 18 August 1987, which gave a detailed account of matters associated with the Burswood Resort with particular reference to the suitability of the directors of BML to be holders of key employee licences.

8.15.2 Mr Bull, the Commissioner, explained the sequence of events touching his handling of Mr Ayton's report. He decided to hold the report for a time pending the completion by the Corporate Affairs Department of the investigation into the costs overrun matter to see whether any charges resulted from that investigation. However, in the meantime, he passed the report over to the Minister for Police, Mr Gordon Hill, on an informal basis. Mr Bull said that the report stayed in the Minister's office for about a week before being returned to him and that he actually discussed with Mr Hill the procedure that he, the Commissioner, proposed to follow with respect to it. For his part, Mr Hill said he had no recollection of having ever seen the report although he had a vague recollection of some report.

8.15.3 The Commission has no doubt that Mr Hill saw the report in September or October 1987 and discussed procedural matters touching it with Mr Bull. While it may seem surprising that Mr Hill has forgotten having a matter of such apparent importance drawn to his attention, the Commission is unable to impute any sinister implication to the evidence. Mr Bull's recollection of these matters is supported by the production of a memorandum marked "strictly confidential", signed by Mr Hill, dated 16 October 1987 and addressed to the Commissioner of Police (himself) which referred to the report "which you recently made available to me for my perusal" and which sought further information. The memorandum reflected an awareness of the contents of the report. Mr Hill suspected that his policy officer, Mr P Ward, might have briefed him about the matter and that such a briefing was the only source of his knowledge of the contents. Probably Mr Ward prepared the memorandum for Mr Hill's signature.

8.15.4 On receiving the memorandum, Mr Bull returned the report to the Minister under cover of a memorandum which concluded with the sentence:

> "As discussed, the documents are forwarded for transmission to the Hon Minister for Tourism, Racing and Gaming."

8.15.5 The Commissioner did not think it was appropriate for him to respond to the request for information contained in Mr Hill's memorandum because he considered it to be an operational matter. He therefore did not do so.

8.15.6 A note ready for Mr Hill's signature forwarding it to the Minister for Tourism, Racing and Gaming was attached to Mr Bull's memorandum. According to Mr Bull, although the copy of his memorandum was dated 12 October 1987, the original would have been altered to bear the date on which he sent it, which was "immediately after" he received Mr Hill's memorandum of 16 October 1987. At that time, he decided not to wait any longer for an announcement of the outcome of the Corporate Affairs investigations.

8.15.7 There is no evidence to suggest that the report was ever sent on from Mr Hill's office to Mrs Beggs, the Minister for Tourism, Racing and Gaming. It was not received by her. It would appear that it was still with Mr Ward in late January 1988 because, on 27 January 1988, Mr Ward conferred with Mr Ayton. Among other things he wished to clarify the significance to be attached to an allegation in the report that Mr Dans had been party to the failure to comply in all respects with the law in connection with the grant of the gaming licence. Mr Ayton said that Mr Ward was told that there was no intention that the report be used other than for its prime objective, that is, for the Commissioner of Police to provide his opinion as to the suitability of the directors of BML to hold casino key employee licences. Mr Ward was also concerned lest the allegation against Mr Dans be leaked to the media and received some reassurance in that regard from Mr Ayton.

8.15.8 The copy of the report delivered to Mr Hill's office in October 1987 for transmission to Mrs Beggs is presumably the same copy of the report as was in Mr Ward's hands on 27 January 1988. Mr Hill ceased to be the Minister for Police in February 1988 and Mr Ward explained that the report might have been destroyed in the resultant movement of files to the office of the new Minister.

8.15.9 The Commission does not find the disappearance of Mr Ayton's report to be of great significance. Perhaps its true purpose has been misconceived. It was a wide-ranging report that belies Mr Ayton's reassurance to Mr Ward that its primary objective was to enable the Commissioner of Police to give his opinion on the suitability of the directors of BML to hold casino key employee licences. Had that been seen to be the case, all that would have been required consistently with the regulations was a condensed report to the Chief Casino Officer.

8.15.10 Indeed the Commissioner's statutory obligation under regulation 5 of the *Casino Control (Burswood Island) (Licensing of Employees) Regulations 1985* extended only to reporting on the suitability of Mr Dempster and Mr Hughes, in respect of whom no report had been provided in response to the CCO's original request. Mr T S Lim, Mr K T Lim and Mr C Au had each been duly licensed after the CCO received the requisite police reports, and regulation 5 provided no scope for police investigation into the suitability of a current licence holder to continue to hold his licence except where such is requested by the CCO.

8.15.11 In truth, the report is Mr Ayton's perception of the manner in which the CCC had performed its task from the time when he was attached to it in August 1985.

Seen as such, Mr Bull's intention that it should ultimately reach Mrs Beggs was entirely appropriate. Mr Bull testified that after reading the report he "did not have confidence in the CCC to act upon the report so I decided to submit the report to the Minister for Police for the purpose of transmission to the Minister for Racing and Gaming to ensure that the report was acted upon". So far as the specific allegation against Mr Dans is concerned, we have already found that allegation to be unfounded.

8.15.12 Finally, we should refer to the possibility that Mr Ayton's report was deliberately lost within the office of the Minister for Police. The evidence does not justify such a finding. On the other hand, the evidence does not provide a satisfactory explanation for the failure of someone in the Minister's office, presumably Mr Ward, to ensure that the report was forwarded to the Minister responsible for the conduct of the casino and the performance of the CCC. In that context, the report was important and should have been forwarded without delay after its receipt from the Commissioner of Police.

8.15.13 The detailed daily record so meticulously kept by Mr Ayton records a number of other incidents which, taken cumulatively and out of context, could suggest that someone in authority was "looking after" Mr Dempster. The Commission has investigated them to the limit of its capacity to do so. It is sufficient to say that the evidence does not provide a basis for serious criticism of the conduct of any person in authority.

8.16 The Connell fee

8.16.1 This matter concerns an agreement whereby Mr Dempster and Mr Roberts agreed to pay a "consultancy" fee of $2 million to Mr L R Connell. The evidence relating to this incident in the history of the establishment of the casino is intriguing, particularly when coupled with evidence of the manner in which Mr Dempster and Mr Roberts each made donations of $25,000 to "the State Labor Organisation" in the period when the selection of a developer for the casino was proceeding. Regrettably, while it raises many questions and affords ground for considerable suspicion, the evidence does not enable the Commission to provide any answers. It is desirable, however, to report in detail the circumstances as revealed by the evidence, and allow those facts, so far as they may, to speak for themselves.

8.16.2 Subsequently to the announcement on 5 April 1984 of the Cabinet decision to invite all existing applicants to tender for construction of a casino at Burswood Island, negotiations commenced between Mr Dempster, on behalf of the Dempster/Tileska consortium, and Mr Roberts of Multiplex. These negotiations culminated in Multiplex being appointed builder for the consortium. The appointment was accepted in a letter dated 27 April 1984 from Multiplex to Mr Dempster which went on to adumbrate the costs of construction. It then stated:

> "To the above costs we confirm that a sum of $2,000,000.00 plus 4% of the total cost of building construction on site as outlined

> above will be added to cover our pre-commencement consultancy work and all head office overheads and profit ... ."

8.16.3 Mr Dempster identified the $2 million as being an amount agreed to be paid by the Dempster/Tileska consortium through Multiplex to Mr Connell, within the category of "pre-commencement consultancy work". Mr Dempster and Mr Roberts agreed that in the course of their April negotiations, Mr Roberts suggested that they involve Mr Connell in the bid. Mr Roberts reached agreement with Mr Connell upon a $2 million fee for the latter's involvement and Mr Dempster agreed, after consultation with the Genting interests, to pay that fee in the event that the consortium's application was successful. Mr Dempster further assisted the Commission with evidence on 7 August 1992. He explained that he had agreed to accept without question the arrangement, made between Messrs Roberts and Connell, whereby BML would pay Mr Connell $2 million. The Commission finds it extraordinary that a businessman of Mr Dempster's acumen and experience would unhesitatingly accept a liability for $2 million. He made no attempt to negotiate a lesser fee or satisfy himself that the services to be provided by Mr Connell represented value for money. He denied that Mr Connell was used in "a lobbying sense" at all and gave the reason for that as: "There was no need to".

8.16.4 On 1 May 1985, BML was sent an invoice from Multiplex for $2 million "Re Burswood Resort Project Consulting Fees as Agreed". On 4 June 1985 Rothwells invoiced Multiplex for $2 million "Re Burswood Casino Development Project. Being agreed stand-by fee in respect of Dempster financing and general advisory services". The fee was paid promptly.

8.16.5 Hence, $2 million was ultimately paid by BML, a company owned by Mr Dempster and the Genting interests, to Rothwells, using Multiplex as a conduit.

8.16.6 While the $2 million fee clearly evidences Mr Connell's involvement with the Dempster/Tileska consortium, the precise nature of that involvement was the subject of conflicting testimony. Mr Dempster insisted that the arrangement with Mr Connell was merely "that he would not work against us" and definitely did not entail any positive action by Mr Connell to assist the bid. When asked whether Mr Connell had participated in any of the discussions connected with the application, Mr Dempster emphatically responded: "None whatsoever". Further, Mr Dempster had no need for Mr Connell's latent support by way of stand-by finance, because Genting was already fulfilling that role. As the party who agreed to pay the fee, why he was willing to incur such a liability simply to ensure that Mr Connell did not assist a rival applicant, Mr Dempster said:

> "As far as being close to the Government, that wasn't the real issue. The real issue was that Connell had enormous influence in the financial community at that time."

8.16.7 Yet on his own testimony, additional financial support was not a particular need of Mr Dempster's in April 1984. What was needed was success in the

selection process which was to ensue, something which would be determined by the Government, not the financial community.

8.16.8 When Mr Roberts was asked whether it was envisaged that the consortium might seek to utilise Mr Connell's apparent direct access to people in Government, he responded:

> "I thought that he was influential in government and as I repeated, I thought it was better to have him onside than not have him on side."

8.16.9 Mr Roberts said that in his initial discussions with Mr Connell they had contemplated a role for Mr Connell in underwriting Mr Dempster's equity to the extent that might be necessary and giving financial advice on the application. Mr Roberts acknowledged that, in fact, Mr Connell had not been used for such purposes.

8.16.10 Mr Connell by contrast, testified that the $2 million was consideration solely for making available the financial services which had been indicated in his conversations with Mr Roberts and which were never employed. While he "wasn't really called upon to do anything", Mr Connell firmly rejected Mr Dempster's evidence that Mr Connell had been paid the $2 million in consideration of his not assisting any rival application. Indeed Mr Connell continued to actively assist the Burswood Ltd (Caesar's Perth) application through to the July 1984 Cabinet Sub-committee interviews in which that syndicate was unsuccessful. Mr Connell denied lobbying the Government on behalf of the Dempster/Tileska consortium but then said he might well have discussed the matter with Mr Burke "and obviously because I had an interest I'd be keen that he supported the Dempster Genting proposal but I don't recall any specific discussion about it".

8.16.11 Thus the Commission is left with the combined testimony of witnesses indicating that Mr Connell was paid $2 million for nothing at all. There was no real consideration. Suggestions of what the consideration was varied, but in each case were strikingly tenuous. Mr Roberts spoke of contemplating provision of certain services to Mr Dempster, yet he had no basis for any firm belief that Mr Dempster required those services and indeed did not suggest that Mr Dempster's consent to payment was founded on any such need. Mr Roberts recalled that "it wasn't expressed that he [Mr Connell] would or wouldn't play an active role at that stage but I think that it was more that we were just going to — you know, it was nice to have him aboard". Mr Dempster apparently did not confirm his understanding of Mr Connell's obligations under the arrangement with Mr Connell personally, even though they knew each other quite well. Mr Connell said that "it was generally known that L R Connell and Partners were involved in advising the Perrott bid ...", but Mr Dempster testified that he knew nothing of it. Mr Roberts acknowledged that during his April discussions with Mr Connell, the latter had "mentioned that he was adviser to some groups" and that "we didn't tie him up to say that he wouldn't be in with anyone else, but on the other hand we probably should have and we naturally thought he wouldn't be with anyone else". It is difficult

to resist the conclusion that Mr Connell was to receive a success fee of $2 million in return for using his influence with the Premier in order to ensure the success of the Dempster/Genting bid.

8.16.12 The manner in which the payment by the consortium to Rothwells was made also warrants comment. Notwithstanding Mr Roberts' role in bringing the parties together, it seems surprising that they chose to pass the money to Rothwells through Multiplex rather than directly from BML, the alleged recipient of Mr Connell's services. It is difficult to apprehend what pursuing this course achieved apart from obscuring the identity of the ultimate payee in the records of BML and perhaps conferring on the payment the character of a cost of development. That this procedure for payment was clearly contemplated when the arrangement was made in April 1984 does not diminish its irregularity. Mr Dempster's explanation was that since Multiplex was the principal which had come to him with the proposal it was appropriate that it should be the conduit through which the money should be passed. One could be forgiven for thinking that this explanation merely confirms Mr Dempster's eagerness to distance himself from the transaction. Multiplex was not the principal in any real sense. It was the builder. In reality, Mr Dempster was the principal and that was why BML, not Multiplex, contributed the $2 million.

8.16.13 On 11 June 1984, some four weeks before the Cabinet Sub-committee's selection of his consortium as one of the two finalists, Mr Dempster wrote Mr Connell a personal note which commenced:

> "Enclosed find my personal cheque for the amount discussed. I confirm a further amount on 1st August '84."

Enclosed was a cheque for $25,000 payable to "State Labor Organisation". The note contained a postscript in the following terms:

> "P.S. This cheque is from me and not including other person's undertaking — just in case delay etc."

8.16.14 Mr Dempster confirmed that the "other person" referred to was Mr Roberts. The next day Mr Roberts paid a cheque for $25,000 to the "State Labor Organisation". Prior to being presented with the note, Mr Dempster claimed a lack of any recollection of any dealings with Mr Connell over political donations. Mr Connell could not assist with any elucidation of the circumstances surrounding the note of 11 June 1984, saying he could "only guess that it was some contribution to the Labor Party that was being sought and I'd been asked to follow it up". Mr Dempster's explanation was as follows:

> "I understood at the time people were asked to contribute some amounts of money and I was approached to donate $25,000 which I did. I also rang John Roberts to see whether he had been approached and he had been."

Asked what he meant to convey by the "PS" to his 11 June 1984 note, he said:

> "Just to let Laurie know that I was following it up with John. Subsequently, John advised me he had sent the cheque in so after I had forwarded this note he had made the $25,000 donation."

8.16.15 Why Mr Dempster would take it upon himself to "follow up" donations by others when he had not been asked to do so is unclear. Such fervour might be thought particularly surprising in someone who was a member of the Liberal Party and possessed the sort of political outlook of which Mr Dempster has given evidence. When Mr Roberts and Mr Dempster were making much more substantial donations in the following year, Mr Roberts did not feel the need to inform Mr Dempster of the amount which he ultimately paid.

8.16.16 When questioned about why he sent his cheque to Mr Connell rather than directly to the State Labor Organisation, Mr Dempster said:

> "Connell rang and said that he understood I had been approached for a donation and that he was collecting them all and sending them in; would I send the cheque up to him. So, as a consequence, I wrote the note and forwarded the cheque."

8.16.17 Mr Roberts said that Mr Connell must have been rounding up funds for the Labor Party and this would explain why Multiplex sent the cheque for $25,000 to him. He mentioned that Mr Bond had also donated $25,000. He denied that the Multiplex donation was associated with the Casino and said that the timing must have been just a coincidence.

8.16.18 Mr Dempster's note of 11 June 1984 ended with the words "Thanks for your assistance and friendship. Sincerely, Dallas". It is difficult to see how soliciting a donation could be construed as "assistance" to the donor, which raises a question as to what assistance Mr Connell had provided to Mr Dempster. Unfortunately, the evidence does not provide an answer.

8.16.19 When Mr Connell received Mr Dempster's note and the accompanying cheque, he penned a short note to Mr Jack Walsh, who was working for Mr Connell at the time, in the following terms: "Jack, Dempster's cheque herewith. Please arrange suitable letter to Burke. Laurie". When asked by Counsel for Mr Dempster whether he could say what sort of letter he was referring to, Mr Connell replied that he could not. When Counsel suggested perhaps a sort of covering letter, Mr Connell agreed "Covering letter, ‘Here's the cheque’". This answer may imply that the cheque was sent to the Premier, rather than directly to the State Labor Organisation. If this was so, no satisfactory explanation as to why the donation was so deliberately brought to the Premier's attention was forthcoming. Mr Walsh has since died and neither Mr Connell or Mr Brian Burke could recollect the circumstances. The latter did ask whether the

"Burke" referred to might have been Mr Terry Burke. Mr Connell testified that he had little involvement with Mr Terry Burke, and that he presumed that the "Burke" referred to was Mr Brian Burke.

8.16.20 Accompanying the notes from Mr Dempster to Mr Connell and from Mr Connell to Mr Walsh on the file from which they were obtained was a handwritten message which read: "Fran, Mr Walsh says you should keep this please". Mr Connell testified that "Fran" was his secretary. There has been no evidence as to why it was considered necessary to retain such correspondence in Mr Connell's files when his testimony would suggest that it was unrelated to his business activities.

8.16.21 Mr Dempster said he was certain that notwithstanding the reference in his 11 June 1984 note to a further amount to be paid on 1 August 1984, no other payment was made at that time. Reference appears elsewhere in this report to the substantial donations made by Mr Dempster and Mr Roberts during the following year. The nature of the assistance provided by Mr Connell to Mr Dempster and of any relationship between that assistance, the $2 million payment to Mr Connell and the payment of donations to the ALP, remains unknown.

8.16.22 The position as we have described it in this section was the position revealed by the evidence received by the Commission before 7 August 1992. However, on that date the Commission received an anonymous communication through the post. The envelope contained only one document, being a copy of a letter dated 1 May 1984, marked "STRICTLY PRIVATE AND CONFIDENTIAL", addressed to Mr John Roberts, Multiplex Constructions Pty Ltd. The letter was typed on the letterhead of L R Connell & Partners and was signed by Mr Connell. The letter read as follows:

> "Dear John,
>
> This letter is to irrevocably confirm that this firm and I, will be exclusively acting as consultants for you in the obtaining of all the necessary approvals to build a casino complex on Burswood Island.
>
> In the event that you or your nominated client receive the approvals then I will be paid a fee of $2,000,000 (two million dollars).
>
> I will regularly keep you advised as to what steps I am taking to ensure that you are fully informed.
>
> Yours sincerely,
>
> L.R. CONNELL"

8.16.23 Mr Connell was recalled to assist the Commission on 19 August 1992. He conceded that the first paragraph was at odds with his previous assertion that he had never agreed to act exclusively on behalf of Mr Roberts and Mr Dempster. He was unable to give any satisfactory explanation for this discrepancy. His evidence failed to throw further light on the matter. A copy of the letter was sent to the solicitors for Mr Dempster and Mr Roberts, inviting comment.

8.16.24 The Commission views the letter as of great importance, emphasised by the failure on the part of Mr Roberts and Mr Connell and probably Mr Dempster, to produce it to the Commission. In the light of the prevarication demonstrated by the earlier evidence of the persons named, the Commission finds that the phrase "all the necessary approvals to build a casino complex on Burswood Island" can have only one meaning. It clearly does not suggest a financial role for Mr Connell as Mr Roberts said had been contemplated in the initial discussions. Nor does it suggest, as Mr Dempster insisted, that Mr Connell was not to be involved in any positive action to assist the bid. Mr Connell was engaged, for a success fee of $2 million, to provide his exclusive services to ensure that Multiplex built the casino. That objective necessarily implied that the Tileska consortium won the approval of the Government to proceed with the development. The objective was achieved and Mr Connell received his fee, paid by BML. Unfortunately, no witness with the necessary knowledge has been willing to inform the Commission of the steps taken by Mr Connell to bring about success.

8.17 Donations

8.17.1 Mr Dempster testified that his political philosophy had never changed and that he was "100% free enterprise". He had been president of the Young Liberal Movement at 19 and had remained a member of the Liberal Party ever since. Evidence before the Commission disclosed a range of donations by Mr Dempster and entities with which he was associated to the Liberal Party and other political organisations espousing a "free enterprise" philosophy over the period 1982 to 1989. The total of such donations was more than $116,000, of which $80,000 was paid to the Institute of Public Affairs, a "right-wing think tank" to which Mr Dempster belonged. Over the same period, Mr Roberts' Multiplex Constructions Pty Ltd donated some $61,000 to the Liberal and National parties.

8.17.2 However, in this period, the considerable level of donations paid by entities associated with these two individuals to "free enterprise" political organisations was thoroughly eclipsed by their support for the ALP cause. As we have seen, in June 1984 they each donated $25,000 to the State Labor organisation. Then in May or June 1985 the Premier contacted each of them. He said that he was approaching most major businessmen in Perth to request contributions toward a fund which he was creating to finance the Government's campaign for re-election the following year. Mr Dempster recalled a figure of $400,000 to $500,000 being suggested by Mr Burke. Mr Roberts was "pretty positive" that in his conversation with the Premier a sum of $300,000 was requested. In consequence of these approaches, cheques for a total of $400,000 from Dempster Nominees Pty Ltd and $300,000 from Multiplex Constructions

Pty Ltd were paid into the No. 1 Advertising Account during June and July 1985. The evidence of Mr Dempster and Mr Roberts which attributed the size of their contributions to express requests for such sums from the Premier is convincing, notwithstanding Mr Burke's initial denial that he ever suggested particular figures.

8.17.3 As the evidence stood until 6 October 1992, Mr Dempster said he had donated $400,000 during June and July 1985. The pattern of cheques drawn by Dempster Nominees is set out below and, because we have reached the conclusion that an additional $200,000 was donated, we have included in the list the two cheques which we are satisfied were used for that purpose but marked them as "unknown" in the list:

Cheque No	Amount	Purpose
024001	$100,000	Unknown
024002	$100,000	Admitted donation
024003	$100,000	Unknown
024024	$87,500	Admitted donation
024025	$132,500	Admitted donation
024026	$80,000	Admitted donation

8.17.4 Evidence given on 6 October 1992 has highlighted circumstances that combine to satisfy us that the two unknown payments were also donations paid into the No 1 Advertising Account. The circumstances were as follows:

(a) Two amounts of $100,000 each were paid into the No 1 Advertising Account on 7 and 13 June 1985 and, although records to identify positively the source of each payment are no longer available, each deposit was made with a bank cheque drawn on the R & I Bank, Perth Branch.

(b) Dempster Nominees banked at that Branch. On each of the days the bank cheques were purchased, the account of Dempster Nominees at that Branch was debited with amounts of $100,000 drawn by cheques 024001 and 024003, the "unknown" payments. Only one other account was debited with an amount of $100,000 on either of those days and records established it was not connected with any payment to the No 1 Advertising Account.

(c) Only limited records of Dempster Nominees were available to the Commission. The cheque butts 024001 and 024003 related to each of the "unknown" debits of $100,000 are not available. The records of Dempster Nominees do establish, however, that each of those amounts was entered as a "sundry loan" and written off. The admitted donations that were paid into the No 1 Advertising Account received the same treatment in the records of Dempster Nominees.

(d) At about this time the Premier, Mr Brian Burke, approached a number of businessmen requesting large donations to support the Government's campaign for re-election. Donations of $300,000 were made by Mr Roberts, Mr Connell, Mr Goldberg and Mr Bond through associated entities.

(e) Mr Dempster could not recall the use made of the two unknown amounts of $100,000. After initially being positive that he donated only $400,000, in the face of the evidence he acknowledged it was possible he donated a total of $600,000.

(f) The cheques numbered 024001, 024002 and 024003 were debited to Mr Dempster's account on 6, 11 and 13 June 1985. On 25 June 1985, Tileska paid $300,000 to Dempster Nominees, said to be for consulting fees. Both the records of Dempster Nominees and Tileska record this payment in that fashion. The following day, 26 June 1985, cheque No 024024 for $87,500 was debited. This was followed on 28 June and 8 July 1985 by debits of $132,500 and $80,000 being consecutive cheques 024025 and 024026. Mr Dempster said it was a coincidence that the payment by Tileska came between two lots of $300,000 that were paid out from the account of Dempster Nominees.

8.17.5 The cheque butts used to draw cheques for the admitted donations each record the cheque was made out to "cash". Mr Dempster said he was anxious to preserve confidentiality and did not wish the bank to be aware that he was donating to the Labor Party. He said the donations were split rather than made in one payment because of similar concerns for confidentiality and financial reasons associated with his overdraft.

8.17.6 We are satisfied that the two unknown cheques were also used to pay donations to the No 1 Advertising Account. The coincidence of consecutive cheques totalling $300,000 being used for donations being followed by both a receipt from Tileska of $300,000 and, thereafter, a further block of three cheques used to donate an additional $300,000, particularly in the light of the fact that other business persons only donated $300,000, strongly suggests that Dempster Nominees was used as a conduit by Tileska for a donation by that company to the ALP. Although Tileska has produced documents through its solicitors, because of the late discovery of this evidence we have

not had the opportunity of questioning the relevant representatives of Tileska in order to investigate further whether the payment was for consulting services or was, in reality, a payment destined for the ALP. We therefore refrain from making any finding in this regard.

8.17.7 As indicated, however, we are satisfied that Mr Dempster donated a total of $600,000 and not $400,000 to which he originally testified. We are also satisfied that Mr Dempster could not have been mistaken in this regard. He chose not to disclose the additional $200,000.

8.17.8 On 15 June 1987 both Mr Dempster and Mr Roberts attended a luncheon with the then Prime Minister, Mr R L J Hawke, which Mr Burke hosted during the 1987 federal election campaign. Following that occasion, Mr Dempster donated $95,000 to the ALP campaign and Mr Roberts donated $200,000.

8.17.9 Excluding the above donations to the federal campaign, donations to the ALP cause from 1982 to 1989 from Mr Roberts totalled $487,000, including a $100,000 contribution to Mr Dowding's 1989 election campaign. Again excluding the assistance federally, donations to what might broadly be described as the ALP cause by Mr Dempster over that period totalled $717,000, including $20,000 to the Perth Trades Hall administration and $65,000 to the John Curtin Foundation. Mr Dempster considered his donation to the latter in October 1984 to be of a charitable, rather than a political nature, though it had been solicited by Mr Terry Burke, the Premier's brother.

8.17.10 As to what would motivate a man with his political philosophy to contribute such substantial sums to the ALP through the eighties and particularly in 1985 Mr Dempster said, as has earlier been noted:

> "When Burke was elected — and everyone appears to be very wise in hindsight, but I believed that he was very good for the State. He had the State on the move. He was actively pursuing new projects, new opportunities for the State, and I believed it was in our best interest to assist him with his funding campaign for the next election ... He didn't lean on me, he didn't coerce me; it was my decision and I believed it was in the best interests of not only myself but the best interests of the State of Western Australia."

8.17.11 In relation to his donation to the federal campaign in 1987, Mr Dempster commented:

> "I believe likewise at the same time the Federal Government was doing a good job also. And it's particularly important — I believe anyhow — for a State like Western Australia which is very isolated —

> particularly in the political sense — that when you've got a federal government in power you should, as a state, be seen to be supportive of that particular federal government."

8.17.12 Mr Roberts said that when he was approached in 1985:

> "Things were going well for me and I was very pleased with the way Labor was going under Mr Burke at that time and, as I said, I checked around and contributed. I also felt that the union movement in Western Australia had a contribution — made contributions to the Labor Party and most union leaders, or some union leaders, got elected to Parliament ... and, consequently have good access to the Minister for Industrial Relations and are regarded as friends of Labor. I thought also that it wouldn't hurt me to be a friend of Labor, and also to have the same access to the Minister for Industrial Relations ... $300,000 was asked for and when I checked around with other people in the community, it seemed to be on the lesser end than what they were paying."

8.17.13 The question of political fundraising, particularly the propriety of such fundraising by parliamentary leaders, has been raised in the hearing of other terms of reference. It will be addressed generally elsewhere in Part II of our report.

8.18 "Tidying-up" of Departmental records

8.18.1 Evidence was given to the effect that over several weeks prior to Mr Burke's retirement as Premier, four or five members of his personal staff were engaged in removing material from departmental files and destroying it. The task was major, involving hundreds of files. It was described by one witness as a "mammoth job". It was done after normal working hours on weekdays and on weekends. There was no consultation with or involvement of records office staff.

8.18.2 The recollection of those who were engaged in this task differed. Nevertheless, a sufficiently clear picture emerged. The work was undertaken on instructions from the Premier conveyed to his private secretary. She recalled that only yellow stickers carrying his personal notes were to be removed, although others recalled that all personal material in his handwriting, not confined to yellow stickers, was to be removed. For the most part, it involved the removal of yellow stickers. However, in some instances, a folio would be removed from a file, part only of its content would be photocopied, the copy would be placed on the file and the original destroyed. As time went on and a greater sense of urgency prevailed, that part of a folio which contained unwanted material was simply torn off and disposed of. In particular, two files relating to the casino were produced with indications that their contents had been interfered

with: folios with the lower part having been torn off; documents stapled together; and folios re-numbered. Mr Burke says that he asked his principal private secretary to ensure that no irrelevant and indiscreet yellow stickers were left on the files but that nothing of any substance that affected the nature of the files should be removed.

8.18.3 Whatever may have been the instruction from the Premier, the manner in which it was carried out carries alarming implications for the integrity of public records. We shall address this matter more generally in Part II of our report.

8.19 Conclusion

8.19.1 The Commission has found no impropriety in relation to this term of reference.

8.19.2 The vision, industry and supreme confidence which took a comparatively undistinguished proposal unrelated to any particular site over the name of Tileska in July 1983 to the detailed description of a Burswood development addressed in November 1983 by Mr Dempster personally to the Premier followed by an extravagant glossy brochure in December 1983 not surprisingly resulted in the Tileska/Dempster proposal being unbeatable. It was just what the Government wanted. It is understandable that others should feel aggrieved by the seemingly irresistible advance of the Dempster machine after the closing date and wonder how this "inside running" could have been achieved without some impropriety somewhere. But the fact remains that despite as thorough an investigation as has been open to the Commission, no impropriety in that regard has been established.

8.19.3 The Commission was concerned by evidence that Mr Connell was paid $2 million, said to be a consultancy fee. According to the explanations given by Mr Connell, Mr Dempster and Mr Roberts, Mr Connell, in essence, was paid $2 million for doing nothing. We have found those explanations unconvincing. Notwithstanding the Commission's misgivings, no impropriety was established by the evidence.

8.19.4 Only four weeks before Mr Dempster's consortium was chosen as one of two finalists for the casino, Mr Dempster, a Liberal Party member, began making large donations to the ALP cause. Mr Roberts, too, was coincidentally donating large amounts at this time.

8.19.5 Regrettably, the evidence has not allowed us to reach any conclusions on these matters. But we have noted the scale and timing of political donations by Mr Dempster and Mr Roberts. Between 1982 and 1989, Mr Dempster gave more than $800,000 to the ALP cause. In the same period, he gave $116,000 to the Liberal cause. On the other hand, Mr Roberts — whose company, Multiplex Constructions Pty Ltd, built the casino — gave $692,000 to the ALP cause during those seven years.

8.19.6 Political fundraising and the propriety of the involvement of parliamentary leaders, including Mr Burke, in soliciting such donations is discussed in chapter 26.

8.19.7 **Mr Ayton**. The major allegations made in this term of reference have arisen from the observations of Mr Ayton. Much has been said by counsel given leave to appear for different parties, in particular by counsel for Mr Dempster and counsel for the Casino Control Committee, in an effort to discredit Mr Ayton's evidence. We reject the submissions that he has shown himself to be biased or obsessed, even though as will be seen we discount his suspicions a good deal. We believe him to be an upright, conscientious investigator.

8.19.8 **Mr Dempster**. In his report in 1984, Mr Ayton described Mr Dempster as "a corporate opportunist". No doubt to many people this is a term of opprobrium. Apparently, it was particularly so to Mr Burke, because, without any regard to the facts on which it was based, he criticised Mr Ayton for using it. Mr Dempster described his personal political philosophy in terms which are not so far removed from a strict definition of a corporate opportunist. He explained:

> "... my view is that you continually follow up any business arrangement you entered into. If someone says "Please desist; don't send me any more information", you would desist, but there is nothing in there that says that you can't continue to supply information."

8.19.9 Certainly, if one reflects on the three major decisions, Mr Dempster left no stone unturned to encourage a favourable decision. The three decisions we have in mind are the initial selection of the Tileska/Dempster proposal, the grant of the gaming licence before Christmas 1985 and the decision of Mr Smith not to prosecute for the alleged false statements in the prospectus and letter concerning the rights issue.

8.19.10 **Mr Alan Smith**. With respect to the prospectus and rights issue, the agonising of Mr Smith and the vacillation that preceded his decision not to prosecute emphasise how close Mr Dempster and his colleagues must have been to facing charges.

8.19.11 It is clear that one factor that led to a decision favourable to Mr Dempster was the manner in which his solicitors kept up the pressure with submissions and statements of witnesses over the months preceding the decision. The witness statements, some of which were from people who would have had to be called by the Crown, were in some respects inconsistent with earlier statements given by them, thereby highlighting the difficulty that would confront the Crown at the trial.

8.19.12 Again, it is understandable that the investigators, Mr Ayton and Mr Jacobs, should hold an unswerving conviction that the evidence they had gathered earlier should lead to prosecution. On the other hand, the evidence clearly establishes

that the decision not to prosecute fell within the range of a proper prosecutorial discretion.

8.19.13 No impropriety has been established by any person or corporation in the affairs of the Government insofar as the casino is concerned. Of course, it must be emphasised that it was not within the authority of the Commission to determine the basic question whether some statements in the prospectus and in the subsequent letter explaining the need for a rights issue were true or false and, if false, were deliberately and therefore fraudulently made.

8.19.14 The Commission's terms of reference do not authorise us to embark on this question because it was not related to the affairs of Government. It must remain a question to be further explored elsewhere, if at all.

8.19.15 **Casino Control Committee**. The CCC was roundly criticised by Mr Ayton. Again, we can find no reason to blame him for providing a detailed factual record of proceedings over the years as they appeared to him. But in evaluating the role of the CCC, it must be remembered that the Committee faced a daunting task during the establishment phase, including the selection of the developer.

8.19.16 The meeting with the Commissioner of Police on 12 October 1984, after receiving Mr Ayton's interim report, graphically reflects the dilemma they faced. Clearly, they were affected by a sense of urgency to make a decision. The interest and anxiety of the Premier for the development to get under way was well known. On the other hand, they had received Mr Ayton's report which foreshadowed that several months would be needed before a police clearance to either of the two finalists could be given.

8.19.17 In the result, they asked that Mr Ayton confine his investigations to the Tileska group, leaving the Federal Hotels/Sabemo consortium to one side. This was a sensible approach, given that the former was favoured at that stage. On 5 November 1984, the Commissioner of Police made a progress report to the CCC. It reported that a visit to Malaysia by the Minister, Mr Dans, and Mr Ayton, had revealed nothing to discredit Genting but that nevertheless he was unable to give a police clearance, having regard to the limited amount of investigation that Mr Ayton had been able to do in the time available.

8.19.18 The CCC considered the report in light of all their other investigations and resolved to recommend that the contract to construct the resort be granted to the Tileska/Dempster group. The report expressly recorded the thanks of the CCC to the Commissioner of Police for his assistance, but failed to reveal that the recommendation was made without a police clearance for either Genting or Mr Dempster.

8.19.19 In this regard the report of the CCC was deliberately misleading. It is perfectly understandable that the CCC should have felt obliged to proceed to a recommendation at that time in favour of the Tileska/Dempster group. The

circumstances, viewed in their totality, did not warrant any further delay and certainly not a delay of the magnitude of which Mr Ayton was thinking. The only criticism to be made of the CCC is that it should have disclosed that so far as they went the police inquiries had not proved unfavourable but that a formal clearance had been withheld.

8.19.20 The CCC was responsible, *inter alia*, for monitoring compliance with the agreement between the Government and the developer embodied in the Schedule to the *Casino (Burswood Island) Agreement Act* 1985.

8.19.21 This imposed an onerous task on the CCC during construction. It held many meetings and was required to make numerous difficult decisions. The magnitude of the proposed complex, so it was thought, offered many advantages to the people of Western Australia — the size of the investment, the employment opportunities, the likely boost to tourism, and the development of a derelict piece of Crown land. With less than two years to run from the ratification by Parliament of the agreement with the developers to the holding of the America's Cup off Western Australia and with the 12-metre World Championships to be held during the intervening period, everything pointed to the desirability of a speedy and trouble-free construction phase. In fact, much was achieved.

8.19.22 **The grant of the gaming licence**. The Commission found no impropriety was established by the evidence about the grant of the gaming licence. We have attributed Mr Ayton's belief that Mr Chapman received Mr Dans' approval to the grant of the gaming licence before the CCC made any recommendation to a misunderstanding of something that Mr Chapman must have said or done at the meeting in question.

8.19.23 It would not be surprising for Mr Dans to have said, after his inspection with Mr Chapman on 23 December 1985 and talking to Mr Dempster and other representatives of BML on the site, that he would be prepared to approve the grant then and there if the CCC were to recommend it. Mr Dempster's advocacy and his readiness to comply with any conditions that the CCC might impose on the grant could well and quite properly have persuaded the CCC and the Minister that the casino was so close to operational readiness that the significant delay which was inevitable if the licence were not granted by 24 December 1985 was not warranted.

8.19.24 At the same time, Mr Ayton's scepticism was not without substance, given that his role was to see that the regulatory controls so carefully prescribed in the *Casino Control Act 1984* and the Regulations were observed.

8.19.25 Although the decision to make the recommendation did not accord strictly with the requirements of the *Casino Control Act 1984*, and the Regulations and the agreement, it was nevertheless a responsible decision in all the circumstances. We have received no evidence that Mr Dempster or any other person sought improperly to influence the Committee.

8.19.26 **The rights issue**. Criticism also has been directed at the CCC over its decision to approve the rights issue by the Burswood Property Trust to unitholders to raise more funds to meet a blow-out of costs of $70 million ($60 million according to the notice to unit holders).

8.19.27 This additional fund-raising could not proceed without the approval of the Minister and without it the developers faced a financial crisis which threatened the successful completion of the project. During the CCC's consideration of an application for a recommendation that the Minister approve the rights issue, doubts emerged as to the veracity of statements in the prospectus. The question then arose as to whether the CCC should withhold a recommendation pending a resolution of this problem.

8.19.28 It eventually was decided to make the necessary recommendation so as not to prevent the successful completion of the construction but at the same time to recommend to the Minister for Racing and Gaming that the matter be referred to the Attorney-General for investigation by the Corporate Affairs Department.

8.19.29 Such a recommendation appeared in a draft of a letter from the CCC to the Minister but apparently was deleted before the letter was sent. Mr Chapman explained that it was decided to delete the passage from the letter because it could cause undue concern in the community if it became public knowledge. He said that he conveyed the recommendation orally to the Minister but such evidence as there was on the subject suggests that the matter went no further.

8.19.30 The rights issue was duly approved and the development proceeded. A year later, in November 1986, a complaint from a member of the public, Mr John Samuel, reached the Corporate Affairs Department and an investigation began.

8.19.31 It is easy enough now to say that the CCC should have retained the recommendation to refer the matter to the Attorney-General in its report on the rights issue. Clearly, it should have done. However, we had no evidence of any undue pressure being brought to bear on the CCC from any quarter and therefore no evidence of impropriety in relation to the decision.

8.19.32 **Key employee licences**. Later decisions of the CCC which we considered were those granting key employee licences to Mr Dempster and to Mr Hughes, both directors of BML, and the decision to recommend that approval be granted to the sale of the hotel.

8.19.33 We have already outlined the circumstances surrounding these decisions and absolved the CCC of any blame.

8.19.34 **Destruction of official records**. Over several weeks before Mr Burke's retirement as Premier, four or five members of his personal staff were engaged in removing material from departmental files and destroying it. The task was

major, involving hundreds of files. It was described by one witness as a "mammoth job". It was done after normal working hours on weekdays and on weekends. Records office staff were not consulted or involved.

8.19.35 In particular, two files on the casino indicated interference with pages torn out, folios renumbered and documents stapled together. These documents may well have been important to the inquiry into this and other terms of reference. We note that all records of Government activities necessarily form part of the official record of the State for accountability and historical purposes. The deliberate destruction of official records cannot be justified and those responsible for authorising it deserve censure. This issue is canvassed further in Part II of our report.

8.19.36 **Alteration of the Cabinet record**. After its election in 1983, the Burke Government began implementing its policy on establishing a casino, culminating in early 1984 with Cabinet's adoption of a draft minute prepared by Mr Bill Thomas, then a ministerial officer with the then Minister for Administrative Services, Mr David Parker.

8.19.37 Mr Thomas' draft, dated 30 March 1984 and presented to Cabinet by Mr Parker, recommended that the Government negotiate with Tileska Pty Ltd, a company associated with Mr Dempster, on establishing a casino on Burswood Island. Cabinet adopted the minute on 2 April 1984 though no record of the decision appears in the official Cabinet record.

8.19.38 Over the next two days, Mr Burke was persuaded to invite other groups to bid for the casino so the Government could not be criticised for showing favourable treatment to Mr Dempster. A revised proposal was agreed by the Labor Party Caucus on 3 April 1984 and was due to be ratified by Cabinet at its next meeting on 9 April 1984.

8.19.39 However, on 4 April 1984, Mr Burke announced that submissions would be invited for a casino on Burswood Island. The matter was never referred back to Cabinet and, again, no record of it appears in the official Cabinet papers.

8.19.40 We have found nothing improper in Mr Burke's action, even though it was irregular.

8.19.41 Unfortunately, the contemporaneous Cabinet record failed to record the decision. A recent insertion, however, made by Mr Thomas, the Parliamentary Secretary of the Cabinet, purported to record the decision, but did so inaccurately. As we have noted elsewhere, Cabinet records serve two important purposes: first as an accountability mechanism, and second, as an accurate historical record of government in this State. Mr Thomas' actions offend both objectives.

8.19.42 **Further matters**. Finally, reverting to the terms of reference, the Commission reports:

(a) There are no matters addressed in this chapter which should be referred to an appropriate authority with a view to the institution of criminal proceedings; and

(b) There are a number of matters addressed in this chapter which render changes in the law of the State or in administrative or decision-making procedures necessary or desirable in the public interest. These matters will be addressed in Part II of our report.

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7.1 The term of reference

7.1.1 The Commissioners are required by their Commission, as affected by the *Royal Commission into Commercial Activities of Government Act 1992*, to inquire and report whether there has been —

(a) corruption;

(b) illegal conduct; or

(c) improper conduct,

by any person or corporation in the affairs, investment decisions and business dealings of the Government of Western Australia or its agencies, instrumentalities and corporations in respect of the acquisition of Northern Mining Corporation NL in 1983 and further to report whether —

(d) any matter should be referred to an appropriate authority with a view to the institution of criminal proceedings; or

(e) changes in the law of the State, or in administrative or decision making procedures, are necessary or desirable in the public interest.

7.2 Australian Labor Party platform

7.2.1 Northern Mining Corporation NL ("Northern Mining") was incorporated in Victoria and during all material times had its registered office in Victoria. Most of the events which are relevant to this term of reference took place in 1983, but it is first necessary to go to some events which occurred prior to that year.

7.2.2 The Australian Labor Party (WA Branch) State Platform adopted in August 1982 at the State Conference of the Labor Party, and operative from 1 September 1982 under the heading "Financial Management" page 15, stated:

> "Labor believes that in the context of the institutional structure of Western Australia and the overall availability of resources, there is a requirement for a financial system which operates efficiently

> to provide finance for those activities which generate maximum benefits to Western Australians."

Then, under the heading "Requirements", it stated:

> "Labor believes that the capital required for the major development projects in Western Australia should be so mobilised as to enable greater Western Australian and Australian equity and participation, thus ensuring a greater return to Western Australians from the State's development."

The Platform also asserted a belief that there should be local control and ownership of Western Australia's land and resources. It was specifically recognised that a Labor Government would "actively participate with private enterprise to establish a financial institution to be known as the Western Australian Development Corporation, for the purpose of attracting major inflows of capital to Western Australia and developing the Western Australia-based finance market".

7.2.3 Under the heading "Minerals and Energy", at page 21, the Platform stated that Labor asserted that:

> "To obtain an orderly and balanced exploitation of Western Australia's mineral resources, a Labor Government will use the powers available to it to ensure the maximum possible Western Australian and Australian control and ownership of the State's mineral development."

Accordingly, a Labor Government "will seek participation in mineral development through the agency of the Western Australian Development Corporation".

7.2.4 At page 24, under the heading "Diamonds", it said:

> "In order to maximise the potential value of the diamond industry to the Western Australian economy, a Labor Government will work to achieve
>
> > a marketing and valuation system to ensure full market value is obtained for diamonds recovered;
> >
> > the establishment of a cutting and polishing industry in Western Australia;

> an equity in the diamond industry equivalent to that held by foreign Governments."

7.2.5 The proposals contained in the platform reflected the view set out in a document dated 7 September 1982 prepared by Mr Michael Naylor, who was then a research officer to the then Leader of the Opposition, Mr Brian Burke. The document is entitled "State Government Participation in the Diamond Industry in Western Australia: Policy Options". The options included the participation between the Joint Venturers in the Ashton Joint Venture and the Government, which effectively resulted in the Government becoming a joint venture partner. The view was expressed that:

> "The extent of the WA Government's participating interest must remain negotiable from a minimum of 15%."

Despite its inclusion in the Platform, the Labor Party's ambition to acquire equity in the Ashton Joint Venture was not given great prominence in the election campaign. According to Mr Naylor, it was perceived in some quarters that the policy might be regarded as a precursor to some form of nationalisation of the diamond industry, and might therefore be used as a weapon against the Party in its campaign.

7.2.6 The Labor Party won Government on 19 February 1983 and Mr Brian Burke was appointed Premier. Mr Malcolm Bryce was appointed Deputy Premier and held the portfolio of Economic Development and Technology and at the relevant time was the Minister in charge of the Department of Resources Development ("DRD"). The co-ordinator and head of that Department at that time was Mr S A Hohnen.

7.3 The Ashton Joint Venture

7.3.1 On 17 November 1981, the Ashton Joint Venture Agreement ("the Agreement"), was executed between the then Premier, Sir Charles Court, acting on behalf of the State, CRA Exploration Pty Ltd ("CRA"), Ashton Mining Ltd ("Ashton"), Tanaust Pty Ltd ("Tanaust"), AO (Australia) Pty Ltd ("AO"), and Northern Mining (together referred to as "the Joint Venturers") for the exploitation of diamond deposits at Argyle in the north-west of Western Australia. The joint venture created was known as and is referred to in this report as "the Ashton Joint Venture". The mining areas

which were the subject of the agreement are collectively referred to in this report as "the Argyle mining area".

7.3.2 The Agreement was embodied in an Act of Parliament, the *Diamond (Ashton Joint Venture) Agreement Act 1981*. This was an Act, according to the long title, to ratify and authorise the implementation of the Agreement and "to make provision as to rights in respect of certain land and minerals to which the Agreement relates and as to the security of operations carried on pursuant to or for the purposes of the Agreement, and for incidental and other purposes". The ownership of the Ashton Joint Venture was allocated among the parties as follows: CRA and its associated companies held 56.8%, Ashton and its associated companies, which included Tanaust and AO, 38.2% and Northern Mining 5%. It was through Ashton that the Malaysian Government owned 15% of the Ashton Joint Venture.

7.3.3 It is necessary to go to some of the provisions of the Agreement. In clause 1, the phrase "relevant town" was defined in relation to the Argyle mining area as the town or towns to be developed by the Joint Venturers with the approval of the State in the Kimberley region as the principal housing area for their mineworkers serving the Argyle mining area and, with the approval of the State, might include an existing town. Clause 7(1) obligated the Joint Venturers to:

> "subject to the provisions of the Agreement, submit to the Minister to the fullest extent reasonably practicable their detailed proposals:
>
> (A) on or before 31 December, 1982 for the mining and recovery of diamonds from not less than 500,000 tonnes per annum of diamond-bearing alluvium from the Argyle mining area to commence not later than six months from the date of approval of such proposals; and
>
> (B) on or before 31 December, 1983 for the mining and recovery of diamonds from not less than 2 million tonnes per annum of Kimberlite ore from the Argyle mining area, such plant to be in operation not later than 31 December 1986."

Those proposals were to include plans, where practicable, and specifications where reasonably required by the Minister, and to make provision, where appropriate, for the necessary workforce and associated population required to enable the Joint Venturers to mine and recover diamonds from the area the subject of the proposal, including the

location, area, layout, design, quantities, materials and time program for the commencement and completion of the construction of each of the following:

> "(a) The mining and recovery of diamonds from ore, including plant, facilities and security measures;
>
> (b) roads;
>
> (c) relevant townsite and relevant town including housing, provision of utilities and services and associated facilities including, subject to the provisions of clause 26, transitional arrangements ... ."

Several other matters which were not relevant to this report were to be included in the proposals. It is of significance that clause 7(1)(B) stated that in relation to the provision of proposals for mining etc, the Joint Venturers "shall make provision *where appropriate* [our emphasis] for the necessary workforce and associated population".

7.3.4 Clause 7(3) provided that "each of the proposals pursuant to sub-clause (1) of this clause may with the approval of the Minister and that of any third parties concerned instead of providing for the construction of new facilities of the kind therein mentioned provide for the use by the Joint Venturers of any existing facilities of such kind belonging to the Joint Venturers or upon reasonable terms and conditions of any other existing facilities of such kind". At the time the proposals were to be submitted, the Joint Venturers were also obliged to furnish evidence of the availability of finance to undertake the proposals and their readiness to proceed.

7.3.5 Clause 8(1) provided that upon receipt of each of the proposals pursuant to clause 7(1), the Minister was obliged to approve or consider them, or require their alteration before giving approval. By clause 8(2), the Minister was obliged to give notice to the Joint Venturers of his decision on the proposals within two months of their receipt. Under sub-clause (3), the Minister was obliged to afford the Joint Venturers full opportunity to consult with him and, should they so desire, to submit new or revised proposals. Finally by sub-clause (4), the Joint Venturers could appeal to an arbitrator if the Minister did not approve the proposals, provided they thought the Minister's decision was unreasonable and they elected to refer the matter to arbitration within two months.

7.3.6 Clause 21 provided for the possibility of electricity to be provided to the Argyle mining area from a hydro-electric generation works on the Ord River. The Joint Venturers were required, with the State Energy Commission, to investigate the feasibility of such a station. However, if upon completion of their studies, the Joint Venturers were able to demonstrate to the Minister that the terms of the proposed agreement between them and the State Energy Commission for the generation works would result in an overall cost to the Joint Venturers which would be greater than the overall cost of supplying electricity to the Argyle mining area and the relevant town from a station constructed by the Joint Venturers at the Argyle mining area, the Joint Venturers were to be relieved from the need to construct a hydro-electric works.

7.3.7 Clause 25(1)(a) provided that should the approved proposals provide for the establishment of a new town or towns, the Joint Venturers should at their cost provide for housing within the town or towns and other related facilities. Clause 26 provided that the Minister, in lieu of requiring the Joint Venturers to comply with all the provisions of clause 25 for the establishment of a new town or towns, or for the assimilation into any existing town, might permit them to enter into such transitional arrangements as he might approve, provided that the arrangements would continue only until such time as the quantity of Kimberlite ore from the Argyle mining area treated for the recovery of diamonds exceeded three million tonnes in any calendar year, or 31 December 1987, whichever first occurred.

7.3.8 Clause 38(1) provided that the parties, by agreement in writing, might add to, substitute or cancel, or vary all or any of the provisions of the Agreement. Clause 40 further provided that notwithstanding any provision in the Agreement, the Minister could, at the request of the Joint Venturers, from time to time, extend or further extend any period or further vary any date referred to in the Agreement or in any approved proposal, for such period or to such later date as the Minister thought fit, whether or not the period to be extended had expired or the date to be varied had passed.

7.3.9 The Agreement imposed various obligations on the Joint Venturers apart from the foregoing, including an obligation to pay substantial royalties to the State to be calculated in accordance with a complex formula. It is sufficient for the purposes of this report to mention only that clause 29(2) obligated the Joint Venturers during each year of the Agreement to pay to the State in respect of diamonds from the areas the subject of the Agreement, a royalty at the rate of 22.5% of the above zero profit for that year, provided however that whenever in respect of a year the royalty payable at the rate

was less than 7.5% of the FOB revenue for that year or there was no above zero profit, the Joint Venturers would pay to the State in respect of that year by way of a minimum royalty payment, an amount equal to 7.5% of the FOB revenue for that year. The phrases "FOB revenue" and "above zero profit" were defined by the clause.

7.4 Northern Mining from 1981 to 1983

7.4.1 Northern Mining was an independent public company until early 1982. In early 1981 the National Mutual Life Association ("NML") emerged as the major shareholder, having acquired a stake of slightly less than 20%. In March 1981, Endeavour Resources Ltd ("Endeavour") was invited to take a placement in Northern Mining of about 10% of Northern Mining's capital. Shortly after taking the 10% placement, Endeavour commenced an on-market acquisition of further shares in the company, building up its entitlement early in 1981 to 19.76% of Northern Mining's then issued capital. In June 1981, NML sold its shares in Northern Mining to Endeavour. That brought Endeavour's interest in Northern Mining to 33% and caused the intervention of the National Companies and Securities Commission ("NCSC"), which resulted in Mr Alan Bond, the Chairman of Bond Corporation Holdings Limited ("Bond Corporation"), being convicted in December 1983 on two charges of having failed to provide substantial shareholding notices within 14 days of the purchase of the shares by Endeavour from NML. Bond Corporation was the majority shareholder in Endeavour. As a result of the NCSC investigation, Endeavour's conduct was declared unacceptable and on 7 July 1981, Endeavour announced that it would make a full takeover offer for Northern Mining. After some delays and false starts, by 30 June 1982, Endeavour finally succeeded in acquiring 100% of the capital of Northern Mining. The total consideration paid by Endeavour for its acquisition of Northern Mining was $52.829 million. The history of Endeavour's acquisition of Northern Mining is set out in detail in Endeavour's 1982 Annual Report.

7.4.2 For some years before 1982 and thereafter during all material times, the Central Selling Organisation ("CSO"), the marketing arm of the De Beers organisation of South Africa, dominated the world's marketing of diamonds. Northern Mining did not accept the concept of selling its diamonds to the CSO and refused to enter into any agreement with the organisation. The company retained its right to market its diamonds independently. As will be disclosed later, independence in marketing arrangements for its share of the diamonds was seen by the Premier, Mr Burke, and some of those advising Government as a desirable attribute of Northern Mining.

7.4.3 It is useful to make reference to a report dated 11 July 1991 prepared by Resource Finance Corporation Ltd ("RFC") for the Commission which traces details of the acquisition by Endeavour of the shares in Northern Mining. From January 1980 until about March 1981, Northern Mining share prices as quoted on Australian Stock Exchanges followed, fairly closely, those of Ashton, which was also quoted on the same exchanges. The Ashton share price declined steadily from about March 1981 until May 1982 which coincided with the decline in the free diamond market and was reflected in the reduction of the rough diamond price fixed by the CSO.

7.4.4 The value of Northern Mining shares, however, did not follow a similar trend, but increased from May 1981 until April 1982, during which period Endeavour acquired additional shares in on-market transactions. The price which Endeavour was obliged to pay for outstanding shares which it had not acquired prior to making its takeover offer was the price which it had paid NML plus a further amount representing notional interest from the date of acquisition of NML's shares. As previously mentioned, the total price paid in the final result by Endeavour was in excess of $52 million. The price of Northern Mining's shares through from January 1981 to May 1982 was considerably higher than those of Ashton.

7.4.5 The RFC report expressed the view that Endeavour paid some $20 million-$25 million more for Northern Mining than its realisable value. That proposition was not accepted by Mr Alan Bond who, at the material time, was a director of both Bond Corporation and Endeavour. Mr Bond agreed Endeavour had a large number of debts but they were substantially debts due to Bond Corporation, an associate company. He said that in the run-up to 30 June 1983, Endeavour needed to sell Northern Mining because the debt level was too high for Endeavour to sustain as it did not have sufficient repetitive income to service its debts. Mr Bond said it was necessary either to raise capital or to sell assets and it was important for Endeavour to remove the debt from its balance sheet before 30 June 1983.

7.4.6 A bundle of documents prepared for the restructuring of Endeavour, shows that a sale by Endeavour of its interest in Northern Mining to Bond Corporation was contemplated as early as 9 May 1983. The documents were prepared for discussion at the directors' meeting of Endeavour on 27 June 1983 and they show the sale of Endeavour's interest in Northern Mining to Bond Corporation was contemplated at $42 million.

7.4.7 The agreement between Endeavour and Bond Corporation seems to have been made before 30 June 1983, and probably following the meeting of directors of Endeavour on 27 June 1983. The sale was subject to approval by the members of Endeavour in general meeting under the listing requirements. By the time the Government on behalf of the State set in motion the steps necessary to acquire the shares in Northern Mining, the beneficial owner of those shares was Bond Corporation.

7.5 Principal persons participating in acquisition of Northern Mining

7.5.1 A number of people played important roles in the events that led up to the acquisition of Northern Mining. Two people who played important roles were Mr Brian Burke, the Premier and Mr L R Connell, the principal of L R Connell & Partners.

7.5.2 Just before the 1983 election, Mr Connell was telephoned at his beach house by Mr Burke, to whom he had never previously spoken. Mr Burke asked him for a contribution to the Labor Party. He did not recall whether he was asked for a specific figure. He agreed to donate $25,000, although he was then a supporter of the Liberal Party. The thrust of Mr Burke's approach was that he had been trying to get to know people in business, that people in business should not be afraid of his election to office, because he intended to create a healthy environment for business and that it was really in the interests of people in business to see him in office. He made a strong case as to why he would win office and as to why there should be a close relationship between business and his new Government. Mr Connell said it seemed sensible to make the donation.

7.5.3 Mr Connell first met Mr Burke in person after his election to office in February 1983. The meeting was arranged by a mutual friend, Mr R Maumill. Mr Maumill said this was at Mr Connell's request. Mr Connell said he had been asked whether he would make himself available to meet Mr Burke and have a discussion with him. He recalled it was arranged at short notice and that it was somewhat inconvenient to him, but he had agreed to the meeting. Mr Burke said he was approached about the meeting by Mr Maumill, who told him he had been asked by Mr Connell to arrange it. Mr Connell had known Mr Maumill quite well. They had both been involved with bloodstock over several years, as had Mr Burke. The meeting was at Mr Burke's home. Mr Maumill said it was very close to the election. Mr M J Naylor, an adviser to

Mr Burke, said it was on the day after the election, a point accepted by Mr T Burke. The two Burkes, and Mr Maumill, Mr Connell and Mr Naylor attended the meeting.

7.5.4 During the discussion which took place was between Mr Burke and Mr Connell, it became apparent that Mr Burke wanted to become known to and involved with people in the local business community. He outlined his philosophy as to how he saw business as having a role with Government, and Government having to react to this, and as to the desirability of developing a local business base which was capable of being involved in projects which were developing within the State. He could not recall any specific projects having been mentioned. Mr Burke also advised that the Government was setting up the entity which later became the Western Australian Development Corporation ("WADC").

7.5.5 Mr Connell had been involved in the corporate scene, generally as a financier, investor and adviser for some time before 1983. At this time, he was a controlling shareholder and the managing director of Rothwells and the principal of L R Connell & Partners. L R Connell & Partners ran a money market book, borrowing and lending money and dealing in securities. It was also involved in investment and corporate advisory work. It had been involved in property development as an investor and as a financier, although it was not itself a major property developer.

7.5.6 Over the next few years, the Government was seen by Mr Connell to be developing many new ideas and developing further those ideas which had been espoused at the meeting concerning how it might participate in business with business and develop it for the interests of West Australians. Mr Burke often used Mr Connell as a sounding board as they discussed these ideas. Mr Connell had a lot of dialogue with Mr Burke and their discussions covered the establishment of WADC, the involvement of the Government in projects, some of which were resource based, the better use of Government funds, and the R & I Bank and its role. His contact was principally with Mr Burke. He met other Ministers periodically, but essentially their contact with him was through Mr Burke.

7.5.7 Mr Connell became involved with the Government in development deals from 1983 to 1985. He negotiated with the Joint Venturers in respect of the townsite option for the Ashton development and he was involved in the acquisition by the State of Northern Mining. He was concerned in the review of the Motor Vehicle Insurance Trust and the State Government Insurance Office, as well as in the review of the

R & I Bank. He was involved with the acquisition from the WADC of the property known as the Perth Technical College Site. He was not receiving fees or other income from the Government, apart from the fees for MVIT and SGIO between 1983 and 1985.

7.5.8 Sometimes Mr Connell would be in contact with the Premier daily, at other times weekly, depending upon the issue. Mr Connell said it was fair to say Mr Burke had a direct line to him. Mr Connell could call him when he liked and expect that his call would be taken.

7.5.9 Although the relationship came to an end in May 1988, Mr Connell maintained he did not feel any bitterness towards Mr Burke. He said he had no reason to do anything other than tell the truth and certainly had no interest in denigrating Mr Burke. In all the circumstances, we accept Mr Connell's assurance with reserve.

7.5.10 As to Mr Burke's first meeting with Mr Connell, Mr Burke said he thought it lasted an hour or an hour and a half. They discussed a range of matters. He understood Mr Connell to be a leading business person who had a very active and energetic approach to business. He did not understand him to be a Labor supporter, although he had what he described as a typical Labor Party person's background. A relationship developed between them in which it was true to say he sought Mr Connell out to obtain his advice about different matters and to refer ideas and proposals to him. He valued his advice, although he did not always take it. There were long periods when he would be out of touch, as, for example, during the 1984 Olympic Games when Mr Connell was manager of the Australian equestrian team. There were periods, he said, when he would not seek advice about matters for an extended time and he would not describe the situation as one in which Mr Connell or anyone else had a direct line to him. He could not recall ever having a telephone call from him on his direct line. Although his relationship with Mr Connell was generally closer than with others, it was only marginally so. He went to Mr Connell's house, he said, on one or two occasions, and visited his horse stud when Princess Anne was a guest. He could not recall going to Rothwells' business offices. He maintained that Mr Connell would have been in his own office on no more than six or seven times. He was a trusted adviser, along with a number of other persons, although there was no inner circle of advisers. Nevertheless, Mr Connell was as close or closer than anyone else in terms of seeking advice.

7.5.11 Mr Burke conceded that his association with Mr Connell was why, in 1987, he, at least in part, accepted that the problems associated with Rothwells were

problems with which "we" should assist, and was instrumental, in his view, in the Government's joining the rescue. Mr Burke said he meant by this that there was an opportunity, a predisposition for these people to seek the assistance of the Government. He said he did not mean to convey that there was any obligation of any sort that would lead him to suggest that the Government should participate. He maintained that his association with Mr Connell in mid-1986 had become difficult on occasions, but certainly had not reached the stage where he was saying to Mr Connell that he should keep a low profile. He did not recollect criticism of his association with Mr Connell over Northern Mining, except as to the publicity about the price.

7.5.12 Mr Burke was asked whether, when he came to Government, he came with a particular philosophy or policy about the Government and business generally and how they should work together. He responded: "I don't know that we had a particular philosophy but we certainly had a commitment to what was called by Robert Holmes a Court — and that was a user friendly approach which was reflected best in a proposed policy [announced by Mr R Davies as Leader of the Opposition] which was to establish a corporation that would be headed by Mr Holmes a Court and would be a provider of venture capital and other assistance to the private sector". He said he did not know that he would describe that as a well developed philosophy or ideology or view about Government and business.

7.5.13 He said he did not have a personal philosophy about Government and business. His philosophy was reflected in the belief that the natural Government of the country was a right-wing Labor Government and that meant a Government which was committed to all sections of the community. He said he had seen the Labor Party exiled from office because it refused to accommodate different points of view, and he was very strongly opposed to some expressions of opinion that said the Labor Party was best in Opposition or, that it achieved more in Opposition than in Government. He believed the Labor Party should be relevant and should not be controlled by extreme elements on either side of the political spectrum.

7.5.14 Once in Government, he set about trying to garner the support of the business community for the ALP and for the Government he led. He applied the same approach to other sections of the community, including traditional opponents within the union movement, and in some difficult areas for the Labor Party, areas like conservation and the environment, he set out deliberately to garner the support of different interest groups.

7.5.15 He believed that Governments of all political complexions had, for many years, been taken advantage of in the sale of Government assets because they seemed to fetch less than they were worth. He had a view that the Government should be more thorough in its use and enhancement of the value of its assets.

7.5.16 He had no inhibitions about Governments co-operating with and being involved with the private sector in productive enterprise. He agreed that he had a positive view of this, a view that the opportunity had not sufficiently been taken up by previous Governments.

7.5.17 He tried to cultivate business people across as broad a spectrum as possible, reflecting his view that he was trying to broaden the base of support for the Labor Party and the Government. There were some with whom he had a greater contact than others. These were Mr Connell, Mr Holmes a Court, Mr Dempster (partly because he was Chairman of the Rottnest Island Board and, in that position, in contact with Government by reason of his duties), Mr B Prindiville, Sir James McCusker, Mr D Cullity, Mr J Roberts and, although not always in Western Australia, Lord Alistair McAlpine (who gave him good and productive advice, especially on tourism). Mr Bond was not a person with whom he had much contact. In the Bond organisation, Mr Peter Beckwith was the person who spoke mainly to Government, and Mr Burke did not have a great deal to do with him.

7.5.18 Mr Jack Walsh was a man of a large physical frame and personality. Indeed, he was described by Mr Naylor as "larger than life". At the relevant time, he was aged about 52, having been born on 31 January 1931. He was a son of Mr James Walsh who opened the first Walsh's store in Hay Street in 1926. He was a close personal friend of the Burke family, having been initially a friend of Mr Tom Burke (Mr Burke's father) who had in turn been a friend of Mr James Walsh. Mr Walsh was a longstanding supporter of the Labor Party and was regarded by Mr Burke as a person whom he could trust and who could provide advice and assistance. Mr Joe Berinson, the Attorney-General in the Burke Government, Mr W R Maumill, a broadcaster, and Mr Naylor all gave evidence to that effect.

7.5.19 As Mr Walsh became heavily involved in the dealings between the Government and the Ashton Joint Venturers, it is necessary to mention his background. He was not able to give evidence because he died in August 1984. He was educated at Christian Brothers College, Perth, and later graduated from Melbourne University with

a Commerce degree in 1952. As Mr Walsh's father died in the same year, he returned to Perth to work in the family store which was then run by his mother in conjunction with her two sons. Mr Walsh then had experience in the mid-1950's working in the retail business in the United Kingdom and the United States. When he returned to Perth, he worked in the family store until he resigned as Managing Director in 1964 in favour of his younger brother. He then worked for a Mr F D O'Sullivan, the principal in a real estate company, General Agency Company, until 1983. While working for Mr O'Sullivan, Mr Walsh was involved in selling real estate and was a director of all the companies with which Mr O'Sullivan was associated. Those companies were involved in real estate and had substantial interests in public companies that were involved in mining and gas exploration, but had no connection with diamond mining. The principal business of the General Agency Company was in subdividing large areas of residential land and selling the subdivided lots. He was described by Mr O'Sullivan as a good all-round business person. In 1983, a transition occurred when Mr Walsh commenced working in part for L R Connell & Partners, dividing his time roughly in half for each organisation. That was still the position when he became involved with Northern Mining.

7.5.20 Mr O'Sullivan recalled that Mr Walsh had told him that Mr Burke had asked him to look at the Ashton Joint Venture and to assist the Government in evaluating what they should pay for the 5% interest in the Joint Venture held by Northern Mining.

7.5.21 Mr Hohnen had a degree in Civil Engineering and a Masters degree in Business. From 1982 to 1987, he was the co-ordinator or head of the DRD, which he had joined in 1973. He was the lead negotiator for the State on the Agreement on behalf of the State. In that regard, Mr Hohnen's position necessarily involved him in a leading role. However, as the events will disclose in this chapter, he was in effect denied the opportunity to play his normal role as head of his Department, as negotiations proceeded with the Joint Venturers because of the intervention of advisers appointed by the Premier and Mr Bryce.

7.5.22 Dr Elizabeth Harman held the degree of Doctor of Philosophy, majoring in Geography, and was a senior lecturer in Public Policy at Murdoch University. In 1983 she was appointed by Mr Bryce as his personal adviser. During the second half of 1983, she was working primarily for the Premier on the Ashton Joint Venture matter.

7.5.23 As we have said, Mr Naylor was originally a research officer for Mr Burke. When Labor gained office in 1983, he became a ministerial adviser to Mr Burke.

7.6 Initial involvement of Government in the acquisition of Northern Mining

7.6.1 Mr Burke testified that Mr Walsh became involved in the Ashton Joint Venture matter on behalf of the Government before Mr Connell. Mr Burke explained that, before leaving on 8 July 1983 for an extended overseas visit, Mr Bryce had reported to him on the need for the Government to respond to a request from the Joint Venturers that they be released from the obligation to build a town. Mr Burke contacted Mr Walsh and asked him to start thinking about how the Government might address the issue of the town. He referred to Mr Walsh as having the "appropriate tertiary qualifications" in relevant areas, for example, financial modelling and "other things like that". He went on to say:

> "Well, I thought that there would be a question of the cost that the Joint Venturers would undertake if they built a town, and there was also the question of the benefit to the State of that town being built. I was also aware, I think from Malcolm Bryce, that the royalty rate which was to be imposed on the project had been adjusted downwards because of the townsite obligation, and so, for these reasons, it was my understanding that Jack Walsh's qualifications would lend themselves to advice and assistance in that area."

7.6.2 Mr Connell testified that he initiated discussions with the Government about Northern Mining in early July 1983 when he asked Mr Walsh to ascertain from Mr Burke whether the Government was interested in acquiring the company. He had previously had discussions with Mr Peter Beckwith, the Managing Director of Bond Corporation, about the possibility of selling Bond Corporation's interest in Northern Mining. He believed this discussion was in the last week of June 1983. Apparently, Mr Connell spoke regularly with Mr Beckwith who told him that Bond Corporation was having difficulties in funding the acquisition of Northern Mining from Endeavour and servicing its immediate cash requirements. Mr Beckwith explained that it was necessary to get Bond Corporation's balance sheet in order by 30 June, and that Bond Corporation was therefore interested in on-selling Northern Mining.

7.6.3 Whether Mr Walsh or Mr Connell first became involved in the Ashton Joint Venture on behalf of the Government is of little moment. It is probable that, after his discussion with Mr Beckwith, Mr Connell spoke to Mr Walsh about sounding out the Government. Mr Connell said that Mr Walsh was a lot closer than he to Mr Burke. On the other hand, it is also probable that Mr Burke, having learned through Mr Bryce about the Joint Venturers' wish to be relieved of the obligation to build a town, perceived that Mr Walsh might be able to help. There is no real inconsistency between Mr Burke's evidence and that of Mr Connell. What is significant is that by July 1983 two ideas had been raised: how the Government was to address the problem created by the Joint Venturers in relation to the town and the suggested acquisition of Northern Mining.

7.7 The appointment of advisers

7.7.1 Mr Naylor assisted in devising a scheme for the appointment of ministerial staff. Ministerial advisers were appointed on contract as distinct from being treated as ordinary members of the Public Service. Mr Naylor describes the purpose of such appointments as follows:

> "The purpose of ministerial staff was, if you like, to complement and work with departmental staff or senior officers of the public service in the implementation of government policy. It was as much to to work on matters directly associated with ministers' parliamentary and party activities and, in that sense, it was, if you like, to some extent, detaching regular public servants from any interaction with political parties which, in the first instance, was probably better handled, certainly judged to be better handled, by people that knew the ministers well and knew the party well and at the same time didn't involve the public service necessarily in the day to day or week to week activities with parliamentary representatives or party representatives."

He also said, surprisingly, that some of the appointees in his view were not necessarily sympathetic to the Labor Party.

7.7.2 According to Dr Harman the rationale for appointing ministerial advisers was based on the concern of the new ministers that permanent department heads would find it difficult to change their practices after a long period of a Government of a different political persuasion and they would remain fully committed to a different

philosophy. It was therefore felt that an alternative source of advice would be useful to incoming ministers.

7.7.3 The practice of appointing ministerial advisers was new to Western Australia, and was not implemented without friction. Mr Hohnen believed it made contact between departments, heads of departments and Ministers more difficult. The need to approach ministers through advisers created a filtering process, which made it more difficult to determine who was giving the advice and who was setting the policy. He found it difficult to see his Minister. Mr L E McCarrey, an economist, who was Under Treasurer from August 1975 to December 1983 explained the Public Service reaction to advisers by saying that it was a matter of concern to all senior public servants, principally because they were uncertain as to the advisers' role and their own role in relation to them. It became apparent that some advisers were acting virtually as assistant managers or ministers and exercising executive responsibility. He cited Mr M Naylor as one of those persons, along with Mr Tony Lloyd and Mr Len Brush. Mr McCarrey's past experience had been of a close relationship between the Under Treasurer and the Treasurer, and it had been easy to contact the Treasurer to discuss issues as they arose. When Mr Burke was appointed Treasurer it became more difficult to see him to discuss matters. More often than not, requests made to the Treasury came not from the Treasurer but from his adviser. In his view, under the Burke administration, it was not sufficient for a public servant to be apolitical or neutral in the normal tradition of the Public Service. The Government wanted political sympathy from heads of departments.

7.7.4 When the Premier established a Policy Secretariat within his Department, a problem was created for the Treasury in that the Department was not informed of the advice that the Secretariat was giving the Premier or Government. Conversely, the Treasury believed that its advice to the Treasurer was passed to the Secretariat for comment, as a matter of course.

7.7.5 On the other hand, Mr Burke said there had been no specific instance which had occurred to cause him any concern as to the loyalty of any member of the public service. This statement is difficult to reconcile with his treatment of Mr Hohnen. He was specifically asked how he worked with and related to advisers and, in particular, Mr Naylor and Dr Harman. He replied that they were completely trusted officers who had considerable authority but who were not replacements for the Public Service. They were responsible for providing independent advice and acting as a buffer between the

politics of Government and the Public Service. Mr Burke relied on Dr Harman and Mr Naylor to advise him and to reduce incoming information to a concentrated and abbreviated form. They were given freedom to act independently in problems. Mr Burke said they were expected to resolve problems if they could and, in most cases, they did.

7.7.6 As we said, advisers were appointed on contract and were not part of the Public Service. However, their remuneration, according to Mr Naylor, was determined in consultation with the Chairman of the Public Service Board and in association with a Mr Douglas Mitchell who was one of Mr Burke's principal ministerial advisers. Mr Naylor said remuneration was linked to what was thought to be an appropriate Public Service classification, but the salary would acknowledge there was no job security and advisers were required, generally speaking, to keep the same hours as ministers kept which may be considerably longer than the ordinary work day.

7.7.7 Mr Naylor denied that his position as a ministerial adviser gave him authority to make decisions on the Premier's behalf. He expressly denied that in carrying out his duties he was acting as an assistant minister. He was never in a position to assume what would be described as an assistant minister's responsibilities or authority.

7.7.8 Mr N P Taylor joined the Burke administration as the Director of the Government Media Office in 1986. He agreed with the proposition that at times advisers tended to get in the way of communication between senior public servants and ministers, including the Premier, though he denied that he had ever been in that position. He expressed the belief that people who were outside the minister's inner office may well have had a belief that those on the inside had much more power than was actually so. In his experience ministers' offices operated differently because some ministers had more faith in advisers than others and some heads of departments had closer rapport with their ministers than other public servants, but he endorsed the view that there might have been occasions when advisers to ministers did get in the way of contact between public servants and ministers. In his view, advisers were generally known to be sympathetic to the Government, even though he did not mean to say that every one of them was a member of the Australian Labor Party. He was, however, emphatic that advisers would not have been appointed unless they were sympathetic to the philosophy of the Government. To do otherwise would be crazy. We must say Mr Taylor's view

seems to us to be much more likely to accord with what happened than the view expressed by Mr Naylor.

7.7.9 Mr Naylor stated that after March 1983 he was asked by a member of the Labor Party to agree to 10% of his salary being paid to the Party directly. In about September he agreed to that request, the timing of his agreement coinciding with his contract of appointment being executed. He did not know why he was asked to make the contribution, but he assumed that it had something to do with his knowledge that State Parliamentary Labor Party members allowed deductions to be made from their salaries for Labor Party activities. He was unaware whether anybody else had been asked by a member of the Labor Party to agree to a percentage donation from salary.

7.7.10 Mr Naylor described his specific function in the Premier's office from February 1983 onwards as being more the Premier's personal assistant than an administrative adviser. He attended to general and specific duties. His general duties included drafting documentation in response to matters raised with the Premier by department heads, other ministers, or members of Parliament. He had a number of specific duties. He was assigned to the Ashton Joint Venture and also to the acquisition of Northern Mining. In relation to these specific duties, his role was to consider the operational and administrative detail required to implement Government policy in those areas. That involved the evaluation of ideas or proposals put to the Premier; for example, identifying the shortcomings or the merits of particular proposals either through the Premier or from the Premier.

7.7.11 We will return to the subject of the role of ministerial advisers in Part II of our report. Suffice to say here that the appointment of advisers, caused problems for the Public Service and perhaps the heads of departments resented, and understandably so, the diminution in their ability to have as close a contact as they may have had in the past with their ministers. It would, however, be a regrettable development if governments listened to and accepted advice only from those whom they believed to be in political sympathy and if the practice of appointing advisers led to the erosion of the quality of the Public Service and the independent character of its advice.

7.7.12 Before leaving the subject of advisers, and dealing specifically with them in relation to Northern Mining, one or two features are worthy of comment. Mr Hohnen certainly did not enjoy the confidence of the Premier and the decision to acquire Northern Mining was kept from him, so much so that he learnt of the acquisition only

by reading of it in the press. It is apparent that his motives were suspected by the Premier because he was believed to have alerted the Joint Venturers to the Government's interest in taking equity in Northern Mining in addition to financial compensation for their desire not to build a town. Mr Burke asked Dr Harman to find out the extent to which Mr Hohnen might have passed information about the Government's plans to the Joint Venturers. Indeed, it was an instruction from the Premier that she should provide to Mr Hohnen what amounted to disinformation. It is to her credit that she felt uneasy about that task.

7.7.13 Mr Naylor's own assessment of Mr Hohnen's position was that Mr Hohnen had difficulty with the policy that the Government wished to be implemented concerning the Ashton Joint Venture because his views were philosophically different to those of the Government. Nothing suggests that Mr Hohnen gave other than honest advice to his Minister and the Premier. Nor did he deserve to be described as a "white ant" as appeared to have been the case in a copy of a memorandum dated 7 August 1983 from Mr Walsh to Mr Connell in which he discussed a memorandum from Mr Hohnen to the Premier of 5 August 1983. He ended his comments to Mr Connell by saying "Obviously, one of their trump cards is the white ants they have within our client's organisation".

7.7.14 The Commission finds that there is a connection between Mr Naylor's appointment as a ministerial adviser and the request of him to donate 10% of his salary to the Australian Labor Party. It is the Commission's view that it is highly undesirable and indeed damaging to the public's perception of open Government, that a person employed by the Government should be requested to donate a proportion of his salary to a political party. This is not to deny the right of any public servant as a private citizen to make a donation to a political party, but it ought not be associated with his employment.

7.8 Compensation and acquisition: May/September 1983

7.8.1 On 6 May 1983, pursuant to clause 7 of the Agreement, the Joint Venturers submitted to Mr Bryce their proposals for the mining and recovery of diamonds from Kimberlite ore. That proposal did not contain any provision for the establishment of a town. Instead, the Joint Venturers proposed to commute their workforce from Perth. The proposals were first considered by a Mr David Gardiner, an officer of DRD.

7.8.2 In a memorandum to Mr Hohnen dated 9 May, Mr Gardiner observed that the proposals rejected the hydro-electric scheme and provided for a commuting arrangement (the commute option) for 450 workers with a total of 50 staff accommodated in Kununurra. There was no provision or contribution for township services or facilities at Kununurra though the proposals provided for a construction camp at the worksite for up to 1,000 persons.

7.8.3 In Mr Hohnen's understanding, the Joint Venturers were keen to fly the bulk of their workforce from Perth on a basis similar to that used for offshore petroleum rigs. At that time, this was a radical concept for an onshore development in Australia (though, according to Dr Harman, not overseas).

7.8.4 On advice from the Department, Mr Bryce wrote to the Joint Venturers pointing out that their proposals did not deal with certain matters mentioned in clause 7 of the Agreement and stating that the consideration of the proposals would be deferred pending the submission of a further proposal concerning details of a relevant town as a principal housing area for the workforce.

7.8.5 The advice to the Minister was dated 8 June and had been prepared by Mr Ken Willett in the absence of Mr Hohnen on leave. In that advice the Minister was reminded of the time constraint of two months in clause 8 of the Agreement. The proposal was seen as a negotiating tactic to capitalize on the State's desire to have the Ashton project proceed and it appeared to have been presented in the context of the weakest members in the financial sense (Ashton's limitations in raising project financing). In that respect, Ashton explained that it had time constraints on its financing package with the Chase Manhattan Corporation. Throughout the negotiations the supposed financial weakness of Ashton was perceived as a negotiating point and at one stage lead to a suggestion of a Government guarantee being given to Ashton to assist in its financing. As events turned out, Ashton obtained the necessary finance to proceed with its share of the cost without taking up the Government's offer. Mr Willett's advice went on to point out that the commute option was suggested for the full 20 year project term. It was thought to be in clear conflict with the provisions of the Agreement where the Joint Venturers were obliged to provide for accommodation of the workforce at the minesite and, consequently, the proposal if accepted would require a variation to the Agreement. Reference was made, however, to the flexibility provided in the Agreement through the transitional arrangement provisions which would allow a deferral of a complete township within the terms of the relevant clause (clause 26). Apparently

Mr Willett was advised by the Ashton project management that the development of a township was likely to cost $60 million, but no details were provided, nor were the relative costs of alternative solutions. The assessed cost of the town, better industrial relations, and a lesser impact on Aborigines, were stated as justification for supporting the commute option.

7.8.6 In a letter of 8 June 1983, Mr Bryce expressed willingness to consult representatives of the Joint Venturers on the proposals in general or any specific point which might concern them. In a reply dated 17 June 1983, Mr O'Leary, on behalf of the Joint Venturers, noted that despite his requests he had been unable to obtain an appointment with Mr Bryce. The letter reaffirmed the Joint Venturers' desire to continue with the commute option and, only reluctantly, would they agree to the commute option being limited within the transitional arrangements. It was hinted that insistence on the township option would require a re-evaluation of the project's viability. As to the hydro-electric scheme, it was asserted that the cost would be greater than electricity provided onsite. No appointment with Mr Bryce had been obtained by 29 June 1983 when Mr O'Leary sent a telex to Mr Bryce requesting a meeting as a matter of urgency. A further telex sent on 1 July 1983 complained that the matter seemed to have been stalled.

7.8.7 A meeting was held on Monday, 4 July 1983 between Mr Bryce, representatives of the Joint Venturers and other members of the Government. Dr Harman was also present. During the meeting the Minister told representatives of the Joint Venturers that the commute option would necessarily involve an amendment to the agreement and that could not be contemplated unless very convincing evidence was provided to show that the proposed option was in the interests of the State. Despite repeated requests for additional information about the commute option, that information had not been supplied. The Minister explained that the Joint Venturers' commute proposals were contrary to a strong commitment to regional economic development which had emerged over the past 20 years. In addition, an amendment would be inconsistent with regard to the sanctity of such agreements and could result in pressure to re-open a number of issues regarding the conduct of the project and the terms and conditions of developing it.

7.8.8 Mr O'Leary, speaking on behalf of the Joint Venturers, referred to matters supporting the proposal and also emphasised that the financial implications of a limited deferral of the project would jeopardise the financing of the project and, in that

regard, referring to Ashton, Mr Bryce advised that he would soon be absent overseas and that further discussions could be held with the Premier after the required information had been provided. Meetings should be arranged through Dr Harman.

7.8.9 Mr Hohnen returned from leave on 5 July 1983 and attended a further meeting on 6 July 1983 with the Minister, representatives of the Joint Venturers, Dr Harman and members of the DRD. A fresh proposal was opened for discussion by Mr O'Leary and, after going through it Mr Bryce advised that it would have to be examined in the context of the additional information sought at the meeting of 4 July 1983 and promised to be delivered on 7 July 1983.

7.8.10 Mr Bryce departed for overseas on 8 July 1983 and was away until 2 August 1983. Mr Burke believed he had a briefing from Mr Bryce in the first or second week of July, but in any event, after Mr Bryce's departure, Mr Burke took over the carriage of the matter. Dr Harman's view was that the shift of the Ashton matter from the Deputy Premier to the Premier would not have occurred merely because the Deputy Premier was going away. By then there had been discussions about equity and it was apparently the view of the Government that the Premier should handle equity matters. She believed she obtained that impression from Mr Naylor.

7.8.11 By letter dated 7 July 1983, Mr O'Leary forwarded additional information on a variety of subjects as required by the Minister. According to Mr Hohnen, who studied the information, the operating cost of the commute option was $50 million less than the town option. Mr Hohnen's view was that it was important that the Joint Venturers had an ongoing responsibility for providing a townsite, remembering that the prime purpose of such a clause in the Agreement was to make sure the Joint Venturers bore the cost of those facilities and not the State. Further, the commute option at the time was very much untested and nobody could tell whether it would succeed. If it proved unsuccessful, the State would want to be sure that the Joint Venturers provided the township to replace the commute option and that it was not left with the cost of providing those facilities.

7.8.12 On Sunday, 17 July 1983, Dr Harman prepared and delivered to Mr Burke some notes which she thought might assist him in the briefing which was to take place the following day by Mr Hohnen. In her notes, she pointed out that DRD "had not, as of Friday, 15 July, looked seriously at the equity option although they knew it was to be considered". According to Mr Hohnen, the equity option had not been

discussed by the Department though it had, through Mr Willett at the suggestion of Dr Harman, prepared a paper evaluating the various options which might be open for consideration. One of the options was to release the Joint Venturers of the obligation to provide a town in return for financial compensation by way of an additional royalty payment equivalent to half the net cost savings in avoiding the erection of the town. It would be so structured as not to cause financial embarrassment to the Joint Venturers. It is not clear why the Department is said to have known that an equity was to be considered and, indeed, Dr Harman herself had not considered the acquisition of Northern Mining by the Government by 18 July 1983.

7.8.13 Earlier in this chapter reference was made to Mr Connell's evidence that he had asked Mr Walsh in early July 1983 to ascertain from the Premier whether the Government would be interested in acquiring Northern Mining from Bond Corporation. Upon receiving an affirmative reply through Mr Walsh, according to Mr Connell, a meeting was arranged with the Premier in, he believed, about the first week of July. Mr Walsh also attended. By the time the meeting took place, according to Mr Connell, the proposal to acquire Northern Mining had developed to where it could be done at no cost to the Government. By relieving the Joint Venturers of the obligation to build a town, a "penalty", to use Mr Connell's word, could be extracted from them in funds so the Government could make the acquisition. Mr Connell was not aware as to who informed him of the desire of the Joint Venturers to quit the obligation to build a town, but it could have come from Mr Walsh or, alternatively, from Mr Beckwith who would have known about it through Northern Mining. Mr Burke would have learnt of the commute option by the end of the first week of July 1983 at the latest, having been briefed by Mr Bryce before he went abroad on 8 July 1983. It is possible that before 17 July 1983, Mr Burke and Mr Connell had met and set in place a framework of a proposition that Northern Mining should be acquired by the Government using funds from the Joint Venturers. On 18 July 1983, the Premier was briefed by Mr Hohnen in the presence of Mr Naylor and Dr Harman. Subsequently, on the same day, Mr Hohnen prepared a memorandum for the Premier. In brief summary, the memorandum stated the Department's position as being concerned to ensure that the intent of the Agreement, if not the complete letter of the Agreement, could still be met by the Joint Venturers and that the option of locating the workforce at the minesite or, indeed, in Kununurra, was not closed off completely. Alternative approaches were also discussed, the last of them being that the Government could seek an equity stake in the project in lieu of a financial contribution as proposed in one of the earlier alternatives. Mr Hohnen stated:

> "This was an option which was not canvassed in our meeting this morning, but which I understand you wished to be considered."

That would clearly indicate that by 18 July 1983 Mr Burke had firmly in his mind the prospect of acquiring an equity stake in the Ashton Joint Venture. Mr Hohnen mentioned that he had not had sufficient opportunity to examine that alternative in detail, but he pointed out several complications that, in his opinion, would result if the Government became, in effect, a member of the Joint Venture. He also referred to the problem created by the *State Trading Concerns Act 1916*, to which reference will later be made.

7.8.14 Later the same day, the Premier met Mr O'Leary and a Mr Billard on behalf of the Joint Venturers, along with Dr Harman who took notes. The dilemma in which the Government and the Joint Venturers found themselves is illustrated by the exchange recorded by Dr Harman in the following terms:

> "Premier: If we simply accept the commute option we will be killed politically.
> O'Leary: If we don't have commute, the financing arrangements especially for Ashton falls apart."

7.8.15 Later still on 18 July 1983, Mr Connell attended a meeting with Mr Burke at which Dr Harman (and probably Mr Naylor) were present. Dr Harman made notes of that meeting but had no independent recollection of it. According to her notes, Mr Connell proposed that Northern Mining should be acquired with "up front $50 million from companies". There is another note referring to Mr Connell that said: "Has access to cash flow etc. How?? Who is he advising?" and then, apparently, there was an answer to that question "Advising someone and can suggest Bond". Mr Connell had no recollection of the meeting and Dr Harman could not say how it came about that Mr Connell was present. Mr Burke was no more helpful as he could not recall the events of that day with any clarity and he had no recollection independent of Dr Harman's notes. It seems fairly clear that Mr Connell must have been invited to the meeting by Mr Burke. The timing of it may have followed an earlier meeting at which Mr Walsh had discussed with Mr Burke the Government's willingness to purchase Northern Mining. The figure of $50 million suggested by Mr Connell would have been in his mind because of his earlier discussions with Mr Beckwith. From Dr Harman's notes it can be seen why it would have been appropriate to call in Mr Connell to discuss further the acquisition of Northern Mining after Mr Burke's

meeting with Mr O'Leary. From her notes she was able to say that at the meeting Mr O'Leary had clearly indicated that the Joint Venturers were prepared to look at some proposition that might do as a *quid pro quo* if they were able to obtain a commute option. As it happened, Mr O'Leary suggested as a possibility the Ord hydro-electric scheme but the formulation of the precise *quid pro quo* was not significant. What is significant is the fact that the Joint Venturers were prepared to do something. Thereafter, according to Dr Harman (whose evidence was of a high order and supported by documents), the question of the acquisition of Northern Mining and the commute option went forward in tandem.

7.8.16 DRD, the Treasury and the Crown Law Department were involved in the negotiations for the commute option but not with the acquisition of Northern Mining. Indeed, within the Premier's office, there was a great deal of concern to maintain the acquisition of Northern Mining as a project confidential to the Premier's Department and, then, to only a few members of it. A conscious effort was made, both on the part of Dr Harman, the Premier and Mr Naylor, to keep the acquisition of Northern Mining secret from DRD. As previously mentioned, Mr Burke was concerned about Mr Hohnen's sympathies and believed the Government's intention to acquire an equity in the Joint Venture might be leaked to the Joint Venturers. In addition, and perhaps for a better reason, it was thought advisable to keep the Joint Venturers unaware of the Government's intentions since they would probably have been very concerned to find the Government an equity partner.

7.8.17 It probably is of little significance at what stage the specific idea of taking an equity through Northern Mining came to the attention of Mr Burke. We have already suggested that it may well have come through Mr Walsh at Mr Connell's suggestion, but certainly, by 18 July 1983, Northern Mining became the preferred means. Mr Connell did say, however, that in the course of his discussions with Mr Beckwith, it was agreed that he would be paid a fee of $5 million by Bond Corporation should he get the Government to purchase Northern Mining. This was confirmed by Mr Bond who gave evidence of his telephone conversation with Mr Beckwith. He was unable to say when these conversations took place; only that they must have been after his return to the United States in early July 1983. Mr Connell said that having been appointed the agent of Bond Corporation to act on the sale of Northern Mining, he asked Mr Walsh to determine whether the Government might be an interested purchaser. According to Mr Connell, Mr Walsh reported favourably, but Mr Burke had no recollection of any approach from Mr Walsh in these terms. As has

been pointed out earlier, it is likely and indeed probable that Mr Connell suggested to Mr Burke that the Government might acquire Northern Mining. It is less likely that Mr Burke sought to enquire whether the company was available for sale.

7.8.18 Mr Connell testified that when he put the proposition to Mr Burke that the Government might acquire Northern Mining (which on his evidence was in the first week of July), Mr Burke asked: "What's in it for you?" It was then, according to Mr Connell, that he told Mr Burke that Bond Corporation would pay him a fee. He said he did not disclose the amount of the fee and it was never discussed with or disclosed to Mr Burke or any person in or acting on behalf of the Government. Mr Burke denied that he had any such discussion though it does appear, from his evidence, that he placed a great deal of confidence in his answer by reason of his belief that he invited Mr Connell to the meeting of 18 July 1983 rather than Mr Connell inviting himself. According to Mr Burke, it did not occur to him that Mr Walsh and Mr Connell might be acting for Bond Corporation, although he was aware that Mr Connell had a business relationship with Mr Bond. At all times, he regarded Mr Walsh and Mr Connell as advisers to the Government only. According to Dr Harman, the Premier always introduced Mr Connell and Mr Walsh as being "our financial consultants" on the matter of the commute option. Furthermore, she understood the position was the same for the acquisition of Northern Mining. It would seem that so far as the Premier's office was concerned, Mr Walsh and Mr Connell worked on the acquisition of Northern Mining and the commute option.

7.8.19 From 18 July 1983, or thereabouts, the commute option and the acquisition of Northern Mining were inseparably linked. Mr Connell says, and there is no reason to disbelieve him, that it was his idea that the Government should ask for compensation or, as described by him, a penalty, from the Joint Venturers of $50 million so they could be relieved of the obligation to build a town. That figure was conveniently a sum which Mr Beckwith had wanted Bond Corporation to receive for Northern Mining.

7.8.20 As the matter of the commute option then proceeded, it was not a matter so much of working out fair compensation based on the costs saved by the Joint Venturers by being relieved of the obligation to build the town. Rather, it was a matter of convincing the Joint Venturers that they ought to pay $50 million. Mr Walsh and Mr Connell, particularly the former, became busy in trying to justify and convince the Joint Venturers that $50 million was fair compensation.

7.8.21 Mr Connell said he told Mr Burke that Northern Mining could be bought for $50 million but Mr Burke pointed out that the Government could not be seen to pay any more than the price that Mr Bond had paid Endeavour. There were sound political reasons for taking that view, but he made it clear to Mr Connell that there could be no purchase of Northern Mining unless the Government received the funds to do so from the Joint Venturers so the purchase would not seem to have cost the State anything. Indeed, if $50 million were the amount of compensation, there would be an $8 million surplus for other purposes.

7.8.22 Mr Connell said that he relayed Mr Burke's statement about the Government not being seen to pay more than $42 million to Mr Beckwith who then met Mr Burke and attempted to negotiate an increase in the price. Mr Connell and Mr Walsh were also present. Mr Connell said Mr Beckwith told Mr Burke that Bond Corporation would not receive the full purchase price in any event because of its obligation to pay Mr Connell's fee.

7.8.23 Mr Burke denied any such meeting. He said he met Mr Beckwith only once and that was shortly before the Cabinet meeting of 26 September 1983, at which the decision was taken to acquire Northern Mining. While he conceded that he might, at some stage, have said that the Government could not pay more than $42 million to acquire Northern Mining, it would have been inconceivable to have negotiated with Mr Beckwith "without my having someone else present, from my side of the, if you like, bargaining table", as he put it. When senior counsel assisting the Commission observed that Mr Walsh and Mr Connell were present and acting for him Mr Burke replied that he had in mind officers of the Treasury or DRD. In assessing that answer, it must be borne in mind that the Premier and his Department were taking great care to keep the acquisition secret from DRD and alerted Treasury to the possibility of the acquisition of Northern Mining only on 27 July 1983.

7.8.24 It does not matter, so far as the purchase price is concerned, whether or not this meeting with Mr Burke and Mr Beckwith took place as alleged by Mr Connell. More relevantly the question is whether the meeting took place during which Mr Beckwith told Mr Burke that Bond Corporation would not receive the full purchase price because of the obligation to pay Mr Connell's fee.

7.8.25 We will deal specifically with the fee and Mr Burke's knowledge of whether a fee was payable later in this chapter.

7.8.26 There is support for concluding that a meeting occurred between Mr Beckwith and Mr Burke before 26 September 1983 from the evidence of Mr M R Rowley. During 1983 and a year or so before, he was employed as an Executive Assistant to the Board of Directors of Bond Corporation. He remembered that in July 1983 Mr Beckwith told him that Bond Corporation was selling to the Government its interest in Northern Mining which it had purchased from Endeavour. He was asked to contact Mr Walsh to produce any necessary financial information that Mr Walsh would require.

7.8.27 Mr Rowley was positive in his evidence about the date because he said he was able to check some records which indicated when he first started working on the matter entrusted to him by Mr Beckwith. He was asked to produce the records but was unable to do so. In a letter to the Commission dated 31 July 1991 Mr Rowley reconstructed that the meeting with Mr Beckwith was in July because he recalled the Northern Mining transaction took place over six to ten weeks prior to the one date of which he had a clear recollection, namely, the date of the September 1983 Cabinet meeting, being the same day as Australia won the America's Cup. Mr Beckwith had also told him that he had endeavoured to achieve a higher price of $50 million but the Government would pay only $42 million. He had said that Bond Corporation would probably have to pay a fee out of the $42 million to Mr Connell, which meant that Bond Corporation would not, in fact, get $42 million. When asked whether he remembered whether any names of members of Government being mentioned by Mr Beckwith, Mr Rowley said some names were mentioned but he could recall only that of Mr Burke.

7.8.28 On 21 July 1983, the Premier, Mr Hohnen, Mr Naylor and Dr Harman met representatives of the Joint Venture. It is not necessary to go to the detail of the minutes of the meeting kept by Mr Hohnen but the following is noted. Mr Burke told the meeting that the previous evening he had discussed with Mr Bryce, who was overseas, options open to resolve the matter. In his own evidence, Mr Bryce tended to dissociate himself from the decision of the Government to acquire Northern Mining. It is difficult to believe that the Premier would have embarked on such a project without the full knowledge that it met with the approval of the Deputy Premier. Dr Harman also said that she kept her Minister, Mr Bryce, fully informed of developments from time to time when he was available for briefing. In view of the high esteem in which Dr Harman was regarded by those who came into contact with her during her two years as an adviser, it seems inconceivable that she would not have kept her Minister briefed.

7.8.29 After 21 July 1983, Mr Hohnen and his Department faded out of the picture in negotiating a settlement with the Joint Venturers except insofar as officers of the Department were asked to do specific exercises. Mr Hohnen's offer, conveyed to Mr Naylor and reported to the Premier, to assist in formulating proposals for a "sensible solution" to the commute option controversy, seems to have been unheeded. Unknown to Mr Hohnen, Dr Harman on 27 July 1983 made an offer to Mr O'Leary to discharge the obligation to provide the town and to forgo construction of the hydro-electric scheme in return for payment of $50 million. Mr O'Leary's responded that the Joint Venturers' legal advice suggested that the commute option was a "proposal" within the terms of the Agreement (particulars of the advice were not revealed but it may have relied in part on the terms of clause 7(1)(B).

7.8.30 Mr Walsh wrote to Mr Burke marked "private and confidential" dated 25 July 1983 to justify a purchase price of $42 million. In the third paragraph, he said:

> "I will have available later in the day new figures from the Bond Corporation in respect of the cash flow that Northern Mining will enjoy from Ashton. At this stage, however, it would seem that the cash flow will fully support a purchase price of $42 million which in turn is supported by Baring Bros' report."

The above passage is significant for several reasons. It shows that Mr Walsh was placing support on a report prepared by Baring Bros Halkerston and Partners Ltd ("Baring Bros"), a matter which will be dealt with in more detail later, but also it indicates that he was able to gain access to confidential information through Bond Corporation of Northern Mining. It is the kind of information that had earlier caused Dr Harman to ponder for whom Mr Walsh and Mr Connell were acting. So also did Mr McCarrey.

7.8.31 If Mr Burke did not know by 25 July 1983 that L R Connell & Partners was acting in the sale for Bond Corporation, then it seems reasonable to suppose the above quoted passage would have raised the same query in the mind of Mr Burke, and Mr Naylor who had undoubtedly also seen the letter. The letter recommended that the State maintain its position that it required the town completed with perhaps an indication to the Joint Venturers that, at the very least, if the town did not go ahead, the Government would require a substantial cash "penalty". He then pointed out all the advantages which the Joint Venturers knew they would get if they were able to enjoy

the commute option and, hence, make them willing to pay a large penalty to avoid building the town.

7.8.32 A meeting occurred on 27 July 1983, presumably at the request of Mr Burke, between Treasury officials, Mr McCarrey and Mrs K Sanderson, and Mr Connell and Mr Walsh and Dr Harman. Dr Harman kept notes. This was the first introduction to Treasury of knowledge of the intention to acquire Northern Mining. Mr Walsh and Mr Connell, who were described in the notes as "financial consultants", outlined the proposal to take a 5% equity in the project through the purchase of Northern Mining. Dr Harman observed that there was no mention of another 5% through the acquisition of a share in Ashton. That is a reference to a proposal which had been raised at an earlier stage in the light of Ashton's supposed difficulty in obtaining project finance. It had been suggested that the Government might take the interest in return for guaranteeing Ashton's indebtedness. That proposal came to nothing.

7.8.33 Mr Connell and Mr Walsh outlined their analysis of cash-flows and their belief that Northern Mining could be bought for $42 million. Dr Harman noted as follows:

> "$50M = requested by Peter Birchmore (Bond)
> $48M = break-even
> $42M = `good deal'."

7.8.34 It would seem that the $50 million is a reference to the price Mr Beckwith originally wanted, while $48 million would represent to Bond Corporation a break-even if that figure is to be regarded as $42 million representing the original purchase price, plus $5 million, being L R Connell & Partners' fee. That is a deduction from the evidence since none of the witnesses attending the meeting was able to say on what basis the purchase price of $48 million could be said to be a "break-even". According to Dr Harman's note, Mr McCarrey's reaction was that the idea of the purchase was "terrific" and "something we should have done before". He was also recorded as having said:

> "We must accept your cash flow analysis and take a punt."

In his evidence, Mr McCarrey thought that his reaction would not have been as optimistic as the note suggests. Mrs Sanderson was of the same view, having regard to Mr McCarrey's naturally cautious disposition.

7.8.35 Dr Harman's note went on:

> "There was some discussion of the ethics and commercial morality of Walsh and Connell's position. They did not provide Treasury with certain detailed analysis belonging to NM. They did show their own analysis."

This note arose in the context of a question raised by Mr McCarrey, confirmed in his own evidence, concerning for whom Mr Connell and Mr Walsh were acting. As Mr McCarrey observed, the information and assistance that might be available to them from Treasury would be far greater if they were acting for the Government than if they were representing a third party. According to Mr McCarrey, Mr Walsh and Mr Connell told him they were advising the Government. He understood the answer to be advising the Government on the commute option, and also on the acquisition of Northern Mining.

7.8.36 Mr McCarrey presented a written submission which was made an exhibit when he was recalled to give further evidence. He pointed out that the Treasury as a whole, and the Under Treasurer in particular, were dominated by budget preparations from July to October each year. All other activities became peripheral, though of course other work had to go on. At that time distractions are not welcomed and, while Treasury responded to requests from the Treasurer to work on other matters, staff involvement in other issues was certainly not sought. The 1983/84 budget was a difficult budget to frame because of a drop in revenue and an unplanned deficit. The new Government naturally wanted to implement new expenditure programmes and taxation increases were likely. That was the background when Dr Harman brought Mr Connell and Mr Walsh to meet Mr McCarrey on 27 July 1983.

7.8.37 There was little discussion of price at the meeting with Mr Connell and Mr Walsh and Treasury had no views to put forward but simply listened to what they said. Mrs Sanderson and Mr McCarrey were more concerned to discuss Mr Walsh's methods for arriving at a purchase price. Treasury agreed that the starting price was to determine the net present value of the expected cash-flow of Northern Mining and then to consider the value of other assets and any premium that might be considered appropriate. Mr Walsh had several computer printouts which were said to be his

analysis of the Northern Mining data, but he was not to make them available at that stage, nor the Northern Mining data which he said he had no authority to disclose. He did, however, undertake to provide details of his analysis and assessment when completed.

7.8.38 Mr McCarrey's object in the discussion was to make an assessment of Mr Walsh's capabilities and to ascertain whether he knew what he was doing in an exercise of the kind he had undertaken. He formed the impression that Mr Walsh did know what he was doing, but he retained doubts as to the capacity of L R Connell & Partners, with their very limited resources, to perform a complex exercise of the kind they had undertaken.

7.8.39 Commenting on his earlier evidence about Mr Connell and Mr Walsh telling him they were acting for the Government, Mr McCarrey said he would certainly have advised the Treasurer of his concerns and recommended the appointment of independent consultants to protect the Government's interest had Mr Connell disclosed that he was, in fact, acting for Bond Corporation in the sale of Northern Mining, even though at the same time he might have been acting for the Government in the purchase.

7.8.40 Mr McCarrey left the matter without further consideration and returned to work on the budget, expecting that Treasury would see a report and analysis from Mr Connell and Mr Walsh and be asked to comment if the Government decided to proceed with the purchase. He did not forward a minute to the Treasurer on the meeting with Mr Walsh and Mr Connell because nothing had emerged that he would not have already known and, in any event, Dr Harman was present at the meeting and he would have expected her to advise the Treasurer. He had no recollection of having told Mr Burke that Mr Connell had told him he was working for the Government. Mr Burke said in evidence that he received that information from Mr McCarrey in respect of confidential or other information that had been given to Mr Connell. Mr McCarrey said no confidential information had been provided to Mr Connell or Mr Walsh and indeed that meeting was the only one he had with them. It is more likely that Dr Harman told Mr Burke of Mr Connell's statement in response to Mr McCarrey's query that he was acting for the Government.

7.8.41 Dr Harman's notes of the 27 July 1983 meeting also discussed the best option for Mr Burke at his meeting with Mr O'Leary which was to take place 30 minutes later. Mr Burke, the note recorded, wanted to tell the Joint Venturers why he was going

to ask for $50 million in lieu of the town so as to use that sum to purchase Northern Mining, but was advised by Mr McCarrey not to do so because that would make the Joint Venturers more nervous than having to pay $50 million. The notes also recorded the meeting which then took place 30 minutes later apparently between Mr O'Leary, the Premier, Mr Naylor and Dr Harman. We have already set out her more expanded notes of what took place when the specific proposition of a payment of $50 million was put forward.

7.8.42 On 3 August 1983, the Premier, Mr Bryce, Mr Hohnen and Mr Naylor and Dr Harman met representatives of the Joint Venturers when both sides restated their positions. Nothing was resolved and the matter was left with the Joint Venturers for further consideration. Mr Hohnen, in a last effort to persuade the Premier to a contrary course, sent a memorandum to him dated 5 August 1983. The position was, therefore, that by early August 1983 the Government was committed to the $50 million compensation route and the attempt of DRD to persuade the Premier away from that course had failed. The Department's role thereafter was merely to consider how the $50 million might be handled as compensation and this Mr Hohnen took up by a memorandum dated 19 August 1983 which suggested a royalty payment which did not disadvantage the Joint Venturers.

7.8.43 It became essential for Mr Walsh and Mr Connell to ensure that the Joint Venturers paid an amount which would cover at least the purchase price of the projected sale of Northern Mining. They knew that unless that sum could be achieved, the sale would not take place and there would be no fee for Mr Connell. A number of witnesses gave evidence that Mr Walsh was heavily engaged in the preparation of cash-flows which he produced from his computer and much effort was directed to the negotiations with the Joint Venturers over the compensation issue. The Treasury was involved in the latter exercise as was DRD and Mr John Caldon, an independent tax expert from Price Waterhouse. Mr Caldon's fee was presumably paid by L R Connell & Partners as it was certainly not paid by the Government. That is significant in deciding whether L R Connell & Partners expected a fee from the Government for the sale. At no stage were the Joint Venturers informed by the Government that compensation was being sought from them to enable the Government to acquire Northern Mining. They were told the money was required for "public purposes" or "community purposes". Mr Burke said in evidence that he believed the acquisition of Northern Mining was within the meaning of both those terms and certainly constituted a public purpose.

7.8.44 In a memorandum to the Premier dated 26 August 1983, Mr Naylor said Mr Walsh had provided a verbal report on the outcome of that day's preliminary discussions with an Eastern States taxation expert. The expert referred to was Mr J Caldon of Price Waterhouse who had flown to Perth from Sydney on 25 August 1983. His services had been engaged in connection with the question of tax liability in respect of the compensation payment. Mr Naylor did not know who paid the tax expert but he understood he was engaged by L R Connell & Partners. Hence, both the Premier and Mr Naylor were fixed with the knowledge that L R Connell & Partners must have incurred the expense of obtaining information from an Eastern States tax expert.

7.8.45 If Mr Burke and Mr Naylor are to be believed, no thought seems to have been given to payment of fees to L R Connell & Partners. This is despite the appointment, albeit informally, of Mr Walsh and Mr Connell as advisers to the Government at least for the compensation issue; despite Mr Walsh, in particular, devoting much time and energy to the compensation and acquisition issues; and despite the engagement of a tax expert who would need to be paid. Mr Burke said that he did not recollect considering whether Mr Walsh and Mr Connell would charge a fee. Mr Naylor said that to the extent that he considered the matter, he assumed that Mr Walsh and Mr Connell would ultimately charge on a time basis at some appropriate rate and seek to recover their expenses. However, the lack of concern of Mr Burke and Mr Naylor about fees might be construed as indicating that they appreciated the fees were to be paid by Bond Corporation.

7.8.46 As negotiations dragged on, it would appear that by about 18 August 1983 it became clear that the Joint Venturers had decided that it might be in their interest to talk more constructively with the Government. By that date, the argument seems to have developed to the point of the Government wanting $50 million, though claiming it could justify a higher figure, while the Joint Venturers were saying they could justify only $25 million as the cost saving by reason of not having to provide a town.

7.8.47 Ultimately, the amount of compensation was set but not without a considerable amount of work done by Mr Walsh. L R Connell & Partners entered into direct correspondence with the Joint Venturers and when the matter looked as if it were stalled, Mr Burke intervened, and by a series of telexes ultimately brought the issue to

a head. In a telex dated 7 September 1983, being part of a bundle of telexes, Mr Burke said:

> "Unless there is a significant departure from the present rigid negotiating framework adopted by the Joint Venturers, I will be forced to turn my attention to ending any deadlock by immediately terminating the negotiations and insisting that the Joint Venturers proceed to construct the minetown."

That was enough for the Joint Venturers to agree to pay $50 million but not precisely as the Government had originally hoped. Cabinet decided on 12 September 1983 that the Premier and Deputy Premier were to be authorised to agree to a payment of no less than $23.8 million in present-value terms. The payment was to be regarded as a prepayment of royalties and the arrangements were to involve an initial payment of not less than $50 million. The final agreement, about 15 September, stipulated that the Joint Venturers were to make an initial payment of $50 million, having a net present value of $27.5 million, as advance royalties. Dr Harman explained the final settlement in these terms:

> "The cash payment was 50 million, and it was 50 million in the form of a prepayment of royalties, but the Government would have to pay back to the Joint Venturers by way of reducing their royalty amounts, and the rate and timing over which those repayments occurred had to be calculated in such a way that net present value would be 27 million. So in summary, I guess the Government got what it wanted in terms of a payment of 50 million, the companies got what they wanted which was to pay something less than — considerably less than — that, and certainly not to pay more than they would have had to have paid in royalties anyway."

7.8.48 By reason of its relevance to the term of reference discussed in chapter 5 of the report, dealing with the Halls Head development, it is convenient to say a little more about how it was decided that the payment of $50 million should be so structured to be an advance payment of royalties. In his memorandum to the Premier of 19 August 1983, Mr Hohnen pointed out that an up-front payment of $50 million would not be deductible for income tax purposes in the hands of the company because such a payment would be regarded by the Commissioner of Taxation as a capital payment for the right to mine. If that were the position, a tax deduction would be denied under section 124AB of the *Income Tax Assessment Act 1936*. Therefore, the after-tax cost

of the payment to the Joint Venturers would be the full $50 million. However, if the $50 million payment were converted to a series of annual royalty payments with a net present real value of $50 million, the payments would be deductible like other royalties for tax purposes. The after-tax cost to the company would then be $27 million. Clearly, Mr Hohnen said, the royalty annuity method would be a less painful means of extracting the $50 million from the Joint Venturers.

7.8.49 There is no reason to suppose that the Premier did not receive that memorandum. There is no doubt that the final arrangement reached with the Joint Venturers was based on a prepayment of royalties as explained by Dr Harman. Mr A W Hubbard, who at the relevant time was employed by Treasury, had the task of making the appropriate changes to the Ashton royalty payments to give effect to the Government's decision to require a $50 million prepayment of royalties and to provide offsetting reductions in royalties in future years. We are unable to see how Mr Burke could not have been fully aware that tax considerations for the benefit of the Joint Venturers were taken into consideration in reaching agreement with them. We do not accept his explanation of the arrangement so as to preclude a tax consideration.

7.8.50 Apart from reaching agreement with the Joint Venturers, the Premier and those advising him were also concerned whether the money should be paid into Consolidated Revenue or into a special fund called the State Development Fund and in that regard Mr McCarrey's advice was sought. These considerations were also bound up with the means by which Northern Mining should be acquired. It is not necessary to go into the precise details of the final solution, except to mention three problems. The first was the selection of the destination of the $50 million payment into State funds, the second involved the *State Trading Concerns Act 1916* and the third involved the fact that the Government did not control a majority in the Legislative Council which meant it could not necessarily rely on its Bills being passed by that House.

7.8.51 Northern Mining clearly fell within the definition of "trading concern" within the provisions of the *State Trading Concerns Act 1916* as section 4(2) provided that:

> "No trading concerns, other than those to which this Act applies or shall apply, shall unless expressly authorised by Parliament be hereafter established or carried on by the Government of the State or by any person acting on behalf of such Government or under its authority."

Northern Mining was not a trading concern to which the Act applied. Mr McCarrey's advice to the Government was that there should be an Act of Parliament enabling the acquisition of Northern Mining with authority to spend $42 million, that the appropriation of $50 million out of the State Development Fund should be made a budget provision, and that a Bill to be called the Northern Mining Acquisition Bill should be prepared. This advice was subsequently accepted and executed.

7.8.52 It is now, however, necessary to go back to the final stages which led to the Cabinet decision of 26 September 1983 to purchase Northern Mining for $42 million.

7.8.53 On 15 September 1983, Mr Walsh said in a memorandum to Mr Connell:

> "While on the face of it the hard work appears to have been done, I think that the necessity to demonstrate to the Board of the purchaser that the deal is a good one requires a certain amount of work if we are to finish the job off properly."

7.8.54 The reference to the "Board of the purchaser" is no doubt a reference to the Cabinet. Mr Walsh said in his memorandum that a potential purchaser would require certain minimum information when a vendor wanted to sell a 100% interest in a company. He then set out what that information should be. The memorandum was a curious jumble of conflicting interpretations. Some of the phraseology suggested that Mr Walsh believed he was acting for the vendor and other phraseology indicated the purchaser. In respect of the latter, he said:

> "At the same time, to do the job professionally for the purchaser, I believe we should have all these things on our file and to be able to refer to them when you report to the Board of the purchasing entity."

There is no doubt, however, that the memorandum suggested that Mr Walsh regarded the work he had done to that stage as being justification of the purchase price of $42 million. Indeed, Mr O'Sullivan, Mr Connell, Mr Musca (Mr Connell's solicitor) and Mr Rowley gave evidence that that was his task. A letter from Mr Walsh to Mr Rowley of 19 September 1983 supported the same view.

7.8.55 The letter of 19 September from Mr Walsh to Mr Rowley is important for several reasons. In the second paragraph, Mr Walsh said:

> "Specifically, L R Connell & Partners have recommended to the Premier of Western Australia the purchase of a specific asset from your Group for $42 million cash. Our recommendation was accepted and your Managing Director has shaken hands with the Premier on this basis."

From the above passage we reach two conclusions. By at least 19 September 1983 and possibly as early as July, an in principle agreement had been reached between the Government and Bond Corporation for the sale of Northern Mining for $42 million and Bond Corporation's "Managing Director", who was Mr Beckwith, had either met the Premier or spoken to him whereby the agreement was concluded. It is more likely, by the use of the phrase "shaken hands" that Mr Walsh had in mind a meeting between the Premier and Mr Beckwith. The third paragraph is also significant:

> "Our advice was based on information supplied to us by Bond Corporation which, unfortunately, has required significant amendment over recent weeks. The latest information supplied to us would not support a purchase price of $42 million and is in a form which is hard to follow. We have no doubt that the investment is in fact worth $42 million and that we will be able to demonstrate this from the new information to be supplied today."

7.8.56 The reference to "significant amendment over recent weeks" suggests that the agreement referred to in the preceding paragraph had been made several weeks previously, a view which is supported by a memorandum written by Mr Burke to Mr Naylor on 23 August 1983 in which Mr Burke noted the importance of preparing very thoroughly "for the acquisition of our interest". The paragraph is also significant since certain "latest information", the contents of which have not been revealed to the Commission, did not support the purchase price of $42 million. Mr Walsh saw his task in the light of that information as being as follows:

> "Our task is to produce a document which will support the Premier's decision to make the purchase when it is presented to Cabinet."

He observed on the second page that Mr Rowley ought to appreciate that there was more than the sale at stake. L R Connell & Partners had to justify the purchase price and in

doing so ensure that any challenge to the proposal from within Cabinet or subsequently in Parliament or the financial press, could be answered effectively and in a way which would not embarrass the Premier. The balance of the letter which went into specifics, demonstrated that as Mr Walsh saw it, he needed information which would support the purchase price of $42 million. It was not a case of examining further information to establish a fair purchase price, but to obtain information which would support a $42 million price. Finally, from what Mr Walsh said on the fourth and last page of the letter, Bond Corporation, through Mr Rowley, had been co-operating readily with him in supplying figures and explanations when previously requested, which again suggested that he had been in contact with Bond Corporation through Mr Rowley for some weeks.

7.8.57 The memorandum of 15 September 1983 was not the only place where Mr Walsh had written as if the Government were L R Connell & Partners' client. Another instance was in a letter from Mr Walsh to Mr Rowley of 30 September 1983. By that date, of course, Cabinet had decided to go ahead with the purchase. The letter was concerned about suggested alterations to the draft of the proposed contract of sale. In paragraph 3, when commenting on clause 4.2(b), Mr Walsh said:

> "Obviously, we would not anticipate any difficulty in agreeing on a fair value, [of diamond stocks] but our client should not be bound by a decision of the vendor."

7.8.58 There is no contemporaneous evidence of any attempt by Mr Walsh or Mr Connell to negotiate down from a price of $42 million. Their failure to do this is consistent with their acting as agents for Bond Corporation. Mr Naylor said in evidence that he believed the price of $42 million was "open-ended" and that he understood that Mr Walsh and Mr Connell were negotiating it with the vendor. He said he asked Mr Walsh directly if the company could be acquired for less than $42 million and Mr Walsh replied that Bond Corporation was not prepared to sell the company for less than $42 million. He remembered that he mentioned a figure of $38 million to Mr Walsh. Further, he remembered speaking to Mr Burke about getting the company for less than $42 million. It is scarcely likely that Bond Corporation, having recently bought Northern Mining for $42 million, would contemplate selling it for less than $42 million. To sell for less would not have looked good in the company's balance sheet and, as will be seen later, when the question of whether a fee had been agreed between Bond Corporation and L R Connell & Partners is further considered, Bond Corporation went to considerable trouble to delay the payment of a fee and to make the discovery of payment a difficult matter.

7.8.59 It is difficult to classify precisely the role of L R Connell & Partners in the acquisition of Northern Mining. It may have been that Mr Walsh believed he was acting in the interests of both parties. We are of the view, however, that L R Connell & Partners was an agent in negotiating the sale on behalf of Bond Corporation. However, it does not necessarily follow from that conclusion that the firm, and particularly Mr Walsh, did not also have a concern for the interests of the Government and, indeed, that concern is amply demonstrated by the evidence, for example the letter from Mr Walsh to Mr Rowley of 30 September 1983.

7.9 The Treasury evaluation

7.9.1 According to the evidence of Mr McCarrey and Mrs Sanderson, the Treasury was not consulted by the Government as to the wisdom of purchasing Northern Mining, nor asked to help negotiate for its purchase. So far as Treasury was concerned, nothing had happened in relation to the acquisition since the presentation of that intention on 27 July 1983 at the meeting of Treasury officers and Mr Walsh and Mr Connell. No cash-flow details were provided at that meeting and both Treasury officers anticipated that they would receive detailed cash-flows subsequently but that never happened.

7.9.2 However, on 16 September 1983 Mr Peter McMullen, an acting Senior Research Officer in Treasury, sent a memorandum to Mrs Sanderson in which he referred to a request from her to assess the reasonableness of $42 million as the possible purchase price of Northern Mining. It is not clear why Mr McMullen was requested to carry out that assessment though he was probably requested to do so a few days before 16 September 1983. The request may have been prompted by a statement said to have been made by Mr Burke to Mr McCarrey a few days before the Cabinet meeting of 26 September when, according to Mr McCarrey, he was told that the Government was buying Northern Mining. Mr McCarrey asked Mr Burke precisely what was being purchased and Mr Burke said that he did not know but Mr McCarrey should clarify this with Mr Walsh. Mr McCarrey said that probably the exercise was done simply because Treasury regarded the oversight of prospective Government expenditure as being one of its duties.

7.9.3 Appended to Mr McMullen's report were various documents relating to the financial position of Northern Mining and Bond Corporation, a summary of the project and marketing arrangements, and the Baring Bros report. The very same

documents were attached to a letter dated 9 September 1983 from Bond Corporation to Mr Connell and by that letter Bond Corporation sought Mr Connell's assistance in obtaining a facility of $20 million to meet its short-term financial obligations.

7.9.4 According to Mr Connell, he had referred that matter to Mr Burke and had obtained Mr Burke's assistance for a facility from the R & I Bank. Mr Burke said he had no recollection of such a request and that it would have been contrary to his general policy in relation to the Bank to accede to it. However, the letter was located on Mr Naylor's file (in a Treasury file cover). Assuming that the letter was received by or in Treasury on or about 12 September 1983, and that the accompanying documents were given to Mr McMullen, then he must have carried out his work in the few days prior to Friday, 16 September 1983, when he produced his memorandum.

7.9.5 Mr McMullen was a graduate economist with an accounting major. He had no experience in private practice, having been employed only in the Public Service. He undertook his task only by reference to the documents which had been supplied to him. He made various attempts to assess the reasonableness of the $42 million price on the basis of the "limited information" available to him. This information included the report dated 19 July 1983 prepared by Baring Bros for Endeavour. The report was required pursuant to Listing Rule 3J(3) of the AASE Listing Rules so that shareholders of Endeavour which was selling to an associated company, might be satisfied that the price was "fair" to them. In their report, Baring Bros identified the "fair criteria" as follows:

> "It is our view that the transaction price should be considered fair if that price is not less than:
>
> (a) the net present value of Northern's discounted after-tax cash flows from operations as now projected based on reasonable cash input assumptions, together with an additional value for the future net worth of exploration interests; and
>
> (b) the comparative value which can reasonably be ascribed to such assets from other indirect sources, in particular the Ashton share market capitalisation, together with any additional premium amount that is related to a direct Joint Venture stake held in a major mining undertaking."

Baring Bros came to the view, on the basis of those criteria, that $42 million was a fair price for Endeavour to *receive* [our emphasis] on the sale of the asset. Stated in these terms and on that basis, the Baring Bros report could not be regarded as a valuation of Northern Mining. Indeed, it is clear from the declaration to the report that Baring Bros did not intend that it should be used as a valuation, and there was very good reason for this although, of course, it was not made public. It was that Baring Bros were of the view that Northern Mining was worth considerably less than $42 million, and probably less than $30 million.

7.9.6 Mr McMullen, in paragraph 6 of his memorandum, noted that Baring Bros had valued a comparable 5% interest in the Argyle mining area via Ashton at $27 million. He went on to say:

> "Due to the free market advantage to be enjoyed by Northern Mining, the report concluded that a fair value for Northern Mining's Ashton interest would be at a premium of 55.6% over and above the imputed value based on Ashton's share market value. While not in a position to comment with any degree of certainty on either the value of Northern Mining's interest, nor the Baring Bros report, a 55.6% premium on derived share market values would appear to be generous."

7.9.7 Mr McMullen did not appreciate the significance of the Baring Bros report and in that regard neither did Mr McCarrey, Mrs Sanderson or Mr Naylor. The report was only to establish whether the price of $42 million was fair to Endeavour's minority shareholders, not whether it was fair to the purchaser. Mr McMullen stated his conclusions in paragraph 8 as follows:

> "... it is felt that the reasonableness of the $42 million figure quoted as the value of Northern Mining's 5% interest in the Ashton Joint Venture cannot be accurately determined from either the company's financial statements nor from the purchase price paid by Endeavour Resources in August 1981 or Bond Corporation in mid-1983. It is significant to note however, that Endeavour Resources disposed of its interest in Northern Mining at a loss of $11 million and that a report by Barings (July 1983) considered $42 million to be a fair price for Northern Mining's 5% interest in the Ashton project. This conclusion of Barings is not adequately quantified however in the attached report."

Mrs Sanderson read that opinion, and Mr McCarrey said he had seen it.

7.10 The events of 21-25 September 1983

7.10.1 In his handwritten memorandum of 23 August 1983 to Mr Naylor, Mr Burke had said:

> "It is important that we prepare very thoroughly for the acquisition of our interest. We must ensure that we have clearly stated a cost/benefit analysis."

This memorandum affords strong evidence that the decision to acquire Northern Mining had been made by this time subject only to receiving compensation from the Joint Venturers. This instruction was no doubt acted upon by Mr Naylor by asking Mr Walsh to prepare a report for submission to Cabinet. Having regard to his memorandum to Mr Connell of 15 September 1983 (referred to earlier) Mr Walsh may well have appreciated a need for a report without prompting. On or about 21 September 1983, Mr Naylor received an incomplete draft document from Mr Walsh, but only that portion of it which follows the first eight pages headed "Possible introduction to report on Northern Mining Limited". Mr Walsh rang the same day to find out if the report had been received and a conversation took place about it. Mr Naylor told Mr Walsh that the introduction to the report needed to be summarised in such a way that it focused sharply on three very important questions on which Cabinet would want to be satisfied. The introduction as it was then presented did not address those issues. And the three questions that he suggested to Mr Walsh are now the three matters that appear on page 1 of the actual introduction, namely, exactly what the State would be acquiring, the reasons for the acquisition, and the cost/benefit to the State of the acquisition.

7.10.2 On 21 September 1983, that is to say, the same date as Mr Naylor had received the incomplete draft, he sent a memorandum to Mr Connell and Mr Walsh on the subject of Northern Mining. He told them Cabinet would meet on 26 September, half an hour before the Cabinet were to meet certain federal ministers, to consider the acquisition of Northern Mining. He detailed certain matters which he felt ought to be covered in the information to be supplied to them and, hence, in the report which L R Connell & Partners was preparing. On page 4 of the memorandum, he stated:

> "I would be inclined to rewrite the introduction to the report with greater emphasis on and attention to those matters which I have indicated will be necessary to demonstrate unambiguously in the Cabinet submission."

7.10.3 On 23 September 1983, Mr Naylor received portion of the draft report. As previously mentioned, the three points which Mr Naylor indicated should be emphasised in the introduction were mentioned. The significant thing, however, about this draft (which incidentally is called "Draft 1"), is reprinted hereunder, the alterations to it having been made by Mr Naylor. This part was not included as part of the draft document Mr Naylor received on 21 September 1983.

> "Declaration of Interest
>
> on assignment by the
>
> L.R. Connell & Partners have, ~~at the invitation of~~ Premier,
>
> *negotiating*
>
> assisted in ~~negotiations~~ between the Ashton Joint Venture Partners and the Government in negotiating compensation for the State for any disadvantage associated with the State's consent to allow the Joint Venture to adopt what is now known as the `commute option' and relieve the Joint Venture of its obligations related to the construction of a mine town. The assistance of the Premier's Department, the Deputy Premier's Department and Treasury has been invaluable in these negotiations which probably could not have been successfully concluded without the direct participation of the Premier in the final discussions. As far as the acquisition of the issued capital of Northern Mining Corporation N.L. is concerned, we have attempted to negotiate with the vendor the best terms and conditions upon which the vendor was prepared to sell the interest. We hereby declare however, that by agreement the vendors will pay L.R. Connell & Partners a fee for negotiating the sale and on that basis we must be regarded as advisers to the vendors in relation to the sale even though we have acted as advisers to the Government in the negotiations with the Joint Venture in respect of the `commute option' and the compensation obtained. We would comment however that the information available to us in the course of negotiating the sale of Northern Mining Corporation N.L. was invaluable in relation to negotiations with the Joint Venturers as a whole.
>
> Perth
>
> Sept. 23, 1983"

7.10.4 It has been suggested that the word "agreement" which appears in the phrase: "We hereby declare, however, that by agreement the vendors will pay L R Connell & Partners a fee" refers not to an agreement between the vendors and L R

Connell & Partners, but between the Government (presumably, through the agency of Mr Burke) and Bond Corporation.

7.10.5 When the whole of the Declaration of Interest is read, we have no doubt it refers to an agreement between Bond Corporation and L R Connell & Partners. We do not believe there is any evidence to suggest that Mr Burke and/or some other person on behalf of the Government entered into an agreement with Mr Bond that Mr Bond should pay L R Connell & Partners a fee and we see no reason why that should have been so. Far more likely it is that the Declaration of Interest was inserted following the advice of Mr L Musca, Mr Connell's solicitor, that a secret commission, a secret from the Government, should not be earned.

7.10.6 As Mr Connell's solicitor, Mr Musca had various dealings with Mr Walsh, often on an informal basis. Indeed, as he told us, he became quite friendly with Mr Walsh. His evidence was that in late September, Mr Walsh asked him to cast his "legal eye" over a draft agreement for the sale of shares in Northern Mining. The draft contained a clause 4.1(p) in the following terms:

> "the Company has no liability to pay commissions to any person, firm or corporation other than in the ordinary course of business;".

7.10.7 On reviewing the document, Mr Musca seems to have been prompted by clause 4.1(p) to ask himself about commission since he made a note which appears against clause 4.1(p) "commission! To LRC?". The draftsman could not have had in mind as falling within clause 4.1(p), a commission payable by the vendor to its agent for effecting the sale of its shares in Northern Mining. But for whatever other purpose the clause was inserted, it does seem to have prompted in Mr Musca's mind the need to bring to Mr Walsh's attention the question of commission. He subsequently raised the matter with Mr Walsh who told him that Mr Connell was being paid a fee by Bond Corporation. Knowing that Mr Walsh and Mr Connell were acting as advisers to the Government, Mr Musca cautioned Mr Walsh about the danger of earning a secret commission. He said that he used an analogy which he knew Mr Walsh would understand, namely that he could not "ride two horses in the same race".

7.10.8 On 22 September 1983, Mr Walsh sent a memorandum to Mr Connell which included the following statement:

> "Clause 4.1(p). I have confirmed to Leon Musca that there is no agreement for Northern to pay any commission to anybody in connection with the sale as he feels that L R Connell & Partners should protect itself from any suggestion of a secret commission. *I have explained to Leon that in my presence you confirmed to the Premier that the vendor would be paying L R Connell & Partners any commission payable."* [our emphasis]

The memorandum is unsigned but was produced to the Commission from Mr Musca's files. He was not able to say how the document came into his possession, but there can be little doubt that it was produced by Mr Walsh. That conclusion is supportable in view of what the memorandum contains. Mr Walsh referred to his discussion with Mr Musca "yesterday" (and that must have been 21 September 1983 since the memorandum is dated 22 September 1983) and in a discussion with Mr Rowley (of Bond Corporation) he reported on the draft agreement, the first draft, by referring to nine clauses in that draft. For example, he referred to clause 4.1(m), clause 6.2 and clause 8.1.1 suggesting that he would have those clauses amended. A further draft of the agreement, which was presented to Mr Musca for his opinion two to three weeks later, after he had seen the first draft, in fact incorporates amendments to those clauses. It seems very probable that when Mr Walsh handed to Mr Musca the further draft he would have handed to him also a copy of his memorandum as an *aide memoire*. It is also possible, however, that the memorandum was handed to Mr Musca before that date because it was Mr Musca who was supposed to prepare the amendment to clause 6.2, and the draft agreement certainly includes an amendment along the lines appearing in Mr Walsh's memorandum.

7.10.9 Mr Connell confirmed that what was contained in clause 4.1(p) was correct, though he did not recall the memorandum. He said he believed that on two occasions he had explained to Mr Burke that Bond Corporation would be paying his commission — the first being when the original discussions concerning the purchase took place and the second being when he attended upon Mr Burke with Mr Beckwith. Mr Burke denied any knowledge of any such disclosure by Mr Connell of the matters referred to in Mr Walsh's memorandum. While Mr Burke accepted that Mr Walsh was an honest man, he pointed out that he was working for Mr Connell and was capable of being compromised. He agreed, however, that he met with Mr Beckwith and Mr Connell and possibly Mr Naylor prior to the meeting of the Cabinet on 26 September 1983 and, to the best of his recollection, at about the beginning of the second half of September. The purpose of the meeting, as far as he understood it, was for him to confirm to Mr Beckwith that he had formed the view that he would

recommend to Cabinet that the Government should purchase Northern Mining. Mr Naylor did not remember being present at the meeting, but he did recall saying certain things to Mr Beckwith in Mr Burke's office. He could not remember whether it was before or after the Cabinet meeting of 26 September 1983.

7.10.10 Mr Burke conceded that with the exception of the reference to the agreement relating to the payment of Mr Connell's fees, all the statements contained in the Declaration of Interest were entirely accurate. He denied that there was any agreement between L R Connell & Partners or the vendor or anybody else with the Government that L R Connell & Partners should be paid a fee by Mr Bond. When asked if he could conceive of any reason for Mr Walsh to put the Declaration of Interest into the introduction, Mr Burke replied that, if he were being asked to speculate, he could foresee a situation in which there was a prospect of difficulties unless the declaration of that nature was inserted, but he did not elaborate, nor was he asked to, on what he had in mind as what might constitute the "difficulties". There is no reason why we should reject Mr Musca's evidence about the advice he gave and which appears to be supported by contemporaneous documents and, therefore, that the inclusion of the Declaration of Interest in the draft was introduced as a result of that advice and, indeed, almost immediately thereafter.

7.10.11 If it is correct that Mr Connell informed Mr Burke that Bond Corporation would be paying commission due in relation to the acquisition of Northern Mining, then when was such a disclosure made? Was, it as Mr Connell asserts, as early as July 1983 or was it in September 1983, prior to the Cabinet meeting? One possibility to be considered is that there never was a disclosure by Mr Connell other than in the Declaration of Interest produced on 23 September 1983. If that were the case, then Mr Walsh could never properly have stated in his memorandum on 22 September 1983 that "in my presence you confirmed to the Premier that the vendor would be paying L R Connell & Partners any commission payable". If that were not true, why should Mr Walsh include it in a memorandum to Mr Connell who would also know it to be untrue?

7.10.12 One exhibit is of considerable importance. It is a letter which Mr Walsh apparently wrote to Mr Naylor which Mr Naylor does not admit having received and the Commission has only a copy. The letter is dated 16 November 1983 and the following is the relevant passage:

> "I believe that it is accepted that L R Connell & Partners have been useful to the Premier in recent weeks and have the potential to contribute further in the years and months ahead. I further believe that the Premier accepts that commercial organisations, such as L R Connell & Partners, need to operate at a profit. The difficulty is that the level of profit required to maintain an operation such as L R Connell & Partners may be higher than the level of fees that a Government can be seen to pay consultants. We believe that we are something more than consultants and therefore higher than usual fees are justified.
>
> In recognition of the problem in respect of fees we have sought to structure particular transactions in a way that minimized the cost of our services to the Government. This was achieved in the case of the negotiations on Ashton and the subsequent purchase of Northern Mining and *we believe it was achieved in a way acceptable to the Premier*." [our emphasis]

The letter concerned a proposal to create a merchant bank in which the WADC would be the major partner and L R Connell & Partners would hold a significant share as well as overseas institutions. As Mr Walsh pointed out, in the way he proposed to structure the creation of the merchant bank, L R Connell & Partners would benefit without direct expense to the Government. The copy bears Mr Walsh's signature and it may be regarded as reflecting accurately his understanding of the matters referred to. And he would not have held that understanding unless he believed that Mr Burke was aware of the way in which Mr Connell was to receive his fee in relation to Northern Mining. The letter also offers an explanation of why it may have been that Mr Burke, if he did know that L R Connell & Partners were to receive a fee, was reluctant for that to become generally known, since the fee of $5 million might be seen by the public to be at a higher level than a government could be seen to pay consultants, even though it was not doing so directly.

7.10.13 Mr Naylor said that on 23 September 1983, in the afternoon, he received the first eight pages of the draft report from Mr Walsh. September 23 was a Friday and the Cabinet meeting was to be the following Monday. Upon reading the eight pages, and particularly the Declaration of Interest, he said he noted three matters that he wanted to discuss with Mr Walsh. First, who decided and when that L R Connell & Partners would act for both sides because the Declaration of Interest was the first knowledge, he said, that he had of any suggestion that the firm would, in fact, act for the vendor on the sale of the company to the Government. Secondly, whether the

Declaration of Interest had been discussed with the Premier and, thirdly, whether the declaration would cause problems if L R Connell & Partners intended to proceed on that basis.

7.10.14 Mr Naylor was able to contact Mr Walsh the following day. He claimed that Mr Walsh said to him that it was L R Connell & Partners' objective to earn a fee out of the acquisition of Northern Mining and that he was concerned about this development at such a late hour. Mr Walsh undertook to speak to Mr Connell. Mr Naylor asked Mr Walsh whether Mr Burke was aware of these arrangements between L R Connell & Partners and the vendor. Mr Walsh said that issue had not been discussed with the Premier and that he, Mr Walsh, had been instructed only recently to document the proposal in the form of the Declaration of Interest. Mr Naylor said that the appearance of the Declaration of Interest in the introduction had occurred without any forewarning and, of course, raised the problem of the integrity and independence of the advice being given to the Government as purchaser.

7.10.15 Later, Mr Walsh told Mr Naylor that he had seen Mr Connell and that L R Connell & Partners would continue to act for the Government, but that they would not receive a fee from the vendor because Mr Connell was concerned that the issue of the fee could sour the relations with the Government and that there would be other opportunities, because of their frequent dealings with the Bond Group, to earn fees from other, unrelated transactions. The conversation ended on the basis that the Declaration of Interest would be excluded from the report and the problem would be solved.

7.10.16 Senior counsel assisting the Commission cross-examined Mr Naylor on why he thought the problem would be solved merely by the excision of the Declaration of Interest and the advice that L R Connell & Partners would not be receiving a fee. It was pointed out to him that he had asked, on behalf of the Government, for L R Connell & Partners to prepare a report, demonstrating that the price of $42 million was fair and reasonable to the purchaser and that, merely because L R Connell & Partners had now decided not to charge a fee, that did not alter the fact that the firm had given its advice to the purchaser while apparently also acting for the vendor.

7.10.17 Mr Naylor sought refuge in his inexperience in this sort of matter and the time constraints which were imposed upon him to get the Cabinet submission ready for the following Monday. Mr Naylor presented to us as a very intelligent person and one who, even though inexperienced in 1983 in handling business matters of the nature and

dimension of the Government acquisition of Northern Mining, would nevertheless have fully appreciated that the integrity of the advice was in no way improved merely because L R Connell & Partners had decided at the last moment not to take a fee (if that indeed is the truth).

7.10.18 Mr Naylor discussed the matter with Mr Burke on the Sunday after Mr Burke received the draft submission. He said he explained to Mr Burke about the Declaration of Interest that had first appeared in the introduction and that he had discussed it with Mr Walsh. He also explained the outcome of the subsequent call with Mr Walsh when Mr Walsh had indicated that L R Connell & Partners, though it had previously anticipated deriving a fee, would now not accept a fee for their services from Bond Corporation. He said Mr Burke's response was initially one of concern and acknowledged that there would be difficulty in proceeding with the transaction if L R Connell & Partners were to receive a fee; but, when the explanation was given to him, namely, that there was to be no fee charged, Mr Burke's response was, "Good", which Mr Naylor accepted as meaning that was an end of the matter.

7.10.19 Mr Burke, on the other hand, said that Mr Naylor had rung him and told him that there had been a disagreement surrounding the question of fees, but Mr Naylor did not otherwise explain what the nature of the disagreement was, or had been. When Mr Naylor told him that the problem had been solved, Mr Burke did not make any further enquiry of him about that matter. When pressed by counsel, Mr Burke was unable to say whether the problem had been solved because Mr Connell was not charging a fee. It was put to him that there would have been no problem unless Mr Connell had been intending to charge a fee to Mr Bond. Given Mr Naylor's description of the work that he carried out for Mr Burke, the Commission is of the view that Mr Naylor would have conveyed to Mr Burke a full report of the nature of any disagreement between him and Mr Walsh.

7.10.20 Taking into account the time and effort which Mr Walsh and Mr Connell had expended to bring the acquisition and the negotiation over the commute option to fruition, and also the money L R Connell & Partners had expended in obtaining the services of the Eastern States tax expert to help them with the commute option, and particularly having regard to Mr Connell's expectations of earning a fee of $5 million from Bond Corporation, the proposition that he would voluntarily relinquish a fee of that magnitude is unbelievable. He denied that he had ever given Mr Walsh any instruction to make any concessions, as Mr Naylor claimed. There is, in addition, silent

testimony in Mr Walsh's letter of 16 November 1983 to Mr Naylor, to which reference has been made. It is highly unlikely that Mr Walsh would ever have made such a statement if L R Connell & Partners were not to obtain a fee for their services in respect of the sale of Northern Mining. In addition, Mr Walsh wrote to Mr Naylor on 5 October 1983, in which he said:

> "I know that L R Connell & Partners could have negotiated a better deal for Bond than was actually negotiated and while not knowing the commission arrangements between this firm and Bond, I know that under certain circumstances the payment would have been increased had Mr Connell not negotiated the deal as though he was working 100% for the Government."

That passage is inconsistent with the proposition that Mr Connell was not charging any fees and that Mr Walsh had made such a statement to Mr Naylor. Mr Connell, in his evidence, said that he told Mr Walsh that Bond Corporation was paying fees, but he never told Mr Walsh the amount.

7.10.21 There is a possibility, which is supported by subsequent events, that Mr Walsh told Mr Naylor during the weekend of 24-25 September that no charge would be made against Mr Bond, but the arrangements would be made for the fee to be paid indirectly or in some covert manner. It is also possible, and consistent with Mr Walsh's memorandum to Mr Connell of 22 September 1983, that Mr Walsh said or confirmed that no fee would be charged to the Government, and that if any fee were payable it would be payable by the vendor. Such an arrangement would enable Mr Burke to say later that Mr Connell had not charged the Government a fee for his work and that he did not know if any other person, such as the vendor, was in fact paying a fee.

7.10.22 Another possibility (assuming Mr Burke was unaware that Mr Connell's fee was to be paid by Bond Corporation) is that Mr Naylor made some arrangement with Mr Walsh which was satisfactory to himself, and did not inform Mr Burke of the disclosure of interest. We reject that proposition. Mr Naylor said that he regarded the disclosure of the interest as a "try on", that is, an attempt to obtain a fee when no previous arrangement had been made. However, the fee was to be paid by Bond Corporation, and inconsistent with the agreement which Mr Connell said he made (and Mr Bond agreed was made) for the payment of a fee of $5 million. It is also inconsistent with Mr Walsh's memorandum of 22 September 1983 and his letters to

Mr Naylor of 5 October and 6 November 1983. The Commission also believes Mr Naylor would at all times have kept Mr Burke fully informed.

7.10.23 While dealing with a matter in a subsequent term of reference, Mr Connell pointed out that a deal could be structured where L R Connell & Partners was acting for both parties so that one party obtained the bigger advantage in the deal and only that party paid a fee to L R Connell & Partners. The statement affords a revealing glimpse of Mr Connell's style.

7.11 The R & I Bank loan to Bond Corporation

7.11.1 By letter dated 9 September 1983, Bond Corporation wrote to Mr Connell asking his assistance to raise additional finance of $20 million for a term of 18 months and offering as security a first charge over the Northern Mining shares that it then owned through Emersat Pty Ltd ("Emersat"). Several documents were enclosed with the letter, one of which was a summary of the Ashton diamond project which was probably the April 1983 Northern Mining report. Mr Connell said there had been a need for restructuring of financing for Bond Corporation from the end of June when he had commenced his discussions with Mr Beckwith. He said he spoke to people in Government, including the Premier, to seek their support in procuring a loan facility for Bond Corporation. The support he required concerned an application to be made to the R & I Bank and that support, he said, was forthcoming. He was definite that he spoke to the Premier. He believed that matters had progressed with the Government on the purchase of Northern Mining to a point where he felt he could ask for government support in making the application for funding from the R & I Bank.

7.11.2 When Mr Burke was asked about this matter he could not recall being requested by Mr Connell or Mr Beckwith to assist Bond Corporation to raise finance from the Bank. He went on to say "I don't recall speaking to anyone at the R & I Bank and it would be contrary to my general policy in respect of that Bank. However, I'm sure that had I spoken to anyone at the Bank then the file would have been appropriately noted". He also said that he did not recall asking anyone to speak to the Bank on his behalf about this matter.

7.11.3 The letter of 9 September 1983 was located in Mr Naylor's file (in a Treasury file cover). Mr Connell could not suggest how a copy of the letter came to be with Mr Naylor, or indeed at some stage, the Treasury.

7.11.4 Mr Dennis Whitely had been a Commissioner of the R & I Bank between 1975 and 1987 when he became a director. He had served as Chairman of the Lending Committee from 1985 to 1990 and retired from the Bank on 29 June 1990 after 42 years' service. He outlined the Bank's practice in regard to handling applications for loans. The Lending Committee at the relevant time in 1983 would have had authority to lend up to probably about $5 million, but any sums above that figure could only be agreed to by the Board which comprised the Commissioners who would have unfettered discretion. Consequently, an application for a facility of $20 million, in normal circumstances, would be required to go to the Board.

7.11.5 In 1983 Mr D P Fischer was Chairman of the Bank, but according to Mr Whitely, he would not have had any authority beyond that possessed by the Board. He remembers a meeting on or about 20 September 1983 at which Mr Fischer produced a copy of a letter dated 15 September 1983 he had written to Mr Connell advising the Bank's approval in principle of a commercial bill endorsement facility for Bond Corporation for $20 million. Mr Fischer sought the confirmation of the Board members stating that he believed it to be an appropriate loan to make. When questioned by Board members, he indicated he had had discussions with the Premier who had tied it in to Government plans. Mr Whitely opposed the grant of the facility because he had reservations about the borrower and it was not a loan that the Bank normally made on the kind of security offered. He believed it compromised the Bank's position on certain other transactions, or it had the potential to do so.

7.11.6 Mr McCarrey was also a Commissioner of the Bank, though only part-time. He outlined to the other Commissioners in strict confidence the Government's plan to buy 5% of Northern Mining. The proposal was confirmed — Mr McCarrey and another Commissioner, Mr W J Phillips, not opposing. In any event, the Commissioners' hands were really tied because the terms of Mr Fischer's letter committed the Bank to the loan.

7.11.7 Sometimes, before regular Board meetings (which appear to have occurred fortnightly) the Chairman might contact his fellow Commissioners informally and obtain their views on a particular transaction with a view to having that decision ratified later at a formal meeting of the Board, but Mr Whitely's recollection was that no such informal discussion had occurred in respect of the Bond Corporation loan. The Chairman, however, when introducing the topic, indicated that subsequent to making his decision he had discussed the matter with the General Manager, Mr Andrew Gordon,

who was also a Commissioner but was absent from the particular meeting when the loan was ratified.

7.11.8 Mr Phillips did not recall the meeting but he was able to confirm that the grant had been made without an application. He said he would have thought that the Bank would never grant a facility of $20 million without a formal application.

7.11.9 Mr B C Howie who had been Manager Corporate Banking at the relevant time, and had the carriage of the loan after it had been approved, confirmed that there was no application for the loan and that was most unusual, especially for a loan of $20 million.

7.11.10 Mr Fischer did not give evidence before the Commission until late in the Commission hearings. Before he gave his evidence, however, he provided us with a statement of his recollection of the events. In that statement he said he was unable to recall any of the circumstances surrounding the application made to the Bank for the facility, nor surrounding the approval of that facility by the Bank.

7.11.11 He did not recall having received any requests or having any conversation with Mr Burke or any member of Mr Burke's department about the facility. Referring to the date of his letter to Mr Connell, 15 September 1983, as being five days before the meeting of the Board, Mr Fischer said he saw nothing unusual in those circumstances. It had not been unusual for matters to be looked at by Board members outside regular formal meetings of the Board. Because several of the Bank's Commissioners were "in-house" the Commissioners would frequently have informal meetings of the Board concerning matters which required speedy consideration. At such meetings the Commissioners present would consider the application and the submissions and recommendations of the relevant lending officers in the Bank and then reach an "in principle" decision on the application. The application, however, would still have to be formally approved and confirmed by the Board in the usual way. He felt certain that he would not have signed and sent out his letter of 15 September without first having discussed it and reached a decision with other members of the Board at one of these informal meetings.

7.11.12 In his evidence Mr Fischer was not able to further enlighten us except to this extent. He pointed out that in the Bank's affairs he had to appreciate who the Premier was and his relationship to the Bank. He said one did not have to receive a direction from the Premier, but an expression of interest was a fair way towards the

equivalent of a direction from him. So, in dealings between the Premier and a Chairman of the State Bank, it was not necessary for the Premier to use an expression like "I hereby direct you to do something" for the Premier could put what he wanted in more polite terms in order to convey his wishes.

7.11.13 Mr McCarrey was recalled to give evidence about the loan but he was unable clearly to remember the incident. He confirmed that it was not common but it was not unusual for a major borrowing to be dealt with by the Lending Committee and by the full-time Commissioners in-house and approval in principle given subject to normal ratification. He remembered nothing of the discussion at the Board meeting, though he agreed that he must have been present for he recognised another item which had been discussed at that meeting. He recalled, however, from that meeting or a subsequent discussion with Mr Fischer that he was informed that the Government had approached Mr Fischer about the loan. He was certain there was no heated discussion at the meeting but he would not say that Mr Whitely did not express his concern, though he did not recollect him doing so. He remembered, however, mentioning to the Commissioners the Government's intention to acquire Northern Mining.

7.11.14 On this evidence, we are led to the conclusion that the application for the loan was a matter of urgency and it was dealt with in an unorthodox manner in that there was no formal application for it. We accept the evidence of Mr Whitely. It follows that the application probably was made to Mr Fischer either directly by Bond Corporation or through the agency of Mr Burke. It seems apparent to us that Mr Fischer had been approached by Mr Burke by some means on behalf of Bond Corporation and in this respect Mr Burke's memory is faulty. It must have been an occasion when he did make an overture to the Bank on behalf of a particular customer.

7.11.15 While there may be nothing illegal or corrupt in Mr Burke making such an overture to the Bank, that he should have done so in the context of negotiations between Bond Corporation and the Government for the purchase of Northern Mining suggests that Mr Burke sought to use his position as Premier to influence Mr Fischer to grant the loan to Bond Corporation which was sought through the agency of Mr Connell. The question is whether it is improper to have so acted. We have already outlined Mr Fischer's evidence concerning his view as to the force and effect of an expression of a wish or desire by the Premier of the State. In the circumstances in which the request was made by the Premier, the Commission finds that Mr Burke acted improperly. That Mr Burke should have spoken to Mr Fischer about the Bond

Corporation application also confirms the fact that Mr Burke was well aware of the relationship between Mr Connell and Bond Corporation. L R Connell & Partners received a fee of $500,000 for its work in helping to procure the R & I Bank facility of $20 million to Bond Corporation. Mr Connell in evidence agreed that the fee had been paid and it was attributed to being part of the $5 million fee which the firm was to have earned through the Northern Mining deal from Bond Corporation. This raises the further question whether a $50,000 donation made to the Australian Labor Party on 9 December 1983 was in any way related to the approval of the R & I Bank loan, a matter to which we will return later in this chapter.

7.12 The L R Connell & Partners Report

7.12.1 The Report ("the Connell Report") was undoubtedly prepared by Mr Walsh. Mr Connell had no input according to him. Its purpose was to provide in the words of Mr Connell, "an information memorandum to the Cabinet". It was distributed to Cabinet members by Mr Naylor before the Cabinet meeting.

7.12.2 RFC, through Mr R B Massy-Greene, was asked by the Commission to review the Connell Report and his report covering that review is dated 11 July 1991. He was also asked to review the working papers and financial projections for the Connell Report and that review is also dated 11 July 1991.

7.12.3 The Connell Report is dated September 1983 and it reached its final form probably on 25 September when it was handed to Mr Naylor for distribution to Cabinet members. The Report including the appendices comprised 76 pages omitting formal parts, and there is some suggestion in the evidence that the actual report as distributed to Cabinet may have contained additional appendices which do not now appear in the exhibit as tendered in the Commission. As it could not have been distributed to Cabinet members much before the day before the meeting and perhaps not even until the morning of 26 September 1983, it seems very unlikely that the Cabinet members would have been able to have anything but the most cursory glance at its contents. Consequently, they may well have obtained an impression from the report which would not have been borne out by a detailed study of it. Superficially, it gives the impression of a well-prepared document. The introduction states the objectives as follows:

> "The purpose of this Report is to give an opinion on the acquisition of 100% of the issued capital of Northern Mining

Corporation NL ("Northern Mining") for a consideration of $42 million.

It has been prepared by L R Connell & Partners ("LRC") from information originating from the Ashton Diamond Mines Joint Venture and specifically takes into account the following:

(1) Cash flow projections from the European Banking Corporation Limited and their opinion as to the value of the 5% interest (see Appendix (1)).

(2) The feasibility prepared by the Joint Venture Manager of Ashton Pipe-AKI.

(3) Baring Bros Halkerston & Partners Limited fairness report prepared for the sale of Northern Mining by Endeavour Resources Limited ("ERL") to Bond Corporation Holdings Limited ("Bond Corporation") (see Appendix (2)).

(4) Confidential information obtained from various sources upon which we have based our opinions."

7.12.4 Mr Massy-Greene pointed out, and we accept his view, that a probable and reasonable inference from the above is that the Report is both expert and independent. If that inference were drawn by Cabinet members it was incorrect because the Report was neither expert nor independent. It was not independent because L R Connell & Partners were agents for Bond Corporation and it was not expert because Mr Walsh did not have the expertise necessary to do a valuation, or indeed even express an opinion, as to the value of Northern Mining. If the Declaration of Interest had remained as part of the introduction, then the inference, at least as to independence, would not then have been capable of being drawn. The removal of the Declaration of Interest clearly gave the report a false image.

7.12.5 The report sets out the reasons for acquisition. It is stated, *inter alia*, that the Ashton Joint Venture project was estimated to yield the State royalty income of at least $2.5 billion over the next 25 years. Mr Massy-Greene said, and we accept his evidence, that that statement was manifestly incorrect (cf projected payments in the Ashton Joint Venture projection), resulting in an understatement by Mr Walsh of the net present value of about $10 million.

7.12.6 Under the heading "Conclusions", the Connell Report states that in relation to the proposal to acquire the issued capital of Northern Mining, for the reasons contained in the report, L R Connell & Partners were of the opinion that the price of $42 million was fair and reasonable. That is the only section of the report which comments directly on the value of Northern Mining. As such, the report must be regarded as being seriously deficient for it fails to identify the criteria by which "fair" and "reasonable" are evaluated. Importantly, the report fails to confirm that fairness is evaluated from the point of view of the purchaser. That is significant because of the lack of independence of the report. Mr Massy-Greene pointed out that "fairness" and "reasonableness" were defined by Policy Release No 102 of the National Companies and Securities Commission ("the NCSC") clause 20 which was in these terms:

> "The requirement for the expert to state an opinion whether (section 23) or that (section 43) an offer is fair and reasonable will entail, first, a comparison between the offer price or consideration and value that may be attributed to the securities under offer (fairness); and, secondly, an examination to determine whether there is a justification for the offer price on objective grounds after reference to that value (reasonableness). Such value will be a value unaffected by external market imperfections, ... value should not be measured by reference to special worth to the offeror."

That clause was current in September 1983. While, of course, No 102 is directed at valuations to which the abovementioned sections apply, it has however relevance to the opinion expressed by Mr Walsh in his Report. In our view, the Report falls considerably short of what No 102 requires.

7.12.7 A substantial part of the Connell Report, for the most part, is taken verbatim from the Northern Mining report of April 1983, a document which seems to have been prepared by Northern Mining and probably upon Bond Corporation's initiative. Paragraph 3.4 of the report details the alleged benefits of independent marketing yielding an expected premium of up to 10%. Mr Massy-Greene disagrees with that premium and views the report in this regard as optimistic. A more important criticism, however, is that the report does not reveal the significance of the premium as a key assumption in the estimation of the value of Northern Mining. Other pages, which include such topics as opportunities to Northern Mining, having established itself in the market as a supplier of diamonds, diamond quality, and revenue forecasts, are taken almost verbatim from the same source, namely the April 1983 report and there is no analysis or critical examination of the information set out. Mr Massy-Greene also

criticises that section of the report which deals with project revenues, pointing out that the revenues derived from L R Connell & Partners' assumptions when compared to L R Connell & Partners' cost estimates present a much more optimistic view than that which is presented in the Ashton Diamond Mine Joint Venture Feasibility Study.

7.12.8 The passages of the report that relate to the European Banking Company ("EBC") loan are unnecessarily detailed. Appendix 1 is a copy of the letter from Mr C R Tinsley of the EBC to Mr Peter Birchmore of Bond Corporation of 14 July 1983 which has obviously been inserted since it supports a valuation of $42 million, but it is not otherwise referred to in the report. Appendix 2 is the Baring Bros report which has been included under Mr Walsh's mistaken belief that it is in effect a valuation of Northern Mining at $42 million. Attached also to the appendices, though not labelled an appendix, is a large bundle of documents which seem relevant to the projected $30 million loan from EBC, and was material probably prepared by Mr Tinsley.

7.12.9 It can be said of the Connell Report that largely it consists of a reproduction of material from other sources without any critical examination of them. There is no indication in the Report of the technical, commercial, financial or other relevant experience of the author or authors, nor as previously remarked, is there any disclosure of the connection between L R Connell & Partners and Bond Corporation. It was, of course, misleading to include the Baring Bros report as an indication that it was relied upon without pointing out that its conclusion may not be consistent with a valuation of $42 million. As to Mr Tinsley's letter, it should not have been included in the report without it being indicated that not a great deal of reliance could be placed upon it in view of the disclaimer the letter contained. In summary, the Connell Report is nothing more than the presentation of a case on behalf of a vendor for the purchase of its property at a designated price and it was misleading for the report to masquerade as anything other than that.

7.12.10 It is clear enough that Mr Walsh lacked the expertise to give an opinion on the valuation of Northern Mining. This is indicated by a number of the communications which he either wrote in the form of a memorandum to Mr Connell or in a letter to Mr Burke. A memorandum of 21 July 1983, indicated he did not appreciate that mining grades might vary from year to year. In a letter to Mr Burke dated 25 July 1983 he revealed his misunderstanding of the effect of the Baring Bros report. In a memorandum of 27 July 1983, he recognised that he was not equipped to

answer, for example, certain questions of a geological nature. The same memorandum also indicates that he did not appreciate the complexity of mining valuations and that he did not understand the nature of a cash-flow. In the memorandum of 2 August 1983, he expressly stated that he was "relatively inexperienced in the type of large-scale mining and financing that is involved in the project". In a letter of 19 September 1983 to Mr Rowley, he acknowledged that his task was to produce a document which would support "the Premier's decision to make a purchase when it is presented to Cabinet".

7.12.11 As Mr Connell never claimed authorship of the report, its integrity and authenticity necessarily depends on Mr Walsh's expertise. The report had little value to any person wishing to rely upon it.

7.13 Cabinet meeting of 26 September 1983

7.13.1 As appears from Mr Naylor's memorandum of 21 September 1983 to Mr Connell and Mr Walsh, it was intended that Cabinet would consider the acquisition of Northern Mining on Monday, 26 September 1983. In his memorandum of 23 September 1983 to Mr Naylor, Mr Burke directed that the Connell Report and Cabinet documents were to be distributed to Cabinet Ministers and to Mr McCarrey by 9.00 am on the Monday. Mr Burke was to ring all Ministers by 9.30 am. As appears from the agenda for the Cabinet meeting, the acquisition of Northern Mining was the only substantial item to be considered. The Attorney-General, Mr J Berinson, was present at the Cabinet meeting and that meeting struck Mr Berinson as unusual in three respects. They were —

(a) the subject matter of the meeting;

(b) the fact that "strangers" were present; and

(c) the remarks made by Mr Burke at the conclusion of the meeting.

7.13.2 Mr Berinson said that Northern Mining was the only matter which he could recall being discussed, and that may well be so because the only other matter was an amendment to the *Small Claims Tribunal Act*. The strangers to whom Mr Berinson referred were Mr McCarrey, Mr Walsh and Mr Connell. It is not clear when Mr McCarrey was invited to the Cabinet meeting. However, he had apparently received the Cabinet papers in advance and was on hand in his office when the meeting was in

progress. According to him, he was telephoned by Mr Burke and asked to attend. It was the first occasion since Mr Burke had become Premier that Mr McCarrey had attended a Cabinet meeting (apart from an earlier meeting for the purpose of effecting introductions). Apparently there was a telephone connection between the Cabinet Room and the Treasury. Mr McCarrey said he had no idea what was required of him when he entered the room. He was "singularly unprepared". He appreciated that the discussion was about the acquisition of Northern Mining and that one or two of the members were a little hesitant about the proposal. He thought that Mr Julian Grill was a Minister who raised some questions about the price, but Mr Grill, in evidence, had no recollection of the discussion. It was probably Mr Berinson. In any event, Mr McCarrey was asked for his view of the acquisition. This, he said, put him in a difficult position. He knew from his earlier discussions with Mr Burke that Mr Burke wished the matter to proceed. As Treasurer, Mr Burke was Mr McCarrey's Minister, and he did not wish to appear to be disloyal to Mr Burke in the Cabinet Room. However, Treasury had not been asked to evaluate the project, or to consider the appropriateness of the price. The only relevant work which had been carried out in Treasury was that undertaken by Mr McMullen, to which we have previously referred. According to Mr McCarrey:

> "I had to just say to Cabinet as cautiously as I could, `Well, we haven't got very much information to go on'. I can't remember exactly my comment but it was words to the effect that on the basis of that, I either can't particularly question the $42 million price or it would seem to be a fair price, and I think I alluded to the Baring Bros Report, because we didn't have much information... ."

Later in his evidence, Mr McCarrey said:

> "Either I said we — either it seemed a fair enough figure or I said `We have no reason to disagree with it'. It was a cautious approach of that kind. It's hard for me to remember precisely what was said but I acknowledge that — you know, it was a pretty cautious statement."

He also mentioned that the Treasury did not have cash-flow figures, which it would need to make a more recent statement about value. He would not have been in the Cabinet Room for more than four to five minutes. He agreed, however, he might have given the impression to Cabinet that the price was a reasonable one, perhaps against his better judgment. He denied, however, that his unease about his position as Under Treasurer would have led him to give a stronger answer than was deserved. With the

benefit of hindsight and an understanding of the significance of the Baring Bros report, Mr McCarrey said he wished he had made it a lot clearer, referring to his view about the reasonableness of the price of $42 million.

7.13.3 If Mr McCarrey's remarks were intended to express veiled caution, they were not interpreted in that way by Mr Berinson. He said that Mr McCarrey was supportive of the proposal and, in that context, he could not separate Mr McCarrey's support between the price and the general proposition.

7.13.4 Mr Burke's evidence about Mr McCarrey's remarks was in the following terms:

> "My recollection is that Mr McCarrey quite definitely said that the proposal was a desirable one and should be proceeded with."

7.13.5 In his written address, Mr McCarrey outlined the normal procedure followed in obtaining Treasury comment on matters before Cabinet. Issues that had major financial implications were generally referred to Treasury in the week before a Cabinet meeting. A written comment with any relevant data and analysis was prepared, usually with a recommendation, and that report would form part of the Cabinet papers provided to each Minister.

7.13.6 That procedure prevailed throughout Mr McCarrey's experience at Treasury, but was modified by the Burke Government with the introduction of Cabinet summary sheets prepared by a Cabinet secretariat. This meant that was that Treasury comment might be briefly summarised on the sheet and the papers not go forward to Ministers. However, on major issues, and where Treasury comment was significant, it was expected that the Treasury paper would be circulated.

7.13.7 Given the above procedure, Mr McCarrey would have expected that the Connell Report would have been provided to Treasury for study and considered comment at least a few days before the Cabinet meeting at which it was to be considered. He received the Cabinet papers as Mr Burke intended on 26 September 1983, that is to say in the morning before the meeting, but with no indication that Treasury comment was required.

7.13.8 Mr McCarrey took up further in his address what happened at the Cabinet meeting. When he entered the Cabinet room Mr Burke asked him if he had

formed any opinions about the Northern Mining proposal and what he thought of the deal. Given his minimal involvement and lack of access to information, of which Mr Burke should have been aware, it was not an easy question to answer. He said, however, that Mr Berinson was correct in believing that he commented favourably on the project. Although it was not the role of public servants to challenge policy decisions once made, it was very much a function of the administration to comment and advise on the implementation of policy. He therefore began his comments by outlining to Cabinet the nature of the Ashton Joint Venture and the fact that Northern Mining's 5% interest gave a right to take and independently market 5% of the output, and expressed the view that the acquisition in his opinion would be the most effective way for the Government to achieve its stated policy of establishing a diamond cutting and polishing industry in the State. In his recollection, he did not have a great deal to say about the question of price, but in his address reinforced what he had said in evidence. He did not consider that the caution he expressed about the price was heavily veiled. There should have been no confusion between his support for the concept of the acquisition and his careful comments on the price of it.

7.13.9 Mr McCarrey did not believe that Cabinet members were under any impression that they were receiving from him considered advice on the price. Ministers surely should have known that Treasury had not been involved to any significant degree because the Cabinet papers contained no Treasury submission on the matter which would have been available if Treasury advice had been sought. It is useful for us to comment here that if Cabinet members (other than Mr Burke) were under any misapprehension as to the extent to which Treasury's views had been sought, that might have come about because of the shortness of time members had to study the Cabinet papers.

7.13.10 In replying to a submission by counsel assisting the Commission in his closing address that Mr McCarrey had a duty to express proper reservations about the price in clear terms, Mr McCarrey said that he had no reason to doubt that Mr Connell and Mr Walsh were giving other than detached advice to the Premier when they stated that as a result of their analysis, a price of $42 million for the issued capital of Northern Mining was fair and reasonable. Importantly, Treasury had no evidence or analysis to support an alternative figure which was surely a prerequisite to forming a view that the price of $42 million was inappropriate. Furthermore, he was not able to fence-sit by saying that he did not have any opinion. In his view, if the Premier asked a senior officer if he had formed any opinion, even on limited information, the Premier was

entitled to have that opinion. Finally, the circumstances in which he attended the Cabinet meeting should be taken into account. There had been lack of notice and he was afforded only a few moments in which to marshall his thoughts in response to Mr Burke's question as to whether he had formed any opinion. He carefully qualified his comments on price, but what he said about it was what he then believed to be true.

7.13.11 We have no hesitation in accepting Mr McCarrey's statement of his conduct on 26 September and believe that conduct was not in any respect improper.

7.13.12 By September 1983, Mr McCarrey was concerned about his position as Under Treasurer. This concern was justified in that, according to Dr Harman, Mr Burke was searching for a painless way of removing Mr McCarrey. In notes made by Dr Harman of a meeting between Mr Burke, Sir Lenox Hewitt and Mr McCarrey, she noted, after Mr McCarrey left the meeting, that Mr Burke said:

> "For the next 3-4 weeks necessary for me to keep Les on side ∴ suggestion he go to London."

Mr Burke, however, said that he had a great deal of respect for Mr McCarrey; but the fact is that Mr McCarrey was moved sideways from being Under Treasurer into being Director-General of Economic Development. Mr McCarrey denied that his advice to Cabinet on 26 September 1983 was in any way coloured by a concern for his personal position.

7.13.13 A conclusion on this matter is not relevant for the purposes of this report; but we feel that we should make these comments. Mr McCarrey's unease in respect of his position was as a result of his perceived view that the Burke Government required more from heads of department than impartiality, namely, sympathy, and there seems to be good reason for taking that view. Furthermore, we are left with a distinct feeling of distaste that Mr Burke should talk about Mr McCarrey in the terms which Dr Harman reports, bearing in mind that Dr Harman did not hold a position as senior as Mr McCarrey and was not even a member of the Public Service, and Sir Lenox Hewitt was not in the Public Service with no obligation not to repeat what he heard.

7.13.14 Even if Mr McCarrey had advised Cabinet in the terms of Mr McMullen's report, it is very unlikely it would have in any way influenced the Cabinet decision, for there was still the Baring Bros report which, misunderstood, seemed to support the price of $42 million. In any event, it is clear that Mr Burke was determined to get Cabinet approval for the purchase, and his standing was such that it

would have been very unlikely that any opposition would have been raised in Cabinet to that course of action.

7.13.15 Mr Connell had no recollection of attending before the Cabinet, although he remembered waiting outside the Cabinet Room prior to being called in. It is not clear what Mr Walsh or Mr Connell said to the Cabinet, but it is notorious that Mr Connell brought with him some diamonds and either spilt them on the Cabinet table or passed them around for Cabinet members to inspect. Mr Berinson regarded this, not unnaturally, as a rather tasteless performance. It was he who subsequently told the story in terms of "showing baubles to the Indians". Mr Connell's evidence, however, was that he produced a range of materials from rough diamonds to cut stones, and did so to inform Cabinet members rather than dazzle them. He said that, prior to his involvement in the matter, he had not been aware of the nature of the materials of this kind and he thought it would be instructive for the Cabinet to see for themselves. In all probability, Cabinet members had no greater experience than Mr Connell. It is difficult not to conclude that the diamonds were brought along, with the Connell Report, to help sell the acquisition to the Cabinet members.

7.13.16 According to Mr Berinson, Mr Burke thanked Mr Walsh and Mr Connell as they were about to leave the Cabinet Room, for the work they had carried out as advisers to the Government. He said they were in the field commercially and would normally be expected to charge. He said that they had offered, and had given, their services on this occasion without charge. In later evidence, Mr Berinson said that statement was to the effect that there would be no cost to the Government. According to Mr Dowding, Mr Berinson said to him either *sotto voce*, or aloud (which, he did not recall):

> "Well, if they're not being paid by the Government who is paying them?"

7.14 The Attorney-General's concern

7.14.1 Mr Berinson did not think that the question he posed to Mr Dowding occurred to him at the Cabinet meeting. He said:

> "... over a number of days I kept having this comment come to mind and I developed an uncomfortable thought that if Mr Connell had in fact not acted in a professional capacity for the Government

> and had been an adviser in an honorary capacity it could well be the case, given the nature of his business, that he charged someone else. If that was the case it could only be the vendor ... or ... ."

With these concerns in mind, Mr Berinson prepared a short hand-written note for Mr Burke on 9 October 1983. In the note (which he did not send), Mr Berinson said:

> "I was frankly stunned at the end of our meeting with CONNELL and WALSH to hear that their services to us (tho' not to others) were without charge.
>
> If I understand the position correctly, that means that our primary advice came from agents (salesmen?) for the vendors. If I am wrong in this, I would be pleased. Even if I'm right, the decision is made and looks right — and has the express support of our own adviser in the Under Treasurer."

The reference to Mr Berinson's reaction at the end of the meeting would be consistent with Mr Dowding's evidence that comments were made by Mr Berinson. The statement is inconsistent with Mr Berinson's evidence to the Commission that the concern came to him only after the meeting. However, Mr Berinson said he did not regard the note as an accurate reflection of his views, and for that reason it was not sent.

7.14.2 In recollection, Mr Berinson believed that Mr Burke had not said expressly that Mr Connell and Mr Walsh were being paid other than by the Government. As he said, an express statement in those terms by Mr Burke would have made the note purposeless.

7.14.3 Mr Berinson clearly drew the inference from Mr Burke's remarks that although the Government wasn't paying anything to L R Connell & Partners, then probably somebody else was. Mr Berinson's note bears a subsequent addition:

> "Not sent — but all matters discussed at P/H [Parliament House] 10/10/83. Connell is the organiser of Bond's loans."

Neither Mr Berinson nor Mr Burke had any recollection of the discussion referred to, and Mr Burke said it was unlikely that he would have been at Parliament House on 10 October 1983. Therefore, we are unable to conclude that the discussion took place. However, the fact that there was some communication on the subject is supported by Mr Berinson's memorandum of 27 October 1983 to Mr Burke, in which he referred

again to the matter. That memorandum is headed "Acquisition of Northern Mining" and states:

> "Observations on the Acquisition
>
> 1. I have previously put to you that we were vulnerable to the charge that we failed to get fully independent professional advice. The opposition has been weak on that, but the criticism will emerge should anything go astray.
>
> 2. We must have independent advice in the future and at a level of experience and expertise that is self-evidently adequate."

The memorandum suggested that at least by 27 October Mr Berinson appreciated that the advice from L R Connell & Partners was not "fully independent professional advice" and that what advice they got was not "at a level of experience and expertise that is self-evidently adequate". Mr Burke had no recollection of receiving the memorandum. If the advice that was given was not fully independent, that must have been because the advisers were at the same time advising somebody else.

7.14.4 Mr Berinson was the third person (Dr Harman and Mr McCarrey being the two others) to be concerned at Mr Connell's position. He said:

> "Nothing is more certain in my mind that had there been any suggestion that the Premier was of the view that perhaps he [Connell] had charged Bond I simply wouldn't have proceeded in this way."

Subsequently he said that if he had been told that Mr Connell was being paid by the vendor:

> "I hope, and I believe, my reaction would have been that we could not proceed on the basis of a valuation received in those circumstances and that we should look further."

7.14.5 If Mr Berinson had pursued the question of Mr Connell's position at the Cabinet meeting by asking a direct question of either Mr Connell or Mr Burke, the matter might still have proceeded. As Mr Dowding said, Cabinet might still have proceeded with the matter, even if Mr Connell's fee had been disclosed, if the

transaction was supported by Mr Burke. However, Mr Dowding would have expected Mr Burke's advice to be based on an independent valuation, which it clearly was not.

7.14.6 We also remark that the note made by Mr Berinson on his letter to Mr Burke of 9 October 1983 which he said he did not send, that "Connell is the organiser of Bond's loans", confirms our view that Mr Burke knew of and indeed lent his support to Bond Corporation's application to the R & I Bank in early September for a $20 million facility.

7.15 The agreement to purchase

7.15.1 On 27 September 1983, Mr Beckwith, on behalf of Emersat, wrote to Mr Burke, setting out the formal offer for the acquisition of Northern Mining. By that stage, Emersat was the beneficial owner of the shares, there having been internal arrangements made with Bond Corporation for Emersat to acquire Northern Mining. Mr Beckwith's letter opened with the following words:

> "Further to recent discussion between representatives of your Government and representatives of L R Connell & Partners, this letter serves as an offer for you, acting on behalf of the State of Western Australia ... to acquire ... Northern Mining."

7.15.2 The distinction drawn by Mr Beckwith between representatives of the Government on one hand and representatives of L R Connell & Partners on the other is an indication that Mr Beckwith at least regarded L R Connell & Partners as acting as an agent for Bond Corporation. Mr Burke, when questioned about the letter, did not draw that inference. The formal letter of acceptance was signed by Mr Burke on 4 October 1983, the acceptance being subject to the enactment of legislation to authorise the acquisition and, secondly, Parliamentary appropriation of the necessary funds. Reference is also made to the necessity for the completion and Parliamentary approval of the variations to the agreement, so as to ensure the payment of the $50 million.

7.15.3 The Cabinet decision on 26 September 1983 to acquire Northern Mining was subject to compliance with, *inter alia*, legal requirements. At that stage, it seems that no serious consideration had been given to the means by which the acquisition of Northern Mining would be achieved. Mr Hohnen had in August 1983 voiced concerns about the *State Trading Concerns Act 1916* in the context of equity participation, but this matter had not been pursued subsequently.

7.15.4 On 29 September 1983, Mr McCarrey prepared a memorandum for Mr Burke on the legislative mechanism proposed for the purchase of Northern Mining. According to his memorandum, he had discussed the options with the Crown Solicitor. In the light of those discussions, he made certain recommendations, advising, *inter alia*, that a "simple authorising Bill tied to the budget is clearly the best approach from all technical viewpoints". Mr Burke wrote on the memorandum:

> "Approved. It <u>is</u> important that the vehicle we purchase be capable of as wide a use as possible."

Mr Burke explained that memorandum as reflecting his intention that Northern Mining should be capable of as wide a range of activities as possible within the diamond industry.

7.15.5 The Crown Law Department gave formal advice in relation to the matter on 30 September 1983. Mr Burke apparently referred the matter to Mr Tony Lloyd, then Director of the Policy Secretariat. On 4 October 1983, Mr Lloyd prepared a memorandum to Mr Burke, in which he said he had discussed the legislative options with the Attorney-General and the Solicitor-General. In his memorandum, Mr Lloyd referred to the width of the *State Trading Concerns Act 1916* and recommended, as had Mr McCarrey previously, that a special Bill be introduced to authorise the purchase of Northern Mining and its subsequent operation. Mr Lloyd went on:

> "The `good news' is that authority to purchase ... Northern Mining will give power to carry on any other activities authorised by the Articles of Association or which are authorised by subsequent changes to those Articles. This will (if they think of it) strengthen the Legislative Council's resolve to delay, amend or defeat the Bill."

Whether or not Mr Burke then had any intention of using Northern Mining as a vehicle for further entrepreneurial activities without Parliamentary control is doubtful. At that stage, he intended that WADC would fulfil that role. According to Dr Harman it was only later in November/December 1983 when the WADC Bill encountered substantial opposition in Parliament that it was determined to hive off the Ashton interest from Northern Mining, and rename it as a corporate vehicle which could be used as the Government's holding company for other ventures.

7.15.6 Mr Naylor had prepared a "participation agreement" or a "memorandum of understanding" dealing with the problem that arose concerning the State's regulatory role under the agreement with its position as a joint venturer. That recommendation was contained in a memorandum to Mr Burke dated 24 October 1983, but in the events that happened, Mr Naylor's recommendation fell by the way.

7.15.7 On 4 October 1983, Cabinet approved the preparation of a Bill which would enable the purchase of Northern Mining to proceed. The Bill was assented to on 31 October 1983. The Cabinet papers referred to the matter proceeding urgently, but the reason for that is not clear, though it may be that Northern Mining was in some form of limbo pending settlement. Alternatively, the urgency may have resulted from the need to have financing in place for the project to enable it to proceed expeditiously. This had been a matter of concern to the Joint Venturers, having been raised by them in their early discussions with the Government on the commute option. The delay in concluding the negotiations with the Joint Venturers on the commute option may well have made the position more critical. Additionally, Bond Corporation, through Mr Connell, may have been seeking to exert pressure on the Government to achieve a speedy settlement to alleviate Bond Corporation's financial problems. This would explain the application for a short-term facility which was made to the R & I Bank following the letter of 9 September 1983 from Bond Corporation to Mr Connell. Mr Connell said that the sale of Northern Mining was urgent from Bond Corporation's point of view.

7.15.8 The formal agreement for the acquisition of Northern Mining was executed at Parliament House on 8 November 1983. It is interesting to compare this document with the first draft contract and a further draft. It will be remembered that the first draft contract was handed by Mr Walsh to Mr Musca for perusal and comment. The first page of that draft had the name of Emersat as vendor but the purchaser was left blank. The second draft had again Emersat as vendor and Mr Burke as purchaser. All had a common ancestry and the probability is that the progenitor was the original agreement of sale between Endeavour and Emersat. It is consistent with L R Connell & Partners acting as agents for Bond Corporation that Mr Walsh would have been able to lay his hands on the original agreement between Endeavour and Emersat and use that agreement as a draft for submission to Mr Musca.

7.15.9 In the weeks prior to the settlement, there had been negotiations between Bond Corporation and the Government relating to the detailed provisions of the

agreement and, hence, the expanded version of the two draft contracts as incorporated in the final agreement. Mr Walsh and Mr Connell had been involved in those negotiations. A copy letter from Mr Walsh to Mr Naylor of 20 October 1983, refers to some Treasury requisitions concerning certain matters the Treasury thought ought to be included in the contract. A perusal of this letter shows that Mr Walsh was uncomfortable about some of the things the Treasury was seeking and the final paragraph of his letter emphasises the somewhat difficult position in which L R Connell & Partners now found itself. He observed, "we would point out that while our role from Treasury's point of view appears to be finished, in the eyes of the vendor, we are still part of the negotiation". The general tone of the letter is more like one written by somebody who had Bond Corporation's interests in mind rather than those of the Government. The evidence of Mr P J Farrell of Treasury certainly suggested that Mr Walsh and Mr Connell were then seeking to further the interests of Bond Corporation during the negotiations that Mr Farrell witnessed with Treasury officials.

7.16 Mr Connell's fee

7.16.1 The evidence suggested that little, if any, attention was directed to the possibility that Mr Connell might charge the Government a fee for his services related to both the commute option and the acquisition. Mr Burke gave no evidence that at any stage did he discuss whether a fee would be charged either with Mr Walsh or Mr Connell. This is somewhat surprising if Mr Burke never became aware that Mr Connell's fee would be paid by Bond Corporation. It is not surprising, however, if Mr Burke knew about the fee payable by Bond Corporation at an early stage. When he told his Ministers at the Cabinet meeting on 26 September 1983 that L R Connell & Partners was not charging a fee for its services rendered to the Government, that statement does not appear to have been based on any express discussions with Mr Walsh or Mr Connell and could only have been justified by implication since neither Mr Walsh nor Mr Connell had raised the subject with him. It might be thought that the degree of activity involving Mr Burke and his advisers during 1983 was such that they might have overlooked the question of Mr Connell's fee altogether or perhaps were not concerned about it as Mr Connell had not raised it. On the other hand, for reasons set out later in this chapter, the more likely explanation is that Mr Burke was able to say to his Ministers that no fee was to be charged because he knew that L R Connell & Partners was to receive a fee from Bond Corporation.

7.16.2 Mr Connell said he had agreed to a fee of $5 million with Mr Beckwith and it was Mr Bond's understanding that Mr Connell would earn that fee only if he was able to procure the sale of Northern Mining to the Government for $50 million. Mr Bond said he was told by Mr Beckwith that as the price was only $42 million, Beckwith wished to renegotiate the fee. Mr Connell disputed that evidence. He contended that he was entitled to a fee of $5 million in any event. In the end, the fee paid probably does not matter, though, as previously remarked, a fee of $5 million payable out of the moneys the Government was paying for Northern Mining might have seemed embarrassing to the Government if that information became public.

7.16.3 It was Mr Connell's evidence that, following his usual practice, he would have written to Bond Corporation in September 1983 setting out the terms on which the fee would be paid, the amount of the fee, and requesting that a signed acknowledgment be returned to him. There is, however, no evidence that this course was followed.

7.16.4 On 10 November 1983, Mr G J Liddicoat, the Bond Corporation Corporate Treasurer, wrote to Mr P K Lucas of L R Connell & Partners. In the letter, he referred to the imminent settlement of the Northern Mining acquisition and to a telephone discussion in which it had been agreed that the Bond group would deposit $5 million with Rothwells at market interest rates or such lesser rates as might be mutually agreed. The deposit funds were to be available until 1 February 1984 and were to be deposited upon settlement of the Northern Mining deal. Although there was evidence that the deposit of moneys at Rothwells by Bond companies was a common occurrence, there is a reasonable inference to be drawn from the letter of 10 November 1983 that the deposit of $5 million was made as security for commission fees, pending final agreement as to how the agreed fee was to be paid or to allow Bond Corporation to separate in time the sale of Northern Mining from the payment of the fee.

7.16.5 On 16 November 1983, two bills of exchange, Nos 1139 and 1140, each for $1.5 million, were drawn by L R Connell & Partners and accepted by Bond Corporation. Then, on 30 November 1983, there was a meeting between Mr Beckwith and Mr Connell at which three handwritten agreements were prepared. According to Mr Liddicoat, the documents were written in his hand but probably at the dictation of Mr Musca who was also present. Two of the agreements related to the bills of exchange and the third agreement stated that Bond Corporation would deposit funds (presumably with Rothwells) as and when required by L R Connell & Partners to compensate for the deferral of fees.

7.16.6 Mr Connell's evidence was that he agreed that the payment might be deferred when he negotiated a fee of $5 million with Mr Beckwith because Mr Beckwith was concerned about bringing such a substantial fee into account in one financial year. According to Mr Connell, Mr Beckwith was also concerned that Bond Corporation should not be seen to have sold Northern Mining at a loss within the year of purchase. Furthermore, Bond Corporation had cash problems.

7.16.7 The bills of exchange referred to above matured on 31 October 1984 and 31 October 1985, respectively. These, coupled with the deposit of $5 million at Rothwells on settlement of the Northern Mining acquisition, presumably satisfied Mr Connell's requirements and were consistent with the agreement of 30 November 1983.

7.16.8 Mr Musca said that he was given three letters and two bills at the meeting and was told to hold them in safe deposit as an escrow holder. He placed the documents in an envelope in which he included a handwritten memorandum in the following terms:

> "Memo
>
> The enclosed 3 letters + 2 bills were handed to me by Laurie on 30/11/83 for me to hold in bank safe as escrow holder.
>
> The 2x $1.5M are part of $5M fee for services in respect of Northern Mining/(Ashton Diamond project) sale to WA Govt.
>
> 30/11/83."

7.16.9 Both Mr Musca and Mr Liddicoat spoke of the sensitive and confidential nature of the agreements prepared on 30 November 1983 and Mr Liddicoat said no copies were kept by him for Bond Corporation. The documents made no reference to Northern Mining or the Ashton Joint Venture and the only relevant reference was contained in Mr Musca's memorandum. There is, however, absolutely no doubt in our view that the bills of exchange and the agreements of 30 November relate to the $5 million fee which we find was clearly agreed between Bond Corporation and L R Connell & Partners in respect of finding a buyer for Northern Mining.

7.16.10 A possible explanation for the somewhat clandestine manner in which the agreements of 30 November 1983 came to be recorded and kept is that Mr Connell was anxious to ensure that no document was produced which was likely to come to the notice of the Government (or its critics) which indicated either that Mr Connell had been paid a fee by Bond Corporation for his services on Northern Mining or the magnitude of the fee. Such a desire on the part of Mr Connell would be consistent with one interpretation of Mr Naylor's evidence of his conversation with Mr Walsh during the weekend of 24/25 September 1983. It is inconceivable Mr Connell should agree not to charge any party for his services for the acquisition of Northern Mining. However, it is conceivable that Mr Connell told Mr Naylor via Mr Walsh that he would not charge a fee in the sense of submitting an invoice for his services on the sale of Northern Mining, but would ensure that he received payment from Bond Corporation by less obvious means. The events of 30 November 1983 may well have been intended to achieve that end. Concealment of the arrangements was, of course, consistent with Mr Walsh telling Mr Naylor that no fee would be charged to Bond Corporation. However, for the reasons given earlier, it seems unlikely that statement was made.

7.16.11 The agreements of 30 November 1983 related to only $3 million. There remained a balance of $2 million. The evidence suggests that this was paid as part of a settlement of various accounts between Bond Corporation and L R Connell & Partners at the offices of Parker & Parker, solicitors of Perth on 4 February 1985.

7.16.12 It remains for the Commission to draw together the evidence bearing on a conclusion as to Mr Burke's knowledge that L R Connell & Partners was to receive a fee from Bond Corporation.

(a) Mr Burke had been introduced to Mr Connell because Mr Connell was an extremely prominent man in the financial and business affairs of Perth. He knew that Mr Connell was the principal behind the merchant bank Rothwells and he must be taken to have known that Mr Connell earned his living substantially by advising clients on financial and business matters. Even if in the initial stages of the Government receiving advice from L R Connell & Partners on the commute option and Northern Mining, Mr Burke's mind had not been directed to the thought of payment of that firm for its services, as time went by, and certainly before 26 September 1983, he must have been aware through his own direct experience or on briefing from his adviser, Mr Naylor,

that Mr Walsh on behalf of L R Connell & Partners was doing a large amount of work concerning the commute option. When work done on Northern Mining is added to that, even a busy Premier would surely have paused to consider, in view of the extent of the assistance with no arrangement to pay a fee, whether the firm was being paid by somebody else for the work it was doing. Dr Harman and Mr McCarrey both questioned in their own minds for whom L R Connell & Partners was acting and Mr McCarrey asked the direct question. Mr Berinson was also troubled by the same matter. If Mr Burke did not say, as Mr Connell said he did, "[w]hat's in it for you?", when Mr Connell suggested the acquisition of Northern Mining, then a person of Mr Burke's intelligence would surely have thought of it in any event and appreciated that there had to be something in it for Mr Connell. That Mr Burke realised that Mr Connell would normally be expected to be paid for his services is apparent from the statement he made to the assembled Cabinet members on 26 September 1983 where he said that L R Connell & Partners were in the field commercially and "that they would normally be expected to charge".

(b) Mr Burke also knew something of the relationship between Mr Connell and Mr Bond because he admitted in evidence that Mr Connell had a relationship with Mr Bond (the note made by Mr Berinson "Connell is the organiser of Bond's loans"). He also knew, as did Mr Naylor, that Mr Walsh was obtaining confidential information through Bond Corporation concerning Northern Mining. That must have been because Mr Walsh had some sort of relationship through Mr Connell with Bond Corporation, a relationship which to the ordinary observer would readily have come to mind as one of agency in connection with the sale. Mr Burke was also aware that L R Connell & Partners had obtained the services of Mr J Caldon, a tax expert to advise on the commute option. As the Government was not paying for Mr Caldon's services, a moment's reflection would have led to the appreciation that somebody had to be paying Mr Caldon and if that somebody were L R Connell & Partners, and it could not have been anybody else, L R Connell & Partners had to surely have been expecting some recompense for their services to reimburse them, at the very least, for Mr Caldon's expenses. The source

of recompense that most readily would come to mind would be from Bond Corporation for services rendered in effecting the sale.

(c) There is direct evidence from Mr Connell that at his first meeting with Mr Burke in July 1983 and at a later meeting, he told Mr Burke that Bond Corporation would be paying him a fee though he did not disclose the amount of the fee. To accept that evidence, of course, requires preferring Mr Connell's evidence to that of Mr Burke. There does not seem to be any reason why Mr Connell should not tell us the truth in this regard as his own interests do not seem to be affected by a finding as to whether he did or did not tell Mr Burke about his expectation of a fee. There may be, however, a reason unconnected with this specific term of reference, of advantage to Mr Connell if Mr Burke's credibility were damaged, though Mr Connell denied that his answers in evidence were intended to disparage Mr Burke. While it is necessary to treat Mr Connell's evidence with caution, having regard to all the matters set out in this chapter, we think his evidence should be preferred. An additional consequence of that finding is the acceptance of Mr Connell's evidence of what Mr Beckwith told him, being that Mr Beckwith went to see Mr Burke when he explained that a purchase price of $42 million would not be full recompense for the price Bond Corporation had paid Endeavour for Northern Mining because of the need to pay Mr Connell's fee. The acceptance, however, of that portion of Mr Connell's evidence is only the first step because it still is necessary to consider whether Mr Beckwith is likely to have told the truth to Mr Connell. In that regard, there seems no reason at all why Mr Beckwith should have told Mr Connell something untrue, and if it be accepted that Mr Beckwith did go to see Mr Burke in order to try to raise the purchase price, it seems likely that in support of his case he would have pointed out that $42 million after deduction of commission, would represent a loss to Bond Corporation.

(d) There is no reason why we should not accept the memorandum from Mr Walsh to Mr Connell dated 22 September 1983 as a *bona fide* document reminding Mr Connell that in Mr Walsh's presence he confirmed to the Premier that the vendor would be paying any commission payable. As previously observed, there seems no valid reason why Mr Walsh would

say something untrue in a private memorandum to Mr Connell which was not likely to be seen by anybody outside L R Connell & Partners.

(e) The letter from Mr Walsh to Mr Naylor dated 16 November 1983, even if not received by Mr Naylor, indicated Mr Walsh's state of mind in relation to the Northern Mining deal being one where the deal was structured in such a way that the cost of L R Connell & Partners' services was minimised to the Government and achieved in a way acceptable to the Premier. That must surely be a reference to the fee payable by Bond Corporation in respect of the sale of Northern Mining covering not only the fees to be earned in respect of that agency by L R Connell & Partners, but also for the work done on behalf of the Government in respect of the commute option.

(f) The letter, written by Mr Walsh to Mr Naylor dated 5 October 1983, in the last paragraph clearly implied that the writer assumed that Mr Naylor was aware that Bond Corporation was paying L R Connell & Partners a commission. The writer is saying that the commission (the extent of which was unknown to him) could have been greater had Mr Connell not negotiated the deal "as though he was working 100% for the Government". In other words, though Bond Corporation were paying L R Connell & Partners commission, that firm negotiated the deal as if it were acting for the Government. When first shown this letter, which was a copy, Mr Naylor said he had no reason to doubt that he received the original, but after a few passages of the letter were put to him, he accepted the opportunity to reconsider whether he had received the original, stating that had he read the letter he would have expected his copy of it to have underlining as the letter would have caused him some concern. He said that it was very likely he did not receive the letter because the particular matter was so important that he would have expected to have at least noted in some way his concern with Mr Walsh and other people. We were informed by senior counsel assisting the Commission that the original of the letter was not in the possession of Commission staff. The fact that there is no underlining or other marking on the copy does not of course mean that Mr Naylor did not see the original since it would have been the original that would have been noted or underlined by him. The letter contains a reference to a

Mr Watkins, who, Mr Walsh stated he had spoken to that morning in an effort to get Ashton to use some influence with CRA to sort out the question of the timing of payments of the royalty. A copy of a letter Mr Walsh also wrote to Mr Naylor on 5 October 1983 expressly refers to his conversation with Mr Watkins that morning but deals only with arrangements in respect of the announcement of the purchase. Mr Watkins had something to do with Ashton's bankers. That copy letter was put to Mr Naylor but the contents of it did not occasion any recollection in him. Though the two letters refer to Mr Richard Watkins, they do in different contexts, and in view of Mr Walsh's propensity for creating written material, there is nothing remarkable in him having written two letters to Mr Naylor on the same day, both referring among other things to the same person.

(g) There seems no reason why we should not conclude that the originals of both these letters were received by Mr Naylor. That leads us to express surprise that the first letter of 5 October 1983 did not result in a response from Mr Naylor to Mr Walsh as Mr Naylor would have expected, though later in examination by his own counsel, Mr Naylor thought that if he had received them he would have paid little attention to their contents. The absence of a response supports the view that the letter contained no surprise to Mr Naylor so far as the payment of commission by Mr Bond to L R Connell & Partners was concerned. In any event, even if the original of the first letter was not received by Mr Naylor, nevertheless it indicates again Mr Walsh's state of mind and his appreciation that Mr Naylor was aware that commission was payable to L R Connell & Partners.

(h) Mr Beckwith, the author of the letter dated 27 September 1983 from Bond Corporation, in the opening paragraph stated that following discussions between "representatives of your Government and representatives of L R Connell & Partners", he was able to make an offer for the sale of Northern Mining. It can be readily inferred from that opening paragraph that Mr Beckwith believed L R Connell & Partners was acting as agent for Bond Corporation. Mr Burke said in evidence that he did not read the opening paragraph in that way. Mr Burke's reply of 4 October 1983 accepting the offer does not

disavow that the discussions had been between representatives of his Government and representatives of L R Connell & Partners. Though not a great deal should be made of this correspondence, it is another indication that a third party connected with the transaction believed L R Connell & Partners had been acting as agent for Bond Corporation.

(i) The Declaration of Interest: This is the most telling evidence of all if Mr Naylor's evidence be not accepted. For reasons already advanced, we have concluded that we ought not accept Mr Naylor's evidence that the Declaration of Interest was the first intimation he received of the possibility of a fee changing hands between L R Connell & Partners and Bond Corporation and also of his conversation with Mr Walsh that the fee was to be foregone. Much more probable is the conclusion that the presentation of the Declaration of Interest on the Friday immediately before the Cabinet meeting presented a problem to Mr Naylor since it disclosed that in giving its advice to Government on the acquisition of Northern Mining, L R Connell & Partners was also acting for the vendor and, hence, the advice could not be considered independent. For that reason, it needed to be withdrawn or otherwise its existence would probably have resulted at the very least in a delay in obtaining Cabinet approval. It is altogether improbable that Mr Naylor did not make a full explanation to Mr Burke of the existence initially of the disclosure in the draft of the Declaration of Interest, and the decision that it was to be excised. We should say in this regard that we are of the view that though Mr Naylor had a measure of independent action conceded to him by the Premier, he would have advised the Premier on all important matters and certainly anything that cast any appearance of doubt on the reliability of the Connell Report would have been of sufficient significance for Mr Naylor to fully brief the Premier as to the problems he was encountering.

7.16.13 In the light of the foregoing, the Commission finds that at all material times Mr Burke knew that L R Connell & Partners was to receive a fee from Bond Corporation.

7.17 The Price Waterhouse report

7.17.1 The public announcement of the Government's acquisition of Northern Mining was made on 10 October 1983, and almost immediately attracted public and Parliamentary criticism. This is referred to expressly in a letter dated 17 October 1983 from Mr Walsh to Mr Burke. Mr Burke recalled that the main criticism was of the price paid, but there was criticism of other aspects and that may well have covered the involvement of L R Connell & Partners. He remembered discussion about ways in which some of the criticism might be answered and he remembered the suggestion, but was not certain from which quarter it came, that the Government should have an independent assessment or evaluation made of the price paid.

7.17.2 Mr Connell remembered discussing the matter with Mr Burke, but he could not recall the exact circumstances of the discussion. The discussion resulted in a decision that there should be some other valuation that could be relied on to support L R Connell & Partners. Following the discussion, Price Waterhouse were appointed. This, in itself, is a commentary on the independence and adequacy of the Connell Report. Mr Connell discussed the appointment with Mr Beckwith of Bond Corporation, mainly because he knew that Mr Beckwith had some dealings with Price Waterhouse and might be able to keep their fee in check. He did not recall any discussions with Mr Burke or any other member of the Government concerning the payment of the fee and he believed that L R Connell & Partners had paid the fee, but he was not sure whether the firm was reimbursed by the Government. In fact, as will subsequently be related when dealing with the evidence of Mr David Humann of Price Waterhouse, the invoice was rendered to L R Connell & Partners but paid by Bond Corporation. In Mr Connell's understanding, a valuation of Northern Mining was to be done to see whether Mr Walsh's conclusions could be supported.

7.17.3 Mr D O'Hara of Price Waterhouse remembered there being a meeting of members of that firm following instructions given on 19 October 1983 which was a Wednesday. Mr Connell and Mr Walsh were present. According to Mr O'Hara, he understood from what was said at the meeting by Mr Connell, with some input from Mr Walsh, that a valuation had been done by L R Connell & Partners and that firm was looking for additional credibility to that valuation from a credible source such as Price Waterhouse. Price Waterhouse were made aware that the independent valuation was required for discussion during the following weekend and for use in Parliament the next week.

7.17.4 Mr Humann was the partner in charge of Price Waterhouse, Perth, from the beginning of 1981 to the end of 1983. Price Waterhouse had been appointed the auditors of Bond Corporation and most of the subsidiaries in that group and Mr Humann was the partner responsible for the audits and, consequently, had considerable knowledge of those companies. His diary showed that he received a telephone call on 19 October 1983 from Mr Connell's office. He went with his team from Price Waterhouse to Mr Connell's office where they were briefed.

7.17.5 Mr Humann was aware that it had been agreed in principle that the Government should purchase Northern Mining and only a legal contract had to be signed and settlement effected for the purchase to be completed. As he understood his instructions, he was to express what he would describe as a businessman's opinion on the price and to do that it was necessary to do some valuation work. He understood that Mr Connell was acting for the State Government. He did not believe that Price Waterhouse were in any way acting for Bond Corporation. Mr Humann did not consider that any conflict of interest arose out of the fact that Price Waterhouse were the auditors of Bond Corporation and were being entrusted on behalf of a third party — the Government — to express an opinion as to the fairness of the price agreed to in principle between Bond Corporation and the Government for the purchase of all the shares owned by a subsidiary of Bond Corporation. He pointed out that an auditor was independent of all his clients and had to keep himself in that state at all times. He took that view even though as auditor he was involved in expressing an opinion as to the carrying value in the Bond Corporation balance sheet of Northern Mining at $42 million and, though not certain as to the exact time of the closing of the audit, it would have been in September and October of 1983 and he would have formed the opinion as auditor that a carrying value of $42 million was fair.

7.17.6 Mr Humann agreed, however, that it would have presented some difficulty to Price Waterhouse in having audited the books of Bond Corporation and agreed to a figure of $42 million if subsequently, in the opinion to be expressed to L R Connell & Partners, Price Waterhouse concluded that the price of $42 million payable by the Government was not fair, being too high. In any event, Mr Humann was confident that Mr Connell knew his firm acted as auditors for Mr Bond (and about that there can be little doubt) and he assumed that the Government was aware of their relationship. He did not apparently insist on Mr Connell bringing that relationship specifically to the attention of the Government, or attempt to do so himself.

7.17.7 The team Mr Humann assembled in his view were capable of carrying out the task entrusted to them, having in all 70 years' experience in accounting and auditing, half of which was his experience. Two of the team were experienced in tax and computer modelling and feasibility studies for mining projects. He stressed, however, that the task entrusted to Price Waterhouse was not that of making a valuation as such for, if it had been so, he would probably have called in additional experts, perhaps geological and exploration specialists, and there might have been a more leisurely pace in conducting the work.

7.17.8 The source data on which Price Waterhouse largely formed their opinion, included the following:

(a) pre-feasibility study prepared by the managers of the Joint Venturers;

(b) the Boston Consulting Group ("BCG") Diamond Price Report; and

(c) the EBC opinion and letters and cashflow studies.

The above three sources were described by Price Waterhouse as credible sources of information independent of Bond Corporation or L R Connell & Partners. In addition, the team read the following reports:

(a) the Connell Report;

(b) the Endeavour Mining Part B Statement dated December 1981, which included reports from A C Goode & Co and BA Australia;

(c) the Baring Bros Report; and

(d) a variety of other material including Hansard and press reports.

7.17.9 On 20 October 1983 Mr Humann wrote to Mr Connell and expressed the view, after referring to his team's review of the material above cited, in these terms:

> "...based on the documentary evidence and the computations presented to us, there is nothing to indicate the assumptions and estimates are not within the ranges customarily adopted in such determinations of values and which are not given reasonable

> credence by the information and the formal reports given to us to assist in our review ... ."

The above expression of opinion was referred to as an initial opinion. It was followed by a more detailed opinion on 22 October 1983. The following were some of the points made:

> "In our opinion the price of $42,000,000, agreed to in principle by the Government of the State of Western Australia ("the State") and the Bond Corporation Holdings Limited Group to be paid by the State for all the issued shares of NMC, is a fair and reasonable price."
>
> "Our opinion is based on an extensive examination of the documentary evidence and formal reports presented to us and referred to in our report to you of 20 October 1983. In forming our opinion we have carried out a series of computer-based financial and sensitivity studies of the data presented to us."

7.17.10 The letter pointed out that by necessity any attempt to determine the current price of an interest in a long-term mining project that was still in its development and construction phase, required an extensive use of assumptions and estimates relating to future events. Those assumptions and estimates, in the main, were subject to significant influences outside the control of Northern Mining and, as such, their existence prohibited the determination by any person of a present value which was correct in any absolute sense.

7.17.11 Sensitivity analysis of the impact of plausible movements in key variables was considered the most appropriate method of arriving at a range of valuations within which a final valuation could be agreed on by the negotiating parties. Price Waterhouse considered the appropriate analyses had been carried out and that the negotiating parties settling on the price arrived at a fair valuation supportable by the available evidence concerning the numerous factors which comprised the operations of the Joint Venture. The key assumptions involved diamond prices, reserves, life of the mine, matching of production and sales, inflation, exchange rate, interest rates, taxation and royalties, and the discount factor.

7.17.12 Price Waterhouse rendered a bill of $25,000 to L R Connell & Partners which was paid, in fact, by Bond Corporation but how that came about Mr Humann was unaware. About 170 hours were worked and the fee charged included a premium.

7.17.13 Price Waterhouse were not asked to provide a valuation of the company, but to add respectability to the Connell Report. It was not produced to enable the ultimate client, the Government, to consider how it should negotiate the purchase of Northern Mining. Rather, it was at all times known to Price Waterhouse to be an opinion required to justify the Government's already announced decision to purchase the company. That may, however, be more a criticism of Mr Connell and the Government, principally Mr Burke, than Price Waterhouse.

7.17.14 What, however, is disturbing concerning the Price Waterhouse valuation is Price Waterhouse's failure to disclose in its report or otherwise that the firm was also the auditor for Bond Corporation. Even if members of Government had been aware of the audit relationship, as the report was to be used to answer criticism of the purchase price, members of the public might not have known of the relationship. In the view of the Commission a disclosure was essential to maintain the integrity of the report.

7.18 European Banking Company Limited loan

7.18.1 During 1983 Northern Mining had been negotiating with EBC for the acquisition of project finance. EBC offered finance in the terms of a letter dated 20 May 1983 to Northern Mining. It is not necessary to go into the terms of the offer. By 26 September 1983, Northern Mining had not accepted the offer. When the Government acquired Northern Mining, consideration was given to seeking finance from other sources and on terms more appropriate to a borrower of the Government's stature. A memorandum in the Premier's handwriting to Mr Naylor, written about 25 September 1983, in item 8 stated:

"R & I to be asked to refinance European Bank funding at once."

7.18.2 This is not what happened. Dr Harman, while not being absolutely certain of why the R & I Bank was not substituted for the EBC, thought the reason was because the Government intended to leave the Board of Northern Mining to operate on a straight commercial basis. In other words, Northern Mining under Government ownership was to operate as a Joint Venture partner as if it was owned by the private sector. The Government would take no action which would suggest that there was any unnecessary interference or intrusion and the maintenance of the EBC connection was seen as an indication of "business as usual".

7.18.3 In a letter from Mr Walsh of 31 October 1983 to Mr Naylor, Mr Walsh saw the continuance of the EBC connection as a matter of principle, pointing out that EBC had a facility in place and without that facility it was doubtful that Northern Mining would have been in the position to proceed with its obligations as a Joint Venture partner. Under the circumstances, Mr Walsh asked Mr Naylor to consider that Northern Mining had some moral obligation to EBC to at least offer it the opportunity to consider whether it could provide a facility of the nature required by Treasury. Whether this moral obligation was really what Mr Walsh had in mind is perhaps doubtful since Mr Connell said that at the request of Bond Corporation he was trying to bring pressure to bear on the Government to see that the EBC remained the financier. In evidence, Mr Connell denied that he had offered his services to EBC for the ongoing financing of Northern Mining in contradistinction to the evidence of Mr Richard Tinsley of EBC (whose evidence we prefer), who said he met Mr Connell on 24 or 25 November 1983 when Mr Connell suggested to him that he might be paid a retainer of $250,000 to work for EBC and to advance its cause with the Government. Mr Tinsley declined the offer, not only because of the clear conflict of interest, but also because EBC stood to earn a fee of only some $50,000 from the Government.

7.18.4 A memorandum from Mr Naylor to Mr Burke dated 18 October 1983 shows that Mr Walsh still saw L R Connell & Partners as having something to add or contribute to the EBC loan since he advised that the conduct of final negotiations in London with the EBC should be handled by Mr Connell, Mr P Mitchell of Bond Corporation, and Mr Ray Hughes of Treasury or the Under Treasurer. His reason for writing that memorandum, we suspect, was more out of a desire for L R Connell & Partners to extract a fee than because of some perceived moral obligation the fulfilment of which must be more readily accomplished with Mr Connell as part of the negotiating team.

7.18.5 The Government also may have caused Northern Mining to abandon any thought of financing its commitments other than through EBC because, already, at the completion of the sale to the Government, Northern Mining had incurred expenses on negotiating the loan. For example, a legal firm in England, Freshfields, and a legal firm in Perth, had been retained by Northern Mining and though no account had been received from any legal adviser, by 17 October 1983 (according to a letter from Mr Rowley of Bond Corporation to Mr Hughes of Treasury dated 17 October 1983) substantial amounts would have to be paid in any event. In addition, a commitment fee to EBC had been accruing from Northern Mining since 19 May.

7.18.6 Probably, the EBC loan was taken up not through any moral reason but because large fees had to be paid by Northern Mining in any event. Behind the scenes, Mr Connell had some hope of extracting a fee. His conversation with Mr Tinsley served to show his cavalier attitude to conflict of interest problems since he would have been acting for both the borrower and the lender.

7.18.7 Northern Mining completed the loan facility with EBC. There is no need to explore the steps taken by Treasury and Northern Mining to complete the loan.

7.18.8 There is nothing in the evidence concerning the EBC loan which suggests any corruption, illegal conduct or improper conduct by any person.

7.19 The Government's case for buying Northern Mining

7.19.1 The Government's case for buying Northern Mining is well set out in a press release of 10 October 1983 announcing the acquisition of Northern Mining. The following points were made:

(a) No Government revenue contributed by ordinary taxpayers was being used. The $42 million would come from the partial prepayment of $50 million in royalties by the Ashton Joint Venture.

(b) Northern Mining's share of the $50 million would be paid before the Government acquired the company.

(c) As the acquisition was being made from funding that would not normally be available to the State, it was in effect self-funding.

(d) Between 1986 and 1993, during which period the partners in the Ashton project would recoup, through reduced royalty payments, the partial prepayment of the $50 million in royalties, projected profits from Northern Mining would make up the State's income to at least the amount it would have received if there had been no variation in the royalty arrangements.

(e) After 1993, the State would receive not only the royalty payments it was entitled to but also Northern Mining's share of the project's profits which

were expected to be substantial. The assessment of the consultants (presumably a reference to L R Connell & Partners) was that the $42 million investment would generate a cashflow of more than $270 million by the year 2007. Cashflow analysis by the consultants predicted a return to the State of 14% per annum after tax and after payments to the State of Northern Mining's share of the royalties.

(f) While CRA and Ashton were marketing their share of production in the project through the CSO, Northern Mining had retained the right to market its share of the diamonds independently and the company had made marketing arrangements accordingly.

(g) The Government was anxious to achieve more downstream processing of the State's minerals within Western Australia and direct participation in the project through Northern Mining would give the Government the opportunity and expertise to work towards an important area of resource exploitation.

(h) The purchase would allow a window into the operation of a project that was likely to be a major factor in Western Australia's economy for many years. The opportunity would be provided to protect fully the State's interest.

(i) Just as importantly, the acquisition made it possible for a relatively new Government coming to office after a long period in Opposition, to give tangible expression of its confidence in the State's future in general and the mining industry in particular.

7.19.2 Several comments may be made about the above. Within the news release is a statement to the effect that the acquisition price of $42 million was the same price paid to Endeavour in June by Bond Corporation. This statement is undoubtedly correct but it glosses over the fact that Northern Mining had to pay its 5% of the $50 million amounting to $2.5 million. By clause 4.6 of the Agreement for Sale, it was provided that if and when the Joint Venturers were required to make payment pursuant to clause 29B(1) of the Agreement, the vendor (Emersat) was obliged to lend to Northern Mining the amount of the company's proportion of such payment. Clause 29B was inserted into the *Diamond (Ashton Joint Venture) Agreement Act 1981* by an

amendment in 1983 following the settlement of the dispute over the commute option to provide for payment of the $50 million compensation as and by way of an advance royalty payment. Though the terms of the repayment of the loan appear to be generous, nevertheless the company had an increase in debt liability of $2.5 million discounted as a result of the generous terms on which the loan was granted. The press release also said that "business and financial consultants appointed by the Government for this transaction and consultants appointed by Endeavour Resources for the June deal have both described the price as fair". As previously mentioned, no doubt that reference is in part to L R Connell & Partners, but insofar as reference is made to consultants appointed by Endeavour, that must be alluding to Baring Bros and that report described the price as fair to the independent shareholders of Endeavour, the vendors, not the purchaser, Bond Corporation. The press report was therefore misleading but that is not to say it was deliberately misleading.

7.19.3 That the purchase would allow a window into the operation of the diamond project was mentioned in the release in paragraph 7.19.1(h) of this chapter and was much stressed by some witnesses and also in documents passing between the Government and its financial consultants, L R Connell & Partners. If the acquisition did achieve a window it was not a window that was kept open very long. In about twelve months the interest in the Ashton project owned by Northern Mining was hived off into the Western Australian Diamond Trust and offered to the public in the form of 60 million units at a price of $1 per unit. The Trust was formed by WADC which was to be the manager. It goes without saying that even though WADC may have been set up by the Government, its duties as manager of the Trust were to the unit holders, not to the Government. What window there may have been was closed off within twelve months.

7.19.4 According to the press release, the purchase of Northern Mining would provide an opportunity to protect fully the State's interest in some undisclosed manner. What became immediately apparent to at least the Mines Department was that the purchase had the potential of creating a conflict of interest. Mr W A Preston, a senior Geologist with the Geological Survey Department of the Mines Department, pointed out that the provisions of the Agreement in respect of royalty payments provided for a new form of royalty in this State, namely a profit-based royalty. The Mines Department was responsible for the assessment and collection of these royalties and in doing so played primarily an audit role to ensure that a fair and reasonable return was received by the State. To carry out its duties, the Department was obliged to obtain information and

documentation to enable it to calculate a fair and reasonable royalty. That necessary information would be made available to the Mines Department by the Joint Venturers for the purpose of the audit and it seemed to Mr Preston and, with respect, with good reason, that there would be a conflict of interest if that information were collected for royalty purposes and also other purposes of the State as a Joint Venturer.

7.19.5 The observation can reasonably be made that the State entered into the acquisition without first assessing whether any problems would arise if it found itself in the dual position of being a collector as well as a payer of royalties. It is not clear whether the early disposal of the interest in Northern Mining to the Diamond Trust was because of the difficulties and the potential conflict of interest the Government found itself in. It may simply have resulted from the perception that a profit could be made by disposal of the investment. It can be observed that the entrepreneurial features of the acquisition and its disposal seemed to have had more influence on the events than a desire to implement the State Labor Party Platform.

7.19.6 There can be no doubt that in 1983, Mr Burke had a high regard for Mr Connell's entrepreneurial expertise. It is probable that Mr Connell suggested the Northern Mining transaction to Mr Burke, who was immediately attracted by it. Mr Burke clearly had entrepreneurial tendencies of his own, and it may be that he succumbed readily to Mr Connell's salesmanship on behalf of Bond Corporation. In an internal memorandum, Mr Burke expressed the view that the transaction was "a good commercial deal (or buy)"; that it was "a commercially clever deal — smacks of private enterprise"; that it was "imaginative and innovative". Perhaps those words clearly reflect Mr Burke's enthusiasm, and explain why the matter proceeded as it did.

7.20 The donation

7.20.1 Mr P Lucas of L R Connell & Partners told the Commission that he controlled a company known as Beverage Holdings Pty Ltd ("Beverage"), a $2 company, by reason of him being beneficially entitled to the shares and also as director of the company. On 9 December 1983, Beverage made a payment of $50,000 to the Australian Labor Party which was credited to the "State Labor Organisation" account. It was not Mr Lucas' intention that Beverage make any such payment out of its own funds. He said he had never negotiated with politicians or made a donation to them.

7.20.2 Mr Lucas at this time was also employed by Rothwells Limited, a company controlled by Mr Connell. He said he had by this time certainly arranged donations on behalf of Mr Connell for the benefit of political parties. However, he had never negotiated a payment to a political organisation on behalf of his own company. In the books of account of L R Connell & Partners, Beverage was shown as having borrowed the $50,000 from L R Connell & Partners. But that, in fact, was not the case and occurred as the result of an accounting error so far as Mr Lucas was concerned. He testified that in a beneficial and real sense Beverage did not make the donation to the Labor Party.

7.20.3 Mr Lucas also recalled this was the first payment to the State Labor Organisation by any entity associated with Mr Connell since Mr Burke had been elected to Government. The Commission concludes the $50,000 payment was made by or on behalf of Mr Connell. Neither Mr Burke nor Mr Connell could recall the payment. Neither could assist the Commission as to the apparent purpose of the payment.

7.20.4 Mr M E Beahan was the secretary of the State Branch of the Australian Labor Party from May 1981 to July 1987. The Party was troubled in servicing the interest on a bill facility granted by the Commonwealth Bank. Mr Beahan discussed the problem with Mr Burke in the latter part of 1983 to see if he could help in getting a donation to the Party to reduce the indebtedness to the Bank. He remembered that he became aware that he would be receiving an amount of $50,000 but was unable to say who told him. It would not have been Mr Connell for he never dealt with him. He supposed he learnt of the proposed payment from the Premier, Mr T Burke the Premier's brother or Mrs Brenda Brush (who worked for the Premier). He also learnt from the same source that the payment was to comprise a $5,000 donation and a $45,000 interest-free loan. The money was received and banked on 9 December 1983. He understood that the money came from Mr Connell though he did not recollect from whom he obtained that information. The $45,000 was shown in the books of the Party as an interest-free loan.

7.20.5 Mr Beahan said that in 1986, Mr G Kafkaris, the accountant of the Labor Party, met Mr Connell at a social function and put to Mr Connell that the loan should be converted to a donation. Mr Connell agreed. Mr Beahan obtained confirmation from either the Premier, Mr T Burke or Mrs Brush of Mr Connell's agreement, and thereafter the loan on 30 May 1986 was treated as a donation to the State Campaign 1986.

7.20.6 The evidence does not disclose any impropriety in the making of this donation.

7.21 The value of Northern Mining

7.21.1 A number of organisations have valued Northern Mining from time to time. The earliest to do so were A C Goode & Co and BA Australia. Their valuations appear in Northern Mining's Part B Statement to Endeavour. A C Goode & Co came up with a figure of $19 million to $70 million. BA seems to have done two valuations — one as at August 1981, the range being between $26 million and $42 million, and as at November 1981 where the range was between $24 million and $40 million. The difference between the two valuations appears to have been based on the number of tonnes per annum through the plant.

7.21.2 Baring Bros, in its report of 19 July 1983 to Endeavour, was of course not called upon to express a value but to decide whether the price of $42 million to be paid by Bond Corporation to Endeavour was a fair price for the vendor to receive. Mr F H Burke, however, who helped prepare the Baring Bros report, gave evidence to the Commission in which he estimated a value in July 1983 of between $20 million and $30 million. Mr Tinsley of EBC did considerable work in preparing a report to the Bank so that it could determine whether it should make the loan sought by Northern Mining. He conducted numerous cash-flows and spent considerable time in Australia (he was based in London) in carrying out this work. Mr Birchmore, a director of Northern Mining, asked Mr Tinsley if he would do a valuation of Northern Mining's interest in the Joint Venture, but because of Stock Exchange guidelines, being a party who hoped to achieve a financial interest in Northern Mining by way of the loan, he could not undertake a formal valuation so what he promised Mr Birchmore was the benefit of the Bank's cashflow bottling. Because of the work he had done, he felt in a good position to make a valuation statement, though as the letter of valuation itself emphasises, it was an internal valuation for the purposes of a loan and there was a strong disclaimer included in it. The letter disclosed a valuation derived from the net present value of the cashflows as at mid-1983 of between $38.6 million and $45 million, depending on whether a real discount rate of 6% or 5% was used.

7.21.3 Then Mr Massy-Greene who was commissioned by the Royal Commission to express a view of the Connell Report and the Price Waterhouse opinion as to value, was of the opinion that at the time of the purchase, the value of Northern

Mining was between $29 and $35 million. Then, of course, there was Mr Walsh on behalf of L R Connell & Partners who, in the Connell Report, attempted to justify a purchase price of $42 million and, of course, as previously referred to, Price Waterhouse expressed its opinion, based on materials which we have previously cited and which were used by Mr Walsh, and also its own cash-flow projections, that the price of $42 million was a fair price to pay.

7.21.4 Mr Massy-Greene was critical of the work Price Waterhouse had done, believing that the firm should not have undertaken the assignment in the time allotted to it. His criticism primarily centred on three of the key factors, namely whether the valuation should have allowed for a premium to Northern Mining in the sale of its diamonds, the discount rate applied, and whether there should have been an allowance for completion risk.

7.21.5 As to the premium, we have already mentioned that Northern Mining, unlike the other two Joint Venturers, had retained the right to sell its 5% share of the diamonds outside the CSO. The feasibility study spoke of the possibility of a 13% premium if the Joint Venturers sold outside the CSO. Price Waterhouse allowed a 10% premium, basing that view on some actual sales made, the feasibility study, and the opinion of others. A C Goode & Co spoke of a premium of up to 35% and BA Australia was also of the view that the valuation should include a premium. Both these valuations, however, were done in 1981 immediately following a large upsurge in the price of diamonds, which came to an abrupt halt in the latter weeks of 1981 when a marked fall in price occurred. Mr Tinsley, at a later time — 1983, also incorporated a premium in his calculated cashflows.

7.21.6 Baring Bros, in the final version of its report which appears as part of the Connell Report, while noting Northern Mining's special position commented that "it is probable Northern will achieve a revenue premium over the other Joint Venturers whose rates are predominantly through the CSO". Reference was made by counsel for Price Waterhouse to a version of the Baring Bros report which was considerably amended before its final completed form. It is true that in that document there was a considerable expansion upon the final version of Northern Mining's special position, and there is a reference to the net sales receipts to Northern Mining being up to 17% higher than those achieved by the Joint Venture partners. We accept, however, the point made by Mr Massy-Greene that the passage which has been deleted from the final version does not support a view by Baring Bros that a premium should be allowed of 17%. In any

event, we believe we should rely only upon the final report as expressing Baring Bros' opinion.

7.21.7 Mr Massy-Greene, while accepting that some valuers might attribute a premium of up to 5%, believed the better view was to allow for no premium. That view was criticised as being illogical but when it is understood why he is of that opinion, then there is nothing illogical in it. Northern Mining, he said, might well achieve a premium when diamond prices were rising for it had been the policy of the CSO, and no doubt would continue to be its policy, to dampen speculation and hence there could be a small margin between its price and prices realised independent of it. However, when diamond prices are falling, selling outside the CSO may be at a discount to CSO prices. In fact, history since 1983 supports Mr Massy-Greene's view. We do not think, however, that speaking as of 1983, Price Waterhouse's rather optimistic view can be said to be so wholly wrong as to be unacceptable. Especially is this so as it relied on the BCG's report on diamond prices which had been commissioned by the Joint Venturers for their feasibility study and which Mr Massy-Greene accepted as being the only published work available at 1983 as an aid in forecasting prices.

7.21.8 Price Waterhouse used a discount rate of 14% nominal, though to express it that way is not strictly correct. Price Waterhouse formulated their opinion by examining cashflows prepared by others and by doing some cashflows of their own and using them to see what discount rate was required to yield a net present value of $42 million. Fourteen per cent nominal was the result of that calculation. This represents a 6.7% real rate after allowance for inflation at 7% applied pursuant to what is known as the Fischer equation. Mr Massy-Greene contended that the discount rate accepted by Price Waterhouse was too low, but he had no criticism of the inflation rate of 7% used by Price Waterhouse, though he used 10%.

7.21.9 There was a lot of evidence about what discount rate should or should not have been used, but in the end all witnesses agreed that valuation is an art, with many scientific tools available in aid. It is not apparent to us that 14% nominal with a 6.7% real discount rate for unleveraged cashflows, was so out of balance with other views as expressed in previous valuations and by Mr Massy-Greene, as to say that it was clearly a wrong rate to be used. In any event, the rate used includes a component being an evaluation of the completion risk to which we now turn.

7.21.10 Mr Massy-Greene thought that there was a marketing risk of above average size. He said that in 1983 there was a substantial concern, both as to the price which might be obtained and also the volume of diamonds which might be sold. The Ashton Joint Venture represented some 30% of the world diamond production by volume and a huge proportion of production in the various segments in which diamonds were mined and sold. In his review of the Price Waterhouse opinions, at page 10 he pointed out that Price Waterhouse appeared to have accepted the premise that the net present value of their projected net cashflows was a fair estimate of the value of Northern Mining. That approach was satisfactory only if the discount rate was sufficiently high to incorporate the development risks which were inherent in any major project. Apart from the marketing risk, Appendix I enumerated a number of other risks, but it is our opinion that the element of risk in those other enumerated risks was very slight indeed. The marketing risk was undoubtedly the most significant ingredient of the risks inherent in the venture. Even Mr Massy-Greene expressed the view that the assessed development risks were not particularly high but he would accept an appropriate reduction in the net present value to be in the order of 10-30%. Accepting the lower end of the scale, we do not believe that a 10% risk would have such an impact on the discount rate as to make 14% unacceptable.

7.21.11 Though criticisms can be made of the Price Waterhouse approach, we do not believe the opinion expressed was on unsupportable grounds. We do, however, believe it was unwise for Price Waterhouse to undertake the mandate in view of it also being the auditor of Bond Corporation and its subsidiaries and it should not have undertaken the task without making certain that the Government was aware of its auditing relationship. We are left with the impression that the team engaged upon the work would have been under pressure, even though unconsciously, to achieve a result which did not invalidate Price Waterhouse's opinion as auditor.

7.21.12 It can be seen that there has been a wide variation in the valuation ascribed to Northern Mining's interest in the Ashton Joint Venture project, from time to time, and the price paid by the Government was in the higher part of that range. Our major criticism of the purchase is that the Government failed to equip itself with a proper valuation of the project for the purpose of making its decision. We reject L R Connell & Partners as a firm capable of making a valuation and, indeed, on our finding, that was not their task since it was primarily to persuade the Government, and in particular members of the Cabinet, that the Government should purchase the company for $42 million from Bond Corporation. L R Connell & Partners had not revealed any

previous experience of valuing mining projects and certainly not diamond mining projects. They were not independent valuers and it was known to Mr Burke at all relevant times that the firm was acting for Bond Corporation in achieving the sale.

7.21.13 The Government could have obtained an independent valuation. RFC would have done the job for $70,000. No doubt enquiry would have elicited others, though Baring Bros may have had a conflict of interest. It was clearly wrong of the Government to spend $42 million without obtaining the best possible advice on the value of the purchase. This was, however, the first of the entrepreneurial projects this Government had entered into and it is apparent that it was conducted with a considerable degree of naivety and inexperience.

7.21.14 Baring Bros points out that a secondary method of valuation involved a comparison with the Stock Market capitalisation of Ashton at the relevant time. Restating Ashton's interest, it amounted to 38.24% of the Ashton project and its share market value at the time was $206 million. The other assets of Ashton were minor and so a comparable 5% interest in the Ashton Joint Venture would approximate $27 million. Of course, a 5% interest in the Ashton Joint Venture through Ashton, was not the same thing as the 5% interest owned by Northern Mining since ownership through the latter amounted to ownership of a direct interest in the Joint Venture whereas, through Ashton, it was only an interest indirectly by means of a shareholding in a Joint Venturer. Unquestionably, the value of Northern Mining's 5% interest would have been greater than $27 million for allowance should be made for not only its direct interest in the project but also because of a possible premium it might earn in respect of its entitlement to deal with its 5% interest in the diamond production. Nevertheless, had Mr Burke and those from whom he sought advice, been more aware of business considerations, they would have sought some independent expert reassurance that $15 million was a reasonable valuation of the additional benefits of the 5% owned by Northern Mining.

7.21.15 Mr Humann placed some emphasis on the sale from Endeavour to Bond Corporation as evidence of value, being a price arrived at in the marketplace by two companies at arm's length with different boards of directors, even though some of those directors were common to both companies. He reasoned that Bond Corporation would scarcely pay $42 million if that was not a fair value when 60% of the purchase price would go to the independent shareholders of Endeavour. In our opinion, it was much more likely that $42 million was the price struck because it settled the debts which

Endeavour owed to Bond Corporation. There was no question of the independent shareholders of Endeavour receiving any return of capital but what it did for them was to reduce Endeavour's liabilities by $42 million.

7.21.16 The only organisation which placed a reliable value on Northern Mining contemporary with the events under inquiry was Baring Bros. On the basis of Mr F T Burke's opinion, the Government paid at least $12 million too much for the company. Even on Mr Massy-Greene's recent independent assessment, the Government paid at least $7 million too much. The probability is that the Government paid somewhere between $7 million and $12 million too much for Northern Mining.

7.22 Subsequent history of Northern Mining

7.22.1 The shares in Northern Mining were acquired pursuant to the Contract of Sale of 8 November 1983 in which Emersat was vendor, and Mr Burke for and on behalf of the State, was purchaser. During the Parliamentary Debate in relation to the *Western Australian Development Corporation Bill*, introduced into the Legislative Assembly on 22 November 1983, problems associated with the provisions of the *State Trading Concerns Act 1916* soon became apparent. Mr Hohnen, as previously mentioned in this chapter, had already brought the Premier's attention to that Act, but apparently the implications of the Act were not then fully appreciated.

7.22.2 Reference was made in paragraph 7.15.5 of this chapter to the memorandum Mr Lloyd sent to Mr Burke concerning the *Northern Mining Acquisition Bill* in which he pointed out that the "good news" was that Northern Mining, when acquired, would enable the carrying on of any other activity authorised by the Articles of Association. He stated that that fact should strengthen the Legislative Council's resolve to delay, amend or defeat the Bill if the point was appreciated. The Burke Government did not have control of the Legislative Council. It is apparent the opposition failed to perceive the breadth of the proposed legislation and, though in a position to frustrate the Bill, did not do so. The provisions of the Bill, which became an Act without amendment, denied any form of accountability to Parliament. The Treasurer was given power to acquire all the share capital in Northern Mining, notwithstanding any other Act, on behalf of the State and to exercise all or any of the powers attaching to the share capital so acquired. He was also empowered, with the prior approval of the Governor, to make advances to Northern Mining from Consolidated Revenue and to guarantee the discharge of any financial obligation of the

company also out of Consolidated Revenue. No provision was made in the Act for the audit of the company to be undertaken by the Auditor General. Thus, the Act bypassed any form of control by Parliament and negated any form of accountability to it.

7.22.3 The *Northern Mining Acquisition Bill* had received the Royal Assent on 31 October 1983. After the *Western Australian Development Corporation Bill* became law, WADC acquired the interests of the State through Northern Mining in the Ashton Joint Venture for a profit to the State of about $3,000,000. That occurred in 1984. Following upon that acquisition, Northern Mining changed its name to West Australian Government Holdings Ltd (WAGH) with the object of it being made the investment arm of the State.

7.22.4 In September 1984, WADC caused the West Australian Diamond Trust ("WADT") to be listed on the Stock Exchange when 60 million units of $1 each were offered to the public and five million units were taken up by WADC in the Trust. The money raised was used by the WADT to acquire the interests of the WADC in the Ashton Joint Venture, plus additional moneys for capital expenditure requirements, administrative, exploration and other costs. The issue was fully subscribed. As a result of the acquisition by WADC of the 5% interest in the Ashton Joint Venture and its subsequent sale to the WADT, WADC made a profit of approximately $2.7 million.

7.23 Conclusion

7.23.1 The Commission has found that Mr Burke's conduct in the acquisition of Northern Mining, the first of his Government's entrepreneurial projects, was improper in several respects. The deal was conducted with a degree of naivety which reflected the inexperience of the relatively recently elected Burke Government.

7.23.2 **Mr Burke**. Mr Burke, from about June to September 1983, personally took charge of matters which resulted in a decision by Cabinet on 26 September 1983 approving the acquisition of Northern Mining. When Cabinet made this decision it was unaware of the unsuitability of the firm, L R Connell & Partners to advise the Government on a proposal of such complexity. Nor was it informed that L R Connell & Partners also were acting also as agents for the vendor, Bond Corporation, and that L R Connell & Partners would receive a fee from Bond in relation to the sale.

7.23.3 The Commission has found that Mr Burke was fully aware of these matters but deliberately chose not to tell his Cabinet colleagues. Such conduct is grossly improper. L R Connell & Partners should not have been retained to advise the Government either in the acquisition or the commute option.

7.23.4 As a consequence, Cabinet approved the acquisition of Northern Mining for $42 million without the benefit of a proper valuation of the company. That decision resulted in Cabinet being unaware that it was being asked to approve a purchase price which may have been between $7 million and $12 million more than the company's true value. In any event, Mr Burke improperly failed to give Cabinet sufficient time either to appreciate the limitations of the report it was given or to consider the merit of the proposal.

7.23.5 We have concluded that Mr Burke improperly used his position as Premier to propose to the R&I Bank that it should grant a $20 million facility to Bond Corporation in September 1983 when the Government was negotiating to buy Northern Mining from Bond Corporation. No formal application was made for the loan. It was dealt with urgently and in an unorthodox manner.

7.23.6 **Mr Naylor**. The Commission has found that Mr Naylor acted improperly in causing Mr Walsh to delete the Declaration of Interest from the Connell Report to Cabinet and thereby causing significant information to be withheld from Cabinet.

7.23.7 We have found that the execution of the employment contract of Mr Naylor, a ministerial adviser to Mr Burke, coincided with his agreement to give 10 per cent of his salary to the Labor Party. We believe it is highly undesirable and, indeed, damaging to the public's perception of open government for somebody employed by the Government to be asked to donate a percentage of his or her salary to a political party.

7.23.8 **Mr Walsh and Mr Connell**. The Commission has found that Mr Walsh and Mr Connell acted improperly by not informing Mr Les McCarrey and Mrs Kerry Sanderson, of the Department of Treasury, of the true relationship between L R Connell & Partners and Bond Corporation with respect to the sale of Northern Mining.

7.23.9 **Price Waterhouse**. Price Waterhouse, having been asked to provide a fairness opinion on the purchase price of Northern Mining for the benefit of the

Government, should have disclosed in their report that the firm also acted as auditors of the Bond Corporation and companies associated with it. The firm's non-disclosure was disturbing. Disclosure was essential to maintain the integrity of its advice, even if that advice was being used only to answer criticism of the purchase price of Northern Mining.

7.23.10 **Mr McCarrey**. Mr McCarrey did not act improperly in speaking as he did to members of Cabinet at its meeting of 26 September 1983 about the acquisition of Northern Mining.

7.23.11 **The Northern Mining Acquisition Bill**. In our view, Mr Burke acted inappropriately in promoting the *Northern Mining Acquisition Bill* in terms sufficiently wide to enable the Government thereafter to use Northern Mining as a vehicle for the acquisition of commercial interests without regard to the prohibition contained in section 4 of the *State Trading Concerns Act 1916* and/or without reference to the Parliament of Western Australia.

7.23.12 The *Northern Mining Acquisition Bill* came before the Legislative Council in a form which would deny accountability in respect of the actions of the Treasurer and the Executive to Parliament. It is a pity that notwithstanding that obvious feature, the Opposition, which could have used its numbers to reject the Bill, or to amend it to preserve accountability, failed to do so.

7.23.13 Northern Mining subsequently became Western Australian Government Holdings ("WAGH") which, with its special statutory attributes, became the vehicle for the Government acquisition of an interest in the Kwinana petrochemical project. By such means, its dealings on that project were largely kept secret from the Parliament and the public. It appears that the Government had in mind that Northern Mining could become a vehicle for its commercial activities at about the time of its acquisition. The issue of government trading activities will be addressed in Part II of the report.

7.23.14 **Ministerial advisers and public servants**. The introduction of the ministerial adviser system we have noted in this chapter marked the advent of enormous changes in the Public Service. The consequence of this practice, as in this instance, was the undermining of the relationship between the permanent head of a department and the Minister responsible for that department. Instead of the almost daily personal

contact between the head and the Minister which characterised former administrations, the normal channel of communication now became the "adviser".

7.23.15 The opportunity for the department head to call on his or her experience of the system to advise the Minister on implementing government policy was diminished. The change was said to be due to a lack of trust in the impartiality of those in the senior echelons of the Public Service, because the Labor Party had been out of office for so long. It also may have been due to the apparent inexperience of the Premier and his relatively youthful Cabinet, and their desire to implement, unimpeded, their policies.

7.23.16 Whatever the reason, the change was almost immediate. It found extreme expression in the Premier's handling of the acquisition of Northern Mining, when the Co-ordinator of the Department of Resources Development, Mr Hohnen, was isolated from the Premier's machinations in relation to the transaction. Mr Burke's distrust of Mr Hohnen was such that he instructed the person then acting as Mr Burke's adviser to feed Mr Hohnen erroneous information. Apparently, Mr Burke believed that Mr Hohnen was likely to disclose details of the Government's thinking to the joint venturers in the Ashton Diamond Mining project. However, the evidence we heard led us to conclude that Mr Hohnen had tried to do no more than uphold the tradition of fair dealing and good faith that, in the past, had played an important role in negotiations between the Government and developers. Mr Burke's instruction to feed disinformation to Mr Hohnen was outrageous. The subject of Ministerial advisers will be addressed in Part II of the report.

7.23.17 **Government involvement with business**. We have received considerable evidence of a change in the approach to government introduced during the Burke years, in the direction of a more entrepreneurial, risk-taking style, all of it, of course, encouraged by a genuine belief that a change in style was in the interests of good government and the State. It is not for this Commission to question such an approach; it reflects a decision which lies fairly and squarely within government. However, the acquisition of Northern Mining was the first, but by no means the last, indication revealed in the evidence of the risks associated with the practice of the Government in its use of advisers.

7.23.18 The Government's decision to buy all the shares in Northern Mining, ostensibly to secure a "window on the industry", was ill-conceived. The serious conflict

of interest, to which it gave rise, between the Government as a joint venturer and the Government as a taxing authority required to assess the amount of the royalty payable on the product of the joint venture was not appreciated. The reluctance of the Government to trust senior officers of the Public Service exposed it to mistakes of this kind.

7.23.19 **Further matters**. Finally, reverting to the terms of reference, the Commission reports:

(a) There are no matters addressed in this chapter which should be referred to an appropriate authority with a view to the institution of criminal proceedings; and

(b) There are a number of matters referred to in this chapter which render changes in the law of the State or in administrative or decision-making procedures necessary or desirable in the public interest. These matters will be addressed in Part II of our report.

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6.1 The term of reference

6.1.1 The Commissioners are required by their Commission, as affected by the *Royal Commission into Commercial Activities of Government Act 1992*, to inquire and report whether there has been —

(a) corruption;

(b) illegal conduct; or

(c) improper conduct,

by any person or corporation in the affairs, investment decisions and business dealings of the Government of Western Australia or its agencies, instrumentalities and corporations in respect of the involvement of the Government Employees Superannuation Board (formerly the Superannuation Board) in the Fremantle Anchorage development and further to report whether —

(d) any matter should be referred to an appropriate authority with a view to the institution of criminal proceedings; or

(e) changes in the law of the State, or in administrative or decision-making procedures, are necessary or desirable in the public interest.

6.2 Definitions

6.2.1 The following abbreviations and definitions will be used throughout this chapter:

"Accord" — Accord Nominees Pty Ltd (subsequently known as Accord Investment Corporation Pty Ltd), a company controlled by Mr Robert Martin;

"Allied Westralian" — Allied Westralian Limited;

"Anniversary" — Anniversary Nominees Pty Ltd, a company controlled by Mr Martin;

"Ball & Sons" — Ball & Sons Pty Ltd;

"the Board" — the Superannuation Board;

"Brenmandah Nominees" — Brenmandah Nominees Pty Ltd, one of the owners of the Anchor Nissan site;

"Brockley Investments" — Brockley Investments Limited;

"Conaust" — Conaust (WA) Pty Ltd (formerly known as Mercantile Stevedores (WA) Pty Ltd);

"Delta Trading" — Delta Trading Co Pty Ltd (trading as Rolly Tasker Sailmakers);

"Elder Prince" — Elder Prince Marine Services Pty Ltd;

"E M Finucane" — the executors of the estate of E M Finucane deceased;

"ERMP" — Environmental Review and Management Programme;

"Fee Agreement" — the Fee Agreement dated 9 April 1986 and made between Accord, Anniversary and the Board;

"Fremantle Steam Laundry" — Fremantle Steam Laundry Coy Pty Ltd (trading as Fremantle Steam Laundry);

"Halpern Glick" — Halpern Glick Pty Ltd, chartered engineers;

"Heads of Agreement" — the Heads of Agreement dated 9 April 1986 and made between Saland, Mr Garry Jones, Accord, Mr Martin and the Board;

"James McLarty" — James McLarty Investments Pty Ltd;

"Kotara Nominees" — Kotara Nominees Pty Ltd, one of the owners of the Anchor Nissan site;

"Land Holdings" — Land Holdings Pty Ltd, the owner of the Swan Wool Scourers site;

"Melampus" — Melampus Pty Ltd (subsequently known as Monash Investments Pty Ltd), a company controlled by Mr Leonard Brush;

"Ritma" — Ritma Pty Ltd;

"Roville" — Roville Pty Ltd, a company acting as trustee for the Board;

"Saland" — Saland Pty Ltd, a company controlled by Mr Jones;

"Saland/Accord Agreement" — the deed made in March 1986 between Saland and Accord;

"Teachers Credit Society" — the WA Teachers' Credit Society Limited;

"Trial Transcript" — the transcript of the trial of Mr Martin and Mr Brush in the District Court of Western Australia, on charges of corruption, forging and uttering, between 11 April 1988 and 29 April 1988; and

"WADC" — the Western Australian Development Corporation.

6.2.2 During the period relevant to this term of reference, the Board's solicitors were Mr Michael Hunt and Mr Bayfield Collison. They were in partnership during the relevant period, first as members of Collison & Hunt, then Collison Hunt & Richardson and finally Blake Dawson Waldron. In this chapter, for the sake of convenience, those firms will simply be referred to as "Collison & Hunt".

6.3 Fremantle Anchorage prior to the involvement of the Board

6.3.1 In 1983, Saland Pty Ltd ("Saland"), a company controlled by Mr Garry Jones, commenced negotiating the acquisition of a number of properties in an area at Fremantle which subsequently became known as the North Fremantle Quay and then as the Anchorage site.

6.3.2 At that time, the Anchorage site comprised about 18 different freehold and Crown leasehold titles. The site had an area of about 11.3 hectares, the boundaries of which were the Swan River, Stirling Highway, Tydeman Road and Queen Victoria Street. Frontage to the Swan River was about 380 metres.

6.3.3 Initially, Mr Jones intended to acquire several of the properties making up the Anchorage site, to consolidate the titles to those properties, and to obtain a rezoning of the site which would permit the construction of a high density, residential and commercial development.

6.3.4 When Mr Jones, through Saland, commenced negotiating the acquisition of a number of the titles, the Anchorage site was variously zoned:

(a) light industry, general industry, special use reserve, and parks and recreation reserve under the City of Fremantle Town Planning Scheme No 2; and

(b) industrial zone, parks and recreation reservation, public purposes (special uses) reservation under the Metropolitan Region Scheme.

6.3.5 The necessary rezoning was to Development Zone under the City of Fremantle Town Planning Scheme No 2 and to Urban Zone under the Metropolitan Region Scheme.

6.3.6 The initial concept for the Anchorage site began with certain riverfront land over which one of Mr Jones' companies had leases from the Public Works Department. It was envisaged by him that the parcels of riverfront land would be developed by the construction of an "over-the-water restaurant" and a small marina. Mr Jones gave evidence that between 1983 and April 1986 the proposed development of the Anchorage site gradually evolved in size and concept. During that period, the number of parcels of land in the Anchorage site that were to be involved in the proposed development increased.

6.3.7 During 1983, Mr Jones set about examining the prospect of making the proposed development larger, and with that in mind, Mr Jones, through Saland, acquired adjoining riverfront properties and some properties to the north of a non-gazetted street called Doepel Street. During 1984 and early 1985, the proposed development expanded further following discussions between Mr Jones and his architect, Mr Robert Allan. The expanded proposed development required the acquisition of all the land from the Swan River to Swan Street. Mr Jones said in evidence that:

> "... it then seemed logical, given the discussions with the architects and the engineers, that we should continue to pursue the acquisition of these varied sites because some of the land holders

> owned land on both sides of Swan Street and it was, therefore, not going to be possible to acquire their land in part. They either wanted to negotiate to dispose of all of their land holdings or not at all."

The land owners in that category comprised Land Holdings Pty Ltd (which owned the Swan Wool Scourers land) ("Land Holdings"), Delta Trading Co Pty Ltd (trading as Rolly Tasker Sailmakers) ("Delta Trading") and Conaust (WA) Pty Ltd (formerly known as Mercantile Stevedores (WA) Pty Ltd) ("Conaust").

6.3.8 By early 1985, the proposed development had reached the stage where Mr Jones wanted to acquire all of the land from the Swan River to Tydeman Road.

6.3.9 Negotiations between Mr Jones and the land owners revealed that some of the land owners, including Land Holdings, Delta Trading, Fremantle Steam Laundry Coy Pty Ltd (trading as Fremantle Steam Laundry) ("Fremantle Steam Laundry Coy"), Conaust, Kotara Nominees Pty Ltd ("Kotara Nominees") and Brenmandah Nominees Pty Ltd ("Brenmandah Nominees") (the owners of the Anchor Nissan site), James McLarty Investments Pty Ltd ("James McLarty") and Elder Prince Marine Services Pty Ltd ("Elder Prince") would sell only if the businesses they were carrying on at the Anchorage site could be relocated to other suitable premises. During 1985 and early 1986, Mr Jones and his advisers had a number of discussions with various Government departments and Crown instrumentalities (for example, the Fremantle Port Authority, the Metropolitan Region Planning Authority, the Main Roads Department and the Department of Industrial Development) in connection with the proposed development and the necessity to relocate some of the existing businesses.

6.3.10 The relocation of Swan Wool Scourers and the Fremantle Steam Laundry posed particular problems. Each of those businesses produced effluent which was discharged into the Swan River. Swan Wool Scourers had been discharging effluent into the river since 1912, and the volume had increased gradually. The businesses carried on by Swan Wool Scourers and the Fremantle Steam Laundry did not conform with the existing town planning schemes. But the businesses had non-conforming user rights in consequence of having been established at a time when their activities were permitted. If Swan Wool Scourers and the Fremantle Steam Laundry ceased carrying on business at the Anchorage site, they could not re-commence those businesses at an alternative site, unless approval was obtained under the existing town planning schemes.

Zoning and land use regulation generally, and the control of noxious industries in particular, had become significantly more strict during the 1970s and early 1980s.

6.3.11 Between 1983 and the end of 1985, Mr Jones, through Saland, commissioned reports and plans on the proposed development, including:

(a) A market and financial feasibility study by Planning Collaborative Australia Pty Ltd, consultants in, amongst other things, market and financial analysis;

(b) A study by Halpern Glick Pty Ltd ("Halpern Glick"), chartered engineers, into the feasibility of constructing a marina;

(c) A traffic impact study by Uloth & Associates Pty Ltd, transport planners; and

(d) Architectural schematic plans by Mr Allan.

He also consulted Allied Westralian Limited ("Allied Westralian") and appointed it as financial adviser for the proposed development. By December 1985, Saland needed to pay a significant amount under contracts of sale and option agreements it had entered into over the Anchorage site. It did not have the required money.

6.3.12 In December 1985, Mr Anthony Treadgold, an officer of Allied Westralian, approached Mr Robert Martin to ascertain whether Mr Martin was interested in becoming involved in the acquisition of the Anchorage site and the proposed development. Mr Martin was a businessman with a wide range of business interests. Initially, it was suggested by Mr Treadgold that Mr Martin might provide a guarantee of about $2 million to enable Saland to secure three of the properties in the site. This proposal was rejected by Mr Martin. Subsequently, Mr Treadgold told Mr Martin that if Mr Martin could find a person or company prepared to purchase the interests of Saland in the Anchorage site, Mr Martin could earn a significant fee or commission.

6.3.13 In late February 1986, Mr Martin, or one of his companies, lent Saland about $80,000 in order to preserve the rights of Saland to one of the properties. Subsequently, further negotiations between Mr Martin and Mr Jones resulted in the

execution of a deed ("the Saland/Accord Agreement") in March 1986 between Saland and Accord Nominees Pty Ltd (subsequently known as Accord Investment Corporation Pty Ltd) ("Accord"), a company controlled by Mr Martin. By this document, it was agreed that:

(a) Mr Martin, through Accord, would lend Saland up to $5 million to enable Saland to complete the purchase of some of the properties; and

(b) Saland and Accord would use their best efforts to secure all of the properties making up the Anchorage site, and to find an end purchaser and third-party financier for the Anchorage site and the proposed development.

6.3.14 The Saland/Accord Agreement also provided that if Accord secured a third-party financier for the site and the proposed development, Saland would assign all of its right, title and interest in and to the site and the proposed development to Accord or its nominee, on the following conditions:

(a) Saland would be paid $137,000 by way of reimbursement of expenses;

(b) Saland would be paid $250,000 as a pre-payment on account of the commission referred to in paragraph (c) below;

(c) If the site and the proposed development was subsequently sold to an end purchaser, Saland would be entitled to a commission based on the sale price. The amount of the commission was as follows:

Sale Price	Commission
$20,000,000	$1,500,000
Up to $25,000,000	$2,750,000
Up to $30,000,000	$4,250,000
For every $1,000,000 thereafter	$ 150,000

6.4 Statutory background

6.4.1 The statutory background relating to the Board is set out in section 5.2 of chapter 5 of this report relating to the Halls Head development.

6.5 The composition of the Board at material times

6.5.1 The composition of the Board at material times is set out in paragraph 5.3.1 of chapter 5 of this report relating to the Halls Head development.

6.5.2 When the Board decided to acquire the Anchorage site, the Board comprised Mr Leonard Brush as full-time Chairman, and Mr Barry Markey and Mrs Winifred Scott as part-time members. Mr Brush was, in effect, the full-time Chief Executive of the Board, and he was responsible for its day-to-day affairs. Mr Markey and Mrs Scott, as part-time members, attended meetings of the Board which were held about once a month. Copies of the agenda for each Board meeting, and of documents relevant to matters on the agenda, were sent to them before each meeting. However, neither of them had any role in the day-to-day affairs of the Board.

6.5.3 During his term as Chairman, Mr Brush's object was to make the Board more entrepreneurial and businesslike. He attempted to give the impression to entrepreneurs and business people that he and the Board could do business deals at their level. Mr Brush was the central figure in this drive to give the Board a new image. The involvement of the Board in the Anchorage site was an example of Mr Brush's entrepreneurial investment philosophy. That philosophy embraced a new approach which was to be made the law as from 1 July 1987 with the enactment of the *Government Employees Superannuation Act 1987*.

6.5.4 Between 11 November 1981 and 24 November 1986, Mr Brian Neville was the Board's Investment Manager. The history of his employment by the Board is described in paragraph 5.3.3 of chapter 5 of this report. At all material times, Mr Neville was an associate of the Australian Society of Accountants. Mr Neville's duties as Investment Manager were to review and report to the Chairman on all aspects of the Board's investments, including management, research and performance. Mr Neville also supervised the activities of the Investment Section of the Board, and he represented the Board in relation to development projects. Further, Mr Neville was a member of the Board's Share Committee, and he liaised with professional advisers and consultants in all investment matters.

6.6 The early involvement of the Board in the Anchorage site

6.6.1 In early January 1986, Mr Jones or Mr Treadgold supplied Mr Martin with information relating to the Anchorage site and the proposed development. Shortly afterwards, Mr Martin contacted Mr Brush. Mr Jones or Mr Treadgold had told Mr Martin that the interests of Saland in the Anchorage site could be purchased for $24 million. Mr Martin conveyed this information to Mr Brush. Mr Brush, on behalf of the Board, rejected this initial approach on the ground that the price was too high. Mr Brush said in evidence that he mentioned to the then Premier and Treasurer, Mr Brian Burke, this initial approach from Mr Martin. Mr Burke advised him to investigate the matter further.

6.6.2 In about early March 1986, Mr Martin made a further approach to Mr Brush. On this occasion, Mr Martin proposed that there be a joint venture involving the Board to develop the Anchorage site. He introduced Mr Jones to Mr Brush and Mr Neville. Mr Brush and Mr Neville would not agree to a joint venture.

6.6.3 At a meeting held on 11 March 1986, the Board formally considered possible involvement in the Anchorage site and the proposed development. At that meeting, it was resolved to investigate the matter.

6.6.4 Subsequently, Mr Neville carried out various investigations in connection with the Anchorage site and the proposed development. He commissioned a valuation of the site by Jones Lang Wootton and a marketing analysis of the proposed development by Richard Ellis. Jones Lang Wootton and Richard Ellis were real estate agents and property consultants.

6.6.5 On or about 3 April 1986, Mr Neville prepared a paper for consideration by the Board. In the paper, Mr Neville made the following recommendation:

> "That the Board proceed to secure ownership of the site from Jones and Martin subject to —
>
> (1) satisfactory valuation;
>
> (2) examination of all schemes and arrangements entered into by those parties and evaluation of the commitments in relation to relocation of Swan Wool Scourers, Fremantle Steam Laundry and Elder Prince."

6.6.6 At a meeting of the Board on 8 April 1986, the Board decided that the proposed development would be a profitable investment and that the site should be purchased. When the Board made that decision, the conditions which formed part of Mr Neville's recommendation had not been satisfied, and neither the Swan Wool Scourers land nor the Delta Trading land had been acquired.

6.6.7 Mr Neville said that at the Board meeting on 8 April 1986 he attempted to persuade the Board to acquire the site because he thought the proposed development was an attractive proposition. Mr Neville added that Mr Brush did not need any persuasion because he had already arrived at the same conclusion. It was Mr Markey and Mrs Scott who needed to be persuaded.

6.6.8 A transcript of the proceedings of the Board meeting held on 8 April 1986 was tendered in evidence. It reveals readily that Mr Brush and Mr Neville viewed the proposed development with considerable optimism. The transcript does not indicate any concern on the part of Mr Brush or Mr Neville in consequence of the conditions recommended by Mr Neville not having been satisfied, or in consequence of the Swan Wool Scourers and Delta Trading land not having been acquired.

6.6.9 Mr Neville conceded in evidence that statements attributed to him in the transcript of the Board meeting held on 8 April 1986 as having been made in response to questions by Mr Markey were inaccurate, and gave the misleading impression that firm arrangements were in place for the relocation of Swan Wool Scourers and the Fremantle Steam Laundry. The statements by Mr Neville were not deliberately misleading, and are consistent with his view at the time that the contemplated investment was too good an opportunity to miss and nothing could go wrong.

6.6.10 At this time, neither Mr Neville nor any member of the Board had prior experience of any project comparable with the proposed acquisition and development. Mr Markey's background was principally as an academic lecturing in accounting and business matters at a technical and further education college. Mrs Scott's background was principally as a canteen supervisor with Westrail. She had retired from that position prior to 1986.

6.6.11 The acquisition of the Anchorage site and the proposed development was a project of considerable magnitude and complexity. The Commission finds that the Board had insufficient experience properly to evaluate whether it should have become

involved in such a project. Its decision, on 8 April 1986, to proceed to secure ownership of the Anchorage site was premature. The Board should have deferred making such a decision until the conditions which formed part of Mr Neville's recommendation had been satisfied. In particular, common prudence should have demanded expert scrutiny of the schemes and arrangements that had been entered into by Mr Jones, Mr Martin and their companies, and the commitments that existed in relation to the relocation of Swan Wool Scourers, Fremantle Steam Laundry and Elder Prince and generally of the prospects of the proposal. The implications of these findings are discussed in section 6.10 of this chapter.

6.7 The Heads of Agreement and the Fee Agreement

6.7.1 On 9 April 1986, the Board entered into Heads of Agreement with Saland, Mr Jones, Accord and Mr Martin. The Heads of Agreement created binding contractual relations between the parties, and set out the terms and conditions of the Board's involvement in the project. The Board also entered into a Fee Agreement with Accord and Anniversary Nominees Pty Ltd ("Anniversary"), another company controlled by Mr Martin. Although the Heads of Agreement were executed on 9 April 1986, the Fee Agreement, which is dated 9 April 1986, was not entered into until about 8 May 1986. It appears that the Fee Agreement was originally drawn so that Accord, Mr Martin and the Board were the parties, but that in late April 1986, it was agreed to substitute Anniversary for Mr Martin, and to provide for Anniversary to be entitled to the fees of $2 million referred to in that agreement.

6.7.2 The salient terms of the Heads of Agreement were these:

(a) By clause 1 Saland, Mr Jones, Accord and Mr Martin ("the vendors") agreed to sell to the Board "the project", a term which was defined as "the Project as evidenced by [the Saland/Accord Agreement] and the subject of this Agreement;". In recital (1) to the Saland/Accord Agreement "the Project" was defined as the "overall Project for the re-development of the area in North Fremantle bounded by Queen Victoria Street, Tydeman Road, Stirling Highway and the waterfronts between the two road traffic bridges known as `The Old Fremantle Traffic Bridge' and `The Stirling Bridge'". It is readily apparent that the definition of the term "the Project" in the Heads of Agreement is

meaningless. This is remarkable as the agreement to sell "the Project" was of fundamental importance.

(b) By clause 4(a) the vendors covenanted with the Board:

> "To sell the land and improvements set out in the First Schedule to the Board at cost to the vendors and in accordance with the First Schedule and the terms and conditions set out therein."

The status of the freehold and Crown leasehold land in the Anchorage site as at the date of execution of the Heads of Agreement is considered in section 6.9 of this chapter.

(c) The first schedule merely described the land which the vendors had acquired from the executors of the estate of E M Finucane deceased ("E M Finucane") and Fremantle Steam Laundry and the cost of acquiring that land. It contained no other terms or conditions.

(d) By clause 4(b) the vendors covenanted with the Board:

> "To assign to the Board all the estate and interest of the vendors (as purchaser) in the land and improvements in the Second Schedule and at the direction of the Board —
>
> (i) use best endeavours to obtain a novation of the contracts for purchase in favour of the Board as purchaser; or
>
> (ii) cause the contracts to be completed by the vendors and then on-sell to the Board on the basis that the Board will immediately reimburse to the vendors the purchase price and other costs paid by the vendors for the land and improvements;".

(e) By clause 4(c) the vendors covenanted with the Board:

> "That the Board will have the right to acquire all the land and improvements the subject of the Project (other

than the land owned by Delta Trading Pty Ltd (Tasker)) arising out of the rights of the Board pursuant to sub-clauses (a) and (b) hereof;".

(f) By clause 4(d) the vendors covenanted with the Board:

"To negotiate and complete the removal of the businesses listed in the Third Schedule at a cost to the project not exceeding the maximum amount provided in the Third Schedule;"

The businesses listed in the Third Schedule included Swan Wool Scourers.

(g) By clause 4(e) the vendors covenanted with the Board:

"To arrange for the sale and disposal of the buildings and structures specified in the Fourth Schedule and to recover for the project not less than the amount specified in the Fourth Schedule upon sale and disposal;".

The buildings and structures specified in the Fourth Schedule include Swan Wool Scourers. The amount specified in relation to Swan Wool Scourers is $300,000.

(h) By clause 5(a) the Board agreed to pay to Saland or Mr Jones:

"Upon the Board being satisfied as to its rights per clause 4(c) above —

(i) $250,000 by way of fees; and

(ii) $137,000 by way of reimbursement of expenses."

(i) By clause 5(b)(i) the Board agreed to pay to Saland or Mr Jones if the project were sold by the Board within two years from the date of the Heads of Agreement a commission based on the sale price. The rate of commission was the same as the rate to which Saland was entitled under

the Saland/Accord Agreement. By clause 5(b)(ii) the Board agreed to pay to Saland or Mr Jones 20% of the amount by which the maximum cost of acquisition (namely, $12 million) exceeded the actual cost of acquisition of the Project. The rates of commission provided for in clause 5(b)(i) and (ii) were subject to several provisions for reduction in particular circumstances.

(j) By clause 7 the Board agreed to pay to Accord or Mr Martin a fee to be agreed. The fee arrangement between the Board and Mr Martin was set out in the Fee Agreement.

(k) By clause 8 it was agreed that the Heads of Agreement represented a binding agreement by way of deed until such time as it was replaced by a more formal agreement entered into by all the parties.

6.7.3 The salient terms of the Fee Agreement were these:

(a) By clause 1 the Board agreed to pay to Anniversary:

> "$1 million upon the Board being satisfied as to its rights in clause 4(c) of the Heads of Agreement and a further $1 million on the rezoning of the Project in accordance with ... the Heads of Agreement."

(b) By clause 2 the Board agreed to pay to Accord if the project was sold by the Board within two years from the date of the Fee Agreement "a fee being 30% of the residual profit from the Project". The method of calculating the residual profit was then set out.

The fees payable by the Board to Accord are dealt with in some detail in section 6.13 of this chapter.

6.7.4 The Heads of Agreement and the Fee Agreement were negotiated on behalf of the Board by Mr Brush and Mr Neville. According to Mr Neville, Mr Brush negotiated the fee, commission and profit sharing entitlements of Mr Jones, Mr Martin and their companies. Mr Neville negotiated the other parts of the documents. However, Mr Brush said in evidence that he did not negotiate the profit sharing entitlements of

Mr Jones, Mr Martin and their companies. Mr Neville did. Mr Brush said that he was reluctant to approve what Mr Neville had negotiated.

6.7.5 Mr Bayfield Collison, a solicitor and partner of Collison & Hunt, was instructed by Mr Neville to prepare the Heads of Agreement and the Fee Agreement. The documents were prepared and executed as a matter of extreme urgency because there was concern about the secrecy of the proposed development. It was thought that if the proposed development became public knowledge, the cost of acquiring the remaining land in the Anchorage site would increase substantially.

6.7.6 Mr Collison gave evidence as to the manner in which the Heads of Agreement was prepared:

> "... a series of drafts were prepared. They were really shorthand draft Heads of Agreement on very inadequate instructions, and they were really in a sense exploratory documents, because information was coming through all the time, information was changing all the time, and each time I would make urgent amendments to the draft. I would send it back to Brian Neville in the Superannuation Board and then presumably the parties there would be conferring with the parties to the agreement. I had no contact with solicitors acting for the other parties except that I did on one or two occasions have contact with Terry McDonnell, who was acting for Jones."

6.7.7 Mr Jones said in evidence that it was critical that the Heads of Agreement be executed on 9 April 1986 because it was necessary to effect settlement under some of the contracts of sale which had been entered into by Saland. If settlement had not been effected on 9 April 1986, those contracts may have been terminated.

6.7.8 When the Heads of Agreement were executed, the conditions which formed part of Mr Neville's recommendation to the Board had not been satisfied.

6.7.9 The first of those conditions was that a satisfactory valuation be obtained. Prior to the execution of the Heads of Agreement, the Board had had access to a valuation prepared by Ross Hughes & Company, real estate agents and property consultants, on instructions from Mr Jones. As at September 1985, Ross Hughes & Company was of the opinion that "subject to encumbrance free titles being obtained and to formalisation of all necessary Government and other approvals to commencement of

development in accordance with the plans and specifications", the Anchorage site had a value of $24 million. In a letter dated 4 February 1986 to Saland, a copy of which was made available to the Board prior to the execution of the Heads of Agreement, Ross Hughes & Company expressed its "preliminary opinion" that the consolidated Anchorage site had a value of $30 million, subject to "encumbrance free titles being obtained, [and] to formalisation of all necessary Government and other approvals to commence development in accordance with revised plans and model".

6.7.10 Jones Lang Wootton was retained by the Board to provide a valuation of the Anchorage site. Mr Neville recalled that he received some oral advice from a representative of Jones Lang Wootton prior to the execution of the Heads of Agreement as to the value of the site. However, Jones Lang Wootton did not submit a draft valuation report until 16 May 1986, and the final form of its report was not made available until 9 June 1986, some two months after the execution of the Heads of Agreement.

6.7.11 Mr Neville said that it was unusual for the Board not to obtain a formal valuation of real property until after the date of acquisition of the property. He explained that the Heads of Agreement was executed prior to the formal valuation being obtained because land owners who had not already agreed to sell their holdings in the Anchorage site might have increased their price if they had known that the Board was attempting to acquire the whole site. A similar problem was perceived if an option to purchase in relation to one of the parcels of land lapsed, and it was necessary for the Board to negotiate a new option.

6.7.12 Mr Brush said that, although the Board had not received the valuation report prior to the execution of the Heads of Agreement, "we were comfortable with what we had been told [by Jones Lang Wootton]".

6.7.13 The Commission observes that, in any event, the Jones Lang Wootton valuation related to the whole of the Anchorage site, and not merely to those blocks which had been acquired as at the date on which the Heads of Agreement was executed. Further, the valuation assumed, amongst other things, that encumbrance free titles would be obtained to the whole of the site and that all necessary Government approvals would be obtained to, and development would commence in accordance with, the proposed development outlined in the plans prepared by Mr Allan, Mr Jones' architect. The Commission finds that the Board failed to appreciate that it should have obtained a

valuation of the rights and interests it was acquiring as at the date of execution of the Heads of Agreement. The value of those rights and interests must have been significantly less than the value of encumbrance free titles to the whole of the site.

6.7.14 The second condition which formed part of Mr Neville's recommendation to the Board required an examination of all schemes and arrangements entered into by Mr Jones and Mr Martin. Mr Neville said that only part of the necessary examination had been conducted prior to the execution of the Heads of Agreement. He added that he thought the various contracts of sale and option agreements which had been entered into by Saland were not vetted or checked by the Board's solicitors until after the Heads of Agreement was executed.

6.7.15 The third condition which formed part of Mr Neville's recommendation to the Board required an evaluation of the commitments that existed in relation to the relocation of Swan Wool Scourers, Fremantle Steam Laundry and Elder Prince. Mr Neville admitted that the necessary evaluation had not been completed when the Heads of Agreement was executed.

6.7.16 The conditions which formed part of Mr Neville's recommendation to the Board were not included in the Heads of Agreement even though they had not been satisfied when the Heads of Agreement was executed.

6.7.17 Mr Neville gave evidence indicating that, prior to the execution of the Heads of Agreement, it was agreed between the Board, Mr Martin and Mr Jones that if the Board subsequently resold the Anchorage site at a loss, Mr Jones and Mr Martin would indemnify the Board in respect of that loss. The indemnity against loss was not included in the Heads of Agreement. Mr Neville acknowledged that it was a very important term from the point of view of the Board. He said that the indemnity was simply overlooked because of the haste in which the Heads of Agreement were prepared.

6.7.18 In about May 1987, Mr Neville instructed the Board's solicitors, Collison & Hunt, to prepare a draft agreement which was intended to be supplemental to the Heads of Agreement, and to give formal expression to the indemnity. It was never settled and signed. Mr Neville said that he sent the draft agreement to Mr Martin and Mr Jones but received no reply. Mr Jones confirmed that he and Mr Martin had agreed "that if there were a shortfall from the sale of the project ... we would indemnify the

Board". He believed there were discussions with representatives of the Board in mid-1987 concerning the amendment of the Heads of Agreement to include the indemnity, but he had no idea why the amending agreement was never signed. Mr Martin denied the existence of any agreement whereby he would indemnify the Board against any loss it might suffer on a resale of the Anchorage site. He said there was no agreement on that issue although there were discussions about it. Mr Brush said there was no agreement to underwrite losses.

6.7.19 Mr Neville also gave evidence that Mr Jones and Mr Martin had agreed to warrant that the Board would receive certain money from the sale of buildings associated with the Fremantle Steam Laundry. If the Board did not receive the money from the proceeds of sale, it was to be deducted from the commission and profit sharing entitlements of Mr Jones, Mr Martin and their companies. This, again, was overlooked in the haste that surrounded the execution of the Heads of Agreement.

6.7.20 Clause 4(c) of the Heads of Agreement contained a covenant by Saland, Mr Jones, Accord and Mr Martin that "the Board would have the right to acquire all the land and improvements the subject of the Project (other than the land owned by Delta Trading ...) arising out of the rights of the Board pursuant to [Clause 4(a) and (b)]". Mr Neville said that the land owned by Delta Trading was excluded because that company had not indicated a willingness to enter into an agreement to sell its land. He said that the Swan Wool Scourers land had not been excluded because Land Holdings had indicated a willingness to enter into such an agreement on terms to be agreed.

6.7.21 In a letter dated 26 June 1987 from the Board's solicitors, Collison & Hunt, to the then Chairman of the Board, the following statements were made by the author of the letter, Mr Michael Hunt, concerning the preparation of the Heads of Agreement:

> "In preparing the Heads of Agreement and, specifically in detailing the land in the Second Schedule we relied on information provided by the Board and by Mr Garry Jones. At the time at which we prepared the agreement we were not instructed as to which land was the subject of contracts entered into by the Vendors with the then owners of the land. We understand that at that time the Investment Manager of the Board was also unaware of precisely which land the Vendors had contracted to purchase."

Mr Neville was, of course, the Investment Manager at that time. He said in evidence that at the time the Heads of Agreement were prepared, he was unaware of precisely which land the vendors had contracted to purchase. He was relying on the advice of Mr Jones. Mr Jones confirmed that, throughout this period, Mr Neville relied heavily on his knowledge and advice.

6.7.22 The letter dated 26 June 1987 from Collison & Hunt to the then Chairman of the Board also stated that:

> "We have recently confirmed with Mr Neville our understanding that it was not anticipated that at the time of the agreement the vendors would ever acquire an interest in public works lots 14-19 and the Crown land in Swan Street. We were further advised by Mr Neville that it was not intended that the vendors contract with Ritma Pty Ltd and Elder Prince for the surrender of their foreshore leases."

Mr Neville said in evidence it was always envisaged that Mr Brush, on behalf of the Board, would negotiate with the Government concerning the surrender of those leases.

6.7.23 The terms of the fee, commission and profit sharing arrangements were changed during the course of negotiating the Heads of Agreement and the Fee Agreement. The two-year time limit was introduced in relation to the commission payable to Saland, and the percentage of residual profit payable to Accord. A $1 million fee was originally to have been payable to Mr Martin or Accord on signing the formal documents. This was changed in the Fee Agreement so that it became payable on the Board being satisfied as to its rights under Clause 4(c) of the Heads of Agreement. Similarly, the $250,000 by way of fees and the $137,000 by way of reimbursement of expenses, which were originally to have been paid to Saland or Mr Jones "at settlement", were expressed in the Heads of Agreement to be payable upon the Board being satisfied as to its rights under Clause 4(c).

6.7.24 The changes to the fee, commission and profit sharing arrangements occurred at the instigation of Mr Neville. It appears that the changes were made between the preparation of the last draft of the Heads of Agreement and the execution copy of that document. Mr Brush gave evidence that the changes were made on the day the Heads of Agreement were to be executed.

6.7.25 Mr Jones said that he objected to the inclusion of the two-year time limit. He added that Mr Brush reassured him by saying the Heads of Agreement would be replaced by a formal agreement, and the time limit would not be included in that document. Mr Martin gave evidence that he recalled Mr Brush saying in his presence, at some time after the Heads of Agreement were executed, that he and Mr Jones need not be concerned about the two-year time limit. In a letter dated 12 October 1988 from Kott Gunning (solicitors acting on behalf of Mr Martin and Mr Jones) to Collison & Hunt (solicitors acting on behalf of the Board) it was said, in relation to the two-year time limit:

> "When the formal agreement was somewhat hurriedly produced, the question of the time limitation which then appeared in the agreement was questioned by Mr Martin who was reassured by Mr Brush in terms that this was a provision inserted by the Board's solicitors, but that neither Mr Martin nor Mr Jones need have any concern about this, as each would receive his agreed share of profit provided that each performed his obligations under the project management agreement."

6.7.26 Mr Brush said he recalled giving such an assurance to Mr Jones. He thought he also gave such an assurance to Mr Martin, but he was not certain. Mr Brush said that the two-year time limit had been introduced by Mr Neville. He was aware of it when he executed the Heads of Agreement. Although he did not agree with its inclusion, he was prepared to leave it in the document because it would keep Mr Martin and Mr Jones "on their toes". Mr Brush said he told Mr Jones, and possibly Mr Martin, in effect "look, the two-year limitation period is there but don't worry too much about it"; "if you do your job, you'll get paid".

6.7.27 The provisions in the Heads of Agreement and the Fee Agreement concerning fees did not, on Mr Neville's evidence, reflect the actual intention of the parties. In the letter dated 26 June 1987 from Collison & Hunt to the then Chairman of the Board, they said:

> "Mr Neville has told us that the vendors and the Board intended that the vendors would not be paid their fees until the contract was signed with Land Holdings Pty Ltd. ... Mr Neville's advice [was] that Anniversary was not to receive its $1 million until Land Holdings was contracted."

6.7.28 Mr Neville said in evidence that it had always been his view that the vendors and the Board had intended that the vendors would not be paid their fees until a contract was signed with Land Holdings. Mr Neville added:

> "The Swan Wool Scourers land was critical to the site, and without it the Board could do nothing with it."

6.7.29 Mr Neville's view concerning the payment of fees is corroborated by notes of conversations between Mr Brush and his solicitor, Mr Robert Richardson, in February 1987 and by a draft statement prepared for Mr Brush by his counsel in March 1987. Mr Richardson's notes state that Mr Martin was to put the Anchorage parcel of land together and get it rezoned. If he was unable to do that, he was to get nothing and to indemnify the Board against any loss on resale of the site. The draft statement prepared for Mr Brush by his counsel included the following passage:

> "We were to proceed if we owned the land. Heads of Agreement produced. Jones had to work on the matter and get all land. He and others underwrote any losses if they occurred but deal was to share profits if they were made. Martin was to get $1 million if site put together and $1 million if rezoning occurred. Jones was in a similar position."

6.7.30 Mr Jones, and most of the other witnesses who gave evidence before the Commission, were witnesses at the trial of Mr Brush and Mr Martin in the District Court of Western Australia during April 1988. At the trial, Mr Jones was asked:

> "What reason did Mr Neville give, if any, perhaps I should add, for not paying the claim [for the $250,000 fee] when you first made it?"

Mr Jones answered:

> "There was no signed agreement with Elders [the group of which Land Holdings was a member]. That was his specific answer."

This evidence is consistent with Mr Neville's view concerning the payment of fees.

6.7.31 The Commission finds that upon, and at all material times after, the execution of the Heads of Agreement and the Fee Agreement, it was the common

intention of the relevant parties that Anniversary and Mr Jones or Saland would not become entitled to their fees unless and until the whole of the land in the Anchorage site (including, in particular, the Swan Wool Scourers land, but excluding the land owned by Delta Trading) had been acquired by the Board. The Commission does not accept the evidence of Mr Brush or Mr Martin concerning the conditions which had to be satisfied before the fees became due and payable. For the reasons set out in sections 6.11, 6.12 and 6.13 of this chapter, their evidence generally lacks credibility. The Commission's finding is supported by the letter dated 26 June 1987 from Collison & Hunt; the evidence of Mr Neville; Mr Richardson's notes; the draft statement prepared for Mr Brush by his counsel; the reason given by Mr Neville to Mr Jones for not paying the fee of $250,000 when it was first claimed by Mr Jones; and the provisions of clauses 4(c), 4(d) and 4(e) of the Heads of Agreement.

6.7.32 Clause 8 of the Heads of Agreement provided that the document represented a binding agreement by way of deed until such time as it was replaced by a more formal agreement entered into by all the parties. Mr Neville said that the Heads of Agreement were intended to be only a preliminary document which would be replaced by a more formal document at a later stage. No such formal agreement was ever prepared. Mr Neville added that he did not know why a more formal agreement was never prepared. Mr Jones said that he raised the issue of the preparation of a more formal document with Mr Neville on several occasions. Mr Jones said that Mr Neville told him a draft would be prepared but, to Mr Jones' knowledge, no draft was ever prepared. Mr Brush explained that Mr Neville was reluctant to proceed with a more formal document "because he was fairly happy with the new clauses that were included ... and to go to a formal contract stage would have brought to a head the changes that he made of his own bat to what was agreed by the Board and ... Mr Martin and Mr Jones".

6.7.33 The Commission finds that the contractual arrangements entered into by the Board with respect to the Anchorage site and the proposed development were most unsatisfactory, and failed adequately to protect the interests of the Board. Although the nature of the rights and interests being acquired by the Board was of crucial significance, they were not defined with any precision in the Heads of Agreement. Several important clauses in the Heads of Agreement, for example, Clauses 4(a), (b) and (c), are difficult to construe. The schedules to the Heads of Agreement do not refer to some parcels of land which should have been mentioned. Parts of the Heads of Agreement and the Fee Agreement which required completion were left blank. The

obligations of the Board under the Heads of Agreement were not subject to or conditional upon the satisfaction of the conditions which formed part of Mr Neville's recommendation to the Board. The Heads of Agreement contained no reference to the indemnity which, on the evidence of Mr Neville and Mr Jones, was to be given to the Board. A belated attempt to include such an indemnity was made without success more than a year after the Heads of Agreement were executed. Mr Neville said that the Board was entitled to a warranty that it would receive certain money from the sale of buildings associated with the Fremantle Steam Laundry, but this warranty was omitted from the Heads of Agreement. The arrangement with respect to fees contained in the Heads of Agreement and the Fee Agreement did not reflect with clarity the actual intention of the parties. Although this issue was mentioned in the letter dated 26 June 1987 from Collison & Hunt to the then Chairman of the Board, no advice appears to have been given that a Court might rectify the documents to reflect the actual intention of the parties. The Heads of Agreement contained no specific provisions with respect to the Swan Wool Scourers land, even though that land had not been acquired as at the date on which the Heads of Agreement were executed (and, indeed, has still not been acquired). Mr Collison said in evidence that when the Heads of Agreement were executed they were in a "half-baked state". No doubt, the unnecessary haste which attended the negotiation and preparation of the Heads of Agreement and the Fee Agreement explain, to a significant degree, the unsatisfactory nature of the contractual arrangements entered into by the Board. But such urgency does not justify or excuse what occurred. If the transaction could not be completed in the available time without prejudicing the interests of the Board, the Board should not have entered into the transaction. The implications of these findings are discussed in section 6.10 of this chapter.

6.8 The Project Committee

6.8.1 Mr Neville gave evidence that after the Heads of Agreement were executed, neither Mr Markey nor Mrs Scott played any part in the attempted acquisition of the balance of the Anchorage site. He also said that Mr Markey and Mrs Scott did not play any part in attempts to bring the proposed development to fruition. Between the date the Heads of Agreement were executed and the date Mr Brush resigned (13 March 1987), all significant decisions relating to the Board's involvement in the Anchorage site and the proposed development were made by Mr Brush or Mr Brush and Mr Neville.

6.8.2 Shortly after the Heads of Agreement were executed, a project committee was formed. The principal members of this committee were Mr Jones, Mr Martin, Mr Brush and Mr Neville. According to Mr Jones, the main function of the committee was to advise the Board on the continuing progress of the proposed development. The committee was responsible for endeavouring to bring the proposed development to fruition.

6.9 Status of the freehold and Crown leasehold land in the Anchorage site

6.9.1 When the Heads of Agreement was executed, the freehold land in the Anchorage site comprised:

(a) The Fremantle Steam Laundry land, the vendor being Fremantle Steam Laundry. Saland had contracted to purchase this land in March 1986. The land was transferred to the Board on or about 9 April 1986. The Board operated the business of the Fremantle Steam Laundry between about April 1986 and September 1989, when the Board sold the business.

(b) The Anchor Nissan land, the vendors being Kotara Nominees and Brenmandah Nominees. Saland contracted to purchase this land in February 1986. The land was transferred to Roville Pty Ltd ("Roville"), a company acting as trustee for the Board, in mid April 1986 and was transferred to the Board in late April 1986.

(c) The Finucane land, the vendor being E M Finucane. Saland was registered as the proprietor of this land on 8 April 1986. Delays in the stamping of the Heads of Agreement meant that the land was not transferred to the Board until mid-June 1987.

(d) The Conaust land, the vendor being Conaust. Saland had an option to purchase this land under an agreement dated 27 February 1986. Saland purported to exercise the option on or about 26 March 1986. There were delays in transferring this land to the Board, but ultimately a transfer was registered on 3 October 1986.

(e) The James McLarty land, the vendor being James McLarty. This land was not included in the Heads of Agreement. In the letter dated 26 June 1987 from Collison & Hunt to the then Chairman of the Board, Collison & Hunt advised that it should have been included in the agreement, and they did not know why it had not been included. Saland contracted to purchase this land under a contract dated 12 March 1986. Delays in stamping the Heads of Agreement meant that a transfer in favour of the Board was not registered until mid-June 1987.

(f) The Delta Trading land, the owner being Delta Trading. When the Heads of Agreement were executed, none of the parties to them was entitled to any interest in the Delta Trading land.

(g) The Swan Wool Scourers land, the owner being Land Holdings. When the Heads of Agreement were executed, none of the parties to them was entitled to any interest in the Swan Wool Scourers land.

6.9.2 After the Heads of Agreement were executed, the Board endeavoured to acquire the Delta Trading land. Mr Neville gave evidence as follows:

Q: Do you agree that the Board was at a significant commercial disadvantage in negotiating the purchase of the Rolly Tasker Land?

A: Yes.

Q: Why was that?

A: Tasker knew that his site was potentially valuable to the Board in the amalgamated North Fremantle Quay site.

Q: As a result, he drove a hard bargain, did he?

A: Yes.

After protracted negotiations with Delta Trading, this land was ultimately acquired and transferred to the Board in mid-February 1987.

6.9.3 Swan Wool Scourers had operated at Swan Road, Fremantle, since 1912. The scour operated under a Swan River Management Authority licence which defined the environmental standards it had to meet, including those concerning the discharge of effluent into the Swan River.

6.9.4 Mr Jones had discussions with representatives of Land Holdings during 1984 and 1985. They indicated to Mr Jones that Land Holdings would be willing to sell its land provided certain conditions were fulfilled. In particular, Land Holdings would sell only if it were provided with an alternative site, premises and equipment so that it could continue to carry on its business.

6.9.5 Before the Heads of Agreement were executed, Mr Jones told Mr Brush and Mr Neville that he believed that there would be no difficulty in acquiring the Swan Wool Scourers land. He told them that he had been informed by Land Holdings that it would be willing to relocate its business if the new site were environmentally acceptable. The new site had to be environmentally acceptable because Swan Wool Scourers had to be able to continue to discharge its effluent.

6.9.6 Mr Neville said in evidence that he was not aware of any advice being obtained prior to the execution of the Heads of Agreement concerning any environmental issues which might be involved in relocating Swan Wool Scourers or proceeding with the proposed development generally. Mr Jones admitted that prior to the execution of the Heads of Agreement, he had not received any advice from the Environmental Protection Authority, or anyone else, as to the environmental issues that might be involved in the proposed development. Mr Jones said no one thought that environmental issues would be a problem. Mr Brush said that "we had every reason to be encouraged to think that the wool scouring land was not going to be a problem". The evidence does not support the view expressed by Mr Brush. The difficulties which subsequently developed should have been anticipated.

6.9.7 Mr Neville conceded in evidence that "Land Holdings had the Board over a barrel in negotiating the sale of the Swan Wool Scourers land". Land Holdings was therefore in a position to negotiate excellent terms for itself. Mr Larry Foley was, at material times, the representative of Land Holdings who negotiated with Mr Jones and the Board. He agreed that Land Holdings was "in a position to drive a hard bargain".

6.9.8 Mr Brush acknowledged that the relocation of the Swan Wool Scourers, the Fremantle Steam Laundry and the Elder Prince businesses was vital to the Board.

6.9.9 On 30 May 1986, the Board, incredibly, at its own expense, ordered new wool scouring plant from Annett & Darling Ltd of New Zealand in anticipation that it would be able to acquire the Swan Wool Scourers site and relocate the wool scouring operation elsewhere. The cost to the Board of acquiring the new equipment was about NZ$2.9 million. The Australian dollar equivalent of that amount at the material time was about $2.35 million. The equipment was delivered in March 1987 and was placed in storage. Ultimately, the Board resold the equipment in October 1990. The purchaser was Thomas Chadwick & Sons and the re-sale price was $1,050,000. Mr Neville acknowledged in evidence that it was premature to order new wool scouring plant before any agreement was entered into with Land Holdings.

6.9.10 In short, when the Heads of Agreement were executed, the "agreement" with Land Holdings was nothing more than "an agreement to agree". After protracted negotiations, the Board entered into an agreement with Land Holdings on 30 April 1987 for the sale of the Swan Wool Scourers land. The contract was subject to several conditions including a condition that the wool scouring operation be relocated. The conditions in the contract were never satisfied and, in consequence, the contract was never completed.

6.9.11 It was initially proposed that the wool scouring operation be moved to a site at Tydeman Road, North Fremantle, with the effluent continuing to be discharged into the Swan River. This proposal was rejected in September 1987 following the publication of a public environmental report by the Environmental Protection Authority. After that rejection, the Board, in consultation with Land Holdings, continued to seek an alternative site but none was found. Swan Wool Scourers continues to operate at Swan Street, Fremantle.

6.9.12 By a letter dated 24 November 1986, Mr Brush wrote to the Premier, Mr Burke in these terms:

> "In April, I sought your approval to the acquisition by the Board of land between the traffic bridges and south of Tydeman Road in North Fremantle. Your response has been mislaid and is now required for audit purposes.

> Acquisition of all the freehold land with the exception of one site has been completed. Negotiations with Rolly Tasker for the last site are continuing."

6.9.13 Mr Brush admitted in evidence that the second paragraph of that letter was false in that when the letter was written, the Swan Wool Scourers site had not been acquired. A contract of sale with Land Holdings had not been signed or even negotiated at that time.

6.9.14 When the Heads of Agreement were executed, the leasehold land in the Anchorage site comprised several leases of Crown land. Leases were held by, among others, Elder Prince, Ritma Pty Ltd ("Ritma") and Ball & Sons Pty Ltd ("Ball & Sons").

6.9.15 When the Heads of Agreement were executed the Board did not thereby obtain control of all Crown leasehold interests within the Anchorage site. Mr Neville agreed that the Board was, to some extent, at a significant commercial disadvantage in negotiating the acquisition of those Crown leasehold interests which had not been acquired by the date of execution of the Heads of Agreement. The reason, as with the freehold land, was that the holders of those Crown leasehold interests knew, at the latest, when the execution of the Heads of Agreement was made public, that the acquisition of their interests was essential if the proposed development were to proceed.

6.9.16 In October 1986, Mr Brush, on behalf of the Board, entered into an arrangement with Western Australian Development Corporation ("WADC") in which WADC would amalgamate the various parcels of Crown land which formed part of the Anchorage site and convert that land to freehold for a fee of $600,000.

6.9.17 Pursuant to a Cabinet decision dated 15 August 1988, the Crown land was to be sold to WADC at fair market value as assessed by the Valuer General. WADC had agreed to on sell the land to the Board.

6.9.18 Although the WADC worked on this task in the early stages of the project, it did not complete it. Rather, between 1989 and 1991, the Department of Land Administration assumed the role of attempting to acquire the relevant Crown land on behalf of the Board.

6.9.19 On 3 December 1990, Cabinet rescinded its 15 August 1988 decision and agreed to the issue of a Crown grant direct to the Board. The 3 December 1990 Cabinet

decision included all of the relevant Crown land except that leased by Ritma. On 15 May 1991, Cabinet rescinded its previous decision of 3 December 1990 and agreed to issue a Crown grant to the Board for all of the Crown land forming part of the Anchorage site upon payment by the Board of $8,062,840. The total amount ultimately paid by the Board for the Crown Grant was $9,429,538. Settlement of the transaction occurred on 28 June 1991.

6.9.20 When the Heads of Agreement were signed, the Anchorage site was affected by the City of Fremantle Town Planning Scheme No 2, for which the City of Fremantle was the responsible authority, and the Metropolitan Region Scheme, for which the State Planning Commission (formerly the Metropolitan Region Planning Authority) was the responsible authority.

6.9.21 In about July 1986, Roville, as trustee for the Board, submitted to the City of Fremantle an application for approval to commence development on the site. The application was prepared by the architect, Mr Allan. The proposed development was described as a mixed development containing residential, hotel, commercial, retail and light industrial components, and was accompanied by detailed plans. The estimated cost of the development was given as $250 million and estimated completion as 1989.

6.9.22 The application required approval not only from the City of Fremantle, but also from the State Planning Commission because the site included land reserved in the Metropolitan Region Scheme for "public purposes (special uses)" and for "parks and recreation", and abutted land reserved for "controlled access highway", "other major highways", "important regional road" and "waterways".

6.9.23 The application was received by the City of Fremantle in June 1986, and forwarded to the State Planning Commission in early July 1986.

6.9.24 In September 1986, the City of Fremantle proposed a rezoning under the Metropolitan Region Scheme and resolved to rezone the entire Anchorage site to Development Zone. At that time, Roville was informed that this decision did not imply approval for the specific development proposed in the application. The rezoning process was completed on 25 March 1988.

6.9.25 In July 1986, the State Planning Commission referred the application for approval to commence development to the Environmental Protection Authority.

6.9.26 On 1 August 1986, Halpern Glick, on behalf of the Board, submitted a notice to the Environmental Protection Authority which set out details of the proposed development and the proposed relocation of Swan Wool Scourers, Fremantle Steam Laundry, Mercantile Stevedores, Elder Prince and Ball & Sons. It also discussed environmental aspects of the proposed relocations. The notice was considered by the Authority on 21 August 1986, which decided that "all aspects of the proposal, including the relocation of all industries and the construction of a new barge harbour, should be subject to further environmental investigation and public scrutiny in the form of an Environmental Review and Management Programme". Such a programme is referred to as an "ERMP" in this chapter.

6.9.27 In view of the development application, the Environmental Protection Authority sought formal referral from the State Planning Commission of any applications relating to the proposed development under section 54 of the *Environmental Protection Act 1971*. This request carried with it the requirement under section 54(8) of the Act that the Minister for Planning should not grant or carry out any application or proposal or exercise any power relating to such application until he or she had received and considered the recommendations of the Authority. A request was also made of the Minister for Transport to defer any approvals that might be required of him or her.

6.9.28 Referral of the development application was made by the State Planning Commission to the Environmental Protection Authority on 9 September 1986. The Minister for Transport indicated his willingness to defer any further action pending the outcome of the proposed environmental assessment by the Authority.

6.9.29 At all material times, Mr Barry Carbon was the Chairman of the Environmental Protection Authority. He said in evidence that the environmental review relating to the proposed development proceeded slowly. He added that the review "stopped and started several times on the behest of either one proponent or another". Mr Carbon explained why the review proceeded slowly, as follows:

> "... The proposals to relocate the industries away from the site proceeded in a normal fashion, albeit with lots of public clamour because they seemed to attract lots of public interest. The actual proposal for the redevelopment of the site stopped and started, depending on whether the EPA was contacted by the Superannuation Board who said they were the proponent and

> sometimes they wanted it to stop and/or contacted by Mr Jones who said he was the proponent and he wanted it to keep going. That got a little confusing sometimes."

6.9.30 Mr Carbon gave further evidence as follows:

> "The original concept, which was one for a very intense redevelopment, tall buildings and such, caused sufficient public concern that the proponents came to us and indicated that what they would like assessed was the concept plan rather than the details, because it was their belief then that it was unlikely to be acceptable in the height development that was being proposed."

6.9.31 An ERMP for a commercial/residential/marina development on the Anchorage site was prepared on behalf of the Board by Halpern Glick. It was completed in May 1987. The ERMP did not relate specifically to the design depicted in Mr Allan's plans, but to a mixed commercial, residential, marina complex including a riverfront marina. It was intended that the ERMP would be sufficient to cover a range of possible developments. The ERMP was prepared because the Board considered that the price it could obtain on a resale of the site would be maximised if the Board could provide an assurance that the Minister for the Environment would approve a particular type of development.

6.9.32 The ERMP stated that:

(a) The development could double the existing residential population of North Fremantle;

(b) The development could generate about 2,000 vehicles per day;

(c) Public access to the foreshore would be improved;

(d) The site was suitable for a comprehensive redevelopment;

(e) There would be a small impact on the biological environment through destruction of 0.2 hectares of seagrass meadow.

In a regional sense, the loss of seagrass meadow was insignificant. Apart from that, the ERMP stated that there would be little impact on the ecosystem of the Swan River.

6.9.33 On completion of the ERMP, Mr Allan, on behalf of the Board, submitted a new application for approval to commence development on the site. The proposed development was described as a mixed development at an estimated cost of $250 million. The estimated time of completion was stated to be 1992.

6.9.34 On 22 April 1987, planning consent was refused by the City of Fremantle for the following reasons:

(a) The proposed uses were not permitted under the then existing zoning;

(b) The form, height, configuration and scale of the development were irreconcilable with the Council's development plan for the area; and

(c) The waterfront was too important a public and economic resource to be used solely for private non-productive purposes.

6.9.35 In the subsequent years, no development at all has been carried out on the Anchorage site.

6.9.36 The Commission finds that it was a serious error of judgment for the Board to have incurred substantial liabilities in connection with the Anchorage site without having secured the crucial Swan Wool Scourers land. The Board was foolish to have ordered the new wool scouring equipment prior to any agreement being entered into with Land Holdings. It is regrettable that the Board failed adequately to appreciate the difficult town planning and environmental issues involved in the proposed development until after the Heads of Agreement were executed. The implications of these findings are discussed in section 6.10 of this chapter.

6.10 The attempted development of the Anchorage site by the Board

6.10.1 In July 1987, the Board's solicitors, Collison & Hunt, with the assistance of, amongst others, Richard Ellis, prepared a development brief. At that time, the Board intended to seek a development submission from a number of "short-listed parties" for the Anchorage site.

6.10.2 The development brief included information on:

— The Anchorage site and the adjacent marine areas;

— The development, selection and approval process;

— The fees required to be paid;

— The information to be supplied with development submissions;

— Planning and design guidelines;

— Responsible Government departments;

— Relevant plans and reports.

6.10.3 The development brief provided guidelines and conditions to selected organisations to assist them to prepare development submissions. A fee of $50,000 was payable by each organisation for a copy of the development brief. Development submissions had to be lodged with the Board by 31 October 1987 together with a further fee of $250,000. The fee of $50,000 previously paid was then refundable. The plans which had been prepared by Mr Allan were intended by the Board to illustrate to selected organisations "the possible direction that the development may take". The Board intended to enter into a contract with one of the organisations that lodged a development submission. By the contract, the Board would sell its estate and interest in the Anchorage site. The Board anticipated that a development submission would be approved, and a contract entered into, by 31 December 1987.

6.10.4 On 18 August 1987, the Premier, Mr Burke, wrote to the Chairman of the Board recommending that the proposed development of the Anchorage site be reassessed. In his letter, the Premier referred to several areas of concern about the project, including:

— Public opposition to the concept plan;

— Local resident concern about the proposal to relocate noxious industries from the Anchorage site to a new site on Westrail land in North Fremantle; and

— The continued discharge of wool scouring effluent from the proposed new site.

6.10.5 After receiving the Premier's letter, the then Chairman of the Board, Mr A J Lloyd, spoke with developers who had expressed an interest in preparing a development submission and told them that that process should cease while the Board undertook a re-assessment of the project. The process never recommenced.

6.10.6 On 21 September 1987, the Environmental Protection Authority released a report recommending that Swan Wool Scourers not be permitted to relocate to the proposed new site.

6.10.7 On 24 September 1987, the Board resolved:

(a) To reassess the Anchorage site, taking into account the matters raised by the Premier;

(b) To continue the Board's involvement in the rezoning and environmental approval procedures for the site;

(c) To continue to work with relevant Government departments and authorities to find alternative sites for businesses then located on the Anchorage site; and

(d) To continue to liaise with the City of Fremantle and developers on alternative proposals for the Anchorage site.

6.10.8 In or about September 1987, the Board instructed Mr Jones and Mr Martin to take no further steps towards development or completion of the project, or its sale, until further notice, and the regular project committee meetings held up to that time were discontinued.

6.10.9 In August 1988, the solicitors for the Board wrote to Mr Jones and Mr Martin informing them that the Board had arranged for long-term management of the project, and that all association with them in respect of the project was terminated.

6.10.10 In June 1991, the then Chairman of the Board, Mr Peter Williamson, said that the Board had no intention of developing the Anchorage site. He added that the Board hoped eventually to sell the site but it had first to purchase the Swan Wool Scourers land. The Board has still not purchased that land. It owns all other parcels of land in the Anchorage site. Mr Cavil Singh, who is currently the Board's Director of Investments, gave evidence that, at present, the Board had "no proposals to develop the site at all". He said that the Board's current strategy was to acquire the Swan Wool Scourers land and then look at its options.

6.10.11 The total costs incurred by the Board, as at 30 June 1991, on the Anchorage project were $25,034,277.88. The market value as at 30 June 1991 of the land owned by the Board was $11,603,228.85. Details of the total costs incurred by the Board, and the market value of the land as at 30 June 1991, are set out in a Board paper dated 16 July 1991. So far as is material, the Board paper provides:

> "The ... Board is the registered owner of 16 Certificates of Title and the ex-Crown land (27/6/91). The total costs incurred by the Board, as at 30 June 1991, on the Anchorage project and current book value is summarised below:
>
> | | $ |
> |---|---|
> | Land Acquisition | 21,691,966.32 |
> | Consultant Fees | 2,671,516.98 |
> | Project Expenses | |
> | (Less: Capitalised Rental) | 670,794.58 |
> | | 25,034,277.88 |
> | Less: Devaluation to 30/6/90 | 6,630,368.22 |
> | Book Value 30/6/91 | 18,403,909.66 |
>
> The method of valuation of the project in prior years has been the current market value of the individual titles owned by the Board,

plus the written down value of the consultant fees. Consultant fees being written down over a 5 year period.

It is therefore recommended that the Board adopt the following figure for inclusion in its 30 June 1991 accounts as the value of the Anchorage project.

		$
Book Value 30/6/91		18,403,909.66
Less: Write down as per attached summary		
	$	
— Land	6,114,477.14	
— Consultant	534,303.40	
— Project Expenses	151,900.27	(6,800,680.81)
		11,603,228.85"

6.10.12 Mr Neville said in evidence that the Board was the author of its own difficulties in relation to many of the problems with the Anchorage site. He also admitted that, in retrospect, the proposed development was far too complicated for the Board.

6.10.13 Later in evidence, Mr Neville said that the arrest and charging of Mr Brush and Mr Martin in April 1987 was "the turning point for the Board and its investment". Everyone was awaiting the outcome of the trial. "Everything stopped. The whole project lost momentum and then it became tainted". Mr Neville added that after the acquittal of Mr Brush and Mr Martin, the project "never got moving again", "everyone just ran away from it at a rapid rate". Mr Neville added that he understood that:

> "... the Government did not want to become involved in a politically sensitive decision involving relocation of Swan Wool Scourers in light of what had happened [that is, the charging of Mr Brush and Mr Martin], in light of the stigma that was attached to that site."

6.10.14 The Commission finds that although the charging of Mr Brush and Mr Martin had some impact upon the proposed development of the Anchorage site, that event does not absolve the Board from responsibility for having expended such a large amount of money in connection with a project which failed. Mr Brush and Mr Martin were charged in April 1987. The Premier, Mr Burke, did not intervene until August 1987. The reasons he gave for wanting the Board to reassess the site related to public opposition to the concept plan, local resident concern about the proposed relocation of noxious industries from the Anchorage site to a new site in North Fremantle, and the discharge of effluent from the proposed new site. No mention was made of the charging of Mr Brush and Mr Martin. Between April and August 1987, considerable work was undertaken by the Board in relation to the preparation of the development brief and the location of a number of "shortlisted parties" who might be interested in submitting development proposals.

6.10.15 The Commission concludes that the principal reasons why the project failed, as disclosed by the evidence, were these:

(a) The Board had insufficient experience and expertise properly to evaluate and implement the project. The land at the time involved a number of blocks in different ownership, in different estates (that is, freehold and Crown leasehold), of different zoning (both under the City of Fremantle Town Planning Scheme No 2 and the Metropolitan Region Scheme), and with non-conforming uses.

(b) When the Heads of Agreement were signed, several blocks of land had not been acquired or secured. In particular, the Swan Wool Scourers land, which was crucial to any development, had not been acquired. It has still not been acquired by the Board.

(c) At the outset, there was a failure adequately to appreciate the town planning and environmental complexities of the proposed development.

(d) Under the Heads of Agreement the Board committed itself to incurring substantial expenditure on the Anchorage site without having first ensured that all necessary land could be acquired at a reasonable price, and the proposed development was likely to be acceptable from a town planning and environmental viewpoint.

6.10.16 The Commission finds that the Board (which at material times was constituted by Mr Brush, Mr Markey and Mrs Scott, and then by Mr Brush and Mr Markey) acted incompetently in the acquisition and attempted development of the Anchorage site. The incompetence included: embarking on a large and complicated project with undue haste; failing to recognise that the members of the Board and its employees did not have sufficient experience or expertise properly to evaluate and implement the project; committing the Board to substantial expenditure without having acquired or secured those parts of the Anchorage site which were crucial to the proposed development; failing adequately to appreciate the town planning and environmental complexities of the proposed development; committing the Board to substantial expenditure without first ensuring that the conditions which formed part of Mr Neville's recommendation to the Board had been satisfied; failing to obtain a valuation of the rights and interests the Board was acquiring as at the date of execution of the Heads of Agreement; failing to endeavour to negotiate and sign a more formal agreement as soon as practicable after the execution of the Heads of Agreement; foolishly ordering the new wool scouring equipment prior to any agreement being entered into with Land Holdings. The Commission finds that the incompetence was of such a magnitude as to constitute improper conduct for which we hold Mr Brush, the full-time chairman of the Board responsible.

6.10.17 Mr Neville carried some responsibility for the Board's assessment of the project and its decision to invest. It is true that Mr Neville was an employee and not a member of the Board. He did, however, hold the position of Investment Manager. His duties included reviewing and reporting to the Chairman on all aspects of the Board's investments, including management, research and performance. Mr Neville was responsible for arranging the preparation of the Heads of Agreement and the Fee Agreement. He sought legal advice for that purpose, and the Commission is not without sympathy for his position. He should have done more to protect the interests of the Board, but in all the circumstances the Commission is not prepared to make a finding that he acted improperly.

6.10.18 Mr Collison must take the major responsibility for the unsatisfactory state of the formal documentation. By his own admission, the Heads of Agreement he prepared was "half-baked". If Mr Collison was of the view that he had inadequate instructions, he should not have continued to act without having sent written advice to the Board informing it that he had inadequate instructions, that the existing instructions did not permit him to prepare documentation which adequately protected the interests of the Board, and that, in the circumstances, the Board should not enter into a legally binding contract with Mr Jones, Mr Martin and their companies until he had been adequately instructed and proper documents had been prepared.

6.11 Payments by Accord (Mr Martin's company) to Melampus (Mr Brush's company) and related matters

6.11.1 In July 1986, Mr Martin arranged for Mr Brush to receive a cheque for $50,000 drawn by Accord and payable to Melampus Pty Ltd ("Melampus"), a company controlled by Mr Brush. Two further cheques, each for $50,000 and each drawn by Accord and payable to Melampus, were delivered to Mr Brush in September 1986.

6.11.2 In July 1986, Mr Brush mentioned to Mr Martin that he was proposing to borrow money to increase his share portfolio. Mr Martin asked him who he would borrow the money from, and Mr Brush mentioned a number of sources including Mr Laurie Connell. It appears that Mr Brush had previously borrowed money from LR Connell & Partners. Mr Martin offered to provide a loan facility to Mr Brush utilising credit available to Mr Martin from his financier, the WA Teachers' Credit Society Limited ("Teachers Credit Society"). The material terms of the loan facility were agreed during this conversation in July 1986.

6.11.3 The first two payments of $50,000 were loans made pursuant to the conversation in July 1986, and the third payment of $50,000 was the purchase price for shares in Sonartec Limited, and shares and options in Aurotech NL, sold by Melampus to Mr Martin or one of his companies.

6.11.4 Mr Brush and Mr Martin had first met in 1984. During 1984, Mr Brush arranged for the Tourism Commission to offer Mr Martin's company, Anniversary, a guarantee of finance which Anniversary required in connection with the El Caballo Blanco complex, near Wooroloo. Mr Martin did not take up the guarantee but, according to Mr Brush, Mr Martin later said that the offer of the guarantee "gave him

breathing space, stopped him going bankrupt". Mr Brush's solicitor, Mr Richardson, was told by Mr Brush at a conference on 18 March 1987 that the obtaining of the offer from the Tourism Commission gave Mr Martin breathing time. Mr Richardson recorded Mr Brush as saying that he (Mr Brush) saved Mr Martin's life.

6.11.5 Notes of conversations between Mr Brush and Mr Richardson in February and March 1987, prepared by Mr Richardson, revealed that the agreement between Mr Brush and Mr Martin in relation to the loan facility was made in Mr Brush's office. Mr Brush told Mr Martin that he needed money urgently. Mr Brush or one of his companies was being sued for misrepresentation over the sale of a business. Mr Brush needed $50,000 to settle the action. Mr Martin told Mr Brush that the issue of a writ was publicity that he did not need. Mr Brush also told Mr Martin that he needed a further $50,000 for investment purposes. Mr Martin agreed to provide the money. Mr Brush facilitated the Commission's understanding of these events by waiving his right to claim legal professional privilege in respect of the notes. The notes prepared by Mr Richardson were corroborated substantially by Mr Brush.

6.11.6 When the payments were made by Mr Martin (through Accord) to Mr Brush (through Melampus), there were no loan or security documents. The documentary evidence comprised principally the cheques themselves and some entries in Accord's books of account.

6.11.7 In April 1988, Mr Brush and Mr Martin were acquitted after a trial in the District Court of Western Australia on charges of official corruption relating to the three payments of $50,000. The Commission has decided that it should not reach any conclusions that are inconsistent with the jury's findings. As a consequence, no issue of corruption or illegal conduct arises in relation to those payments. There is, however, the question of improper conduct.

6.11.8 Mr Brush has admitted to the Commission that he acted improperly in accepting the loans.

6.11.9 The Commission finds that it was improper for Mr Brush to have agreed to accept a loan facility from Mr Martin. At all material times, Mr Brush, on behalf of the Board on the one hand, and Mr Martin, through his various companies on the other, were engaged in a variety of business transactions. The creation of a serious conflict of interest should have been obvious.

6.11.10 The Commission also finds that the degree of Mr Brush's impropriety in accepting the loans was exacerbated by the failure to create contemporaneous loan and security documents to evidence the transaction. Mr Brush conceded in evidence that he acted improperly in that regard.

6.11.11 The Commission further finds that it was improper for Mr Martin to have offered a loan facility to Mr Brush in circumstances where Mr Martin must have realised, or should have realised, that there was a real risk that Mr Brush's objectivity in his dealings with Mr Martin would be compromised. Mr Martin knew that he was negotiating with Mr Brush, and that Mr Brush was Chairman of the Board. Mr Martin also knew, or should have known, that if the fact and circumstances of the loan facility became public knowledge, confidence in the proper administration of the Board would be adversely affected.

6.11.12 The Commission concludes that the notes made by Mr Richardson of conversations between Mr Brush and Mr Richardson in February and March 1987 are the most reliable account of what was discussed between Mr Brush and Mr Martin during July 1986 in connection with the loan facility. The notes were made about eight months after the discussions between Mr Brush and Mr Martin. The information contained in the notes was given by Mr Brush to Mr Richardson in confidence, and at a time when there was a serious risk that Mr Brush would be charged. It is true that Mr Brush told lies to Mr Richardson in relation to the backdating of the loan and security documents. Those lies were told at a time when Mr Brush was apparently endeavouring to protect his position as Chairman of the Board. Mr Brush told Mr Richardson the true position concerning the documents on 16 March 1987. There is no reason to suppose that Mr Brush would have told any other lies to Mr Richardson.

6.11.13 Mr Brush did not inform either the Board or anyone employed by the Board of the loan facility from Mr Martin until the date on which Mr Brush resigned, namely 13 March 1987. Mr Brush has admitted to the Commission that he acted improperly in failing to disclose the existence of the loans until 13 March 1987. The Commission finds that Mr Brush acted improperly in that regard.

6.11.14 It appears that in about January 1987, Mr Alex Clark, the General Manager of the Teachers Credit Society, became aware that a member of Parliament, Mr Ross Lightfoot, was inquiring about payments made by Accord to Melampus in July and September 1986. Mr Clark passed this information to Mr Martin.

6.11.15 Mr Brush and Mr Martin then decided that the loans should be documented. Mr Martin instructed Mr Terence McDonnell, a solicitor then in practice in West Perth, to prepare the documents. Mr McDonnell had considerable familiarity with the Anchorage site, having acted for Mr Jones/Saland in connection with it. Mr McDonnell's office in West Perth adjoined Mr Jones' office.

6.11.16 Mr McDonnell prepared a mortgage and a charge. These documents were signed in the presence of Mr Jones as witness. Mr Brush dated the documents 16 July 1986. At all material times, Mr Martin knew that the mortgage and the charge had been backdated.

6.11.17 Mr Martin himself sent letters to Mr McDonnell and Mr Brush which he backdated to July 1986. Mr Martin also sent a letter to the solicitor, Mr Hunt of Collison & Hunt, in which he said:

> "As the original facility was envisaged to be a short term advance, it was not my intention to have the documents stamped when they were prepared in July of 1986, so I regret that I have probably occasioned an extra charge for the borrowers in having the document stamped at this late stage."

That statement was clearly false and known by Mr Martin to be false when it was made.

6.11.18 Mr Brush lied about the true date on which the documents were prepared. He lied to police officers, journalists and his own solicitors.

6.11.19 In January 1987, in addition to the backdating of the documents prepared by Mr McDonnell, Mr Brush prepared and backdated various handwritten documents. The handwritten documents were contained in a pen carbon book. Mr Brush dated the letters September and November 1986 although, in the case of one letter, he made a slip and dated it September 1987. Mr Brush wrote the letters in different parts of the carbon book to give the impression that they had been written at different times.

6.11.20 After the documents were prepared by Mr McDonnell, Mr Brush apparently destroyed a true document in order to disguise the documents prepared by Mr McDonnell. The true document was a note relating to the loan facility which Mr Brush said, at his trial, he made in about July 1986, but did not give to Mr Martin.

6.11.21 In early January 1987, Mr McDonnell affixed a false "date received" stamp, namely 16 July 1986, to the letter from Mr Martin. On 15 January 1987, Mr McDonnell wrote to Mr Martin falsely inferring that the security documents had not been prepared in the days immediately beforehand. Mr McDonnell drew an account to Mr Martin dated 6 February 1987 falsely referring to instructions alleged to have been given in writing on 16 July 1986. On 6 February 1987, Mr McDonnell wrote to Mr Martin enclosing his "well overdue account" when the account was not well overdue. On 22 December 1988, Mr McDonnell was found guilty of unprofessional conduct by the Barristers' Board in relation to those matters. He died in January 1990.

6.11.22 Mr McDonnell and Mr Jones also gave deliberately misleading information to police officers as to the date on which the security documents were signed.

6.11.23 The deceit relating to the loans and the security documents was brought to an end only when Mr McDonnell informed Mr Brush, Mr Martin and Mr Jones at a meeting at Fremantle on 13 March 1987 that he, Mr McDonnell, intended to tell the truth to the police.

6.11.24 The Commission finds that it was improper for Mr Brush to backdate the security documents and to lie concerning those documents to the police, journalists and his solicitors. Mr Brush conceded in evidence that he had acted improperly in that regard.

6.11.25 The Commission finds that it was improper for Mr Martin to backdate the letters to Mr McDonnell and Mr Brush, and knowingly to make the false statement contained in the letter to Mr Hunt.

6.11.26 During early March 1987, Mr Brush, on instructions from the Premier, was making arrangements for Melampus to repay the loans to Accord. However, after he resigned on 13 March 1987, Mr Brush changed his mind and decided not to repay the loans at that stage.

6.11.27 Each loan of $50,000 was repayable 12 months after the loan was made. However, Melampus has never repaid the $50,000 loan which was advanced by Accord in September 1986.

6.11.28 According to Mr Martin, Mr Brush approached him after the trial. The trial ended on 29 April 1988, and the approach from Mr Brush could have occurred after 30 June 1988. Mr Martin said that Mr Brush was contemplating "filing for bankruptcy because he had enormous legal bills", and Mr Brush asked him if he would release Melampus from the $50,000 which remained owing. Mr Martin said that although Melampus still effectively owed Accord $50,000, he would not seek to recover the outstanding $50,000 or interest on that amount.

6.11.29 Mr Martin's evidence may be contrasted with Mr Brush's evidence. According to Mr Brush, he approached Mr Martin about six months after the conclusion of their trial. Mr Brush said that he told Mr Martin he was unable to repay the loan. Mr Brush did admit, however, that the legal fees he incurred in connection with the trial were paid shortly after the trial from donations collected for his benefit by the Australian Labor Party.

6.12 The Brockley Investments indemnity and the $150,000 cash

6.12.1 Mr Martin acquired effective control of Brockley Investments Limited ("Brockley Investments") in about August 1986. The cost of acquiring control (about $4 million) was financed by the Teachers Credit Society. When acquired by Mr Martin, Brockley Investments could readily have obtained authorised trustee status by being listed on the Stock Exchange. Its only asset of significance was about $4 million cash at bank.

6.12.2 Mr Brush became a director of Brockley Investments on 15 September 1986. Also on 15 September 1986, the Board of Brockley Investments resolved that Mr Neville should be Mr Brush's alternate. On 10 February 1987, Mr Neville was appointed a director in his own right.

6.12.3 On 16 September 1986, Mr Brush recommended to the Board of the Superannuation Board that it take an interest in Brockley Investments. On 21 November 1986, the Board agreed to invest in Brockley Investments, based on a verbal report from Mr Brush. The Board purchased one million shares in Brockley Investments on 2 December 1986, and three million shares in Brockley Investments on 31 December 1986, at a total cost of $4 million.

6.12.4 Mr Alex Clark, the General Manager of the Teachers Credit Society, became a director of Brockley Investments on 15 December 1986. Mr Joseph Bodlovich, assistant General Manager of the Teachers Credit Society, was his alternate. The Teachers Credit Society also subscribed for shares in Brockley Investments in about December 1986, the total subscription price being $4 million.

6.12.5 For some years, Anniversary (one of Mr Martin's companies) had been the owner of the El Caballo Blanco complex. During the latter part of 1986 and early 1987, it was agreed that Brockley Investments would purchase El Caballo Blanco. The purchase did not proceed.

6.12.6 In or about late September or early October 1986, Mr Martin purchased on behalf of Brockley Investments 500,000 shares in Western Reefs Ltd at 70 cents per share. Mr Martin said in evidence that he "had been a little bit imprudent in buying the shares". The minutes of a meeting of the Board of Brockley Investments held on 31 October 1986, which were signed by Mr Martin as Chairman, contained a minute as follows:

> "The Chairman advised that the company had made a commitment to acquire 500,000 shares in Western Reefs at $0.70. However, as certain particulars relating to the acquisition are being disputed, Accord Investment Corporation had agreed to indemnify Brockley Investments Limited in relation to the acquisition if this was necessary."

No indemnity was ever executed.

6.12.7 In a letter dated 7 December 1988 from Accord to the Board of Brockley Investments, which was signed by Mr Martin, it was stated:

> "Notwithstanding that Accord made an offer to indemnify Brockley Investments Limited for any loss sustained in the sale of Western Reefs Ltd shares purchased in October 1986, this indemnity has never been officially accepted by the Brockley Board as an obligation for Accord to meet.
>
> There have been several discussions with various directors subsequent to Accord making this offer, particularly with Mr Len Brush and Mr Alex Clark in early 1987, whereupon it was agreed that the indemnity would not be binding on Accord as myself, as

> principal of Accord and a director of Brockleys, had acted in good faith in acquiring the Western Reefs Ltd shares.
>
> This waiver of the indemnity was never formalised in early 1987, because of the resignation of Mr Len Brush representing the shareholding of the State Superannuation Board."

6.12.8 Mr Martin, in his evidence, emphatically denied having agreed with Mr Brush or Mr Clark that the indemnity would not be binding on Accord. He was then shown a copy of the letter dated 7 December 1988. Mr Martin prevaricated about the obvious inconsistency between his earlier evidence concerning the indemnity and what he had written in the letter.

6.12.9 During November and December 1986, Mr Martin arranged for three cheques drawn by Accord on the Teachers Credit Society, each for $50,000, to be cashed. The first cheque was cashed on 11 November 1986, the second on 25 November 1986 and the third on 23 December 1986. The evidence given by Mr Martin to the Commission as to the manner in which he dealt with the cash contained numerous inconsistencies.

6.12.10 Mr Martin's evidence about the Brockley Investments indemnity, and the manner in which he dealt with the $150,000 cash, underscores his lack of credibility.

6.13 The payment of the $1 million fee

6.13.1 Clause 4(c) of the Heads of Agreement was an important provision by which Saland, Mr Jones, Accord and Mr Martin covenanted with the Board:

> "That the Board will have the right to acquire all the land and improvements the subject of the Project (other than the land owned by Delta Trading Pty Ltd (Tasker)) arising out of the rights of the Board pursuant to sub-clauses (a) and (b) hereof."

6.13.2 Clause 4(c) was important because the payment by the Board to Mr Jones or his company, and the payment by the Board to Mr Martin or one of his companies, of certain fees, was conditional upon the Board being satisfied as to its rights under clause 4(c).

6.13.3 By clause 5(a) of the Heads of Agreement, the Board agreed to pay to Mr Jones or Saland:

> "Upon the Board being satisfied as to its rights under clause 4(c) above —
>
> (i) $250,000 by way of fees; and
>
> (ii) $137,000 by way of reimbursement of expenses;".

6.13.4 By clause 1 of the Fee Agreement between Accord, Anniversary and the Board, the Board agreed to pay to Anniversary:

> "$1 million upon the Board being satisfied as to its rights under clause 4(c) of the Heads of Agreement and a further $1 million on the rezoning of the project in accordance with ... the Heads of Agreement;".

6.13.5 On Wednesday, 1 October 1986, Mr Martin sent a letter to Mr Brush in which he said:

> "Pursuant to the terms of [the Heads of Agreement] ... Anniversary Nominees Pty Ltd is to receive $1 million on the rezoning of the various lots acquired for the above project.
>
> As you are aware, the City of Fremantle has approved the re-zoning of the above project ... a copy of the Minutes relating to such approval being attached.
>
> In compliance with the terms relating to the rezoning, I would request that a cheque for $1 million be made payable to Anniversary Nominees Pty Ltd."

The letter was sent by courier on 1 October 1986.

6.13.6 On receipt of the letter of 1 October 1986, Mr Brush wrote on the letter:

> "Mark, please arrange cheque payable to Accord as per request. The payment is in accordance with the Heads of Agreement."

The letter also bore a notation by an employee of the Board indicating that an "urgent cheque" was required for Thursday, being the day after the date on which the letter was received at the Board.

6.13.7 When the letter of 1 October 1986 was received at the Board, Mr Neville was on holidays. Ordinarily, it was Mr Neville's job to attend to the payment of fees. It is significant that on 3 October 1986 Mr Brush went on leave for two weeks. Mr Brush knew or suspected that Mr Neville would object. He intended to present Mr Neville with a fait accompli when he returned from holidays.

6.13.8 A cheque for $1 million was sent to Anniversary on Friday, 3 October 1986.

6.13.9 Before the Heads of Agreement were executed, Mr Brush had agreed with Mr Martin that the $2 million fee would be payable as to $1 million on executing the Heads of Agreement and as to the other $1 million upon rezoning. These arrangements were changed, at the instigation of Mr Neville, in the executed copy of the Heads of Agreement. The substance of the change was that the $1 million which was to have been paid on the Heads of Agreement being executed, became payable on the Board being satisfied as to its rights under Clause 4(c). Mr Brush, Mr Martin and Mr Jones were aware of the changes before the Heads of Agreement were executed.

6.13.10 At his trial, Mr Brush gave evidence to the following effect:

(a) He said he read the Heads of Agreement before he signed it. When he read the document, he queried with Mr Neville the payment of the first $1 million. He assumed it meant that, rather than giving Mr Martin the $1 million on signing the Heads of Agreement, the Board would give him $1 million once the Board was satisfied that Mr Martin actually controlled the project. He said that if Mr Martin was prepared to accept that, then he thought it was a fair condition.

(b) He believed Mr Martin and Mr Jones had been entitled to their fees, that is Mr Martin's fee for the first $1 million and Mr Jones' $250,000 fee, on the day the Board assumed control of the properties. The Board, of course, has never assumed control of all the properties; the Swan Wool Scourers site has never been acquired.

(c) He told Mr Neville, after the $1 million fee had been paid to Mr Martin, that he (Mr Brush) thought that the Heads of Agreement spelt out plainly that Mr Martin was entitled to the $1 million.

(d) In Mr Brush's view, Mr Martin was entitled to the $1 million payment when the Board was satisfied as to the rights it was taking over. He added that when the Board was satisfied as to its rights, it made payment and then took control of the project.

(e) The intention of the parties to the Heads of Agreement was that the Board would purchase from Mr Martin and Mr Jones what they had to sell to the Board. Mr Martin and Mr Jones could not sell to the Board several parcels of land in the Anchorage site including the Swan Wool Scourers land. It was the intention of the Board to use its best endeavours to enter into an agreement with respect to the Swan Wool Scourers site.

(f) Before receiving the letter of 1 October 1986, Mr Martin had never asked for payment of the $1 million. Mr Martin had made no steps to demand payment, or charge interest or do anything else in relation to the $1 million which was payable on the Board being satisfied as to its rights under clause 4(c). On the first occasion on which Mr Martin approached him for money, the approach was made in respect of rezoning, not in respect of clause 4(c).

6.13.11 When he gave evidence before the Commission, Mr Brush said that during the preceding month or two he had re-read the transcript of his evidence at the trial. He also said that he could not recall anything in the transcript that was wrong or that he would want to correct.

6.13.12 Before the Commission, Mr Brush gave evidence as follows:

(a) Although he did not believe that the $1 million was payable under the rezoning provision as requested by Mr Martin, he thought that $1 million was nevertheless payable under the Heads of Agreement.

(b) He believed that Mr Martin was entitled to the $1 million as from the date on which the Heads of Agreement was signed, and that to have failed to pay the $1 million when it was requested could have resulted in the Board incurring further costs, interest and charges.

(c) Although he said that the Heads of Agreement was badly drafted and difficult to understand, he also said it did not occur to him to contact the Board's solicitors to obtain their view on whether or not the $1 million was due and payable. He admitted that it would simply have been a matter of telephoning the solicitors.

(d) He agreed that the fee of $1 million which was payable to Mr Martin, and the fee of $250,000 which was payable to Mr Jones, were payable on the occurrence of the same event, namely, on the Board being satisfied as to its rights under clause 4(c). He also agreed that Mr Jones was treated more harshly than Mr Martin in that Mr Martin received his fee in October 1986 whereas Mr Jones did not receive his fee until January 1987. He said he had assumed that upon Mr Martin being paid in October 1986, Mr Jones would also be paid. He added that it was not his function to pay those fees; it was Mr Neville's responsibility.

6.13.13 When giving evidence before the Commission, Mr Brush was critical of Mr Neville's attitude to the payment of fees generally. For example, Mr Brush said in relation to Mr Neville:

"He was anti paying anybody anything, I must tell you."

6.13.14 Mr Brush said, however, that he had attempted to contact Mr Neville, who was, as previously mentioned, on holidays, to discuss the proposed payment to Mr Martin. It is difficult to understand why Mr Brush would have wanted to contact Mr Neville to discuss the payment in view of Mr Brush being satisfied that the $1 million was due and payable, and in view of his comments concerning Mr Neville's attitude to the payment of accounts.

6.13.15 Mr Brush and Mr Martin denied they had discussed the payment of the $1 million either before Mr Martin sent the letter or before the Board sent the cheque. The Commission rejects this denial. Since April 1986 Mr Brush and Mr Martin were

in regular contact over the Anchorage project. By 1 October 1986 the loan facility between Accord and Melampus had been arranged, loans totalling $100,000 had been made by Accord to Melampus, Accord had paid a further $50,000 to Melampus as the purchase price for some shares, Mr Brush had joined the Board of Brockley Investments, and Mr Brush had recommended to the Superannuation Board that it acquire an interest in Brockley Investments. The Commission finds that the payment of the $1 million would have been discussed informally between Mr Brush and Mr Martin before the money was paid.

6.13.16 The Commission does not accept the evidence of Mr Brush and Mr Martin as to their belief concerning the timing of the $1 million payment. The Commission finds that both men knew that, as found by the Commission in section 6.7 of this chapter, after the execution of the Heads of Agreement and the Fee Agreement, it was the common intention of the relevant parties that Anniversary and Mr Jones or Saland would not become entitled to their fees unless and until the whole of the land in the Anchorage site (including, in particular, the Swan Wool Scourers land, but excluding the land owned by Delta Trading) had been acquired by the Board.

6.13.17 The Commission also finds that Mr Brush was willing to accelerate the payment of $1 million to Anniversary primarily because the original agreement he negotiated with Mr Martin was that $1 million would be paid to Anniversary on signing the Heads of Agreement.

6.13.18 The Commission further finds that the close and friendly relationship which have developed between Mr Brush and Mr Martin, as evidenced by the payments of $150,000 previously made by Accord to Melampus and by the arrangement entered into over Brockley Investments, influenced Mr Brush's decision to pay the $1 million. Mr Brush said that he supposed he felt grateful to Mr Martin for having provided the loands. He acknowledged that Mr Martin helped him out of a "difficult spot" in July 1986.

6.13.19 Mr Markey gave evidence that he had no involvement in deciding whether or not the $1 million ought to be paid. Mr Neville said in evidence that the Board never resolved that it was satisfied with its rights under clause 4(c) of the Heads of Agreement. He added that he thought the issue as to whether or not the Board was satisfied with its rights under clause 4(c) was never discussed at a meeting of the Board. It was only a matter that was discussed between Mr Neville and Mr Brush. Certainly,

the relevant minutes of the Board reveal no indication that the issue was ever discussed at any Board meeting.

6.13.20 Mr Brush said in evidence that, in his view, references to the Board in the Heads of Agreement did not mean the Board as such. He said that the Board had delegated authority to him and Mr Neville to handle the whole matter. Mr Brush said that in practice he and Mr Neville simply ran the Anchorage project as they saw fit. By October 1986, the Board had no role in the Anchorage project.

6.13.21 Section 20 of the *Superannuation and Family Benefits Act 1938* provided:

> "The Board may, by resolution under seal, authorise the Chairman to determine such matters as are specified in the resolution and may at any time in like manner revoke such authority."

The Board never delegated its powers to Mr Brush under section 20 in relation to any aspect of the Anchorage project. In particular, there was no delegation of any of the Board's powers under the Heads of Agreement or the Fee Agreement.

6.13.22 The Commission finds that it was highly improper for Mr Brush to authorise the payment of the $1 million knowing that it was the common intention of the relevant parties that Anniversary was not entitled to the money unless and until the whole of the land in the Anchorage site (including, in particular, the Swan Wool Scourers land, but excluding the land owned by Delta Trading) had been acquired by the Board. The Commission also finds that Mr Brush's failure to refer the issue of the payment of the $1 million to the Board for decision, constituted improper conduct by Mr Brush. The Commission further finds that Mr Brush acted without authority, and therefore beyond power, in purporting to authorise the payment of the $1 million without a resolution under seal having been made as required by section 20 of the Act.

6.13.23 The implications of the Commission's findings in relation to the $1 million payment are further discussed in a confidential appendix to this report.

6.13.24 The Commission further finds that Mr Brush acted without authority, and therefore beyond power, in purporting to make important decisions on behalf of the Board in relation to the Anchorage project without a resolution under seal having been made as required by section 20. He should have had a general delegation.

6.13.25 The Commission has found some assistance in determining these facts from other evidence which reflects on Mr Brush's credit.

6.13.26 On 23 December 1986, Mr Brush signed a false name and wrote a fictitious address on a bank document by which he requested the issue of a bank cheque for $3,447. Mr Brush purchased the bank cheque with cash, and he used the bank cheque to purchase some patio or outdoor furniture. Mr Brush admitted that the signing of the false name and the writing of the fictitious address was improper. The impropriety is clear and serious. It is obviously improper for a person holding a senior position in a Crown instrumentality to sign a false name and write a fictitious address in the circumstances disclosed by the evidence.

6.13.27 Mr Brush signed the name "G Jones" on the bank document requesting the issue of the bank cheque. The address he wrote was "Flat 16, 139 Marine Terrace, Cottesloe", a non-existent address. He explained that he was concerned about his handling of the money, and wanted to retain some anonymity.

6.13.28 Mr Brush was then taken to evidence given at the trial in April 1988 and to evidence given previously before the Commission. After being confronted with that evidence, Mr Brush accepted that as at 23 December 1986 the problems and publicity which emerged in relation to Mr Brush and Mr Martin had not then emerged, and did not emerge until January 1987.

6.13.29 Mr Brush gave evidence about the cash used to purchase the bank cheque as follows:

(a) The cash was part of his accumulated savings. It was part of "cash money that I had, which was accumulated over a period of time, which included my betting racing money that I used to bet with each week".

(b) The cash was kept in a floor safe at his home in Lovett Street, Scarborough.

(c) He believed that as at 23 December 1986, there would have been further cash in the floor safe, apart from the cash he used to buy the bank cheque.

(d) The amount of cash in the floor safe varied from "nothing up to probably about $10,000 or so, backwards and forwards".

(e) On average, there was "probably somewhere between $3,000 and $7,000 or $8,000 (in the floor safe)".

(f) As at December 1986, his sources of income comprised his salary as Chairman of the Board and his wife's salary from her Government position.

(g) He did not recall that his wife ever contributed to the cash in the floor safe from her salary.

(h) He could not recall ever contributing to the cash in the floor safe from his salary. He said that "it was obviously a combination of accumulated savings from salary plus what I refer to as my betting money".

(i) He said that there was no other source for the money from time to time in the floor safe other than his salary as Chairman of the Board and winnings from gambling activities.

(j) He said that he kept the money in the floor safe rather than investing it in a bank account or a building society account because he went to the races every Saturday and it was convenient.

(k) He said that there was always money in the floor safe. His previous evidence that at times there was no cash in the floor safe, was wrong.

6.13.30 Mr Brush denied that he received the cash he used to purchase the bank cheque, or indeed any other cash, as a gift from anyone. In particular, he denied that Mr Martin had given him any cash.

6.13.31 The Commission does not accept Mr Brush's explanation as to the source of the cash used to purchase the bank cheque or his explanation as to why he signed a false name and wrote a fictitious address on the bank document requesting the issue of the bank cheque. The purchase of furniture is not a transaction which normally needs to be done in secret. It is an innocuous transaction. If the cash came from a legitimate

source, Mr Brush had nothing to hide, and no need for anonymity. The trouble involving Mr Brush and Mr Martin did not emerge until January 1987. Mr Brush's demeanour in the witness box changed noticeably when he was confronted with the document disclosing the false name and the fictitious address. It is difficult to understand why Mr Brush was so deceitful. It suggests that the cash used to purchase the bank cheque was unlawfully received. The whole incident is thoroughly destructive of Mr Brush's credit.

6.13.32 Other evidence before the Commission which reflects on Mr Brush's credit includes:

(a) In February 1992, Mr Brush gave evidence that, about six months after his trial, he was "on the bones of his backside financially" and he did not even have a job. The trial ended on 29 April 1988. He gave evidence at his trial to the effect that he had taken a "financial hammering" since his resignation from the Board in March 1987. Mr Brush gave evidence in February 1992 that since about six months after his trial "I just haven't been able to, in this town, do anything. As soon as somebody finds out I'm involved, the thing falls over straight away". All of that evidence is to be compared with Mr Brush's evidence in August 1992 that he had a full-time job with Wizard Industries Ltd as from June 1988; a financial statement of 6 October 1988 that Mr Brush signed and gave to the National Australia Bank Ltd which represented that he and Mrs Brush had a net worth on that date in excess of $500,000; and Mr Brush's evidence in August 1992 that the financial statement was accurate and that there were no assets listed in the statement which were acquired after the trial.

(b) On 15 February 1990, Mr Brush signed a statement as to the financial position of himself and Mrs Brush. It disclosed that they had a net worth in excess of $1 million. He gave the statement to the Bank of Melbourne for the purpose of procuring a loan. Mr Brush said in evidence that some of the asset values listed in the statement were "generous". He also admitted that various amounts he owed had not been included in the liabilities section of the statement. When asked why those amounts had been omitted, Mr Brush replied "I think I was trying to get the loan".

(c) The reason given by Mr Brush for his failure to repay to Accord one of the $50,000 loans, namely financial difficulties, is inconsistent with his financial position as disclosed in the statements of 6 October 1988 and 15 February 1990, and with the amount of his income after June 1988.

6.13.33 Mr Brush should not have been placed in a position of trust. He has been wholly discredited. His evidence in relation to any material matter, unless corroborated by cogent evidence, should not be accepted.

6.14 The letter from the Teachers Credit Society of 26 November 1986

6.14.1 In about November 1986, after Mr Neville had returned from holidays, Mr Neville told Mr Brush that he thought the $1 million should not have been paid to Mr Martin. Mr Neville said that the rezoning had not occurred. Mr Brush told Mr Neville that the $1 million had been paid under the other provision in the agreement concerning clause 4(c). Mr Neville said that the $1 million should not have been paid under that provision. Mr Brush responded by telling Mr Neville to read the Heads of Agreement. Subsequently, Mr Neville spoke to Mr Brush again about the matter and they agreed that Mr Neville should contact Mr Martin and report back to Mr Brush.

6.14.2 Mr Neville contacted Mr Martin telling him that he thought the $1 million was not payable. Mr Martin did not agree with him. Mr Neville thought that during this conversation with Mr Martin, Mr Martin agreed to provide a bank guarantee to the Board. But there was no discussion as to the circumstances in which the Board could make demand under the bank guarantee. A bank guarantee was never provided. Instead, Mr Martin arranged for a letter to be sent by Mr Clark on behalf of the Teachers Credit Society to the Board. In the letter, Mr Clark said that:

> "... should Mr Martin's entitlement be negotiate [sic], we will refund the $1 million on his behalf."

Mr Clark said in evidence that the word "negotiate" should have been "negated".

6.14.3 Mr Neville frankly acknowledged that the letter did not "mean much at all" and he could not understand it. After receiving the letter, Mr Neville wrote a note on the letter to Mr Brush saying:

"Len, this is supposed to be a bank guarantee."

Mr Brush, in turn, responded with a note as follows:

"Brian, I am happy with Teachers Credit Society letter."

6.14.4 Mr Neville did not have any further discussions with Mr Brush concerning the provision of a bank guarantee. He decided not to pursue the matter because Mr Brush was the Chairman, and he was therefore ultimately responsible.

6.14.5 Mr Brush, in his evidence, said that at the time he was happy with the Teachers Credit Society letter, but on reflection he did not know that he should have been happy with it. He further said, in relation to the letter, that he "took the view at the time that [Mr Neville] was barking up his usual tree of not wanting to pay anything to anybody at any time" and that he, Mr Brush, was "aware that getting a bank guarantee had significant costs attached to it".

6.14.6 Mr Brush said that it did not occur to him to obtain advice from solicitors in connection with the letter. He thought that requiring a bank guarantee would impose an unfair impost on Mr Martin.

6.14.7 The Commission finds that the cavalier approach adopted by Mr Brush in relation to his acceptance of the letter from the Teachers Credit Society failed adequately to protect the interests of the Board, and was such as to amount to improper conduct.

6.15 The consent of the Treasurer

6.15.1 At the material time section 25(2) of the *Superannuation and Family Benefits Act 1938* provided:

> "The Board shall not invest the Fund or any portion thereof in any investment of any kind whatever without the consent of the Treasurer being first obtained."

6.15.2 According to Mr Brush, the oral consent of the Treasurer, Mr Brian Burke, was obtained before executing the Heads of Agreement. Mr Brush

said that the oral consent was given after he provided the Treasurer with "the broad parameters" of the project.

6.15.3 The evidence does not establish any corruption or illegal conduct in connection with the obtaining of the Treasurer's consent. But the Commission observes that the informal manner in which the Treasurer's oral consent was obtained to "the broad parameters" of the project was most ill-advised. Although section 25(2) did not require that the Treasurer's consent be in writing, propriety and good public administration demanded that a written consent be obtained to the Board's participation in a project of such magnitude and complexity.

6.16 The Board carrying on the business of the Fremantle Steam Laundry

6.16.1 At all material times section 25(1) of the *Superannuation and Family Benefits Act* prescribed the kinds of investments in which The Superannuation Fund could be invested. Section 25(1) did not authorise the Board to invest the Fund in the acquisition and carrying on of a business.

6.16.2 The Board was a statutory corporation: section 19(1). Statutory corporations have such rights and can do such acts only as are authorised directly or indirectly by statute.

6.16.3 In April 1986, the Board acquired the land on which the business of the Fremantle Steam Laundry was conducted. At that time the Board also acquired the business of the Fremantle Steam Laundry including the goodwill and the relevant plant and equipment. It appears that the Board originally intended to sell the business to Perpetual Trustees WA Ltd as trustee of the SB Investment Trust. However, that sale never eventuated. At all material times after about April 1986 the Board carried on business as the Fremantle Steam Laundry. SB Investment Limited, a company beneficially owned by the Board, managed the business on behalf of the Board. The business of the Fremantle Steam Laundry was eventually sold by the Government Employees Superannuation Board, the Board's successor, on 15 September 1989.

6.16.4 The Commission finds that the Board acted beyond its powers in carrying on the business of the Fremantle Steam Laundry because the carrying on of that business was not directly or indirectly authorised by the Act. The carrying on of the

business is evidenced by a number of documents including an agency agreement and sundry financial statements.

6.17 The Constitution of the Board

6.17.1 Section 9(1) of the *Superannuation and Family Benefits Act 1938* provided:

> "For the purposes of this Act, there shall be a Superannuation Board which shall consist of three members who shall be appointed by the Governor."

6.17.2 Section 11 of the Act empowered the Governor to fill vacancies caused where a member of the Board died or otherwise vacated office.

6.17.3 Mrs Scott ceased to be a member of the Board on 12 July 1986. For some nine months, from the date of her resignation until Mr Brush resigned on 13 March 1987, the only members of the Board were Mr Brush and Mr Markey. Mr Brush said that he wrote and spoke to the Premier on several occasions concerning the appointment of a person to replace Mrs Scott. Mr Brush understood that a replacement was not appointed because new legislation was proposed that would have changed the structure of the Board.

6.17.4 The Commission observes that the failure of the Government to replace Mrs Scott promptly reflects an irresponsible approach to Government, and merits criticism.

6.18 The $443,500 overpayment to Accord

6.18.1 In May 1986, the Board paid to Accord the sum of $876,201.75. That amount included $443,500 which was paid in reimbursement of amounts expended to secure the site owned by Conaust. This was a proper payment.

6.18.2 When the acquisition of the Conaust site was settled on or about 28 August 1986, Collison & Hunt, the solicitors for the Board, sent to Mr McDonnell, the solicitor for Mr Jones, a bank cheque for $443,500 payable to Saland. It appears that when the Board's solicitors sent the cheque to Mr McDonnell, the Board and its solicitors held the mistaken belief that Saland was entitled to $443,500 as a

reimbursement for amounts previously expended to secure the Conaust site. However, in fact, neither Saland nor anyone else was entitled to such a reimbursement. Accord had received the relevant reimbursement in May 1986.

6.18.3 Mr McDonnell's accounting records disclose that he received the bank cheque from Collison & Hunt on 28 August 1986. On the same day he arranged for the proceeds of the bank cheque to be invested with Rothwells Limited. The deposit with Rothwells was withdrawn on 9 October 1986, and on that date Mr McDonnell drew a cheque for $443,500 payable to Accord. He apparently sent the cheque to Accord, and it was deposited in Accord's account with the Teachers Credit Society on 10 October 1986.

6.18.4 Mr McDonnell's accounting records disclose that the interest which accrued on the $443,500 while it was deposited with Rothwells was used for the benefit of Mr Jones or Saland. Interest earned during the period of deposit would appear to be about $9,000.

6.18.5 According to Mr Martin, he did not become aware of the receipt of the $443,500 until a considerable time after 10 October 1986. However, he admitted that he became aware of the payment before the commencement of his trial, that is, before April 1988. Mr Martin conceded that it would have been unusual for a deposit of an amount exceeding $250,000 to be credited to Accord's account in the second half of 1986.

6.18.6 Mr Martin said that when he learnt of the deposit of $443,500 he did not make any inquiry of his staff as to the circumstances of the deposit. He added that he did not "think [he] even thought too much about it at the time". He did not make any inquiry as to Accord's entitlement to the amount.

6.18.7 Mr Martin said later that when he and his staff discussed the matter in 1988, they concluded the $443,500 was a duplication or overpayment of the reimbursement relating to the Conaust site. However, Mr Martin did not contact the Board to ascertain whether that conclusion was correct. Mr Martin's explanation was that his relationship with the Board was then "souring rapidly". He said that it did not seem prudent to seek clarification from the Board, and that it would have been commercial suicide to have made the Board aware of the overpayment. No doubt the

commercial suicide related, at least in part, to Mr Martin's difficult financial circumstances after April 1988.

6.18.8 Mr Martin gave evidence to the following effect:

(a) Since early 1988, it would have been very difficult for Accord to have found the money to repay the $443,500.

(b) He had no recollection of discussing with any solicitors or accounting firms, before deciding to retain the $443,500, whether Accord was entitled to retain that amount.

(c) Accord issued a Writ of Summons against the Board on 13 April 1989 claiming $1 million under the provision in the Fee Agreement relating to the rezoning of the Anchorage site. He said that the relevant rezoning occurred on 25 March 1988. He also said that he did not know of any set off in the Writ of Summons whereby Accord gave credit to the Board for the $443,500.

(d) He acknowledged that Accord was not entitled to the $1 million until such time as the rezoning in fact occurred. He said that before his trial in April 1988, he did not raise with anyone whether rezoning had occurred.

6.18.9 The Commission finds that it was improper for Mr Martin to have retained the $443,500 overpayment when it was, or should have been, obvious to him that the money had been paid to him by mistake. The implications of this finding are further discussed in a confidential appendix to this report.

6.18.10 The Board was unaware of the overpayment until it was so informed by the Commission. The Commission observes that the failure of the Board to detect the overpayment indicates that, at least at the relevant time, the procedures adopted by the Board were inadequate.

6.19 Conclusion

6.19.1 Acquisition of the Anchorage site and the proposed development was a project of considerable magnitude and complexity. The Commission has found that the Board, which included Mr Brush and part-time members Mr Barry Markey, a lecturer in accounting and business matters, and Mrs Winifred Scott, a retired canteen supervisor, had insufficient experience properly to evaluate whether it should become involved in the project.

6.19.2 When combined with Mr Neville's inexperience in such large and complex matters, the Board should have deferred entry into the transaction until it had a valuation and was satisfied with the other arrangements. Its decision, on 8 April 1986, to secure ownership of the Anchorage site was premature and arrived at with undue haste and inadequate preparation.

6.19.3 The Commission has not accepted the assertion, made by Mr Brush and Mr Martin, that the institution of criminal proceedings again them in 1987 was responsible for the failure of the project.

6.19.4 By 30 June 1991, the Board had spent more than $25 million on the Anchorage project. Market value of the land at the time was $11.6 million.

6.19.5 The Commission has found that Mr Brush should never have been placed in a position of trust. He has been discredited and we have found that his evidence on any material matter should not be accepted unless corroborated by cogent evidence.

6.19.6 Mr Martin's evidence about Brockley Investments and his dealing with $150,000 in cash underscored his lack of credibility.

6.19.7 **The Heads of Agreement and Fee Agreement**. The Commission has found that on and at all material times after the execution of the Heads of Agreement and the Fee Agreement, it was the common intention of the relevant parties that Anniversary and Mr Jones or Saland would not become entitled to their fees unless and until the whole of the land in the Anchorage site (including, in particular, the Swan Wool Scourers land, but excluding the land owned by Delta Trading) had been acquired by the Board.

6.19.8 The Commission has found that the contractual arrangements entered into by the Board for the Anchorage site and the proposed development were most

unsatisfactory, and failed adequately to protect the interests of the Board. Although the nature of the rights and interests being acquired by the Board was of crucial significance, they were not defined with any precision in the Heads of Agreement.

6.19.9 It was a serious error of judgment for the Board to have incurred substantial liabilities with the Anchorage site without having secured the crucial Swan Wool Scourers land. The Board was foolish to have ordered the new wool scouring equipment before any agreement was entered into with Land Holdings. It was regrettable that the Board failed adequately to appreciate the difficult town planning and environmental issues involved in the proposed development until after the Heads of Agreement were executed.

6.19.10 **Mr Brush**. The Commission has found that the Board acted incompetently in the acquisition and attempted development of the Anchorage site. That incompetence was of such a magnitude as to constitute improper conduct by Mr Brush, the full-time chairman of the Board.

6.19.11 **Mr Neville**. Mr Neville carried some responsibility for the Board's assessment of the project and its decision to invest. While he was an employee and not a member of the Board, he was Investment Manager involved in reviewing and reporting to the chairman on all aspects of the Board's investments, including management, research and performance.

6.19.12 Mr Neville was responsible for arranging the preparation of the Heads of Agreement and the Fee Agreement. He sought legal advice for that purpose, and the Commission is not without sympathy for his position. He should have done more to protect the interests of the Board, but in all the circumstances the Commission is not prepared to find that he acted improperly.

6.19.13 **Mr Collison**. Mr Collison must take the major responsibility for the unsatisfactory state of the formal documentation. By his own admission, the Heads of Agreement he prepared were "half-baked". No doubt his instructions were hopelessly inadequate. He should not have continued to act without having sent written advice to the Board informing it that he had inadequate instructions, that the existing instructions did not permit him to prepare documentation which adequately protected the interests of the Board, and that, in the circumstances, the Board should not enter into a legally

binding contract with Mr Jones, Mr Martin and their companies until he had been adequately instructed and proper documents had been prepared.

6.19.14 **The Brush-Martin loans**. The Commission has found that it was improper for Mr Brush to have agreed to accept a loan from Mr Martin. At all material times, Mr Brush, on behalf of the Board on the one hand, and Mr Martin, through his various companies on the other, were engaged in a variety of business transactions. The creation of a serious conflict of interest should have been obvious.

6.19.15 The degree of Mr Brush's impropriety in accepting the loans was exacerbated by the failure to create contemporaneous loan and security documents to evidence the transaction.

6.19.16 The Commission has further found that it was improper for Mr Martin to have offered a loan to Mr Brush in circumstances where Mr Martin must have realised, or should have realised, that there was a real risk that Mr Brush's objectivity in his dealings with Mr Martin would be compromised. Mr Martin knew he was negotiating with Mr Brush, and that Mr Brush was chairman of the Board. Mr Martin also knew, or should have known, that if the fact and circumstances of the loan became public knowledge, confidence in the proper administration of the Board would be adversely affected.

6.19.17 Mr Brush did not inform either the Board or anyone employed by the Board of the loan from Mr Martin until 13 March 1987, the day Mr Brush resigned. Mr Brush rightly admitted to the Commission that he acted improperly in failing to disclose the loans until 13 March 1987.

6.19.18 It was improper for Mr Brush to backdate the security documents and to lie about those documents to the police, journalists and his solicitors.

6.19.19 It was improper for Mr Martin to backdate the letters to Mr McDonnell and Mr Brush, and knowingly to make the false statement contained in the letter to Mr Hunt.

6.19.20 **Payment of the $1 million fee**. We have rejected the denial of Mr Brush and Mr Martin that they had discussed the payment of the $1 million either before Mr Martin sent the letter or before the Board sent the cheque. Since April 1986,

Mr Brush and Mr Martin contacted each other regularly about the Anchorage project. By 1 October 1986, the loan between Accord and Melampus had been arranged, loans totalling $100,000 had been made by Accord to Melampus, Accord had paid a further $50,000 to Melampus as the purchase price for shares, Mr Brush had joined the Board of Brockley Investments, and Mr Brush had recommended to the Superannuation Board that it acquire an interest in Brockley Investments.

6.19.21 The Commission has found that the payment of the $1 million would have been discussed informally between Mr Brush and Mr Martin before the money was paid.

6.19.22 The Commission did not accept the evidence of Mr Brush and Mr Martin as to their belief about the timing of the $1 million payment. The Commission has found both men knew that, after the execution of the Heads of Agreement and the Fee Agreement, it was the common intention of the relevant parties that Anniversary and Mr Jones or Saland would not be entitled to their fees unless and until the whole of the land in the Anchorage site (including, in particular, the Swan Wool Scourers land, but excluding the land owned by Delta Trading) had been acquired by the Board.

6.19.23 The close and friendly relationship which had developed between Mr Brush and Mr Martin, as evidenced by the $150,000 previously paid by Accord to Melampus, and by arrangements entered into over Brockley Investments, influenced Mr Brush's decision to pay the $1 million.

6.19.24 The Commission has found that it was highly improper for Mr Brush to authorise the payment of the $1 million knowing that it was the common intention of the relevant parties that Anniversary was not entitled to the money unless and until the whole of the land in the Anchorage site (including, in particular, the Swan Wool Scourers land, but excluding the land owned by Delta Trading) had been acquired by the Board.

6.19.25 The cavalier approach of Mr Brush in his acceptance of the letter from the Teachers Credit Society failed adequately to protect the interests of the Board, and was such as to amount to improper conduct.

6.19.26 **The Treasurer's consent**. The evidence did not establish corruption or illegal conduct in the obtaining of the Treasurer's consent. The informal manner in

which the Treasurer's oral consent was obtained to "the broad parameters" of the project was ill-advised.

6.19.27 Although section 25(2) of the Act did not require that the Treasurer's consent be in writing, propriety and good public administration demanded that a written consent be obtained to the Board's participation in a project of such magnitude and complexity.

6.19.28 **Fremantle Steam Laundry**. The Commission has found that the Board acted beyond its powers in carrying on the business of the Fremantle Steam Laundry because the carrying on of that business was not directly or indirectly authorised by the Act.

6.19.29 **Constitution of the Board**. The failure of the Government to replace Mrs Scott on her retirement from the Board reflected an irresponsible approach to Government, and merits criticism.

6.19.30 **The $443,500 overpayment**. The Commission finds that it was improper for Mr Martin to have retained the $443,500 overpayment when it was, or should have been, obvious to him that the money had been paid to him by mistake.

6.19.31 **Further matters**. Finally, reverting to the terms of reference, the Commission reports:

(a) There are matters referred to in this chapter which are addressed in a confidential appendix to this report; and

(b) Our findings on the dealings between Mr Brush and Mr Martin highlight the need for constant vigilance to ensure that laws and procedures designed to achieve integrity in government actually work and the means by which statutory authorities are made properly accountable to the public, through the Parliament, will be discussed in Part II of our report.

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