

CHAPTER 23

TERM OF REFERENCE 2.1

BRIBERY ALLEGATIONS — OBSERVATION CITY

CHAPTER 24

TERM OF REFERENCE 2.2

OTHER ALLEGATIONS — SMITH AND MARTIN TRIAL

CHAPTER 25

TERM OF REFERENCE 2.3

ADEQUACY OF POLICE INVESTIGATION

CHAPTER 26

POLITICAL DONATIONS

CHAPTER 27

CONCLUSION

TABLE OF CONTENTS

27.1	Introduction	2
27.2	General evaluation	3
27.3	Material referred to Director of Public Prosecution	5
27.4	Description of the Appendices to the Report	6

27.1 Introduction

27.1.1 It remains for the Commission in this Chapter to bring this Part of its report to a close.

27.1.2 The Commission has made a number of findings of serious impropriety. We have, however, refrained from detailing any findings in respect of illegal or corrupt conduct, reserving those matters for an appendix to our report which we recommend should be received in confidence and passed to the Director of Public Prosecutions for his consideration with a view to the institution of criminal proceedings. This course is recommended in order to safeguard against any prejudice that might otherwise arise. Whether or not criminal proceedings will eventuate will be a matter for the prosecuting authorities. In this regard, the Commission has expounded in Chapter 1 the particular interpretation that it has placed on the legislative purpose underlying the amendment effected by the Parliament, in its requirement that we inquire and report as to whether there has been corruption or illegal conduct in the contexts specified in the terms of reference.

27.1.3 Nevertheless, it is appropriate that we should report that there has been comparatively little evidence of illegal or corrupt conduct. What evidence there has been in that regard has tended to focus on a very few individuals. Of course, it must be remembered that there are already many prosecutions pending, having been instituted independently of the Commission, which relate to the matters we have been required to consider.

27.1.4 It should be noted that the Commission made considerable efforts to hold its inquiry in public so as to ensure maximum publicity. It issued repeated invitations to members of the public to assist it with relevant information. Nevertheless, there can be no guarantee that the Commission's procedures, having regard to a range of difficulties, including the inadequacy, removal and in some cases the reconstruction of records, the marked lack of recollection on the part of many key witnesses and the Commission's inability to compel the attendance of witnesses or the production of documents from overseas, have enabled it to ascertain the truth in all instances.

27.1.5 It is appropriate to observe that there were two principal aspects of the public interest that were seen and expected to be served by the appointment of the Commission. The first was the disclosure, so far as possible, of the circumstances

surrounding each of the terms of reference. We believe that this objective, in large measure, has been achieved. To this extent, the Commission observes that the value of its work is not to be measured by the number of prosecutions that may result. The report discloses an enormous amount of detailed information. The sifting of the evidence to obtain that information and the task of presenting it in readable form in the report has fully taxed the resources of the Commission. Regrettably, lack of time may have led on occasion to a less than perfect expression of what we have discovered, although without diminishing the accuracy of its substance in any way.

27.1.6 The second aspect, of far-reaching importance, was the Commission's obligation to report whether changes in the law of the State, or in administrative or decision making procedures, are necessary or desirable. In the light of our detailed findings and observations in relation to them, we cannot emphasise too strongly that change is imperative if the public interest is to be adequately protected.

27.2 General evaluation

27.2.1 The governmental system of this State exists to serve the interests of the people of Western Australia. Our findings and observations provide compelling evidence that this fundamental purpose has not always been uppermost in the minds of our elected and appointed public officials, in some instances far from it. They equally demonstrate that the present institutional arrangements for the conduct of government cannot be relied upon either to ensure that government will be conducted for the public's benefit or to provide reassurance to the public that it is being so conducted.

27.2.2 At the very least, it must be said that the Parliament, the public's representative forum, has failed to provide an effective check on the executive arm of government. The Parliament, no less than the public, was kept ignorant of many of the matters which led to the establishment of this Commission and which have had such adverse consequences for every person in the State. It must bear some direct responsibility for this state of affairs.

27.2.3 Ministers have elevated personal or party advantage over their constitutional obligation to act in the community's interests. Public funds have been manipulated to partial ends. Personal associations and the manner in which electoral

contributions were obtained could only create the public impression that favour could be bought, that favour would be done.

27.2.4 Members of statutory authorities with very significant public funds subject to their control, have seemed to be unaware of, or else indifferent to, their legal and public duties. Compliance with the law has not been honoured as their first obligation. Where some level of independence from political pressure was to be expected, it was not demonstrated. Partial conduct on their part has cost this State dearly.

27.2.5 The Public Service lost, if not its way, then some of its role and character in the political and governmental environment into which we have inquired. Denied an effective advisory role in some number of the transactions with which we have been concerned, it was reduced to impotence in circumstances where ministerial advisers, favoured appointees to the Public Service and others captured the advisory role which traditionally has been seen as a *raison d'être* of an experienced Public Service.

27.2.6 The processes of decision making, but more importantly the very reasons for decision in many of the matters inquired into, were often shrouded in mystery. If a basic principle of good administration is that governmental decisions should be taken by officials who are known to be responsible for, and accountable for, those decisions and who can provide considered, documented reasons for those decisions, then that principle has been disregarded systematically at the highest and most important levels of government.

27.2.7 The absence of effective public record keeping has dogged this Commission in its inquiries. Records provide the indispensable chronicle of a government's stewardship. They are the first defence against concealment and deception.

27.2.8 The practice of government, especially in its business relationships, changed markedly during the Burke years. There was a more entrepreneurial, risk-taking style. No doubt, the change had its origin in a genuine belief that a change of style was in the interests of good government and the people of the State. It is not for the Commission to question such an approach; it reflects a decision which lies fairly and squarely within the province of government.

27.2.9 The Government was entitled to pursue new goals. What it was not entitled to do was to risk the public resources of the State without its actions being subjected to critical scrutiny and review. Effective accountability was a casualty of its entrepreneurial zeal. Influence in the conduct of this State's public affairs was captured by a small group of self-interested businessmen.

27.2.10 Impropriety of considerable proportions occurred in the period into which we have inquired. While criminal prosecutions may need to be contemplated in some instances, a matter to which we refer below, our abiding concern is that many elected and appointed officials appeared to have little understanding of their role and responsibility and of the standards of conduct to be expected of them.

27.2.11 In a system of government such as our own, power is given to elected and appointed officials alike to be exercised for the benefit of the public. This is the condition, the "trust", on which that power is given. Of course, in any particular case, the question whether a proposal serves the public interest is the very stuff of politics, requiring open and vigorous debate. This makes for a healthy society. But when government seeks to "live by concealment", to adapt a phrase used in evidence by Mr David Parker, it can be anticipated that instances will occur where official power and position are both misused and abused. Our report is a testament to this. But what our inquiry has revealed is how lamentably lacking are the safeguards against misuse and abuse to which the public should be entitled, given that they are obliged to rely on elected and appointed officials to serve their interests.

27.2.12 Unless quite significant changes are made to the institutions of this State, to its laws and to the manner in which government is conducted, we can provide no reassurance whatever to the people of Western Australia that events of the type into which we have inquired, if not similar in their detail then at least in their effects, will not occur again. A lesson has been learned. It must not be forgotten.

27.2.13 If public confidence in our institutions of government is to be restored and maintained, if government is to warrant the public's confidence and not its suspicion, a systematic reappraisal of our institutions, laws and practices is called for. In Part II of our Report we will address what is required.

27.3 Material referred to Director of Public Prosecution

27.3.1 Paragraph (2)(b) of the terms of reference declared that the Commission

"...may, during the course of the inquiry, refer any matter to the Solicitor General or another appropriate authority with a view to the institution of criminal proceedings, where you consider that delaying such action to the completion of your report would be undesirable."

In the course of the inquiry, Commission investigators compiled a wide range of confidential material. That material, which contains important financial information, has been referred by the Commission to the Director of Public Prosecutions. It was beyond the reach, resources and time of this Commission adequately to investigate the matters to which the information relates.

27.3.2 While recognising that law enforcement agencies throughout Australia may already be familiar with some of this material, it seems to us to be of the greatest importance that the Director of Public Prosecutions, or any relevant authority that may be established in the future, receive every encouragement, including the provision of any necessary resources, to proceed to a full examination of these matters.

27.4 Description of the Appendices to the Report

27.4.1 There are five appendices annexed to Part I of the report. Their contents may be described as follows:

Appendix 1: A confidential record of matters which we are recommending be referred to the Director of Public Prosecutions for his consideration. This document is not included in the bound volume of the report. It must be emphasised, as we said in the introduction to the Report, that merely because a matter is referred to the Director of Public Prosecutions for his consideration, it does not follow that the Commission has recommended the institution of criminal proceedings. We have done no more than draw attention to evidence which in our view warrants the Director's consideration. The Commission recognises that there are many factors, including questions of hearsay, corroboration, and the prospects of a conviction which require to be taken into account in considering the exercise of a prosecutorial discretion.

Appendix 2: (a) A list of witnesses who gave evidence either orally or in writing to the Commission. The list specifies the term of reference in which the evidence was given.

(b) A list of Counsel to whom leave was given to represent persons appearing before the Commission.

Appendix 3: A descriptive list of the principal persons referred to in Part I of the report, reporting the positions held by them at relevant times and other biographical information.

Appendix 4: Details of the record-keeping function, the recording and transcription service and the information technology used in the course of the Commission's activities together with details of the facilities provided to the media, the arrangements made for media coverage of the hearings and a list of the media organisations which attended the Commission, together with the names of the principal reporters.

Appendix 5: A list of the officers engaged in the service of the Commission.

* * *

TABLE OF CONTENTS

26.1	Introduction	2
26.2	Concerns arising	3
26.3	Leader's Accounts	5
26.4	Use of the \$100,000	9
26.5	Some uses of No. 1 Advertising Account	17
26.6	Gold	19
26.7	Loans	21
26.8	Conclusion	22

26.1 Introduction

26.1.1 The issue of political donations arose during evidence in connection with a number of terms of reference. It was obviously relevant to investigate the relationship between businessmen, who were involved in the activities under investigation, and both the Government of the day and individual politicians. In that context, donations to political parties or individual politicians, particularly at about the time of the business activities under investigation, were relevant.

26.1.2 The evidence concerning specific donations made at about the time of particular events under investigation has been discussed in detail in the chapters dealing with those events. It is necessary, however, in order to gain a full appreciation of the significance or otherwise of political donations, and in order to assess their wider implications, to consider those donations in their totality. We have, therefore, set out the relevant donations in an attached schedule, which includes brief references to particular events established in the evidence. Those references are not intended to be exhaustive of relevant events or evidence concerning those events mentioned. The schedule should be read and understood as containing brief reference points only. In addition, it should be noted that the schedule refers to donations by individuals, for example, Mr Alan Bond, Mr Laurie Connell, Mr Yosse Goldberg, Mr John Roberts and Mr Dallas Dempster, rather than the associated entities through which the donations were made.

26.1.3 The schedule may not reflect every donation by those persons listed. Records were difficult to locate and collate. In addition, some of the amounts listed were not the subject of evidence and have been obtained from confidential material provided to the Commission.

26.1.4 The schedule includes donations by Mr Lang Hancock, Mr Vince Yovich and Mr Dennis Cullity, none of whom was involved in any of the business dealings investigated pursuant to the terms of reference. They were called to give evidence of their particular donations, and of the circumstances in which they made those donations, as part of a general overview of the manner in which donations were sought and of the size of the donations by persons other than those engaged in the particular activities that were the subject of investigation.

26.2 Concerns arising

26.2.1 The cumulative picture immediately gives cause for concern. The total for each donor, drawn from the foregoing schedule, was as follows:

	\$	
Mr Anderson	366,000	
Mr Bond	2,038,000	
Mr Connell	860,000	
Mr Cullity	30,000	
Mr Dempster	512,000	
Mr Dempster (Tleska?)	300,000	
Mr Goldberg	425,000	(including \$125,000 to Puppet Theatre)
Mr Hancock	950,00	
Mr Hill	20,000	
Mr Holmes a Court	30,000	
Mr Martin	15,000	
Mr Parry	205,000	
Mr Roberts	692,000	
Mr Yovich	125,000	

The size of the donations was quite extraordinary, particularly when compared with the size of donations made before Mr Burke became Premier. In many instances, there is an obvious connection in time between donations and events in which the donors were concerned with Government. It is not surprising, therefore, that the circumstances should give rise to suspicion that improper practices might have occurred and undue influence might have been exercised.

26.2.2 The donations listed in the schedule include a number that followed a lunch held in Perth on 15 June 1987 with Mr Burke and the Honourable R J Hawke, then the Prime Minister, attended by Mr Bond, Mr Connell, Mr Dempster and Mr Roberts. It is sufficient for the Commission's purposes to note that Mr Hawke was not involved in seeking donations and that the donations that followed in July 1987 were made to the Federal campaign as a consequence of undertakings given at the lunch after Mr Hawke had left. These donations were:

	\$
Mr Bond	400,000
Mr Connell	250,000
Mr Coppin	200,000
Mr Dempster	95,000
Mr Roberts	200,000

26.2.3 The circumstances in which various donations were sought have been canvassed in the various chapters dealing with the particular terms of reference. All witnesses have denied that there was any impropriety associated with the donations, or that the payments were in any way connected with the particular business transactions in which the donor was engaged with the Government. It was hardly to be expected otherwise. Mr Connell came close to admitting that he was put in a position where he had no choice but to comply with the request by Mr Brian Burke for a very substantial donation.

26.2.4 Generally speaking, it is obviously very difficult to establish any connection between business dealings and donations. In documentary evidence concerning other donations, which has been suppressed because the donors have not been called, it is apparent that other businessmen in Western Australia made large donations and that some would have been involved in activities with the Government. A common theme is apparent in the evidence of most of the donors, namely, that the Government was good for business and provided them with a strong incentive to assist in its efforts to be re-elected. In his approach to businessmen, Mr Brian Burke was direct, to the point at times of being forceful. He nominated amounts expected that were far in excess of amounts previously donated in political fundraising in Western Australia. Mr Burke claimed he always ensured that a third person was present when he discussed donations, but it is apparent that he frequently failed to follow that procedure. Although Mr Burke claimed he was at pains to ensure that requests for donations were not linked with any suggestion of favours in return, Mr Yovich said Mr Burke promised personal access to himself and provided Mr Yovich with his private telephone number.

26.2.5 Mr Brian Burke, as Premier, was obviously very successful in his fundraising approaches. It appears that his brother, Mr Terry Burke, who was also

actively involved in that area, was similarly capable. There were obvious risks associated with the involvement of the Premier in approaching businessmen for donations. The same risks existed for Ministers who, according to Mr Parker, were strongly encouraged by Mr Burke to be involved in fundraising activities. Unfortunately, however, Mr Burke's enthusiasm for fundraising was not accompanied by appropriate guidelines and restraint. Political donations generally are further considered in Part II of the Commission's report.

26.3 Leader's Accounts

26.3.1 During the course of the investigation into the donations made by Mr Connell and Mr Goldberg in June and July 1985, it emerged that the \$300,000 from Mr Connell, and \$200,000 of the \$300,000 donated by Mr Goldberg, were deposited in an account titled the "Advertising Account No 1" ("The No 1 Account"). A number of other large donations were also deposited into that account. In an attempt to determine whether various donations were legitimate political donations or were, in reality, payments for favours done or anticipated, it was necessary for the Commission to examine the No 1 Account and other accounts into which donations were deposited. The uses to which donations were applied was relevant to the question whether particular amounts were legitimate donations or otherwise. In particular, Mr Burke retained in cash \$100,000 of the \$300,000 donated by Mr Goldberg and the use made of that \$100,000 called for consideration. Such use stood to be contrasted with the uses to which other donations were applied.

26.3.2 By way of background, it is appropriate to consider first the circumstances in which the No 1 Account was opened. Senator Michael Beahan, who was the Western Australian State Secretary for the Australian Labor Party ("ALP") from 1981 until July 1987, provided some of the background. In the lead-up to the 1983 election, two accounts known as the Leader's Fighting Fund and the Union Fighting Fund were opened as part of the planning for fundraising in connection with that election. Mr Beahan said those accounts were separate from the normal administrative accounts of the ALP, but were run in conjunction with them. He regarded the funds raised and deposited into those accounts as the property of the ALP to be used in general for campaign purposes.

26.3.3 Mr Beahan said that during 1983 he had discussions with Mr Brian Burke. Mr Burke wanted to establish a Leader's Fighting Fund to be kept

separate from the ALP and over which he would have more discretion. He advanced three arguments. First, there were many people, particularly those in business, who were more prepared to give to the leader than to a particular party. Secondly, there were those who were concerned that confidentiality might be breached if a donation was made through the Party. The third argument was described by Mr Beahan as a legitimate claim by the leader to discretionary funds for operations associated with the campaign, such as businessmen's luncheons or a direct mail campaign from the Premier's office on specific issues. Mr Beahan said he disagreed with Mr Burke about the establishment of a separate fund because Mr Beahan believed that the funds should be, at least in part, under the control of the Party. Mr Beahan eventually conceded and, although not aware of the name of the account, he was aware that a Leader's Account had been established. The Leader's Fighting Fund was closed.

26.3.4 Mr Beahan said he and Mr Burke had a clear understanding that proper accounts would be kept and a report in general terms would be provided to him from time to time. It was understood that the report might not include the names of donors, but it was certainly Mr Beahan's understanding that the report would include the amounts donated, as well as details of expenditure. He said he raised regularly with Mr Burke the principle that there must be no commitments made to any of the donors in any form. Mr Burke always assured him very firmly that no such commitments would be made. Finally, there was an understanding that the money raised would be used for campaign purposes, although Mr Beahan said, "... that was never defined specifically".

26.3.5 As we have said, Mr Beahan said he raised with Mr Burke the issue of commitments to donors on more than one occasion. As to why he did so, he said he insisted on formal procedures and administrative tightness which was in contrast to Mr Burke's "... loose sort of knee jerk way of operating". He said Mr Burke was an extraordinarily good campaigner and a very clever leader, but their differences were the cause of both friction and some concern that the looseness should not flow into the accounting and manner in which the Leader's Account was handled. Mr Beahan accepted Mr Burke's assurance that there would be no favours for any donations received, but he had a generalised concern that Government was being seen as too close "... to three or four big players at the big end of town". He had in mind persons such as Mr Bond, Mr Connell, Mr Dempster and Mr Roberts. He said he discussed the matter informally with Mr Burke, who always responded with an assurance that, while it was

important to have contact with those people, no special favours would be given to them.

26.3.6 Mr Burke said he could not recall being involved in the establishment of the Leader's and Union Fighting Funds prior to the 1983 election. As to the separate Leader's Fund, Mr Burke said he recalled one discussion about the matter with Mr Beahan, who agreed immediately to its establishment. He said confidentiality was a factor that they might have discussed. Although he could not recall discussing a claim to the discretionary control of funds, Mr Burke said such a claim was in accord with his general position. He could not recall, however, any differences between them. He remembered Mr Beahan mentioning that John Tonkin had a leader's account and that such accounts were common in other States. Mr Burke said he could not recall an occasion when Mr Beahan took issue with him about any matter to do with the establishment of the Leader's Fund or its operation, but Mr Beahan did make inquiries of Mr Burke from time to time. Similarly, Mr Burke could not recall Mr Beahan ever raising the aspect of proper accounting and did not agree that Mr Beahan tended to have a more strict or formal view about control over finances and the use of them. He said that Mr Beahan would say to him that he, Mr Burke, was more extravagant in campaigning terms, "... but not that he [Mr Beahan] had a more formal view of the operation of this or that or anything else". He disagreed with the evidence of Mr Beahan that there was a difference because Mr Beahan insisted on formal procedures and administrative tightness in comparison with Mr Burke's "... loose sort of knee jerk way of operating".

26.3.7 As to the evidence of Mr Beahan that there was an understanding between them that proper accounts would be kept, Mr Burke said it was an issue that did not require discussion and it was not raised. As to whether he intended or assumed that proper accounts would be kept, Mr Burke said he did not think it even came to mind. He would not accede to the suggestion that it was an unspoken understanding with Mr Beahan because he did not recall it coming to mind. He denied there was an understanding between them that a report would be provided to Mr Beahan from time to time. He also disagreed with Mr Beahan's evidence of an understanding that the money raised would be used for "campaign purposes". He said there was a general and unstated understanding that moneys raised would be used at Mr Burke's absolute discretion to further the interests of the Labor Government. As to the issue of ensuring that there would be no commitments to anybody in return for donations, Mr Burke said

that it was raised only once and he would have been affronted had it been raised on more than one occasion.

26.3.8 Mr Beahan was an impressive witness. We have no hesitation in accepting his evidence in preference to that of Mr Burke. As will be seen during the discussion of Mr Burke's use of the funds, particularly the \$100,000 cash that was retained in his office from the \$300,000 donation made by Mr Goldberg, Mr Burke applied funds to purposes that could not legitimately be regarded as campaign purposes or purposes genuinely furthering the interests of the ALP. He failed to keep proper accounting records and did not advise the Party of the amount of donations received. Mr Burke had already given evidence on those matters well before Mr Beahan gave his evidence. We have no doubt that Mr Burke's later evidence in response to Mr Beahan was influenced by his knowledge of the potential for criticism of his use of the funds and lack of proper accounts. Mr Burke, on this occasion and on others, displayed a willingness to depart from the truth when he believed it was necessary in order to protect his own position.

26.3.9 As to ownership of the funds in the No. 1 account, in a statement prepared by his solicitor which he signed on 14 February 1991, Mr Burke said the donations were the "... property of the Party". On 1 March 1991, he told the police they were "... ALP funds" and, in evidence given on 2 May 1991, he agreed the funds belonged to the ALP. By 15 April 1992 he was no longer giving straightforward answers on the topic and said he did not know who owned the funds. As to his previous understanding, Mr Burke said that he did not think he ever turned his mind to the question of ownership of the funds.

26.3.10 We have no doubt that Mr Burke knew the funds were the property of the ALP. He prevaricated in his most recent evidence because he appreciated that he might be criticised for his use of those funds.

26.3.11 Mr Burke also gave conflicting accounts as to who had ultimate authority over the use of the funds in the No. 1 account. In his statement of 14 February 1991, he said the decisions as to disbursements were left to "... the leaders of the Party" and he nominated himself, as Premier, and the State Secretary of the Party. He said he and the State Secretary "... were ultimately responsible ... for the funds". When asked by the police on 1 March 1991 about this issue, Mr Burke said if the State Secretary had given a specific instruction, he, Mr Burke, would have been obliged to comply with it.

Mr Burke said in evidence, however, that his answer to the police was incorrect. He suggested the error might have occurred because he was under considerable stress.

26.3.12 Mr Burke said he had a discretion as to the use of the funds. He acknowledged the funds should be used in furtherance of the ALP interests, but said it was for him to determine what was in the interests of the ALP. He agreed expenditure for illegal or improper purposes was not authorised.

26.3.13 Mrs Brenda Brush, who was then a ministerial officer with Mr Burke, was unable to recall any conversation about opening the new account. She said she assumed that Mr Burke would have suggested that it be done. The particular circumstances attending the initial deposits are canvassed in chapter 10, section 18 of this report.

26.3.14 The Commission was provided with a chart that set out full details of the deposits and debits to the No 1 Account. The full contents of that chart have not been disclosed because there are many donations, both large and small, from persons who have no direct connection with the terms of reference. In those circumstances, we were satisfied it was sufficient to make available for publication details of donations about which oral evidence was given. It was apparent that the vast bulk of the funds was applied for campaigning or other purposes properly associated with furthering the interests of the ALP. In referring to "furthering the interests of the ALP", we are not endeavouring to define the boundary between proper and improper uses of these funds, but to indicate clearly that, whatever reasonable test is applied, the bulk of the funds were legitimately applied for proper purposes. The evidence of the use of the funds has been compiled by tracing the cheques paid from the account. Remarkably, and unfortunately, Mrs Brush destroyed all the records of donations received and expenditure. She was unable to provide a satisfactory explanation for having done so.

26.3.15 The circumstances in which \$100,000 of Mr Goldberg's donation of \$300,000 was retained by Mr Burke as cash in his office safe have been canvassed in section 19 of chapter 10. Mr Goldberg gave instructions to Mr Musca that a cheque for \$200,000 was to be drawn in favour of the No 1 Account and \$100,000 was to be in cash. Mr Musca checked with Mrs Brush and was told, "that's how he wants it". We are satisfied that, prior to speaking to Mr Musca, Mr Goldberg had been told that the donation was to be split in this fashion by Mr Burke, Mrs Brush or perhaps Mr Connell. We reject the evidence of Mr Burke that the issue first arose when Mr Musca

telephoned Mrs Brush at the time he was speaking with Mr Goldberg. We have no doubt that if Mrs Brush or Mr Connell gave the instruction to Mr Goldberg, that instruction must have originated with Mr Burke.

26.4 Use of the \$100,000

26.4.1 The fact that Mr Burke had made the decision to split the donation and retain \$100,000 cash before Mr Goldberg spoke with Mr Musca is relevant to an examination of why that cash was retained. We first consider, however, the evidence on the issue given by Mr Burke and Mrs Brush.

26.4.2 Mrs Brush was unable to recall any reason why the \$300,000 donation should have been split in this fashion, or why she or Mr Burke would have wanted \$100,000 retained in cash. She speculated that a donor might have wished to make it appear that there were two donations, that it might have been related to the polling company, Insight West, which was to be established by the ALP, or was needed for a cash float. She acknowledged that those speculative explanations were inadequate.

26.4.3 As mentioned in chapter 10, Mr Burke said there was an occasional need for cash and the ALP was considering the establishment of the polling organisation, Insight West, for which it wished to use cash in order to preserve confidentiality. He said that between \$5,000 and \$15,000 was paid to Mr John Utting for the purposes of polling, perhaps as a forerunner to Insight West. That claim to a desire to preserve confidentiality is not supported by the use of cheques drawn on the No 1 Account in favour of Insight West:

4.12.85	\$57,010
12.12.85	\$12,914
20.12.85	\$14,284

In addition, we note that when reporting to Mr Beahan, Mrs Brush recorded the payment of \$57,010 as a cost of setting up Insight West. Mr Burke explained the apparent inconsistency between a desire existing in July 1985 to use cash for confidentiality and the use of a cheque in December 1985 to meet establishment costs by saying he could not recall the specific reason behind the first decision to retain the cash for Insight West.

26.4.4 Mrs Brush gave evidence about this matter before Mr Burke. She said that in recent discussions with Mr Burke prior to her giving evidence, she and Mr Burke between them were unable to recall any reasonable explanation for retaining the \$100,000 cash. Mr Burke, however, said he and Mrs Brush had worked out why that cash was retained. He said that while discussing this issue, he repeated to Mrs Brush his memory of the phone call from Mr Musca, which we have canvassed in chapter 10. Mrs Brush had told him she needed the funds. He said they had in mind the polling organisation. Mr Burke claimed he and Mrs Brush both agreed, during this discussion, that those were the reasons they had retained the \$100,000 cash. Mr Burke's attention was then drawn to the evidence of Mrs Brush in which she had said that, during their recent discussions, they had been unable to recall why the cash had been retained. In response, Mr Burke first said there was more than one discussion and, if Mrs Brush was right that during one of the discussions they could not recall why the cash had been withheld, they must have worked out between them why it was withheld after she gave evidence. It was then pointed out to Mr Burke, however, that it was 1 May 1991 that Mrs Brush had given evidence of the inability to work out a reason, yet he had given evidence on 2 May 1991 and spoken of the explanation related to the polling organisation. Mr Burke then suggested that, if she was correct, they either discussed it between the conclusion of her evidence on 1 May and the commencement of his on 2 May, or "... when I gave evidence I had wrongly thought that she had agreed with me about the reasons for holding back the money".

26.4.5 It is impossible fully to convey the changes of ground reflected throughout the evidence of Mr Burke, and to a lesser extent, Mrs Brush. We reject Mr Burke's explanation. An examination of the uses to which the funds were ultimately applied reinforces our conclusion that the retention of the \$100,000 cash was not related to the establishment of the polling organisation.

26.4.6 According to Mr Burke and Mrs Brush, the cash was retained in an envelope in a safe in Mr Burke's office. Mr Burke said about \$87,000 of it was used for the purchase of stamps, as an investment for the ALP. In considering the evidence concerning that use, it is to be remembered that these were not the first funds from donations that had been applied to the purchase of stamps. The prior expenditure in this fashion was discovered as a result of investigations by the Commission and not volunteered by Mr Burke or Mrs Brush.

26.4.7 On 20 July 1984, an account was opened with the R & I Bank with a deposit of \$20,000. This amount came from Goudhurst Pty Ltd ("Goudhurst"), a company associated with Mr Danny Hill, who was a close friend of Mr Connell. The original cheque had been payable to the State Labor Organisation at the request of Mr Hill's secretary, but the late Mr Jack Walsh indicated it had not been made out properly. Mr Anthony Trevisan, the property consultant who signed the cheque, said it was changed to "Cash", but he was not sure on whose instruction. It would appear that Mr Walsh gave the instruction. Neither Mr Burke nor Mrs Brush could recall this particular amount.

26.4.8 A few weeks later, on 14 August 1984, an account was opened with the Westpac Bank ("Westpac") with a deposit of \$2. Mrs Brush recalled transferring from the Rural and Industries Bank of Western Australia ("R & I Bank") to the Westpac because a teller she knew had transferred to that branch of the R & I Bank and she wished to maintain a greater degree of confidentiality. On 15 August 1984, \$25,000 was deposited into the Westpac account. That amount was a donation from Oakhill Pty Ltd ("Oakhill"), Mr Connell's family company. The procedure relating to the donation followed a similar course to that obtained from Goudhurst. The original cheque requisition within Oakhill was dated 9 August 1984 and sought a cheque payable to the State Labor Organisation. That requisition was cancelled on 13 August 1984 and altered to seek a cheque payable to cash. The cheque was, accordingly, made payable to cash. Mr Peter Lucas believed it was Mr Walsh who gave the instructions for that alteration. Although the Westpac account was opened on 14 August 1984, it was not until 28 August that the account at the R & I Bank was closed and the balance of \$19,748.96 transferred to the Westpac account.

26.4.9 A little under \$45,000 was therefore deposited in the Westpac account by way of donations. From that account the following payments were made to Mr Bruno Santarelli, the Government driver who was actively involved in putting together Mr Burke's stamp collection:

	\$
30.8.8	1,360
11.9.84	11,894
20.9.84	2,000
8.10.84	5,181

23.10.84	2,996

Total	23,431
	=====

26.4.10 On the instructions of Mr Burke, Mr Santarelli regularly purchased stamps for him. It is unnecessary to canvass all the details, but it is clear that his involvement in the purchases was extensive. He said he frequently purchased the stamps from his own funds and was later recompensed by Mr Burke. In addition to stamps, although he was unable to remember details, Mr Santarelli said he probably purchased small items and paid for expenses such as cigarettes and drycleaning. He said he was unable to recall spending any large sums of money on items other than stamps. Apart from stamps, Mrs Brush was unaware of any expenditure by Mr Santarelli that might have led to payments to him between August and October 1984 totalling \$23,431. Similarly, Mr Burke was unable to account for the payments to Mr Santarelli, although he made mention of some hundreds of dollars being involved when he would "shout for the bar" during campaigning. Mr Burke acknowledged that, whatever amount from the total of \$23,431 was spent on stamps, it would have to be added to the \$87,000 that had been taken from the cash in the envelope during 1985 and used to purchase stamps.

26.4.11 While we accept that a small percentage of the total of \$23,431 paid to Mr Santarelli from August to October 1984 may have been by way of recompense for expenditure unrelated to stamps, we are satisfied that the great bulk of that amount was spent by Mr Santarelli in purchasing stamps on behalf of Mr Burke and in accordance with Mr Burke's instructions. It is clear that Mr Burke had commenced his large spending on stamps during the second half of 1984. Further, we are satisfied that Mr Burke instructed that the \$100,000 cash be retained from the donation by Mr Goldberg with the specific intention of using those funds, or a substantial proportion of them, for the purchase of stamps for his personal collection.

26.4.12 Before returning to the use of the \$100,000, we note that on 18 July 1985, one week before the donation was received from Mr Goldberg, \$10,000 cash was withdrawn from the No 1 Account. No record exists of why those funds were withdrawn, or how they were spent, and neither Mr Burke nor Mrs Brush was able to provide any satisfactory explanation.

26.4.13 Mrs Brush was first asked about the use of the \$100,000 in interviews conducted by investigating police officers on 1 March and 28 March 1991. Initially she said the money had been paid to candidates; but, after reconstructing with her solicitor, Mr Hugh McLernon, she said it had been applied to campaign purposes. The Commission has no doubt that those statements were deliberately false. On 28 March 1991, she said she could not think of any other uses. Prior to the interview with police on 28 March 1991, she had worked with Mr Burke attempting to reconstruct the uses to which the funds were put and she said they discussed expenditure on stamps. In not mentioning the stamps during the interview, she said she was not trying to avoid telling the police of that expenditure and she suggested that, prior to the interview, there had been mention of stamps in discussion with the police officers. That suggestion was denied by Assistant Commissioner Les Ayton and we accept his evidence. The first mention of stamps came from the solicitor, Mr McLernon, who was acting for Mrs Brush, toward the end of the interview of 28 March, when he indicated his instructions that a large portion of the cash was used to buy stamps. In our view, when being interviewed by the police, Mrs Brush deliberately withheld the information as to how the funds were used, not wishing to contribute anything more than was already known.

26.4.14 Mr Burke displayed a similar reluctance to provide information. He was interviewed by the police on 1 March 1991 in the presence of his solicitor, Mr McLernon. He was told of the payment of \$300,000 to Mr Musca's trust account and that \$200,000 went to the No 1 Account and the cheque for \$100,000 was cashed by Mrs Brush. He was asked whether he had any knowledge of that and he responded: "No, I don't have any recollections at all, not at all". Later in the interview, he said he did not know whether Mrs Brush cashed such a cheque; but, if she did, it would have been for the purpose of paying an account or to do something else "... in the normal course of things". He repeated that he had no knowledge of the \$100,000 or what Mrs Brush would have done with it.

26.4.15 Mr Burke said that, although there was never a time when he had forgotten the \$100,000 in the safe and its use for stamps, when being questioned he did not connect the \$100,000 being discussed with the \$100,000 that had been put in the safe. He said he put two and two together within a couple of hours of the interview during discussions with his solicitor. That explanation, however, was not consistent

with a response that Mr Burke gave to officers of the Commission only four days later on 5 March 1991. He was asked what would have happened to that \$100,000 and he responded:

"Well, Ayton asked me about that as well, and I simply said it would have just been used to pay normal accounts in the normal course of events. I would trust Brenda Brush with my life, and I have no reason to believe that anything untoward would have happened to any of the money. But we had large amounts of cash being donated by people who fell into some sort of surprising categories. For example, one member of a finance committee of the Liberal Party was quite a significant donor to the Labor Party, and for a range of reasons. We were dealing with some quite substantial cash donations, and my assumption is that the money was simply used to pay — either to get bank cheques or to pay accounts that were legitimate Labor Party accounts".

Mr Burke was asked in evidence why he did not tell the Commission officers of the use of those funds for the purchase of stamps. He was unable to explain satisfactorily why he had not provided that information to the officers from the Commission. He said he presumed that he did not recollect it at the time of the interview.

26.4.16 We reject Mr Burke's explanations. We have no doubt that, when spoken to by the police and Commission investigators in March 1991, Mr Burke was fully aware that the \$100,000 being discussed was the amount retained by him in the safe and used mainly for the purchase of stamps. He deliberately avoided advising the police and Commission investigators about the use of those funds, and was not truthful with the Commission when he said that he did not recollect that use during the course of those interviews. We are satisfied Mr Burke decided to disclose that use only when he realised he would otherwise be unable to account for the expenditure of those funds.

26.4.17 As previously mentioned, Mr Burke and Mrs Brush said the \$100,000 was kept in a manila envelope in the safe at the Premier's office. We note, however, the evidence of Mr Burke's ministerial assistant, Mr Vince Shervington, that on occasions he observed cash being removed from the safe and at other times he removed the cash himself. He said the cash was contained in a typical bank calico bag and he did not see cash in an envelope. He could not recall seeing any record of expenditure. When Mrs Brush cashed the cheque, a calico bag would have been the most obvious container into which to place the cash. We see no reason to doubt the evidence of Mr Shervington. Both Mr Burke and Mrs Brush said the only records kept of the

expenditure of that \$100,000 were notations made on the outside of the manila envelope in which they claimed the cash was contained. According to Mr Burke and Mrs Brush, that envelope is no longer available and both said they were unable to recall what happened to it. We accept the evidence of Mr Shervington in this regard. The Commission is satisfied that Mr Burke and Mrs Brush have contrived to tell the Commission that the cash was stored in the envelope as a means of creating a false explanation as to keeping a record and why that record is no longer available. There never was such an envelope.

26.4.18 In evidence given on 1 May 1991, Mrs Brush readily acknowledged expenditure on stamps. She said she would not have used the funds without the permission of Mr Burke and, apart from the purchase of stamps, she had only a vague memory of going to the safe and using the remaining funds for what she assumed were campaign purposes. As to the amount spent by Mr Burke, he did not have any records which could assist. Commission investigators conducted extensive inquiries of many stamp dealers and were able to establish that Mr Burke spent many thousands of dollars on stamps, particularly during 1985. Complete records were unavailable, however, and there is no evidence to confirm or contradict Mr Burke's assertion that he spent approximately \$87,000 of the \$100,000 on the purchase of stamps.

26.4.19 Ordinarily, Mrs Brush was a meticulous record keeper. She kept records of Mr Burke's personal accounts. She acknowledged that keeping a record on the outside of the envelope was in conflict with her usual practice and contrary to good accounting practice. She acknowledged that she was aware of the importance of keeping proper records, but was unable to explain why she did not follow her usual practice in respect of the expenditure of the \$100,000. While claiming that every item was recorded on the outside of the envelope, Mr Burke said any other record, such as invoices, had previously been destroyed. He was also unable to explain why there was no proper record kept.

26.4.20 Mr Burke said that when the stamps were purchased, he kept them separate from his own stamp collection. He said Mr Santarelli bought stamps for himself, the ALP and Mr Burke, and he claimed he gave instructions to Mr Santarelli as to where the stamps should be placed. He said he would identify stamps purchased for his own collection and the ALP stamps were kept in separate albums. Mr Santarelli said he was responsible for placing the stamps in albums and cataloguing the collection. He understood from Mr Burke that Mr Burke had previously sold most of his personal

collection to fund a political campaign and that he was starting to build up another collection. He said he and Mr Burke worked out how the stamps would be laid out and the recording of them. As to the issue of purchasing for the ALP, Mr Santarelli recalled Mr Burke wanted to frame a collection for the ALP but, while Mr Burke might have previously told him that purchases were for the ALP, Mr Santarelli did not recall him having done so. The evidence of Mr Burke that he instructed Mr Santarelli to keep the collection separate is contradicted by the following evidence of Mr Santarelli:

Q: You were putting them [stamps] in albums, weren't you?

A: The stamps. Yes.

Q: Yes. You were putting the collection together?

A: Yes.

Q: When the stamps were bought, you would put them in an album and you would make the notations to go with them. Is that right?

A: Yes.

Q: So as you put them together you didn't put some stamps into a special album that was supposed to belong to the ALP?

A: No.

26.4.21 In his initial evidence concerning the stamps, given on 2 May 1991, Mr Burke said that during 1988 he sold a number of stamps belonging to the ALP. He said they failed to realise the investment price, the shortfall being about \$20,000, and he made up the shortfall from his own resources. Having made up that shortfall, he arranged for \$50,000 to be distributed by Mrs Brush to particular ALP candidates, thereby repaying \$50,000 to the ALP. He said no one apart from Mrs Brush, and possibly Mr Santarelli, was aware that he had used the funds for the purchase of stamps. Only Mrs Brush and Mr Santarelli were aware of the sale, and only Mrs Brush was aware of the payments to the particular candidates. Mr Burke left Australia to take up his position in Ireland during July 1988. He said that he took the remaining ALP stamps with him. He estimated the value of those stamps as approximately \$18,000. He agreed that if the Commission had not eventuated, and he had not chosen to tell anyone in the ALP about the stamps, no one would have learned about them unless Mrs Brush had spoken up. He acknowledged that this was unsatisfactory behaviour. In addition, he said that when he was overseas, after completion of the sales, he placed ALP stamps in

albums together with his personal stamps. He then claimed he was able to distinguish the stamps, but nobody else could do so without his assistance. He said he had not thought of the problem that would be created if he had died. In later evidence given on 5 August 1992, Mr Burke said he felt he would have difficulty in identifying the stamps originally purchased for the ALP.

26.4.22 As to his explanation given in evidence on 2 May 1991, Mr Burke gave further evidence on 25 July 1991. He said he had not made his position clear in his previous evidence. He said that once he realised the sale of the stamps would not return their full value, he mentally appropriated the balance of the stamps as his own and regarded himself as indebted to the ALP for \$37,000. He said he arrived at that figure because \$50,000 of the \$87,000 spent on stamps had been repaid by the payments to the various ALP candidates. In addition, Mr Burke asserted that his previous evidence about the shortfall of \$20,000 on the sale of the stamps was incorrect and that he had either been mistaken or confused. He said the true figure was in the vicinity of \$8,000 or \$9,000.

26.4.23 The Commission finds that Mr Santarelli was not given any instruction to isolate stamps purchased for the ALP. He was building up only one collection for Mr Burke. We are satisfied Mr Burke's evidence concerning an instruction to separate stamps was contrived in order to avoid the conclusion that he was using ALP funds for the purpose of setting up a personal collection. Mr Burke's entire evidence about the extraordinary retention and expenditure of cash was most unsatisfactory and totally lacking in credibility. We are satisfied that Mr Burke deliberately diverted the funds from this particular donation with the intention of using those funds for his own purposes. Such purposes may have included, but certainly were not limited to, an intention to assist candidates of his choice. The implications of our findings in this paragraph are discussed in a confidential appendix to this report.

26.4.24 As to the framed collection, it is unnecessary to discuss the evidence in connection with that matter in detail. We should note, however, our view that Mr Burke deliberately attempted to avoid disclosing the existence of that collection. It is likely that he did so because it was made up of stamps purchased with ALP funds and, from the evidence and an examination of the frames, it is apparent that Mr Burke intended to present the framed collection to the ALP as a personal gift.

26.5 Some uses of No. 1 Advertising Account

26.5.1 As we have already mentioned, some uses of the funds in the No 1 Account were examined. From the No 1 Account, and from a subsequent account of a similar nature, a total of \$44,000 was paid to the Balga Soccer Club. This was a club in Mr Burke's electorate with which he had a long and close association. Mrs Brush thought the payments might have been donations to the club channelled through the account. This was the explanation first given to the police by Mr Burke. He said they were donations from Mr Connell. In evidence before the Commission, however, Mr Burke gave the following explanation:

"Well, the Balga Soccer Club was a prominent sporting club in my electorate. It was in a working class area providing a very valuable role in — in fielding sometimes as many as 28 or 29 junior teams in sporting competition, and it was facing bankruptcy. It had severe financial difficulties. That was the context. But the reason was that the Balga Soccer Club, not as a club but through its office bearers and members, had consistently supported the Labor Party at Federal and State elections in a number of important ways. It had, for example, manned polling booths at Federal and State elections, made signs and erected the signs, distributed pamphlets, organised social functions, and done a wide range of things to assist the Labor Party. On both of these bases, I thought it was something that was justified in supporting through the Labor Party's funding".

26.5.2 The payments made to the club were as follows:

30.8.85	\$15,000
30.10.85	\$ 9,000
17.3.86	\$10,000
27.5.87	\$10,000

The payments, therefore, covered the period August 1985 to May 1987. Mrs June Copley and Mr Martin Kirwan, then the Treasurer and President of the Balga Soccer Club Committee, believed that the donations had come from Mr Burke personally. Mrs Copley said the money came after Mr Burke was asked for a donation. Mr Burke denied that he had said or done anything that might have led them to that impression and maintained he made it clear that the money had come from a sponsor.

26.5.3 We reject Mr Burke's explanation insofar as he purported to suggest that these payments amounted to justifiable expenditure of ALP funds. Mr Beahan was undoubtedly correct in his view that such a use of campaign funds was inappropriate. In addition, we accept the evidence of Mrs Copley and Mr Kirwin that Mr Burke did not make it clear that the money was from a sponsor. He was content to allow the club to believe this was a personal donation. The implications of our findings in this paragraph are discussed in a confidential appendix to this report.

26.5.4 The other payments of particular concern were made to Mr Charles Wright, who operated a fundraising and business relations consultancy. He had done work for the ALP since 1976 in assisting with fundraising at a Federal level. He explained that, leading to the July 1987 Federal election, Mr Burke telephoned him and indicated Mrs Brush was without a job. He said Mr Burke wanted Mrs Brush to continue to look after the fundraising activity in Western Australia. Mr Wright had no objection, but told Mr Burke he could not afford to pay her. Mr Burke said he would arrange for payment. No fee was discussed. Subsequently Mr Wright made payments to Mrs Brush for which he was recompensed from the No. 1 Account. In essence, Mr Wright was a conduit for \$80,000 that was paid from the No. 1 Account to Mrs Brush. Mr Burke gave a similar explanation.

26.5.5 It is unnecessary to discuss this evidence in detail. It is clear that the work carried out by Mrs Brush did not justify a figure even remotely approaching \$80,000. Mrs Brush received \$55,000 of the total in advance of the work done. Although she suggested a certain amount should be allowed for past services, in our view such allowance, if genuine, would be very small. We are satisfied it was paid in advance because both Mrs Brush and her husband were unemployed and were said to be in difficult financial circumstances. Mr Burke's defence of the payments was unconvincing. The Commission is satisfied that he made use of campaign funds for the purposes of assisting a friend under the guise of employment. The implications of our findings in this paragraph are discussed in a confidential appendix to this report.

26.5.6 Mr Burke's appreciation that a number of payments made from the account would meet with Mr Beahan's disapproval is apparent on a consideration of a report provided to Mr Beahan at his request in December 1985. Although Mrs Brush initially maintained in her evidence that the report provided to Mr Beahan was a complete list of payments, she later amended her evidence. She said she thought a couple of items were omitted because Mr Burke was dealing with them in his electorate

or external to the State and they did not directly involve the State campaign. Mr Burke's general explanation for the omissions was that he knew the inclusion of particular items would cause friction between him and Mr Beahan and he indicated he was mainly referring to money given to candidates. He could not explain why other items were excluded, except that they might be issues about which Mr Beahan would argue with him. The Commission notes a fundamental omission from the report to Beahan. It did not state the total amount of donations received into the account. The records were later destroyed.

26.5.7 Mr Burke directed that the payments totalling \$50,500 made to particular electorate campaigns or individual members should not be included in the information provided to Mr Beahan. In addition, he omitted any reference to the payments to the Balga Soccer Club, a cash withdrawal on 18 July 1985 in the sum of \$10,000 and \$20,000 paid to the Shop and Allied Employees Association on 22 November 1985. Mr Beahan said funds were sought from the Union movement to run a campaign concerning privatisation and he remembered the Shop and Allied Employees Association "big noting themselves" about the fact that the donation from that Union was the largest. He was unaware that the Union's donation had been funded from the No 1 Account.

26.6 Gold

26.6.1 In maintaining that he purchased the stamps as an investment for the ALP, Mr Burke referred to purchases of gold which he said were also an investment for the ALP. It appears that \$93,569.17 of ALP donation funds was used to initiate trading in gold in accounts anonymously labelled "XYZ" and "BT". During the course of the gold trading, however, three purchases were made with cash, the sources for which cash remain unidentified. Those payments were:

	\$
21.4.87	120,000.00
2.6.87	50,000.00
11.8.87	37,166.64

Total	\$207,166.64
	=====

26.6.2 Mr Burke traded in gold with the assistance of Mr Michael Naylor who, it will be remembered, had a close association with Mr Burke over a number of years. In 1987 Mr Naylor was an executive director of WADC and was assigned the responsibility for establishing the gold trading programme of Goldcorp Australia Corporation ("Goldcorp"), a division of WADC. He said that, although the Perth Mint was a separate government instrumentality, WADC was, through Goldcorp, supervising the redevelopment of the Perth Mint programme. Goldcorp began trading in gold during the first half of 1987.

26.6.3 According to Mr Naylor, in 1987, under ordinary circumstances, it was unlikely that an individual investor could have traded in gold through Goldcorp. In his capacity as the director responsible for Goldcorp, however, Mr Naylor handled gold trading for Mr Burke through Goldcorp. Mr Burke was, at the time, the Minister responsible for Goldcorp. After initial inquiries as to the procedures for trading in gold, Mr Burke provided Mr Naylor with funds and instructed Mr Naylor to apply them in the purchase of gold. Mr Naylor said Mr Burke described the funds as related to Labor Party funds and assured Mr Naylor there was nothing improper or irregular about them.

26.6.4 Although Mr Burke was inclined to dispute that the various transactions were carried out on his express instructions, we accept the evidence of Mr Naylor that Mr Burke did provide such instructions. It is unnecessary to refer to those transactions in detail. Of significance is the evidence of Mr Naylor that, on one occasion, he received cash from Mr Burke at Mr Burke's home. He thought that cash was in the vicinity of \$50,000. Mr Burke said he was unable to recall such an occasion and he had no idea where he could have obtained that amount of cash. We see no reason to doubt the evidence of Mr Naylor. The Commission is unable to accept Mr Burke's extraordinary claim that he has no memory of such an occasion.

26.6.5 Commission investigators have made exhaustive inquiries and examined all the ALP related accounts of which they were aware. The investigators were unable to account for the \$207,166.64 cash that was used during 1987. This gives rise to the probability that either donations were made of which the Commission is unaware, or that it has not been told of all the accounts which might have been used to provide those funds. The Commission rejects Mr Burke's claim that he is unable to explain the source of those funds other than to say the funds must have been left over from previous fundraising campaigns.

26.6.6 When the gold trading account was closed, the balance eventually found its way into the ALP accounts and, in particular, to the legal defence fund. In addition, the ALP had previously assisted Mr Brush in connection with his legal fees and a small amount from the proceeds of the gold trading account was used toward reimbursement of the ALP contribution.

26.6.7 The gold trading exercise demonstrates that Mr Burke was prepared to use what were ordinarily regarded as campaign funds for most unusual purposes. The Commission observes, in passing, that it was extraordinary behaviour for a government instrumentality to permit the Premier or anyone else to trade in gold anonymously through accounts in fictitious names.

26.7 Loans

26.7.1 The Commission also heard evidence of large borrowings, exceeding \$500,000 in their total, by Mr Burke from his brother, Mr Terry Burke, and from a friend in Ireland, Mr J D Traynor. Remarkably, all of the loans were interest free. Those from Mr Traynor did not include any provision for repayment while the loan from Mr Terry Burke was repayable on 12 months' notice.

26.7.2 Mr Terry Burke funded the \$185,000 loan from the \$600,000 commission he received for fundraising on behalf of the ALP. The agreement for commission was entered into with Mr Beahan, as the State secretary of the ALP, and it is not for us to comment on these arrangements. While the fact that the loan to Mr Burke was funded from the commission received by Mr Terry Burke might tend to suggest it was not a genuine loan but was, rather, a sharing of the commission, both brothers deny that suggestion and there is no evidence to contradict them. The Commission makes no finding in this regard.

26.7.3 The loans from Mr Traynor were taken on nine separate occasions as follows:

	IR£	\$A approx conversion
February 1989	10,000.00	16,880
November 1989	69,293.48	129,200

January 1990	5,000.00	10,010
February 1990	10,000.00	20,980
August 1990	5,000.00	10,610
November 1990	5,000.00	11,720
December 1990	6,000.00	13,970
December 1990	5,000.00	11,650
June 1991	60,000.00	119,400
	-----	-----
	IR£195,293.00	\$A344,420
	=====	=====

Mr Burke was adamant that these were genuine loans and not drawings of funds that, in reality, had been transmitted overseas and belonged to him. There is no evidence to contradict him and we have not had the opportunity of hearing evidence from Mr Traynor. The Commission makes no finding in this regard.

26.8 Conclusion

26.8.1 The evidence revealed in this chapter is startling in its content and implications. It largely speaks for itself and renders any conclusion superfluous. Mr Burke's reprehensible conduct was made possible by a legal system which lacked specific controls over fundraising for political purposes. This topic will form an important part of the Commission's recommendation for law reform to be discussed in Part II of our report.

* * *

SCHEDULE

Date	Circumstances	Donor	Amount
			\$
1.7.82		A Bond	3,000
24.8.82		K Parry	2,000
3.9.82	State Superannuation Board (SSB) agreed to carry out a preliminary feasibility study into a joint venture with Esplanade Mandurah K Parry) - re Halls Head Development.		
11.82		D Dempster	3,500
17.11.82	SSB and Esplanade Mandurah entered into Heads of Agreement for SSB's acquisition of 50% interest in Halls Head joint venture.		
26.11.82		Multiplex (J Roberts)	10,000
24.12.82	SSB confirmed intention to purchase 50% interest in Halls Head joint venture.		
19.1.83		D Dempster	3,500
2.2.83		J Roberts	5,000
14.2.83		K Parry	1,000
Pre 1983 election		L Connell	25,000
19.2.83	State election - Mr B Burke became Premier.		
5.3.83	Federal election		
15.3.83		J Roberts	5,000
28.3.83	Cabinet established a Cabinet Sub-committee and Government Casino Advisory Committee to advise on casinos.		
11.6.83	Government invited expressions of interest in the establishment and operation of casinos in WA.		

Date	Circumstances	Donor	Amount
23.6.83	Expression of interest from Tileska Pty Ltd ("Tileska"). Contract of sale and joint venture agreement between SSB and Esplanade Mandurah signed.		
30.7.83		J Roberts	3,000
6.9.83	Tileska advised Casino Advisory Committee that Mr Dempster a joint venturer.		
26.9.83	Cabinet confirmed purchase of Northern Mining Company NL ("Northern Mining") for \$42 million.		
9.12.83	Donation originally described as \$5,000 donation plus \$45,000 interest free loan. The loan was converted to a donation on or about 30 May 1986.	L Connell	50,000
23.12.83	Mr Parker appointed Minister for Employment, Planning and Administrative Services, Minister assisting the Minister Co-ordinating Economic and Social Development and Minister for Minerals and Energy.		
20.3.84	City of Stirling granted planning approval for Observation City.		
2.4.84	Cabinet decided to locate casino on Burswood Island and award to Tileska/ Mr Dempster. The decision was changed by the Premier, Mr Burke, after advice from Mr L Smith. Tenders were to be called for construction of a casino on Burswood Island. Mr Dempster and Mr Roberts agreed that Multiplex would be the builder if Mr Dempster secured construction of casino.		
7.6.84	A short list of six applicants in respect of the casino was decided, including Tileska/Dempster.		
15.6.84		D Dempster J Roberts Bond Corp (A Bond)	25,000 25,000 25,000
30.6.84		K Parry	2,000
3.7.84	Six applicants for casino interviewed by Cabinet		

Date	Circumstances	Donor	Amount
	subcommittee.		
9.7.84	Short list of Tileska/Dempster and Swan River Park for casino announced.		
12.7.84		L Connell	25,000
24.7.84	Mr Brush appointed Chairman of SSB.		
19.7.84		Goudhurst Pty Ltd (D Hill)	20,000

Date	Circumstances	Donor	Amount
.8.84	Mr R O'Connor resigned from Parliament.		
10.10.84	Records suggest this was a donation to the John Curtin Foundation.	A Bond	100,000
15.10.84		K Parry	25,000
17.10.84	Records suggest this was a donation to the John Curtin Foundation.	W Anderson	33,000
2.11.84	Records suggest this was a donation to the John Curtin Foundation.	D Dempster	65,000
9.11.84	Casino Control Committee recommended award of casino to Tileska/Dempster.		
15.11.84		L Connell	35,000
19.11.84	Tileska/Dempster announced as successful applicant.		
31.12.84) 21.1.85)	Part A statement by J N Taylor Holdings Limited ("Holmes a Court") re Fremantle Gas and Coke Co Limited ("FGCC").		
11.1.85	Mr Parker wrote to FGCC refusing request for increase in share capital.		
29.1.85		Bell Group Limited (R Holmes a Court)	30,000
Late Jan/Feb 1985	Mr Connell approached by Mr Burke and Mr Parker re FGCC.		
7.3.85	Mr Connell met with Mr Parker and others and understanding reached concerning a "white knight" and on-sale to Government.		
10.3.85	SSB sold its interest in Halls Head to Esplanade Mandurah but its obligation to pay outstanding instalments of the purchase price remained.		
23.3.85	Commissioner for Corporate Affairs, Mr A Smith, issued a statement clearing Mr Dempster and Katanning in connection with allegations of an offence.		
18.4.85	Part A statement issued by Mathew James Pty Ltd (Mr Goldberg) for FGCC.		

Date	Circumstances	Donor	Amount
19.4.85	SSB purchased a 50% interest in the David Jones site (Midtown).		
23.4.85	Part B statement issued by FGCC recommending acceptance of Mr Goldberg's offer.		

Date	Circumstances	Donor	Amount
26.4.85	Burswood Property Trust launched.		
June 85	Mr Burke embarked on a fundraising campaign.		
15.5.85	Records suggest this was a donation to the John Curtin Foundation.	W Anderson	33,000
7.6.85	Mrs Brush collected 300,000 cash from L R Connell & Partners. This amount plus \$100,000 used to open Advertising Account No 1.	L Connell D Dempster	300,000 100,000
11.6.85		D Dempster J Roberts	100,000 150,000
12.6.85		A Bond	10,000
13.6.85		D Dempster	100,000
25.6.85	Tileska paid \$300,000 to Dempster Nominees.		
26.6.85	The first of three consecutive payments by Mr Dempster totalling \$300,000 (a conduit for Tileska?)	D Dempster (Tileska?) L Hancock	87,500 100,000
28.6.85		A Bond A Bond D Dempster (Tileska?)	150,000 150,000 132,500
3.7.85	Mr Parker wrote to Mallina Holdings Limited (Mr Dempster) and others inviting applications for a mandate to conduct a feasibility study for the extraction of LPG from the North West Shelf Gas.		
5.7.85		D Dempster (Tileska?) Accord Nominees (R Martin) V Yovich	80,000 5,000 20,000
9.7.85	<i>Daily News</i> reported capitulation by Mr Holmes a Court re FGCC. Mr Goldberg successful.		
11.7.85		A Bond	50,000
16.7.85		J Roberts	150,000

Date	Circumstances	Donor	Amount
23.7.85		W Anderson	150,000

Date	Circumstances	Donor	Amount
25.7.85	A \$300,000 donation was made through the trust account of solicitor, Mr L Musca. He was initially paid by L R Connell & Partners but Western Continental (Mr Goldberg) reimbursed L R Connell & Partners immediately. \$200,000 was deposited in Advertising Account No 1 and \$100,000 cash was retained in the Premier's office.	Y Goldberg	300,000
	Cheque was drawn on Halls Head joint venture account but presented as a donation from Mr Parry.	K Parry	150,000
2.8.85		L Hancock	100,000
7.8.85		V Yovich	20,000
16.8.85	Announcement of Brewery site sale by Mr Goldberg to Government.		
5.9.85		V Yovich L Hancock	20,000 100,000
10.9.85		J Roberts	5,000
Aug 1985- 1986	Mr Dempster sought exclusive mandate to conduct a feasibility study concerning a petrochemical complex.		
8.10.85		V Yovich L Hancock	20,000 100,000
4.11.85		A Bond	70,000
10.12.85	Letter from Mr Parker to Mr Hurley of Standard Chartered confirming agreement in principle for the purchase of FGCC.		
12.12.85		V Yovich	20,000
3.2.86		R Martin	10,000
8.2.86	State election - Burke Government returned.		
25.2.86	Mr Parker reappointed to various Ministries and appointed Minister for the Arts.		
2.3.86		A Bond	100,000
11.3.86	SSB resolved to investigate possible involvement		

Date	Circumstances	Donor	Amount
	in the Anchorage development.		
8.4.86	SSB resolved, subject to conditions, to purchase Anchorage development from Mr Martin, Mr Jones and associated companies.		
	FGCC wrote to Mr Parker requesting approval to increase authorised capital from 5,000,000 \$1 shares to 15,000,000.		
14.4.86	Mr Kingsmill sent a memorandum to Mr Parker recommending that the application for approval be rejected.		
17.4.86	Mr Parker's day sheet and diary record a 12.15 pm lunch meeting with Mr Goldberg.		
9.5.86	Mr Parker met with Mr Goldberg and Mr Pope (of Price Waterhouse). Donation by Mr Goldberg to Spare Parts Puppet Theatre discussed.		
21.5.86	Mr Parker wrote to FGCC agreeing to an increase from 5,000,000 shares to 10,000,000 shares. A second letter was subsequently prepared and backdated, authorising increase from 5,000,000 to 15,000,000.		
6.6.86		L Hancock	60,000
10.6.86	Mr Parker's day sheet refers to a lunch meeting with Mr Goldberg.		
2.7.86	Mr Parker told Mr Wilson of Spare Parts Puppet Theatre that he had found a private sponsor to fund the building at the back of 52 Henry Street.		
1.8.86		L Hancock	50,000
26.8.86	Mr Parker met with Mr Dempster and others concerning the petrochemical project.		
26.8.86	Mr Parker met with Mr Connell and Mr Goldberg at Mr Connell's home and agreed SECWA would purchase the gas utility for \$39.75 million. Donation by Mr Goldberg to Spare Parts Puppet Theatre discussed.		
8.9.86	Mr Parker wrote to Mr Dempster advising he had decided to seek Cabinet approval to the granting of an exclusive mandate for a feasibility study to Mr Dempster.		

Date	Circumstances	Donor	Amount
10.9.86	Mr Parker wrote to Spare Parts Puppet Theatre advising that he had secured an anonymous donor for \$250,000, which funds would be made available to him within the next two or three months.		
15.9.86	Mr Parker signed a submission to Cabinet recommending that a six month exclusive mandate be granted to Mallina.		
16.9.86	Mr Parker signed a written direction to SECWA directing that it proceed with the purchase of the gas utility for \$39.75 million.		

Date	Circumstances	Donor	Amount
19.9.86	Mallina informed Mr Parker of the incorporation of PICL to carry out the mandate.		
6.10.86	Cabinet declined to grant the mandate to Mallina/PICL. Cabinet approved the calling for expressions of interest.		
21.11.86	Mr Parker paid \$12,980 cash deposit for the purchase of 12 Knutsford St, Fremantle.		
27.1.87	Cabinet approved the award of a six month mandate to PICL to conduct the feasibility study.		
13.3.87	Mr Brush resigned as Chairman of SSB.		
19.3.87	Mr Lloyd appointed Chairman of SSB.		
6.4.87	This was half the donation promised by Mr Goldberg. Cheque was payable to Australian Elizabethan Theatre Trust and letter of 7.4.87 indicated preference in the allocation of the donation to the Spare Parts Puppet Theatre, which occurred on 30.4.87.	Y Goldberg	125,000
15.4.87	Mr Brush and Mr Martin charged with official corruption, forgery and uttering.		
16.4.87		J Roberts	12,500
21.4.87	Possible donation used to purchase gold. Source unknown.	120,000	
29.4.87		L Connell	75,000
1.5.87	This amount was refunded in June 1988.	Teachers Credit	5,000
11.5.87		A Bond J Roberts	50,000 20,000
2.6.87	Possible donation used to purchase gold. Source unknown.		50,000
15.6.87	Prime Minister's lunch.		
2.7.87	Four payments were made this day for a total of \$95,000.	D Dempster	95,000

Date	Circumstances	Donor	Amount
7.7.87		K Parry	25,000
10.7.87		L Connell	250,000
		V Yovich	25,000
		J Roberts	200,000
11.7.87	Federal election - Hawke Government returned.		

Date	Circumstances	Donor	Amount
15.7.87		A Bond	400,000
20.7.87	Government announced rescue of Swan Building Society.		
11.8.87	Possible donation used to purchase gold. Source unknown.		37,166.64
17.8.87	Government announced rescue of Teachers Credit Society.		
3.9.87		Westralian Forest Industries (D Cullity)	10,000
24.10.87) 25.10.87)	Rothwells rescue weekend		
8.2.88		L Hancock	20,000
26.2.88	Mr Burke resigned as Premier.		
23.3.88		Bond Corp	200,000
25.3.88		J Roberts	2,000
13.4.88	Mr Dowding's day sheet records a meeting with Mr Lloyd, Mr Edwards and Mr Connell.		
14.4.88	Donation for Dowding image campaign.	L Connell	50,000
6.5.88	These funds were used for the legal fees incurred by Mr Brush. Mr Connell was aware of the purpose but Mr Dempster said he was not.	L Connell D Dempster	50,000 20,000
11.5.88		J Roberts	2,000
1.7.88	This amount appears to be the balance of the funds raised for the legal fees of Mr Brush.	A Bond	30,000
28.7.88	Memorandum of Understanding signed by the Government in connection with the purchase of PICL.		
10.8.88		L Hancock	60,000
13.9.88		L Hancock	60,000
3.10.88	Cabinet approval re PICL		

Date	Circumstances	Donor	Amount
6.10.88	News conference re PICL		
14.10.88		L Hancock	60,000
3.11.88	Appointment of provisional liquidator to Rothwells.		

Date	Circumstances	Donor	Amount
10.11.88		L Hancock	60,000
7.12.88		L Hancock	60,000
21.12.88		A Bond	200,000
9.1.89		L Hancock	60,000
13.1.89		A Bond	200,000
16.1.89		A Bond	100,000
18.1.89		A Bond	200,000
20.1.89		J Roberts	100,000
26.1.89		Westralian Forest Industries (D Cullity)	20,000
4.2.89	State election - Dowding Government returned to office.		
16.2.89		L Hancock	60,000
23.5.89		J Roberts	2,500
28.7.89	Government applied to wind up PICL.		

TABLE OF CONTENTS

25.1	The term of reference	2
25.2	Chronological sequence of events	2
25.3	Factors of concern	11
25.4	The evidence of Mr Ayton	13
25.5	Negotiations with Mr Smith	17
25.6	The strategy	19
25.7	Conclusion	23

25.1 The term of reference

25.1.1 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 respect of the matter referred to in Schedule 2 which in their view warrant further investigation 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.

25.1.2 Paragraph 2.3 of Schedule 2 refers to "The adequacy of the police investigation of the matters referred to in items 2.1 and 2.2 of the Schedule".

25.2 Chronological sequence of events

25.2.1 The evidence discloses the basis for a concern about the adequacy of the police investigation to be the extraordinary delay in its commencement. Those circumstances arose in the following way and we would propose initially to describe the material events chronologically.

25.2.2 As has been mentioned in chapters 23 and 24 of this report, on 6 December 1988 Australian Federal Police ("AFP") executed search warrants on the home and business premises of Robert Mark Smith, a private investigator and former police officer.

25.2.3 As a result of that search a number of documents, cassette tapes, diaries and files of various description were seized. Among the documents seized were several items which held implications for the Western Australian Police Force ("the WA Force") and which may have revealed possible offences against State law. We shall refer to those documents as the "Smith materials". Relevantly, the Smith materials contained a copy of the "bribe tape" considered in chapter 23 of this report, the blue file, a 1987 diary and a computer disc on which was stored various documents including a transcript of the bribe tape conversation and various reports prepared by Mr Smith.

25.2.4 The Commissioner of Police, Mr Brian Bull, was not informed immediately of the existence or nature of the material seized from Mr Smith's premises.

25.2.5 It may be added that very little in the way of financial records relevant to Schedule 2 of the terms of reference was discovered in Mr Smith's possession and AFP officer Detective Sergeant Ken Harding was of the view that the premises had been "dry cleaned", with key financial records being removed.

25.2.6 On 6 December 1988, the same day on which the search warrants were executed, Mr Harding had a conversation with Mr Smith during which Mr Smith indicated he was not prepared, on the instructions of his solicitor, to speak to police at that time. Mr Harding gained the impression that Mr Smith might be prepared to talk at a later time.

25.2.7 On 29 December 1988 an AFP officer contacted Superintendent Les Ayton of the Internal Affairs Unit of the WA Force, at that time an Inspector, and advised him that one of the tapes seized from Mr Smith's house recorded the voice of Mr Ayton. It is not certain whether there was any discussion at that time with Mr Ayton about other materials found at Mr Smith's house. On the following day, 30 December 1988, Mr Ayton informed Mr Bull that the AFP would be forwarding materials in due course.

25.2.8 On 23 January 1989 Mr Ayton went to the AFP headquarters and listened to the tape of the conversation in which he was involved.

25.2.9 On 22 February 1989 Mr Hugh McLernon, a lawyer then acting for the former Premier, Mr Brian Burke, arranged to meet Mr Bull. Mr McLernon discussed

the Smith materials with Mr Bull, the latter having no prior knowledge of their content. Mr McLernon advised Mr Bull that there were certain materials soon to be provided by the AFP and apparently gave Mr Bull some general idea of the nature of those materials. Mr Bull contacted Inspector Allan Watson and informed him of what had transpired. Mr Watson and Mr Ayton were at that time the sole members of the Internal Affairs Unit.

25.2.10 On the evening of 27 February 1989, Mr Bull was visited by Mr Burke at his home. Mr Burke delivered a brief written statement. It contained an account by Mr Burke of his relationship with Mr Smith. It was obviously Mr Burke's desire to preempt any suggestion of impropriety on his part arising from his relationship with Mr Smith. Mr Burke said in the statement that he had been briefed about the content of the Smith materials. He confirmed that Mr Smith's firm had been employed by the State Government and by the Australian Labor Party as a "security consultant", and then went on to assert that:

"11. I have never personally employed Smith or given him any instructions on work which was to be done either for the State Government, its instrumentalities or the Australian Labor Party.

12. I have certainly not instructed him to obtain any documents or information. More especially I have never directed him on the methods he should adopt in relation to the work he was doing either for the Government, its instrumentalities, or the ALP.

...

14. If it turns out to be the case that Mr Smith or any of his employees have breached any law, either Commonwealth or of the State, then I can say categorically that this occurred without my knowledge and certainly without my instruction."

Mr Bull testified that Mr Burke had never before been to his house. Apparently he was leaving for Ireland shortly thereafter. He had taken up his duties as Australian Ambassador to Ireland and the Holy See some months before. Although there is no mention of it in the statement, it is also clear from Mr Bull's contemporaneous note of

the conversation that Mr Burke discussed matters that touched upon the bribe tape. On 3 March 1989, Mr Burke left for Ireland.

25.2.11 Some time early in March 1989, Mr Ayton went on annual leave.

25.2.12 On 7 March 1989 the Federal Commissioner of Police, Mr McAulay, wrote to Mr Bull officially advising him of the existence of some of the Smith materials.

25.2.13 On 13 March 1989 Mr Bull met with Superintendent Curnow of the AFP and there was a general discussion about the documents.

25.2.14 On 14 March 1989, Mr Bull advised Mr Watson of the matter and instructed him to attend at the AFP Headquarters to view the materials and ascertain which ones were to be the subject of a search warrant, this being the agreed method whereby the material would pass from the custody of the Federal Police to the State Police.

25.2.15 On 15 March 1989 the WA Force executed a search warrant on the AFP premises and obtained, *inter alia*, the Smith materials, which included a copy of the bribe tape, the computer disc, transcript and other documents mentioned earlier.

25.2.16 On 23 March 1989 Mr Watson, having inspected the papers, provided them to Deputy Commissioner Mott and Mr Bull.

25.2.17 On 30 March 1989 Mr Bull returned the materials, or copies thereof, to Mr Watson and requested him to carry out a preliminary investigation, which Mr Watson promptly commenced.

25.2.18 On 10 April 1989 Mr Ayton returned from annual leave. He was briefed by Mr Watson. In the days that followed Mr Ayton and Mr Watson discussed the matters at some length.

25.2.19 On 20 April 1989 Mr Ayton sent a report to Mr Bull, the contents of which are of some importance. The memorandum is more than four pages in length and contains 37 paragraphs. It is divided into three sections respectively headed "Corruption by a Public Officer", "Police Leaks" and "Political Considerations". A major part of the report, comprising 21 paragraphs, is devoted to "Corruption by a Public Officer". It is

a discussion of some of the issues arising out of the bribe tape and is relevant to term of reference 2.1, considered in chapter 23 of this report. In the preamble it is recognised that only one of the three issues appeared to be a matter for the Internal Affairs Unit, namely "Police Leaks". The observation is made that the issues were "politically sensitive in the extreme". In paragraph 20, in the section dealing with corruption by a public officer and related to the bribe tape, the following appears:

"Of prime concern also is the high political profile of the participants in both the original corrupt scheme and the subsequent covert taping of O'Connor.

The sensitivity of this issue has been increased by the fact there does not appear to have been any report of the matter by the former Premier or his brother to Police.

The above two issues notwithstanding, there is in my opinion no alternative but to commence Police inquiries into this matter forthwith."

25.2.20 The remaining paragraphs in that section relate to the need for extra resources if the Internal Affairs Unit is to be involved.

25.2.21 In the section headed "Police Leaks" there is no particular stress laid upon the need for a police inquiry but in the section entitled "Political Considerations" being a reference to the issues that were the subject of term of reference 2.2, considered in chapter 24 of this report, the following paragraphs appear:

"How Smith came to be in possession of the material must be addressed in a manner which causes minimal political upheaval, that more importantly does not rebound on and cause adverse criticism of this Force.

On the face of the material contained in the documents some action must clearly be taken and Smith should be interviewed.

I recommend also that there should be discussion as soon as possible with you to consider the best course of action and who best should handle what could become a messy and politically sensitive matter."

25.2.22 It is thus plain that on 20 April 1989, Mr Ayton was of the view that police inquiries should proceed without delay and that the matters were extremely serious and sensitive.

25.2.23 On about 25 April 1989, Messrs Ayton, Bull and Mott had a meeting in which it was decided that Mr Ayton would receive support for a full inquiry by the Internal Affairs Unit, to be pursued without delay.

25.2.24 Mr Ayton then discussed the matter with Mr Watson. Over the next few weeks Mr Ayton began to change his mind about pursuing the investigation promptly. He said that he commenced to formulate a different strategy that involved, in effect, waiting to see whether Mr Smith was prepared to co-operate. Mr Watson agreed with Mr Ayton's evidence in this regard.

25.2.25 On 26 May 1989 at a meeting attended by Messrs Bull, Mott and Ayton there was a discussion about Mr Ayton's change of mind. It is possible that the change had been mentioned in an earlier conversation, but it was at this particular meeting that the changed approach was officially acknowledged. In a written statement, Mr Bull described Mr Ayton's conclusion as follows:

"Mr Ayton advised us that he had further considered the material and after consultation with Inspector Watson was of the view that due to the material being incomplete and limited in context, the institution of evidence gathering investigations would be futile and little could be achieved concerning the material (including the tape) without firstly obtaining the co-operation of Robert Mark Smith.

Mr Ayton was confident that although Smith was at that stage unco-operative, he could, with the co-operation of the Australian Federal Police, secure the co-operation of Smith."

25.2.26 Mr Bull testified that he agreed with the strategy.

25.2.27 On 16 June 1989, Mr Bull returned the original copy of Mr Ayton's memo dated 20 April 1989 to him. A written notation was made on the document by Mr Watson. Mr Bull did not concede that there was anything unusual in his return of the memo and he made the observation that if he had any sinister intent whatsoever he would have shredded the document rather than return it to its author.

25.2.28 Early in March 1990 Mr Robert Smith was convicted after trial in the District Court of offences involving telephone tapping related to the Burswood Casino inquiry. He was sentenced to a term of imprisonment. No approach was made by police to interview him at that time nor was any attempt made to commence an investigation. In the intervening period, from April 1989, the police officers had carried out no investigations at all in relation to the Smith materials. Mr Ayton said that he kept in touch with the AFP concerning Mr Smith's attitude but he made no contact with Mr Smith personally. However, the evidence suggests that the AFP made no effort to interview him after 6 December 1988. There was a suggestion in the evidence that, from time to time, Mr Ayton may have obtained information from the AFP to assist an inquiry into the identity of a police officer who may have been leaking information but, unusually, none of these activities of Mr Ayton or his unit were recorded in any way.

25.2.29 There is no dispute that for almost 19 months from April 1989 to November 1990 the investigation into the Smith materials was not pursued. The matter remained dormant, purportedly pending some appropriate opportunity to interview a cooperative Mr Smith. At the heart of the inquiry covered in this chapter is whether this inactivity was the result of a *bona fide* operational decision or whether it was in truth a failure to discharge official duties, either because of a desire to avoid embarrassment to prominent political persons or because of some other motive.

25.2.30 On 8 May 1990, Mr Martin Saxon, an investigative journalist employed by *The Daily News*, an afternoon paper then circulating in Perth, wrote to Mr Bull asking the following question:

"Since January 1987, has the WA Government ever provided information to you (or your department) in relation to an alleged corrupt payment to a Stirling City councillor for his help in having a beachfront development approved?"

Sending this letter was one of several steps taken by Mr Saxon at about this time in the course of an investigation by him into the bribe tape. Those steps included conversations with both Mr Ray O'Connor and Mr Terry Burke. Mr Saxon did not receive any written response from the Commissioner or anyone else on his behalf to his question of 8 May. There was a cautious response from the WA Force's media relations section involving a number of telephone calls until ultimately Mr Saxon was informed

that the police force had received no communications from the State Government, officially or unofficially, in relation to that matter.

25.2.31 In the evening of 12 May 1990, Mr Bull received a telephone call at his home from Mr Terry Burke. Mr Burke reported having been approached by Mr Saxon asking questions about the bribe tape. The Commissioner had never before received any communication from Mr Terry Burke, either at his home or anywhere else. Mr Burke informed Mr Bull that he had been approached by Mr Saxon regarding the allegations made by Mr O'Connor and that he, Mr Burke, had refused to comment. He added that if Mr Saxon published a story about the matter, then he, Mr Burke, would probably make a statement to the media through his solicitor. Mr Bull made no comment save to thank Mr Burke politely for the information. After the call, he made a written note in his own handwriting recording the detail of what Mr Burke had said. That note was made available to the Commission by Mr Bull.

25.2.32 On 16 June 1990 Mr Ayton appears to have had a meeting with Mr Bull. A brief note of the meeting in Mr Ayton's hand is one of the documents tendered in evidence. The note reads as follows:

"16.06.90, 11.30, C of P

Discuss 1. Pace — inq. update
Budget?
Annual Report requirements
Update Hyman
AFP — discuss current * position — hold —
wait. Confirm. For Smith to be interviewed
— after trial."

25.2.33 This document provides some evidence that on the date it bears there was in existence a strategy to delay any investigation until after the trial of Mr Smith was concluded. Mr Smith would then be interviewed. The document could assume considerable importance because there is no other contemporary record in writing of the adoption by Mr Ayton of a "wait and see" strategy with respect to the investigation.

25.2.34 In July 1990 Robert Smith was charged with a further indictable offence, namely, giving false evidence to a Parliamentary select committee. The prosecution was laid by the Crown Law Department.

25.2.35 On 15 October 1990, the Smith/Martin trial referred to in term of reference 2.2 commenced. On 24 October the Crown Prosecutor cross-examined Mr Smith as to his credit. For that purpose the prosecutor utilised the Smith materials that he had secured from the custody of Mr Bull. It was at about this time that the fact that the Smith materials had been in the possession of the Commissioner for many months became public knowledge.

25.2.36 Mr Saxon did not publish anything about the bribe tape at the time that he spoke to Mr O'Connor and Mr Terry Burke and wrote his letter to Mr Bull. He said that over the following months he probably discussed the matter with contacts he had in the police force but he did not have any official discussion about it. The first time that he spoke to Mr Bull about the bribe tape was on 3 November 1990. It was a Saturday morning. It followed widespread publicity of the cross-examination of Mr Smith on the contents of the Smith materials. Mr Saxon telephoned Mr Bull at home to tell him that the following day he would be running a story in *The Sunday Times*. He invited Mr Bull to comment. Mr Bull declined to make a comment on the record, but there then followed a private discussion. It appears that Mr Saxon and the Commissioner had a good relationship based on mutual trust. They had engaged in private discussions in the past. Mr Saxon's recollection of the discussion on this occasion is informative. It tends to corroborate Mr Bull's more general testimony. Mr Bull explained to Mr Saxon that essentially it was a very difficult case and one very hard to investigate. He confirmed that the police officers had not yet spoken to Mr O'Connor, Mr Terry Burke or Mr George Cash. He indicated that they had been waiting for the outcome of the several trials involving Mr Smith. Mr Saxon's evidence then proceeded:

"He [Mr Bull] confirmed that the police had not spoken to Mr O'Connor, Mr Terry Burke or Mr Cash. He indicated that they'd been — they'd been waiting for the outcome of trials. This was — he didn't use the word 'strategy', but he said that this was sort of part of a game, kind of, if you like. And I said, 'What, you're simply waiting for Smith to roll over, and you need him to put the case together?' And he essentially said, 'Well, yeah. That's — you're spot on. That's exactly what we're waiting for'."

Mr Saxon then added that while he didn't exactly agree with the strategy, that was what Mr Bull had said. Mr Saxon published his article in the paper the following day, confining himself so far as the WA Force was concerned to the statement that the Commissioner declined to comment.

25.2.37 Mr Saxon's evidence presents the Commission with some difficulty. It is perhaps surprising that it should be Mr Saxon, not Mr Bull, who articulates the strategy so exactly:

"What, you're simply waiting for Smith to roll over, and you need him to put the case together."

Nevertheless, after careful consideration, the Commission has concluded that it should accept Mr Saxon's evidence as a substantially accurate account of his conversation with the Commissioner. It therefore supports a conclusion that a *bona fide* strategy existed.

25.2.38 On 5 November 1990, Mr Smith was sentenced to a term of imprisonment and at the same time the investigation by the Internal Affairs Unit officially commenced. On that date the Commissioner also made a statement on television in answer to questions from a journalist. During that interview Mr Bull stated that "the matter has been investigated to the fullest extent as circumstances permitted". In his evidence Mr Bull explained that he felt he had answered the media appropriately and that responses to a journalist are different to those that would be required by a Royal Commission.

25.2.39 From 5 November 1990 the now enlarged Internal Affairs Unit, under the direction of Mr Ayton, vigorously pursued the investigation into the issues. That investigation involved many police officers and continued without interruption until it concluded with a report submitted to this Commission in April 1991.

25.2.40 The report focused on the question of whether there was evidence that offences had been committed.

25.2.41 Concerning the issue that arises out of the bribe tape, the Police expressed the view that there was a "grave suspicion" that "something distasteful" took place concerning the matter but that the inquiry was inconclusive because of the lack of hard evidence of payment of money. Other related issues, namely whether there had been concealment of a crime by the Premier or his brother in not reporting the matter to the Police or whether improper use had been made of the tape, were not pursued because of lack of evidence. It was concluded by the Police that there had been an offence committed by Mr Terry Burke against section 4 of the *Listening Devices Act 1978* but that it was statute barred.

25.2.42 The report also covered aspects relating to the possible disclosure of official secrets, breach of police regulations, unlawful use by Mr Burke of the information provided by Mr Smith, whether Mr Smith had been paid from public funds and whether Mr Burke had known that Ms Anne Sutton was to obtain the Liberal Party accounts unlawfully.

25.2.43 The police concluded that there was no doubt that unknown police officers had disclosed official secrets to Mr Smith and had breached police regulations but there was no evidence of the identity of the culprits. There was also no evidence that the information provided by Mr Smith to Mr Burke concerning various opposition members of Parliament was used unlawfully, and there was no evidence that Mr Smith had been paid for his services from public funds.

25.2.44 Concerning the question of Ms Sutton, the police concluded that there was no evidence Mr Brian Burke had paid the sum of \$400 to Mr Smith for Ms Sutton for the Liberal Party accounts, and lack of evidence generally prevented further inquiry.

25.2.45 To sum up, the report demonstrates a thorough inquiry into the issues arising from the Smith materials, but recommends no prosecutions, either because of lapse of time or because of a conclusion that there was no evidence or insufficient evidence to establish the commission of an offence.

25.3 Factors of concern

25.3.1 On the evidence that has been presented to us, the adequacy of the police investigation, once it commenced on 5 November 1990, is beyond criticism. However, the central question for us to determine is whether there was any impropriety associated with the delayed commencement of the investigation from approximately April 1989 until November 1990. It will also be appropriate for the Commission to determine whether the police investigation as a whole, defined as commencing when the WA Force received the Smith materials and ending when the report was presented, was adequate.

25.3.2 Both Mr Ayton and Mr Bull gave evidence on two occasions before the Commission and they were examined at length. Mr Watson gave evidence on one occasion.

25.3.3 The focus of our inquiry has been an examination of the reasons for the inactivity on the part of the WA Force during the period from about April 1989 until 5 November 1990. The questions that were raised during the hearing fell broadly into the following categories, namely:

- (a) Whether there was some political or other interference from outside the police force — particularly bearing in mind that the issues raised in terms of reference 2.1 and 2.2 involved senior politicians from both sides of politics.
- (b) Whether there was some interference from inside the police force in the sense of Mr Ayton being directed or pressured in some way by the Commissioner not to take action.
- (c) Whether Mr Ayton's attitude to the investigation was influenced by his professional experience of other major inquiries of a sensitive political nature, together with a suspicion of interference by Government in the affairs of the WA Force, leading him to place undue reliance on the co-operation of Mr Smith as an indispensable element of a successful outcome.
- (d) Whether Mr Ayton or any other police officer was concerned about the possibility of adverse effects upon their own career prospects.

25.3.4 The principal feature of the evidence before us was that concerned with the delay itself. It may be said that the delay of almost 19 months before the inquiry was commenced was *prima facie* an extraordinary and excessive delay. During that period at least one important witness, Mr Beckwith, died. Furthermore, as a matter of human experience, recollections fade and evidence becomes stale. Another aspect was the fact that the inquiry's commencement followed immediately upon the media furore when some of the Smith materials became public, thereby focussing attention on the delay in police investigation. This raised concern about whether there ever would have been an inquiry if the matters had not been made public.

25.3.5 The concern over the delay was heightened by the fact that Mr Ayton had recommended prompt and concentrated action in his report in April 1989 and had received every encouragement from the Commissioner. Yet almost immediately, before

any action was taken, further reflection led Mr Ayton to change his mind and delay the investigation indefinitely. Notwithstanding the detailed written report to the Commissioner that contained the original recommendation, the change of mind and the reasons for it were not committed to writing. They were the subject of a verbal report to the Commissioner followed by the Commissioner's acquiescence expressed by Mr Bull in the same conversation. The absence of any contemporaneous record of such a significant strategic decision provides a substantial reason for this inquiry. So far as we have been able to discover, the change of plan was not evidenced in writing anywhere until 13 months later which was about five months before the Smith/Martin trial, and then only in a cryptic handwritten note.

25.3.6 There were 13 witnesses who gave evidence relevant to this term of reference but of course the central witness was Mr Ayton.

25.4 The evidence of Mr Ayton

25.4.1 Mr Ayton stated that he had known Mr Smith for some years and that he had met him when Mr Smith was a police officer prior to his resignation in 1978. He had interviewed Mr Smith in about October 1987 in the course of his inquiries into the Casino cost overruns and in particular in relation to a query about leaks from the police force. Mr Ayton believed that Mr Smith had lied to him during that interview. Other than that, it does not appear that Mr Ayton knew Mr Smith well. He told the Commission that he believed, rightly or wrongly, that Mr Smith was evasive, unco-operative and that he would tell lies. That was one of the reasons why he did not interview Smith immediately upon receiving the Smith materials.

25.4.2 Mr Ayton repeatedly stated that he felt that Mr Smith was the key to the total inquiry and he was most anxious not to put Mr Smith "off side". He also was convinced, in spite of all of Mr Smith's denials, that Mr Smith was being "looked after" by others. He put it in terms that he was aware Mr Smith had steadfastly refused to admit he was working for powerful and influential people in the business and political world and it was against that background that he made a decision not only not to interview Mr Smith but also not to interview others lest he thereby jeopardise the possibility of Mr Smith becoming co-operative in the future. From time to time, Mr Ayton was in contact with the AFP, and learned that Mr Smith "was not coming across with the goods for the AFP". He also knew that Mr Smith had not been co-operative in the course of the Casino inquiry. The Commission finds it strange that

Mr Ayton did not attempt to interview Mr Smith personally before 5 November 1990 in order to judge for himself the chances of securing the latter's co-operation. He relied wholly on the AFP. Yet, strangely, the AFP apparently didn't interview him either after 6 December 1988. In his evidence, Mr Ayton insisted that he felt the Observation City inquiry was not a "goer", in the sense that it was unlikely to succeed. He did not feel it was worthwhile pursuing the parties involved before he obtained the co-operation of Mr Smith. He said that the bribe tape had a number of bizarre features, that it was "not much" evidentially and he made a value judgement to wait until an opportune moment arose to interview Mr Smith.

25.4.3 Mr Ayton's approach is reflected in this passage of the transcript:

A: Before you use Smith as a witness he's got to be co-operative. He's — we are trying to enlist Smith to work on our side on a number of issues. To do the Stirling City Council inquiry, bearing in mind that I considered that he was being looked after, would simply edge him more into their camp and make the likelihood of him working for us more remote ...

Q: But he would not have been at risk, would he, except for some perhaps minor matter, with respect to the Stirling City inquiry?

A: If you focus on the City of Stirling entirely what you are saying would be right but I wasn't focusing entirely on the City Stirling. I took a decision that other issues were more important.

25.4.4 Mr Ayton vigorously rejected any suggestion of outside political interference of any kind, stating that he was apolitical and implying that any such interference would only have made him more determined in his efforts. Mr Bull's assessment of Mr Ayton as a skilled and resourceful investigator supports this response. Mr Ayton also denied any suggestion that Mr Bull had interfered in his decision in any way.

25.4.5 He said that he reached an appreciation that the inquiry would have to commence without delay when the newspaper publicity became excessive in early November 1990 following the Smith/Martin trial.

25.4.6 A number of aspects raised during Mr Ayton's examination warrant mention. He stated that there was a feeling amongst some members of the WA Force in 1987, and subsequently, that there had been political interference in the force from time to time. He denied any suggestion that there had been such interference concerning the Observation City inquiry. However he agreed there was some concern reflected in a dispute that arose in about July 1987 between the Government and the Police Union. A police officer, Mr Pace, who, as we mentioned earlier, led the police raid on the premises of businessman Robert Martin, was one of five police officers whose promotion, having been recommended by Mr Bull, was held up by the Minister for Police, Mr Gordon Hill. In due course the promotion was approved but thereafter an inquiry was held that resulted in Mr Pace's resignation. Mr Ayton agreed that there was some perception amongst members of the police force, whether or not it was soundly based, that the promotion of Mr Pace had been held up as a result of his having led the police raid against Mr Martin, who was an associate of Mr Len Brush, who in turn was a close associate of the Premier, Mr Burke.

25.4.7 Mr Hill rejects the proposition that Mr Pace's promotion was held up for political reasons. His evidence is that he delayed accepting the Commissioner's recommendation that Mr Pace be promoted because of allegations suggesting incompetence and improper association which came to his notice. Mr Bull was overseas at the time and the Minister held the matter up pending his return so that it could be discussed at a personal level. This happened and the promotion was approved. Mr Hill also observed that Mr Pace was not the only police officer who had his promotion held up temporarily, and maintained that Mr Pace's involvement in the Brush/Martin affair had nothing at all to do with the matter. Of course, while it is good to have Mr Hill put the record straight, if in fact there was a perception abroad, albeit unfounded, the existence of that perception may have influenced Mr Ayton's approach to the problem of handling Mr Smith.

25.4.8 Mr Ayton also believed that there was some Government interference in the decision not to pursue a prosecution with respect to the Burswood Casino cost overruns and rights issue inquiry. Mr Ayton had led that investigation and made his recommendation in about May 1987. In substance, he told the Commission that he believed that an offence had been committed. His recommendation went to the Corporate Affairs Department, but no prosecution was instituted. The combined effect of these matters, according to Mr Ayton, led him to a concern about Government involvement in police matters generally.

25.4.9 Mr Ayton gave evidence at greater length before the Commission when he was called a second time. He expanded on his view of Mr Smith. He said that he felt that Mr Smith was merely a tool of the people who employed him. For there to be any chance of pursuing those who had employed him, he regarded Mr Smith as an essential witness. He agreed that evidence given by Mr Smith would not be likely to be believed because he had lost any credibility as a witness of truth, but his importance lay in the fact that he was, so Mr Ayton believed, in possession of hard corroborative evidence in the form of documents or tapes that were secreted somewhere and that would incriminate those who had employed him.

25.4.10 Mr Ayton also said he was not concerned about his personal promotional prospects. He noted he had already been appointed an Inspector at the relevant time.

25.4.11 With respect to the unrecorded reversal of the recommendation set out in the memorandum of 20 April 1989, Mr Ayton stated that it was not his practice to reduce things to writing on every occasion. He spoke of briefings with the Commissioner from time to time which were not minuted. It appears that on many occasions issues were discussed which were of such a sensitive nature that a written record was considered inappropriate. He rejected the suggestion that the lack of written evidence of the change of plan was significant.

25.4.12 As we have said, Mr Ayton testified that after the strategy had been formulated and during the months that followed, he kept in contact with the AFP concerning Mr Smith's attitude. He kept the matter under review although he did not carry out any investigations. However, a stage was reached after the passage of several months when he doubted the wisdom of the strategy and he became concerned that the matter was "dragging on". He did not keep a running sheet of any of the communications he had with the AFP during this time as he felt it was unnecessary. He was merely monitoring the people that were "around Mr Smith".

25.4.13 Mr Smith's first trial in February/March 1990 came and went without any attempt being made by Mr Ayton to contact him. Mr Peter Beckwith, who, according to Mr O'Connor's statements on the bribe tape, had played a key role in securing approval of the Observation City development, died in about June 1990 without having been interviewed by any member of the WA Force, notwithstanding that both the Commissioner and Mr Ayton had some awareness of Mr Beckwith's illness prior to his death. Mr Ayton conceded that he could well be criticised for not trying to obtain a statement from Mr Beckwith before his death.

25.4.14 Mr Ayton made some inquiries concerning police leaks during the period May 1989 to November 1990 and obtained information from Mr Harding of the AFP. However, he rejected any suggestion that one of the reasons for his inactivity in investigating the bribe tape was that he was preoccupied with concerns about police leaks.

25.4.15 Mr Ayton's explanation for commencing the inquiry on 5 November 1990 was expressed in the following passage of the transcript of his evidence:

A: I had a meeting with the Commissioner on that day to discuss the issue at 8 o'clock in the morning, and we ran over the strategy again ... and I was a bit concerned that I may have been wrong... ...And then later that day after the meeting the Commissioner also got a call from Saxon that he had some documents. Because remember, there was a whole lot of media speculation about Stirling City Council. And later that day I got a call to say that Smith was extremely agitated and unhappy, and so I went and saw him, and that's when it started. That's when the inquiry started, when I thought I had Smith. I mean, that's simply the reason.

Q: And you thought you had Smith because of what he had intimated to you in that interview in the interview room in the lock-up?

A: What happened was that I got a call to say that .. I mean, he got a pretty stiff sentence. I got a call to say that he had got a stiff sentence and he felt pretty aggrieved by that, and I thought, 'Here's a chance. Let's have a go here'. So I went and saw him. And he was pacing and ranting and roaring. And that's why the tape only contains part of the interview. And he indicated that he had talked it through with his solicitor, and that's when I went and saw Mazza."

25.4.16 Mr Ayton interviewed Mr Smith on 5 November 1990 but the conversation that was recorded provides no indication that Mr Smith was in a co-operative mood.

25.4.17 The investigation that commenced on 5 November 1990 and ran for the next six months or so, culminating in a report dated 24 April 1991, was fully diarised

in a police "running sheet". The running sheet is a daily record of all activity taking place pursuant to the inquiry. Looked at overall, it is clear that the investigation was vigorous and adequate in the sense that all available relevant witnesses were interviewed. There do not appear to be any obvious oversights or omissions.

25.5 Negotiations with Mr Smith

25.5.1 A major issue raised during the hearing with respect to the conduct of the inquiry after 5 November 1990 was whether Mr Smith at any stage, but particularly in early November, gave any indication that he was prepared to co-operate. This seems to have been the view of Mr Ayton and Mr Bull and the suggestion was made by them that the strategy very nearly succeeded because of that fact.

25.5.2 Some parts of the interview of Mr Smith by Mr Ayton in the detention centre of the District Court on 5 November 1990 were not recorded. According to Mr Ayton, it was during those parts that Mr Smith gave the impression he was prepared to co-operate. In the running sheet it is expressed thus:

"Interview RM Smith — Detention Centre taped — part — aggressive — possible opening — defensive of Burke's agreed to talk, wants Solicitor."

25.5.3 Mr Smith denied that he gave any such impression. Mr Smith's solicitor was Mr James Mazza. Mr Ayton, at Mr Smith's insistence, dealt through Mr Mazza thereafter. On 8 November 1990 there is an entry in the running sheet which reads as follows:

"Discussions Jim Mazza, Smith prepared to co-operate, can implicate 3 — 4 prominent West Australians. Wants something in return — arrange through J Mazza and will then talk. Mazza will advise to co-operate, wants to look after Smith."

25.5.4 Mr Ayton relied on that entry and the unrecorded statements of Mr Smith made three days previously, to support his assertion that Mr Smith made a decision to co-operate and that the strategy very nearly succeeded.

25.5.5 Mr Mazza's evidence contradicted the entry in the running sheet. He said that his comments to Mr Ayton were not to the effect that Smith "could" implicate 3 — 4 prominent West Australians but that if he was to do so (without Mr Mazza being

able to say whether he could or not) then he would expect something in return in the form of immunity from prosecution. Thus the evidence of Mr Mazza is suggestive of a misunderstanding.

25.5.6 Mr Mazza's evidence of whether or not an indication had been given from Mr Smith that he "could" implicate 3 or 4 prominent West Australians is as follows:

"That afternoon, I think it was in the afternoon, Inspector Ayton rang me and we discussed what concessions might be available to Smith and he said that he had seen Mr Bull, Commissioner of Police, and Mr Bull had said that he could give concessions. I told Mr Ayton that we wanted the concessions listed in writing and that we would discuss it further along the line ...

At the same time I reasoned with him and I told him that if Mr Smith's evidence is so important and so vital that it would be practical commonsense that the prosecution against him be cancelled because if ... these were the words, not the exact words but it was a conditional situation — if Mr Smith could deliver 2 or 3, it might have been 3 or 4, prominent West Australians to him that would be worth their while to do it but at no time did I say to Mr Ayton, Inspector Ayton, that Mr Smith had 3 or 4 prominent West Australians which he could deliver to him. I categorically deny that I said that to Mr Ayton. Mr Smith at no time ever told me that he could deliver any body, prominent or otherwise, and I had no instructions whatsoever to make any statement such as that and, indeed, I didn't make that statement."

25.5.7 We accept Mr Mazza's evidence. It follows that there was no indication given by Mr Smith through Mr Mazza that he could provide information that would implicate three or four prominent West Australians. There is no dispute that the phrase "three or four prominent West Australians" was mentioned but it was mentioned in a hypothetical content. Mr Ayton must have misunderstood the effect of Mr Mazza's statement. Mr Smith denied having made any statement different to Mr Mazza's understanding of his instructions.

25.5.8 During the following weeks there were extensive negotiations conducted from time to time between Mr Ayton and Mr Smith, through Mr Mazza, with a view to offering some benefits to Mr Smith in return for co-operation. From Mr Ayton's point of view co-operation meant that Mr Smith would both reveal who his real, hitherto

undisclosed, principals were, and provide hard evidence to corroborate his statements. His approach was based upon a conviction that Mr Smith was possessed of such information.

25.5.9 The benefits that Mr Smith sought were chiefly centred around the withdrawal of a prosecution then pending against him for giving false evidence to a parliamentary select committee of inquiry. As Mr Ayton agreed in evidence, the negotiations were never likely to succeed because it was too difficult to arrange for a charge of that nature to be withdrawn. The then Crown Prosecutor, Mr John McKechnie QC, gave evidence of that difficulty. Thus Mr Smith wanted a concession that was not within Mr Ayton's power to arrange. Indeed, the negotiations concerning immunity never actually commenced because Mr Smith never provided the requisite signed statement outlining the evidence he could give if immunity was granted.

25.5.10 Whether or not Mr Smith was prepared to co-operate on or after 5 November 1990 does not bear significantly on the determination of the question of whether the police inquiry was adequate. If Mr Smith had begun to co-operate at that time in the sense given to that word by Mr Ayton, and had provided the evidence the latter desired, it would still leave a question concerning the rationale for the delay of 19 months. There is no dispute that during this period no contact was made with Mr Smith by Mr Ayton and no effort whatsoever was made to interview him. Indeed, the strategy of waiting until the various trials of Mr Smith that were pending in 1989 or 1990 were completed served only to diminish the bargaining power of the WA Force because Mr Smith had less to gain from co-operation.

25.6 The strategy

25.6.1 There is no dispute that on 5 November 1990 there was extensive publicity which put pressure upon the police to begin the inquiry. Mr Ayton said that he felt there was "an indication" from Mr Smith that he could co-operate although it seems to the Commission that there must always have been a degree of wishful thinking in the belief that a harsh sentence would convert Mr Smith's attitude from hostility to co-operation. It appears to the Commission that the intense media pressure on the police supplies the explanation for the commencement of the inquiry. Mr Ayton was asked whether the inquiry would have commenced if there had been no media pressure and he replied:

A: The fact that it weighed heavily on us, as I have said in evidence, I agonised about that with Allan (Watson) on several occasions. We'd wondered whether we had done the right thing. Probably we would have had to go. I mean, I just don't know, but certainly — quite frankly I thought I had made the wrong decision, when it had gone so long."

Q: When did you have that thought? Do you still have it?

A: Yeah I'm still doubtful. I mean the practical policeman's viewpoint says `yes you're right' but there is always at the back of your mind a lot of `what ifs'.

25.6.2 Mr Bull also gave evidence on two occasions and he corroborated the evidence of Mr Ayton in material respects, including the change of plan and the factors that were weighed up at the time the strategy of "wait and see" was adopted in May 1989. He also rejected the proposition that significance should be attached to the lack of written record of the change of strategy. He commented that police often decide to wait and that "we can afford to be very patient".

25.6.3 By the end of 1989 and the beginning of 1990 he said that although he did not feel that the strategy was flawed, he felt it was going on longer than expected. Mr Bull was calm and assured in his evidence and he denied ever bowing to media pressure. He commented that Mr Ayton was a fearless police officer and he observed that he would not have given the job of pursuing inquiries into the Smith papers to him if he had not wanted the job properly pursued. He asserted that he himself was apolitical and rejected the proposition that he had any concerns about the WA Force carrying out an inquiry that would have implications for both sides of politics.

25.6.4 Specifically he denied having made any statements of the kind to which former Deputy Commissioner Frank Peters testified. Mr Peters stated that he attended a meeting in early 1989 with Mr Bull and Mr Mott at which Mr Bull had held up what became known as the blue file and said something to the effect that if he went on with the investigation he'd have to "lock up people on both sides of the political fence" — thereby suggesting that he did not want to upset the politicians.

25.6.5 There is a history of animosity between Mr Bull and Mr Peters. We have before us the written statement of former Deputy Commissioner Mott who is in Papua New Guinea, to the effect that he could not recall any such statement being made by Mr Bull. Whether or not the statement was made, there is no other suggestion in the evidence that the reason the inquiry was not pursued between May 1989 and November 1990 was because of fear of possible political repercussions. The Commission discards such a factor as having any bearing on the decision to "wait and see".

25.6.6 Mr Bull recalled being of the view that Mr Smith had "turned" but then changed his mind. He felt that the strategy "almost succeeded". Of course, his view would necessarily reflect what he was told by Mr Ayton. There is no suggestion that he had access to any other relevant source of information.

25.6.7 Mr Watson's evidence did not add greatly to that of Mr Bull and Mr Ayton although it was supportive and corroborative. He stated that the number of remands that Mr Smith obtained of the hearing of the various charges that were already pending against him during 1989 and 1990 was unforeseen. Hence the process of Mr Smith being dealt with by the Courts took far longer than the police had expected. There was a stage, he said, when he became concerned as a police officer because the matter was "going on and on" and there did not appear to be any progress. He said that the strategy to "wait and see" was reviewed from time to time. He did not feel it at all strange that the change of strategy in May 1989 was not reduced to writing.

25.6.8 The Commission has heard sworn evidence from three senior police officers to the effect that there was a strategy formulated between 20 April and 26 May 1989 to "wait and see" whether Mr Smith was prepared to co-operate with police. Each of these officers was examined at some length and they were each adamant that the strategy existed. Furthermore, as we have said, once accepted, Mr Saxon's evidence of the conversation with Mr Bull on 3 November 1990 is persuasive.

25.6.9 There is also the rough handwritten record of a meeting between Mr Ayton and Mr Bull on 16 June 1990, five months before the Smith/Martin trial. The inference that can be drawn from that note is that, at least at that time, there was a strategy to "wait and see". In the course of his evidence, Mr Ayton appeared not to appreciate the possible significance of this document. It is a relatively contemporaneous record of the existence of the strategy.

25.6.10 The fact that the memorandum of 20 April 1989, in which Mr Ayton strongly recommends action, was made available to the Commission also tends to support the good faith and honesty of the police officers. Although some might think it strange that there was a lack of any written record of the decision to formulate a strategy to "wait and see" in May 1989, the absence of such a record has been explained. The sensitivity of the issues and the relative informality of briefing sessions that ordinarily took place between the Commissioner and his senior officers lead us to conclude that, as a matter of practice, many decisions of that kind are not recorded in writing. We find on the evidence that a decision to adopt a strategy of "wait and see" was in fact made, in good faith, some time in May 1989.

25.6.11 Discounting as much as we can for the wisdom of hindsight we are of the view that the strategy was flawed. It overlooked some of the public interest aspects of the issues arising from the Smith papers, such as that highlighted in a letter dated 18 December 1990 from the Mayor of the City of Stirling to Mr Bull. The Mayor complained about the delay and gave some insight into the effect that long standing allegations had on the staff of the City of Stirling. The strategy did not take any account

of the interests of the persons who were the subjects of the taped allegations, and whose reputations inevitably remained susceptible to serious prejudice for as long as those allegations remained uninvestigated.

25.6.12 The Commission concludes Mr Ayton's tactic of waiting until Mr Smith "turned" and provided the desired co-operation, was unrealistic. Mr Smith had never given any indication of ever being likely to assist the police prior to 5 November 1990. In our view, the hope on the part of Mr Ayton that Mr Smith might be persuaded to assist was insufficient justification for the delay. In the result, avenues of inquiry that did not involve Mr Smith were not pursued at all for many months and it will never be known whether other information could have been discovered if the inquiry had commenced earlier. The late Mr Beckwith may have been in a position to assist.

25.6.13 As has been mentioned, Mr Ayton had been involved in the Casino cost overruns and rights issue inquiry, which was a long investigation. A prosecution was never brought and Mr Ayton felt strongly about that fact. Mr Smith was charged with telephone tapping offences concerning one of the principal participants in that inquiry and Mr Ayton was of the view that the person who had engaged Mr Smith in that regard was a high-profile Perth businessman. Furthermore, Mr Ayton had no doubt that the surveillance and other work that Mr Smith appeared to have been doing, as evidenced in the blue file and Mr Smith's diary, was at the behest of Mr Brian Burke, the former Premier. Thus it was that Mr Ayton saw Mr Smith as being of critical significance to any prosecution of those matters.

25.6.14 It was this perspective which fuelled Mr Ayton's determination to explore every possibility of getting Mr Smith to provide the evidence that Mr Ayton believed he had. It was a perspective which clouded his judgment and prevented him from seeing the wider implications of delay. In particular, it prevented him from recognising the immense importance to the public interest of a swift investigation of the issues arising out of the bribe tape allegations. On that basis, we find that Mr Ayton's decision to pursue this strategy of "wait and see" was a wrong decision in the circumstances. Indeed, Mr Ayton appeared to concede as much in the witness box.

25.6.15 A further ground for concern should be mentioned. The entire strategy hinged on the possibility that Mr Smith's attitude would change and that he would "roll-over". As time went on, one would have expected Mr Ayton to interview Mr Smith so as to judge for himself the prospects of any change in attitude. Yet, surprisingly, from the time when he first received the papers in April 1989 until the conclusion of the trial early in November 1990, he made no attempt to do so. He said he kept in touch with the AFP and "those around him", meaning Mr Smith. There is no evidence of the AFP being in regular contact with Mr Smith or, indeed, in any contact at all. One might well ask, "How was Mr Ayton ever to know whether Mr Smith had turned or not?" He kept no record of any inquiries made or information received. The circumstances are suggestive of a misguided approach to the entire investigation.

25.6.16 However, does it necessarily follow that the gross delay between May 1989 and November 1990 rendered the inquiry inadequate? The decision to delay was made in good faith by the police officers concerned for what seemed to them at the time to be legitimate reasons. It perhaps would be unfair for the Commission to criticise this decision in hindsight, especially when one considers that the Commission has had the benefit of wide publicity and a measure of co-operation from members of the public that was not available to the WA Force. At the time this Royal Commission was announced in November 1990, the police inquiry was clearly inadequate but the relevant term of reference contemplated that the police force have the opportunity to continue their inquiries to completion. Those inquiries have now been completed. Nevertheless, the Commission is obliged to find, having regard to all the circumstances that we have discussed, that the police investigation, viewed in its entirety from April 1989 to April 1991, was inadequate.

25.7 Conclusion

25.7.1 We have subjected the adequacy of the police investigation of the matters referred to in items 2.1 and 2.2 of Schedule 2 to full examination. We report our findings as follows:

- (a) There was no evidence of corruption, illegal conduct or improper conduct by any person or corporation in respect of the adequacy of the police investigation into the City of Stirling bribery allegations or other allegations arising from the Smith/Martin trial.
- (b) The delay in the commencement of the police investigation from April 1989 to November 1990 was the result of a decision made in good faith by Mr Ayton and concurred in by Mr Bull.
- (c) The decision resulted from the adoption in good faith of a strategy that saw Mr Smith's willing co-operation as a witness for the Crown as an essential component of a successful investigation into important matters that directly affected the well-being of the State, including the integrity of the WA Force and the conduct of certain highly-placed political and business leaders in the State.
- (d) Mr Ayton's hopes of Mr Smith ever co-operating in the manner contemplated by the strategy were unlikely to be fulfilled and too much weight was placed on those hopes in the formulation of the strategy. To that extent it was flawed.
- (e) In particular, the strategy was flawed in its failure to take account of the fact that the City of Stirling bribery allegations were only peripherally connected with Mr Smith and it was not in the public interest for an investigation into that matter to be delayed indefinitely. We believe that it could have proceeded without prejudice to the strategy in its

application to those other matters which we have mentioned and which Mr Ayton perceived to be of greater importance than the bribery tape.

- (f) In all the circumstances, we have found the police investigation into these matters, viewed in its entirety from April 1989 to April 1991, to have been inadequate.

25.7.2 **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 no 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.

* * *

TABLE OF CONTENTS

24.1	The term of reference	2
24.2	Introduction	2
24.3	Robert Mark Smith's background	3
24.4	Mr Vince Shervington	3
24.5	Mr Darcy Farrell	4
24.6	Mr Smith's engagement by the Government	4
24.7	Mr Smith's work for the Labor Party	8
24.8	The Blue File	10
24.9	The 1987 diary	13
24.10	Other documents seized from Mr Smith	17
24.11	Conclusion	17

24.1 The term of reference

24.1.1 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 respect of the matters referred to in Schedule 2 which in their view warrant further investigation after present police inquiries are completed, 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.

24.1.2 Paragraph 2.2 of Schedule 2 refers to "Other allegations arising from the trial of Robert Mark Smith and Robert Paul Martin held in the District Court of Western Australian before His Honour Judge Keall and a jury in October 1990, including those with respect to surveillance activities".

24.2 Introduction

24.2.1 The hearing before the Commission was conducted upon the basis that this term of reference was intended to focus upon the broad question of the nature and extent of work done by Mr Robert Smith, a private investigator, for the Government, the Labor Party or the Premier personally during 1987 and 1988. This question arose as a result of certain matters being ventilated at the trial referred to in the term of reference.

24.2.2 On 15 October 1990 Messrs Smith and Martin were presented for trial on a charge of conspiring to tap the telephone of a person who had appeared as a witness

in an earlier trial in April 1988, involving Mr Martin and Mr Len Brush. On 24 October 1990, the Crown Prosecutor cross-examined Mr Smith as to his credit. In course of that cross-examination a number of documents in the possession of the police were put to Mr Smith. Those documents had been amongst material seized from Mr Smith's offices and home on 6 December 1988, some 22 months previously. The documents included some of Mr Smith's files and a diary. Entries in those documents, in Mr Smith's own hand, suggested strongly, despite his denial, that Mr Smith was doing work in the course of his business as a private investigator for the then Premier, Mr Brian Burke. The capacity in which Mr Burke was dealing with Mr Smith and the nature and extent of the work carried out form the basis of the term of reference.

24.3 Robert Mark Smith's background

24.3.1 Mr Smith was a former police officer who joined the Western Australian Police Force ("WA Force") in about 1965. He voluntarily left the force in 1978, having reached the rank of Detective Senior Constable. He resigned in order to establish his own business as an inquiry agent. Whilst in the WA Force Mr Smith spent considerable time in the Drug Squad, the CIB Motor Squad and on general uniform duties.

24.3.2 Mr Smith obtained a licence as an inquiry agent and commenced his business in 1979 from premises in South Perth. Initially he carried out private inquiry investigations for private clients but in due course moved into insurance work which involved the investigation of fraudulent claims for worker's compensation and damages at common law. A significant portion of that work involved surveillance which required him to follow people and obtain evidence on film. This was so particularly in the case of alleged insurance fraud cases where the disability of the claimant was disputed.

24.3.3 Mr Smith traded under the name of R M Smith and Co. His business grew and by 1987 he employed 13 people including investigators and office staff. During the year 1987/88 his turnover was in the region of \$700,000.

24.3.4 Mr Smith's major client during the period 1987 to 1988 was the State Government Insurance Office, although he also carried out work for other insurance companies.

24.4 Mr Vince Shervington

24.4.1 In March 1987, Mr Vince Shervington was classified as a Ministerial Services officer but in fact he was the Premier's driver and general factotum. According to Mr Smith, he first met Mr Shervington when the latter was working as a tow truck driver. It was during the time when Mr Smith was a police officer, between the years 1965 to 1978. Mr Smith said that he met Mr Shervington in the normal course of his duties. He recalled having done some inquiry work — "a couple of jobs" — for Mr Shervington after he, Mr Smith, commenced his business as a private inquiry agent. He thought the work was done in about 1986.

24.4.2 Mr Shervington's evidence was to the effect that he only met Mr Smith a few months before March 1987 and that he "didn't know him that well at all". He believed that he might have met Mr Smith when he worked as a tow truck driver but was uncertain. In general he appeared to play down his prior relationship with Mr Smith. He said that he had never had any personal relationship with Mr Smith prior to March 1987. When asked why it might be that Mr Smith would have Mr Shervington's birth date, being 25 June, recorded in his 1987 diary, Mr Shervington vaguely recalled having been sent a tie as a present that year.

24.4.3 The Commission concludes that in early 1987 Mr Smith and Mr Shervington were reasonably well known to each other and that they had first met some years previously.

24.5 Mr Darcy Farrell

24.5.1 Mr Darcy Farrell was a former Director of News at Television Channel Seven in Perth, for which Mr Burke had worked for some years prior to his entry into politics. When Mr Burke was in opposition, Mr Farrell was engaged by him to provide professional services as a consultant in public relations. He continued to work for Mr Burke after the latter became the Premier. He wrote scripts and speeches and, to use his own words, Mr Farrell "assisted him in terms of what the general image of the Government was in the community, assisted other Ministers and perhaps their role in dealing with the media, things of that nature — organising events, made a number of documentaries for the Government and that sort of thing".

24.5.2 The terms of Mr Farrell's engagement as a public relations consultant were reduced to writing in the form of an agreement, being a deed dated 2 May 1983 made between Mr Farrell and Mr Burke as the Premier of Western Australia. The agreement

was followed by an appointment of Mr Farrell by the Executive Council on the following day.

24.5.3 The agreement dated 2 May 1983 remained in force until it was replaced by another agreement dated 1 July 1987.

24.6 Mr Smith's engagement by the Government

24.6.1 On 17 March 1987 officers of the WA Force attached to the Company Fraud Squad executed a search warrant on the home of Perth businessman Mr Robert Martin. The officer in charge of the operation was Detective Sergeant Colin Pace. When police arrived at Mr Martin's premises, representatives of the television media were already in attendance and the event was filmed and replayed on the television news that evening. It also received wide publicity in the print media on the following day.

24.6.2 At that time there was concern already in Government circles about security generally. In hand written additions to a memorandum to the Premier dated 25 March 1987 from Mr Digby Blight, the Director General of the Department of Premier and Cabinet, Mr Blight noted some sources of concern as being:

"some private telephone conversations quoted to the dollar. Information in press. General precautions — especially in privately owned offices. Noises on phones indicated some irregularities (clicking etc). Previous Government did this (according to Gordon Pearce)."

24.6.3 Given the combination of those concerns with the leak to the media by somebody in the WA Force concerning the raid upon Mr Martin's premises and the probability that such a leak would have been intended to harm the Government because of Mr Martin's relationship with Mr Brush, a close friend of the Premier, the scene was set for the involvement of an outside private investigator to assist and advise the Government. A further reason for engaging a private investigator was, as disclosed by Mr Burke in a statement made on 14 February 1991, to "counteract quite slanderous statements being made by some members of the Opposition".

24.6.4 On 18 March 1987 the first steps were taken which resulted in Mr Smith being engaged by the Government as a private investigator. It is not clear precisely how it came about that Mr Smith's name was put forward. Because of the sensitivity of the work, there was no call for tenders. Mr Shervington's recollection was that Mr Smith's

name had been given to him by Ms Donna Radalj, a member of Mr Burke's personal staff, and that he had then put Mr Smith's name forward. It appears that Mr Burke was most anxious that somebody be engaged without delay. He wanted, amongst other things, a person to carry out preventive measures in respect to telephone tapping, in other words to carry out de-bugging or what was known as the "sweeping" of telephones.

24.6.5 After some other private investigators' names were mentioned and rejected, Mr Blight's recollection was that it was Mr Shervington who suggested the name of Mr Smith. Mr Blight looked through the Yellow Pages of the telephone book and in due course Mr Smith was invited to come in for an interview. Although no extensive screening of Mr Smith was carried out, Mr Blight was aware that he would require a licence to engage in business as an inquiry agent and Mr Blight made an assumption, valid in the circumstances, that if there had been anything untoward about Mr Smith he would not have been allowed to hold such a licence.

24.6.6 An apparently contemporaneous record of his negotiations with Government was made by Mr Smith and was found in what has become known as "the blue file". This record appears as the opening entry amongst the documents in that file and is dated Wednesday 18 March 1987.

24.6.7 The blue file was one of the documents seized from Mr Smith's house on 6 December 1988 and one of the documents upon which the Crown Prosecutor cross-examined him in the Smith/Martin trial. Another document in the same category was Mr Smith's personal 1987 diary.

24.6.8 Some 32 of the documents in the blue file appear to be a record of work done during the period from 18 March 1987 until 13 April 1987. On the other hand, the 1987 diary contains no entries between 16 March 1987 and 13 April.

24.6.9 Moreover, the blue file has the word "Govt" marked on it. It is reasonable to conclude that the documents contained in it are a record of work done for the Government. In his evidence Mr Smith maintained that the documents allegedly contained in the blue file had not been in the file when he last saw it prior to his arrest. Detective Sergeant Harding of the Australian Federal Police ("AFP"), who led the police raid in which the blue file was seized disputed this. It may be that no great significance attaches to the precise location of the documents at the time of their seizure. We are of

the view that the documents speak for themselves to some extent and certainly appear to belong to the blue file.

24.6.10 The opening pages in the blue file diarise the negotiations that preceded the formation of an agreement between Mr Smith and the Government. On 18 March 1987 Mr Smith attended at the Department of the Premier and Cabinet. He met and had conversations with Mr Shervington, Mr Blight, Mr Cannon and Mr Burke. Mr Smith made a note concerning the preoccupation of those he had met with bugged telephones and on that same morning he went to Mr Burke's residence with Mr Shervington and "swept the premises". There was discussion about a continuous contract to "sweep" Ministers' homes and offices. There is also an entry which is in these terms

"Advise Premier on Police matters. Street level only — not taken in any other context — taken to mean to act as interpreter between what happens and what he is told. — at Premier's discretion — accepted."

24.6.11 There is also mention on that day of Mr Smith sweeping the home of Mr and Mrs Len Brush in Lovett Street, Scarborough and of the need for Mr Smith to have complete lists of the names and addresses of politicians in order to carry out his de-bugging duties.

24.6.12 It appears that Mr Smith returned to the Premier's residence later in the afternoon on 18 March 1987 and that there followed a discussion with Mr Burke concerning police related matters, the "Brush affair" and the question of whether or not Mr Smith believed that there was an informant inside the police force. This followed the report in the press that morning concerning the police raid on Mr Martin's house.

24.6.13 Later in the day, apparently prior to 9.00 pm, it seems that Mr Smith met a person named "Deep Throat (1)". The identity of this particular "Deep Throat" was never revealed but it would appear from the context that it was a police officer who was acting as an informer to Mr Smith.

24.6.14 After 9.00 pm on the evening of 18 March 1987, Mr Smith attended upon Mr Shervington and went to the Premier's residence once more to complete his "sweep". There is a record in the file of a comment about the Police Commissioner being castigated — the words used were "Bull matted". This reference was never explained by any witness. Mr Burke and the Police Commissioner, Mr Brian Bull

denied any such incident. However, there is no doubt that the Premier was very angry about the leak to the media in connection with the Martin search and could well have vented his anger on the Police Commissioner.

24.6.15 The details of the agreement reached between the Department of the Premier and Cabinet and Mr Smith are referred to at some length by Mr Blight in a memorandum he prepared for the Premier, Dr Carmen Lawrence, on 1 November 1990. Following the initial discussions on 18 March 1987, correspondence was exchanged between Mr Smith and Mr Blight which formed the basis of the agreement. It was proposed that Mr Smith would carry out regular surveillance of Ministerial offices and homes which involved approximately 54 separate locations, between two and four times per year, depending upon location, for a fixed annual fee of \$79,000 payable in monthly instalments.

24.6.16 Mr Smith's proposals were supported by Mr Blight in a memorandum to the Premier dated 25 March 1987 and he recommended the firm of R M Smith and Co for the work. In a memorandum dated 3 April 1987, Mr Blight formally advised the Premier of the terms of the agreement that had been reached with Mr Smith and invited the Premier to inform his Ministers. In a handwritten note on that memo dated 7 April 1987 Mr Burke wrote "Digby, I've conveyed this info verbally to the Mins. Could you convey same verbally to each of Mins to confirm details."

24.6.17 Mr Smith set about his work of de-bugging offices with some zeal and rendered monthly accounts over the following period until the contract was terminated in December 1988. During that period the sum of \$133,619.62 was paid to Mr Smith under this contract. The arrangements with Mr Smith for this work appeared to be properly documented and above criticism and there is no suggestion that the activity was illegal or improper.

24.6.18 Mr Smith's blue file records the receipt of the copies of the full names and addresses of various members of Parliament. None of the other entries in the blue file appears to refer to the work that Mr Smith carried out pursuant to the agreement to de-bug Ministers' offices and residences. The references appear to be to other work of an investigative nature being carried out by Mr Smith.

24.7 Mr Smith's work for the Labor Party

24.7.1 In addition to being engaged by the Department of the Premier and Cabinet to carry out de-bugging activities for Ministers' offices and residences, Mr Smith was also requested to do work for the Labor Party. According to Mr Burke, this work was required because of the "slandrous" nature of attacks being made upon the Government by the Opposition both in the Press and in the Parliament. In the words of Mr Burke's statement of 14 February 1991:

"Smith was requested to do inquiry work for the Labor Party during this period. This work was separate from the work being done by Smith for the Government and clearly therefore could not be paid for by Government funds."

24.7.2 It appears Mr Burke approached Mr Farrell to "act as a post box" so as to give the appearance that Mr Farrell had engaged Mr Smith to do this other work. It was intended that Mr Smith's fees be paid not by the Government but out of Labor Party funds, the source of which was donations received personally by the Premier and controlled from his office. The documentary evidence of the arrangement was a letter dated 6 April 1987 written to Mr Smith by Mr Farrell on letterhead of his firm, Darcy Farrell and Associates. The first paragraph is a blatant distortion of the truth. The whole letter is brief and reads as follows:

"This is to confirm your appointment to carry out certain assignments on this company's behalf.

I realise you have already undertaken some work over the past two to three weeks and that you will continue with these enquiries and any other investigations which might arise.

I understand that your fees for this work will be based on the scale of fees currently in operation under the Private Inquiry Agents Code."

24.7.3 So it was that Mr Smith commenced to carry out other inquiries in fact for Mr Burke and the Labor Party but ostensibly for Mr Farrell and his firm in West Perth. Mr Burke's evidence was to the effect that there was a need for some subterfuge in the arrangements with Mr Smith because of the desirability of satisfying any inquirer that the work was separate from and not paid for by the Government. It was paid for by the private funds of the Labor Party. Mr Burke rejected any suggestion that the deception was put in place in order to disguise the fact that Mr Smith was being asked to do illegal work and he repeatedly said in his evidence and in the statement to which reference was

made earlier, that he never on any occasion either directly or indirectly requested anybody to do anything illegal or improper.

24.7.4 Nevertheless, after careful consideration of the material, the Commission is left with a grave sense of disquiet. Some appreciation of Mr Smith's activities can be ascertained from a reading and comparison of the blue file and his 1987 diary together with the invoices tendered in evidence. We have therefore concluded that selected extracts from the blue file and the diary should be included in this report. Those extracts form the schedule to this chapter.

24.7.5 Mr Smith was less than frank in his evidence about the work he did for the Labor Party under the guise of work for Mr Farrell. He took the stance that he was working for Mr Farrell in fact and that he could not recall the nature of the functions he performed. Mr Farrell's evidence was simply that he acted as a post box and had no knowledge of what it was that Mr Smith was required to do by Mr Burke or the Labor Party. He received accounts from Mr Smith from time to time reading simply "Professional services done". He would contact Mr Shervington who would then collect the account and deliver it to Mr Ross Harrison. Mr Harrison was then a member of the Premier's personal staff and was responsible for dealing, under Mr Burke's direction, with a building society account styled "No.1 Advertising Account". Labor Party donations were paid into this account. Mr Harrison would make the funds available to meet Mr Smith's account and Mr Shervington would deliver the payment back to Mr Farrell's premises, from where Mr Smith would collect it.

24.7.6 It seems that the only persons who knew what services were being provided by Mr Smith, apart from Mr Smith himself, were Mr Burke and Mr Shervington. Mr Shervington manifested a very poor recollection although he did not dispute that he had the involvement that Mr Smith's documents implied. Specifically, it is clear that in addition to deliveries between the Premier's office and Mr Farrell, Mr Shervington acted as a messenger and a courier from time to time between Mr Burke and Mr Smith.

24.7.7 An analysis of Mr Smith's documents can provide some insight into the volume of work which he did. In the period from 18 March 1987 until 13 April 1987, Mr Smith did work for Mr Burke sufficient to earn the sum of \$5,267.50. A cheque drawn to cash in that amount was paid to him on 1 May 1987 through Mr Farrell and a photocopy of that cheque was found amongst Mr Smith's

papers when the AFP executed a search warrant on 6 December 1988. There is no doubt that the cheque was paid out of the No.1 Advertising Account operated for Mr Burke by Mr Harrison. The evidence leads to the inference that the payment was in respect of work done by Mr Smith prior to 14 April 1987 and the entries contained in the blue file in respect of that period are consistent with such a conclusion.

24.7.8 A bundle of invoices received in evidence were rendered to Mr Farrell by Mr Smith on 27 May 1987 in respect of his hours spent in "professional services" between 14 April 1987 and 17 May 1987 inclusive. Those invoices total \$3,195 being 71 hours of work at \$45 per hour. Mr Smith was paid this sum in cash, again out of the same account and through Mr Farrell, on 24 August 1987.

24.8 The Blue File

24.8.1 One of the early entries in the blue file is dated Monday 23 March 1987. It contains a reference to the receipt of some information from "Deep Throat number 3" which is said to be set forth in a document numbered 18. A document numbered 18 is in the blue file. It contains a description of the salient facts of what became known as the Brush/Martin affair and resulted in a trial in the District Court a year later.

24.8.2 An implication from document number 18 is that a police officer informed Mr Smith that he had overheard other police officers discussing the Brush/Martin affair, and that the content of the discussion was passed to Mr Smith and then sent on to Mr Burke. There is no other reasonable conclusion that can be drawn from the entries for 23 March 1987 in the blue file. There is some indication that the Premier knew most of the information in any event. On 30 March there is a record of instructions to commence inquiries with respect to the companies of Mr Ross Lightfoot MLA and also a reference to an accountant with whom Mr Lightfoot was apparently involved. Mr Lightfoot at that time was an Opposition member of Parliament. On 31 March 1987 a large number of companies are listed. Perusal of the following pages supports the inference that Mr Smith carried out an extensive search of public records at the Corporate Affairs Department relating to companies with which Mr Lightfoot was connected.

24.8.3 In an entry dated 2 April 1987, there is mention of Mr Smith's interview with Mr Terry Burke in which instructions were given about the operation of the tape recorder which was used in the creation of the Burke/O'Connor bribe tape. In an entry

on the following day, there is a lengthy reference to the tape and its extremely poor quality. Mr Smith theorises about the reasons for the poor quality and he records the commencement of transcription. At the end of the page there are notations — "summoned to BB house", "discussion re tapes" and "sweep phones" — alongside of which Mr Smith has written "contract", perhaps wishing to indicate that this material was part of the ordinary Government contract and not to be included in the arrangements involving Mr Farrell. On the following days Mr Smith spent a number of hours transcribing the tape.

24.8.4 An entry dated 8 April 1987 refers to "Vince" raising an urgent matter and the mention of the words "documents to photostat (Lawrence sic)".

24.8.5 Mr Ian Laurance MLA was deputy leader of the Opposition at the time and a bundle of his financial records, being statements from the Teachers Credit Society, were amongst the papers seized from Mr Smith's house by the AFP. It is probable that the reference to Laurance mentioned above is a reference to the TCS statements.

24.8.6 There is no explanation of how Mr Smith came into possession of those documents but it is unlikely that they were obtained lawfully.

24.8.7 The entry on 9 April 1987 relates to inquiries into Mr Lightfoot and then there is mention of a man named Keith Jessup, with some of his personal particulars. Mr Burke said in evidence that he did not know who Keith Jessup was and knew nothing about the matter. Mr Smith was not able to recall.

24.8.8 When the proposition was put to Mr Burke that it was he who had asked Mr Smith to carry out various inquiries into Mr Lightfoot he denied that he had specifically asked Mr Smith to do anything whatsoever. We are unable to accept that denial. Mr Burke did say, however, that he was prepared to accept "the responsibility for causing Mr Smith to provide the copies of that legally available information", referring to searches of various companies obtained from the Corporate Affairs Department in respect of Mr Lightfoot. In his evidence Mr Smith maintained that he had been doing searches of the kind that can be inferred from his entries in the blue file for Mr Martin and that he had made available the copies of his searches to Mr Burke, with the consent of Mr Martin. In any event it is obvious that Mr Smith was doing work involving searches of Corporate Affairs and Titles Office records and that the

information one way or the other was being made available to Mr Burke through Mr Shervington.

24.8.9 In an entry dated 12 April 1987 in the blue file there is mention of Mr Martin's name and his address and an entry which on the face of it appears to be in the nature of an "opening entry". If Mr Smith was doing work for Mr Martin prior to 12 April 1987, then it seems odd that Mr Martin's name and address appear at this date. There is also reference to certain names involved in the Martin/Brush affair such as Aslan and Jurisich, which were not mentioned earlier and had no relevance to Mr Burke save that they were witnesses against Mr Burke's friend, Mr Brush.

24.8.10 We find that the references in the blue file covering the period from 18 March 1987 until 12 April 1987 indicate activity in which Mr Smith engaged on the instructions of Mr Burke, conveyed no doubt through Mr Shervington. There is no clear indication in the blue file that the activity of Mr Smith carried out for Mr Burke during that period was unlawful although the nature of some of the work is unknown. On the other hand, there is a clear inference that it involved a degree of surveillance of some members of the Opposition and that it is likely to have had some discreditable features. It is hardly necessary to pay a private investigator \$45 per hour to make searches of company information publicly available in the Corporate Affairs Department, a task which could easily be done by a competent junior clerk. Mr Smith's work for Mr Burke obviously involved much more than that.

24.8.11 Other documents contained in the blue file are also consistent with the proposition that Mr Smith was doing work for Mr Burke. In particular there is a copy of the daily diary of Mr Burke from 23 March until the end of the week commencing 6 April 1987 which is capable of leading to an inference that there was a need at that time for Mr Smith to be aware of where Mr Burke was at any particular moment. This is consistent with what was described as the political atmosphere of those days, the pressures being imposed on the Government by the Opposition, and the desire of Mr Burke to retaliate.

24.8.12 Finally, it is noted that the blue file contained six different lists of the names, addresses and contact details of politicians, including all Ministers, all members of the State Parliamentary Labor Party, and all Liberal Party Members in both Houses. In one of those lists, which was a directory of Liberal Party members in the Legislative Assembly, the names of Mr Laurance and Mr Lightfoot are highlighted by an asterisk which suggests that they were to receive special attention of some kind.

From other references in the file it is obvious that Mr Smith was conducting specific inquiries into these two politicians and that he was doing so at the request of the Premier, Mr Burke, whether directly or indirectly. Mr Burke returned later in the hearing, at his own request, to correct evidence that he had given earlier when he denied having sought any information concerning Mr Laurance. On this occasion, he explained that he may have indirectly asked Mr Smith for information about both Mr Lightfoot and Mr Laurance. The actual statement Mr Burke made to the Commission was as follows:

"I would like to — to thank the commission for accommodating my request to re-appear to say that although I have absolutely no recollection of asking Mr Smith to obtain any information about Mr Laurance, nor do I have any recollection of receiving information and certainly any recollection of using any information about Mr Laurance, I'm now convinced that I may have, despite the lack of recollection, not directly but indirectly asked Mr Smith about information of a similar nature to that which I asked Mr Smith about in respect of Mr Lightfoot. Although I don't have the recollection, and although I'm aware only of the empirical evidence that was drawn to my attention previously — that is, I've not become aware of any other evidence — I concede that I may have, despite my lack of recollection, asked Mr Smith about Mr Laurance indirectly."

The politically-motivated interest of Mr Burke in Mr Lightfoot and Mr Laurance is also referred to in our report into the collapse of the Teachers' Credit Society: see chapter 12 of this report.

24.9 The 1987 diary

24.9.1 The written account of Mr Smith's activities on behalf of Mr Burke from 14 April 1987, that is, after the entries in the blue file, appears to be contained in his 1987 appointment diary.

24.9.2 The relevant opening entry in the diary is on 13 April where the words "billed to this date" are written. They appear to be in Mr Smith's handwriting. The entry is consistent with the proposition that he had rendered an account to Mr Farrell for work done as we have described in the previous section of this chapter. A copy of the account is not available to the Commission. The entries in the diary are cryptic. They frequently make reference to work having been done for "B.B.". Mr Smith's evidence was that "B.B." referred to a file of that name. He said that when he commenced to do work for Mr Martin, he took a previously used manila folder from the stationery cabinet and placed all of the work for Mr Martin in that folder. He said that,

quite by chance, the notation on the folder was "B.B.", hence the use of that description in the diary.

24.9.3 We are aware that Mr Smith has previously given evidence on oath in the District Court to like effect and we are also aware of his legal and penal history. In his evidence to the Commission, he emphatically denied that the letters "B.B." in the diary and the blue file were a reference to Mr Brian Burke. We emphatically reject his denial.

24.9.4 We also note that Mr Burke, in the majority of examples put to him, agreed that the reference to "B.B." was probably a reference to him. When regard is had to all of the documents found in Mr Smith's possession by the AFP, and especially to the blue file and the 1987 diary, and further to the persons mentioned in those documents, the conclusion is overwhelming that the reference to "B.B." is a reference to Mr Brian Burke. This inference is reinforced by the correlation between the total number of hours mentioned in the diary commencing from 14 April 1987 and ceasing on 17 May 1987, and the five invoices dated 27 May 1987 which were tendered in evidence. The invoices were addressed to Darcy Farrell and Associates and render an account that totals \$3,195 being exactly 71 hours at \$45 per hour. We find that the work described in the diary as being for B.B., was work that was invoiced to Mr Farrell pursuant to the arrangement described above. As has been established, Mr Burke asked Mr Farrell to "stand in" and be a post box or, perhaps, "go between", for the purpose of disguising Mr Burke's connection with Mr Smith's activities.

24.9.5 The entries in the diary in mid April 1987 refer to work being done for "B.B." with respect to Mr Lightfoot. There was no dispute that Mr Smith was doing work for Mr Burke in investigating the background of Mr Lightfoot and the reasons for this have been mentioned already. Most of the entries in April refer to work in respect of Mr Lightfoot although on 28th of that month there is mention of a person named Illidge and a reference to the State Superannuation Board. Neither Mr Burke nor Mr Smith was able to assist the Commission with the meaning of the entry on that day and specifically they both rejected the suggestion that Mr Smith had been requested to investigate the background of Mr Illidge.

24.9.6 The diary records work done by Mr Smith continuing into May 1987 in relation to Mr Lightfoot. In May there is an entry

"Spoke with Vince. Pressure on. Wants something on Lightfoot."

24.9.7 On 6 May there is a reference to Mr Smith sending a note to "B.B." about Lightfoot. Mr Smith apparently produced documents concerning Mr Lightfoot on 9 May and he did 8 hours work on that day. He also wrote "Brian rang concerned re non showing of resignation of Lightfoot from Minech. Will check". Minech was apparently a company in which Mr Lightfoot had an involvement.

24.9.8 On 15 May there is a reference "4 hours B.B., Lawrence (sic), Lightfoot". This is the first reference in the diary to Mr Smith doing any work in connection with Mr Laurance.

24.9.9 On 19 May there is a reference to further work for B.B. re Lightfoot and also mention of a person described as "Darth Vader", who may be a police informer, and of the passing of a note to B.B in that regard. There are also references from time to time to Mr Smith having seen, telephoned, or heard from a man named Vince who, on the whole of the evidence, we find to be Mr Shervington.

24.9.10 On 22 May 1987 the following entry appears:

"Rang A.S. Query re accounts through firm. Met with A.S. Do Liberal Party returns will supply \$400 per job."

24.9.11 On the following day, being 23 May, there is an entry that Vince rang, apparently prior to the departure of the Premier for Canberra, and gave a message "Boss wants Lawrence (sic). Go slow on Lightfoot".

24.9.12 Mr Burke does not dispute that during this period he was under pressure from the Opposition. There is no doubt that he was using Mr Smith to obtain information about Messrs Laurance and Lightfoot for the purposes of countering pressure in and out of Parliament. However the reference to A.S. had a different context. A.S. was Ms Anne Sutton, who at the relevant time worked for a firm of accountants in Perth of which the Liberal Party was a client. The reference in the diary on 22 May records Mr Smith's approach to Ms Sutton in order to obtain copies of Liberal Party financial records for \$400. On 26 May, Mr Smith recorded his having met with Ms Sutton. Importantly on both 22 and 26 May he kept a record of the hours worked. Although these hours are not included in the 5 invoices that supported the claim for \$3,195 already referred to, it is reasonable to infer that Mr Smith was going

to charge somebody for the work he did concerning Ms Sutton. It is also reasonable to infer that the account was sent to Mr Farrell.

24.9.13 On 27 May the following entry appears in the diary: "Vince rang. Wanted to know anything yet. No. Met A.S. Supplied and photocopy Liberal Party accounts, Tax Returns, 2.1 hours and paid \$400".

24.9.14 There is no dispute that Mr Smith met Ms Sutton, obtained a significant number of documents from her and paid her \$400.

24.9.15 In his evidence Mr Burke indicated that he recalled being offered an opportunity by Mr Smith through Mr Shervington to have access to copies of the Liberal Party accounts but he declined that offer stating that he was not interested. There can be no dispute however that Ms Sutton obtained this information and provided it to Mr Smith and that in the course of doing so, she has been found to have broken the law. She was convicted on her plea of guilty of the offence of stealing the paper on which the financial records were photocopied. In the following months Mr Smith was also prosecuted and pleaded guilty to procuring Ms Sutton to commit the offence.

24.9.16 The relevant question for this Commission is whether we are persuaded that Mr Smith did this work at Mr Burke's request. If so, it may lead to a finding that Mr Burke engaged Mr Smith to perform unlawful activity on his behalf.

24.9.17 The Commission heard evidence from Mr Burke, Mr Smith and Ms Sutton on this question. Both Mr Burke and Mr Smith denied any suggestion that there had been an instruction from Mr Burke to Mr Smith to do this work. Mr Smith appeared to say that he had requested the information out of his own interest and that he had never been asked by Mr Burke to obtain the documents. But he also suggested that he had obtained this information for Mr Martin because Mr Martin had been very concerned about the possibility that the Liberal Party was providing financial assistance to two of the witnesses who had been called to give evidence against him in his criminal trial. He was unhelpful on the question of where the \$400 came from to pay Ms Sutton. To say the least, his evidence was unsatisfactory.

24.9.18 Ms Sutton's evidence was inconsistent on the point. In her evidence in chief before the Commission she indicated that Mr Smith had told her that it was Mr Burke for whom he wished her to obtain the information — thus leading to

a suggestion that Mr Burke had requested Mr Smith to ask Ms Sutton to obtain it. However a number of prior inconsistent statements were put to her to the effect that she was not aware of the identity of the client for whom she had been asked to obtain the documents. She appears to have made assumptions to the effect that the documents were for Mr Burke and her evidence fell far short of being sufficient to form the basis of a finding that Mr Burke had engaged Mr Smith to ask Ms Sutton to obtain the documents illegally.

24.9.19 Support for the inference that the documentation was intended for Mr Burke is provided by the memorandum accompanying the Liberal Party accounts themselves. The typewritten, unsigned memorandum is dated 28 May 1987, the day after Mr Smith paid Ms Sutton \$400 for the documents. The memorandum lists the eight sets of financial statements covering several divisions of the Liberal Party for the years from 1983 to 1986. It then draws attention to alterations which the author describes as "interesting". It concludes with two paragraphs under a heading "IMPORTANT" in the following terms:

"It is blatantly obvious when perusing the documentation as to its origins. It is of the utmost importance to our source that no information leaks as to the documentation now in our possession.

We have been assured that similar documentation will be available, with perhaps more information at the end of the current financial year, and on a continuing basis thereafter. Any leaks would severely compromise our source in this particular area."

Mr Martin clearly would not have required information of this kind nor continuing access in future years.

24.9.20 In the light of all the evidence, we have no doubt that Mr Smith obtained this material for the use of Mr Burke in the course of the latter's strategy in answering what he termed the "slandorous" campaign being waged against him by the Opposition at the time. Furthermore, we do not accept Mr Burke's evidence when he says that the documents were offered to him but he declined to take them. The evidence of some importance in coming to this conclusion is Mr Smith's diary note on 27 May 1987. That note and the juxtaposition of the call from "Vince" and Smith's meeting with Ms Sutton is entirely consistent with a conclusion that Mr Shervington was pressing Mr Smith to secure possession of the accounts. With a cost of \$400 involved,

it is most unlikely that Mr Smith would incur the expense without the authority of Mr Burke. In addition, the paragraphs we have cited from the memorandum attached to the documents are wholly consistent with the relationship existing at this time between Mr Burke and Mr Smith. We therefore find that the documents were obtained for Mr Burke's use. However, that is not to say that Mr Burke, in making the request, knew that compliance would necessarily involve unlawful conduct. It is possible he believed the documents could be acquired without a breach of the law. The Commission finds that the evidence falls short of establishing illegal conduct on Mr Burke's part. The question of impropriety will be addressed in the concluding section of this chapter.

24.10 Other documents seized from Mr Smith

24.10.1 There is other documentation amongst Mr Smith's papers that appears to have been provided by him to Mr Burke. There is a copy of a report on a police officer dated 19 May 1987. There is a copy of the statements of an account held by Mr Laurance with the Teachers Credit Society. There are copies of various memoranda concerning Mr Lightfoot dated 10 April, 6 May, 9 May and 19 May 1987. The reports in their terms are informative and provide the results of Mr Smith's investigations into Mr Lightfoot's background. These reports reflect the result of Mr Smith's efforts during the periods covered by the blue file and the 1987 diary mentioned above.

24.11 Conclusion

24.11.1 There were two areas considered under this term of reference. The first related to the security work done by Mr Smith between April 1987 and December 1988 in relation to the offices and residences of ministers during that period. The second concerned the strange relationship between Mr Smith and Mr Burke, between 18 March 1987 and 27 May 1987.

24.11.2 The Commission had no concerns with the first area. It was a perfectly straightforward contract made between Mr Smith's security firm, R M Smith and Co, and the Department of Premier and Cabinet. The procedure under which the terms of the contract were agreed was supervised by Mr Blight, the Director-General of the Department. We have no evidence to suggest that the agreed rate of

remuneration, namely \$79,000 per annum, leading to a total payment over the period of \$133,500, was not a fair return for the work done.

24.11.3 As to the second area of concern, the Commission considered the role of Mr Farrell. He agreed at Mr Burke's request to act as a post box whereby Mr Smith would receive his remuneration for work done for the Labor Party. There was nothing more to Mr Farrell's role than that.

24.11.4 Mr Farrell acted in the best traditions of the three wise monkeys who saw no evil, heard no evil and spoke no evil. Mr Smith would deliver his accounts to Mr Farrell's office in West Perth. Mr Farrell would then notify Mr Shervington in the latter's role of courier. Mr Shervington would collect the accounts and courier them to Mr Harrison. Mr Harrison would arrange for the amount required to be provided from the No.1 Advertising Account and the courier would deliver it back to Mr Farrell's offices in an envelope addressed to Mr Smith.

24.11.5 In due course, Mr Smith would collect the envelope and then receive his reward for the services performed at Mr Burke's request for the Party. Mr Farrell could not tell us what those services were. He was not told and did not ask.

24.11.6 Mr Burke explained his use of Mr Farrell by saying that the services were performed for the Labor Party and it was therefore necessary that there should be no overt connection with the Government. He was zealous in avoiding any suspicion that services performed for the Party were being paid for by the Government.

24.11.7 He was emphatic in asserting that no improper or illegal purpose was attached to the engagement of Mr Smith as a private investigator to perform services for the Labor Party. If this were so, then the subterfuge displays an extraordinary sensitivity which is at odds with the confident, assured demeanour which the Premier displayed at other times during his premiership.

24.11.8 Considerable Labor Party funds held in various accounts described as advertising accounts together with cash held in his office were controlled personally by Mr Burke and disbursed directly for Labor Party purposes without any apparent anxiety that an observer might think, mistakenly, that Government funds were being misused.

24.11.9 The written material seized from Mr Smith's premises must, to some extent and in the absence of any reliable evidence to the contrary, speak for itself.

24.11.10 We found that the material clearly establishes a private relationship between Mr Burke and Mr Smith over the relevant period but it falls short of revealing exactly the work that was done. Despite all our efforts to discover with precision the detail and character of the work that was done, we were unable to do so. Surprisingly, neither Mr Burke nor Mr Shervington could or would recollect any detail at all.

24.11.11 Mr Burke reconstructed, rightly, that several hours would have been taken in transcribing the taped conversation between Mr O'Connor and Mr Terry Burke. He referred also to evidence available from Mr Smith's records to suggest that many searches were made at the Corporate Affairs Department into companies associated with Mr Lightfoot and Mr Laurance. But beyond these matters, Mr Burke contributed nothing.

24.11.12 He denied that he was responsible for Mr Smith and Ms Sutton breaking the law to gain access to accounts relating to the Liberal Party. Mr Shervington acted as the go-between in the relationship between Mr Burke and Mr Smith and would obviously have been privy to the nature of the information sought by Mr Burke. But he was unable to recall any detail. And, as we have said, Mr Farrell did not concern himself with the detail at all.

24.11.13 Some assistance may be gained from a consideration of the evidence about the payments that were made to Mr Smith for this work. Two payments were made and both were made with money drawn from the No.1 Advertising Account in the Town and Country Building Society.

24.11.14 The account was controlled initially by Mr Harrison and later by Mrs Brenda Brush. Neither of these two assisted in relation to the payments. In particular, the fact that the first payment, being \$5,267.50, was in the form of a cheque drawn to cash on 1 May 1987, was not something on which Mr Harrison was able to comment. He could not explain why the cheque was drawn to cash when, in fact, it was to be paid to Mr Smith.

24.11.15 Mrs Brush arranged the second payment, that of \$3,195 on 24 August 1987. The withdrawal slip had been signed in blank by Mr Harrison, but this

in itself was not unusual. This payment to Mr Smith was made wholly in cash. Unfortunately, Mrs Brush did not throw any light at all on the circumstances which led to such a large payment being made in cash. She made no comment at all. Toward the end of 1987, shortly before Mr Burke relinquished the office of Premier, Mrs Brush ceased to operate the account and she destroyed the only record of payments. She testified that she did so on instructions from Mr Burke.

24.11.16 The almost total loss of memory suffered by Mr Burke and the members of his staff who had anything to do with these transactions is truly remarkable.

24.11.17 Notwithstanding the difficulties encountered by the Commission in elucidating these matters, we have no reason to doubt that Mr Smith received at least \$8,462.50 for the work he did for Mr Burke between March and May 1987.

24.11.18 We have found that he received such a sum in two payments as already described. We made this finding even though there was no record of the \$3,195, received by him in cash, being banked by him, and Mr Smith was unable to recall having received either payment. Given the evidence that Mr Smith charged for his services at the rate of \$45 per hour, we found that he charged and received a total of \$8,462.50 for about 188 hours of work. Even after allowing a few hours for transcribing the tape and the time spent in searches at the Corporate Affairs Department, it is clear that Mr Smith or his staff spent a large amount of time on additional work for Mr Burke.

24.11.19 The hours recorded in the blue file and the diary would account for much of that time, while not enabling a conclusion to be drawn with respect to the precise nature of the work. As we have said, although we found that the Liberal Party accounts were secured by Mr Smith at Mr Burke's request and that an offence was committed by Mr Smith in fulfilling that request, the evidence fell short of showing that Mr Burke knew positively that the assignment necessarily involved illegal conduct.

24.11.20 While he denied a recollection of it, Mr Burke must have been advised of the nature of other work done by Mr Smith at the times that he approved the payment of the Smith accounts. It is plainly ludicrous to suggest that he would have consented to payment of more than \$8,000 for company searches and the transcription of a tape, innocuous things which trusted staff in his own office, for example, those handling the secret advertising accounts, could have easily done.

24.11.21 We have noted several unsatisfactory features of Mr Smith's evidence, in particular his refusal to concede that he did any work for Mr Burke through Mr Shervington even in instances where Mr Burke agreed that the work was done.

24.11.22 Clearly, Mr Smith was not wholly truthful with the Commission, but having regard to his history this may not be surprising. Broadly speaking, his evidence in material respects was consistent with that which he had previously given on oath in the District Court. He may well have felt that he could not change that evidence without exposing himself to a charge of perjury.

24.11.23 There was no evidence of any arrangement between Mr Smith and Mr Burke whereby Mr Smith would protect Mr Burke in return for favours in the future. Mr Smith vehemently rejected any such arrangement. On the contrary, his demeanour suggested that he might well have cause to feel bitter towards those influential people who had been happy to use his services but had then abandoned him to suffer alone the consequences of his actions.

24.11.24 Turning to the term of reference itself, we report that our inquiry into the allegations, which have been dealt with in this chapter, arising during the Smith/Martin trial, did not disclose any illegal, corrupt or improper conduct by any person or corporation which warrants further investigation. Nevertheless, the emphasis in that statement must rest on the phrase "which warrants further investigation". The Commission considered a different question, namely, whether the conduct of the Premier, Mr Brian Burke, in his private dealings with Mr Smith, was improper.

24.11.25 That question presented the Commission with considerable difficulty. On the one hand, Mr Burke spoke of slanderous personal attacks which were provocative to him. No doubt he would be interested in receiving information which could enable the Government to counter the perceived strategies of its opponents. On the other hand, the community is entitled to expect of its Premier behaviour which engenders respect and sets an example or standard for other members of Parliament to follow.

24.11.26 After careful consideration, we found that Mr Burke's conduct was seriously deficient. We rejected the reason he gave for being party to the subterfuge with Mr Farrell. The purpose of that subterfuge was to create the impression that

Mr Smith was performing services for Mr Farrell's firm, where in reality they were provided to Mr Burke.

24.11.27 The retention of an adequate record of disbursements of the funds of the Labor Party from Mr Burke's office would have ruled out any confusion with Government money. After all, the expenditure of Government money is not usually handled by the Premier's personal staff.

24.11.28 In the light of the secrecy surrounding the arrangement, the manner of its implementation, the inability or unwillingness of anyone, Mr Burke, Mr Shervington, Mr Smith or Mr Farrell, to inform the Commission of the precise nature of the tasks performed by Mr Smith, the knowledge that within a period of 10 weeks Mr Smith charged for 188 hours of work performed on behalf of Mr Burke of which no more than a few hours were accounted for, the remainder assuming a clandestine character, and the destruction of the record of disbursements by Mrs Brush on instructions from Mr Burke, the Commission is compelled to the conclusion that the relationship itself, as distinct from any particular services performed, was one which it was improper for the Premier of the State to establish and maintain.

24.11.29 We therefore have found that Mr Burke engaged in improper conduct.

24.11.30 **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) Changes in the administrative or decision-making procedures of the State with particular reference to the provision of guidelines for the conduct of Ministers in circumstances such as those revealed in this chapter, are necessary or desirable in the public interest. These matters will be addressed in Part II of our report.

* * *

SCHEDULE

(referred to in paragraph 24.7.4 of this chapter)

Selected extracts of documents contained in Mr Smith's blue file and pages from his 1987 Diary.

TABLE OF CONTENTS

23.1	The term of reference	2
23.2	Background to the term of reference	3
23.3	History of development policy at Scarborough beachfront	4
23.4	The Observation City proposal	7
23.5	The approval	8
23.6	The Councillors	12
23.7	Advocates for the proposal	15
23.8	The Learmonth allegation	22
23.9	The role of Mr Jack Walsh	25
23.10	The Bond cheque for \$25,000	28
23.11	The Ray O'Connor consultancy	31
23.12	The taped conversation between Mr Terry Burke and Mr O'Connor	34
23.13	The response of the Burkes to the tape-recorded conversation	39
23.14	The question of corruption	39
23.15	Bribe tape — criminal defamation	42
23.16	Conclusion	42

23.1 The term of reference

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

- (a) corruption;
- (b) illegal conduct; or
- (c) improper conduct,

by any person or corporation in respect of the matters referred to in Schedule 2 which in their view warrant further investigation after present police inquiries are completed, 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.

23.1.2 Paragraph 2.1 of Schedule 2 refers to "Allegations of bribery with respect to planning decisions of the City of Stirling for Observation City".

23.1.3 A further two items in Schedule 2 will be considered in chapters 24 and 25 of this report and read as follows:

- 2.2 Other allegations arising from the trial of Robert Mark Smith and Robert Paul Martin held in The District Court of Western Australia before His Honour Judge Keall and a jury in October 1990, including those with respect to surveillance activities.
- 2.3 The adequacy of the police investigation of the matters referred to in items 2.1 and 2.2 of this Schedule.

23.1.4 The following comments are made in relation to all three terms of reference.

23.1.5 One of the differences between paragraphs 1 and 2 of the Commission's terms of reference is constituted by the latter's inclusion of the phrase "which in your view warrant further investigation after present police inquiries are completed". These words gave rise to a question whether a full hearing and report in respect of the matters listed in Schedule 2 would have been necessary had the Commission concluded that no further investigation was warranted.

23.1.6 The use of the word "allegations" in terms of reference 2.1 and 2.2 and the lack of specific elaboration of those allegations referred to in Term of Reference 2.2 made desirable the provision of an opportunity for persons potentially affected by the terms of reference to make submissions as to their interpretation.

23.1.7 On 17 January 1992 the Commission convened to receive submissions, which were made by senior counsel assisting, Mr Brian Martin QC, and by those counsel acting for the City of Stirling and the former Premier, Mr Brian Burke. Although a number of other counsel representing various persons and Mr Ray O'Connor, a former Premier of Western Australia, who was not represented by counsel, were also advised of the hearing, no other submissions were forthcoming. The Commission determined that a full public inquiry into the Schedule 2 terms of reference was required and that those terms should not be construed to contemplate forbearance from such an inquiry in the event that police investigations were found to have been adequate, because it was only through a full inquiry into the subject matter of police investigation that the adequacy of that investigation could be assessed. Of course, it is to be borne in mind that it is not the adequacy or otherwise of the police investigation that provides the focus of our inquiry but whether there has been corruption, illegal conduct or improper conduct by any person or corporation in respect of the three matters referred to in the Schedule. Nevertheless, the question of adequacy is intimately related to the third of those matters.

23.1.8 Further, it was concluded that the word "allegations" in terms of reference 2.1 and 2.2 should be given a liberal interpretation. With respect to term of reference 2.2, it was concluded that "allegations arising from the trial" should include allegations made during and after the trial and also allegations made by counsel in addresses.

23.1.9 The Commission decided that the terms of reference should be interpreted in a general sense. No other questions relating to the interpretation of the terms of reference were raised during the hearings.

23.2 Background to the term of reference

23.2.1 The genesis of the term of reference lies in the cross-examination by the Crown Prosecutor of Robert Mark Smith, a private investigator, during the trial of Mr Smith and Robert Paul Martin held in the District Court of Western Australia before His Honour Judge Keall and a jury in October 1990. The two accused were charged with conspiracy to tap the telephone of a person who had been a witness in an earlier trial. During the course of cross-examination on 24 October 1990, the Crown Prosecutor referred to a number of documents which he had obtained from the custody of the Commissioner of the Western Australian Police Force ("the WA Force").

23.2.2 In this way the existence of those documents, which included some of Mr Smith's files and diaries, became known to the public. The documents appeared to have significant political implications and this significance deepened when it was revealed the WA Force had had them in its possession for many months, yet had not pursued a full investigation.

23.2.3 Following the extensive publicity surrounding the trial and the appearance of some articles by an investigative journalist, it became apparent that the documents included reference to an alleged act of bribery involving some members of the City of Stirling Council ("the Council") in respect of a proposed development on the Scarborough beachfront known as Observation City.

23.2.4 The documents also suggested that Mr Smith had done work for the Premier, Mr Burke, and the Labor Party. This aspect of the matter is the subject of term of reference 2.2 and will be dealt with in chapter 24 of this report.

23.2.5 The police investigation into these matters commenced on 5 November 1990, being the date of Mr Smith's sentence, and it was pursued vigorously, culminating in a lengthy written report in April 1991. Meanwhile, on 19 November 1990, the Premier, Dr Carmen Lawrence, announced a Royal Commission. The adequacy of the police investigation is the subject of term of reference 2.3 and will be dealt with in chapter 25 of this report.

23.2.6 Observation City is a 17 level building, completed in 1987, erected on the Scarborough beachfront in the City of Stirling. It is by far the tallest building on the beachfront in the vicinity of Perth and is the only large structure in its immediate vicinity. It was the first high rise building of a planned three tower development complex. The application for planning development was approved by the Council at a meeting on 20 March 1984. Although the approval related to a three tower proposal, of which the Observation City tower was only stage one, the other two towers have not been built.

23.3 History of development policy at Scarborough beachfront

23.3.1 The first district planning scheme of the City of Stirling made under the *Town Planning and Development Act 1928* (as amended) was gazetted on 17 October 1974. The Scheme zoned 7.6 hectares of land at the Scarborough beachfront as a "Special Beach Development Zone" ("the Zone"). Clause 3.26 of the Scheme stated:

"Special Beach Development Zone; Notwithstanding any uses listed in the Zoning Table, all development in a Special Beach Development Zone requires special approval of the Council. The Council wishes to encourage in this Zone a high standard of development which will be complementary to Scarborough Beach. The Council will therefore discourage piecemeal developments on inadequate sites; or uses and buildings not in keeping with the standard desired. The Council is prepared to co-ordinate the development of land in various ownerships and will act wherever appropriate to facilitate the construction of buildings of a high standard of quality."

23.3.2 The policy of the Council towards development of the Zone is documented in evidence before the Commission. On 5 December 1983, Mr J R Glover, then the Director of City Planning for the City of Stirling, prepared a report setting forth the history of the land. The evolution of the Council's view concerning the land can be seen from a perusal of that report.

23.3.3 By the end of 1981 there had been little progress in development of the area and Mr Glover was of the view that the Council was losing patience. On 8 December 1981, an application was received from a corporation named Murdoch Pty Ltd ("Murdoch") for development of a high rise building comprising 81 residential units.

As a result of this application the Planning Committee of the Council called for new guidelines for the development of the Zone. In answer to a question concerning whether the Planning Department was supportive of high rise development within the Zone, Mr Glover observed:

"My view is that from the time the first Murdoch proposal came in, I think in December 1981, that the City Councillors had become exasperated with Scarborough Beach and the lack of development and the cost and the criticism that it was getting, not only from visitors but also from some of the Scarborough ratepayers, who were on record as saying that it was about time that something happened down there. They certainly didn't like the form that the development took but they were mindful of the fact that it was a fairly low grade kind of an area and it was purported to have one of Australia's best beaches, but the private development and the beach facilities were very, very poor. Council was very concerned about that and I think it saw that really the answer to its problems was to give encouragement to a developer, any developer, to come in and do a development of a high rise nature which could incorporate facilities — shops, residential, recreation, the whole sort of things they were talking about when they established the Zone in the first place. That was in 1981 and I would make the point that that was quite a time before Observation City came in."

23.3.4 In May 1987, before the Town Planning Appeal Tribunal of Western Australia, Mr Glover described the issue in these terms:

"Certain citizens in the Scarborough area have urged the Council ... that they can no longer tolerate the run-down chatty little shops which are mainly summer beach trade oriented, a vast area of land which does not reflect the nature of a magnificent beach and gets used by bodgies and widgies for wheelies and all sort of things in the middle of the night. I think some of the community of the Stirling and Scarborough area in particular have indicated to the Council for over a period of years that 'how much longer are you going to tolerate this kind of thing'."

23.3.5 This evidence was given by Mr Glover before there was any suggestion publicly of a bribe having been paid in connection with the Council's decision on Observation City.

23.3.6 The Town Planning Scheme of 1974 imposed no height limit. From the evidence of Mr Glover, the application by Murdoch in December 1981 prompted a call for a change to guidelines for development of the Zone. New guidelines were made by the Council on the recommendation of the City's Planning Department to deal with high-rise development applications.

23.3.7 Mr Glover recalled several occasions where the Council had approved applications for high-rise development. It is important to note that in the two years before the approval of the application relating to Observation City, the Council approved three applications by unrelated entities for high-rise development in the Zone. Those applications related to developments that ranged in height from 10 to 20 levels. However, none of them proceeded.

23.3.8 Having heard the evidence of Mr Glover and received the exhibits tendered in evidence, we find that the Council had been supportive in principle of the kind of high-rise development involved in the Observation City concept well before March 1984. The absence of any development on the Scarborough beachfront prior to the application relating to Observation City was due to commercial difficulties suffered by the various applicants and was in no way the result of any disinclination on the part of the City of Stirling to foster high rise development in the area. There can be no dispute about this matter on the evidence and we consider that some importance attached to it because of the perspective it gave on whether the councillors of the City of Stirling would have been likely, in the absence of corruption, to have approved the application for planning approval for Observation City in March 1984.

23.4 The Observation City proposal

23.4.1 In early 1982 Austmark International Pty Ltd ("Austmark") submitted a proposal to the Council that involved a comprehensive development of the entire central and northern sections of the Zone. The proposal comprised at least one 20 level building together with a ten level hotel. The Council approved the proposal as a concept plan on 18 May 1982 and it was then made the subject of advertisement for 42 days. The project in that form did not proceed because the developer had not secured all of the land that was the subject of the application.

23.4.2 In September 1983, a syndicate led by Mr Alan Bond won the America's Cup. The Cup had to be defended about four years later. It was proposed to conduct the race series off the coast in the vicinity of Fremantle.

23.4.3 During the last quarter of 1983, Bond Corporation acquired Austmark. The precise means and method of the acquisition, and the relationship that was established between the two corporations remained unclear on the evidence. Mr Bruce Buckley, then the property manager for the Bond Corporation, said in evidence that the interests of Austmark were acquired by the Bond Corporation as a result of Austmark having run into serious financial difficulties.

23.4.4 Mr Bond said that Austmark was an asset acquired as part of a rescue of a company called Austotels, which had approval to build some high rise developments on the site at the Scarborough beachfront. It is not necessary to identify the precise association between Bond Corporation and Austmark. For the purposes of this inquiry, it is clear that the two corporations were related. In Mr Bond's words, the Bond Corporation "had substantial loans to" Austmark. In the examination of the issues the subject of this term of reference we propose to use the term "Bond Corporation", save for references to the original application made by Austmark.

23.4.5 In November 1983, Austmark's application to the Council for approval to commence development was revived and resubmitted. This time, however, the applicant was able to produce evidence of having acquired control of properties within the area of proposed redevelopment.

23.4.6 The interest of Bond Corporation in a high rise development on the Scarborough beachfront, against the background of the anticipated yachting series, was logical and predictable. It was proposed that the races take place off the beach area and a high rise development afforded an excellent opportunity to provide facilities for observation of the contest. Hence "Observation City". From the outset however, the pressures of time were keenly felt. Although Mr Bond did not concede it was essential the development be completed before the Cup defence, it is obvious on the evidence that there was a strong desire to have the building completed before the races in 1987.

23.4.7 It should also be observed that the attitude of the Council to the re-submission of the Austmark application, backed by Bond Corporation, was one of relief and enthusiasm. This was because it was perceived the applicant now had financial resources, expertise and other characteristics that meant it was likely the development would be carried through to completion rather than fail through commercial difficulties as had previous applications.

23.4.8 The first step that was required by Bond Corporation for commencement of the development was to obtain planning approval from the Council. Bond Corporation's position on the matter was made quite clear to the Council in oral negotiations and correspondence. In a letter to the Mayor dated 13 February 1984, Mr Buckley stated: "We have set ourselves a difficult task in scheduling to have this project completed by late 1986 and we can only make this time frame by way of receiving positive Council support in all aspects in the shortest possible time." From the evidence before us we find that the City of Stirling needed no persuasion as to the merits of the proposed development in principle and it appears to have been more a question of the mechanics of getting the job done.

23.5 The approval

23.5.1 Following the re-submission by Bond Corporation of the application for planning approval, supported by evidence of land ownership, the Planning Department of the City of Stirling commenced to process the application. The objective, after all due inquiry and adherence to procedures and formalities, was to produce a report and recommendation for the Planning Committee. Whereas the Planning Department was staffed by salaried professional officers of the City of Stirling, the Planning Committee was a committee comprised of elected Councillors.

23.5.2 The Planning Department was required, *inter alia*, to satisfy itself that the application complied with Council policy and guidelines. After familiarising itself with the plans and other documents forming part of the application, the Planning Department then went about the business of gathering information in the course of forming its recommendation. A number of studies of various kinds were undertaken. For example, studies involving the effect of wind erosion, sand dune movement and engineering aspects were required. The normal procedure was that, if as a result of thorough inquiry by its officers, the Planning Department reached the view that there should be a recommendation to the Planning Committee that the application be approved, then the details of the development were put on public exhibition for a fixed period following which any objections received were dealt with by the Department in its report to the Committee.

23.5.3 On 14 February 1984, the decision was made to advertise the proposal in accordance with the provisions of the District Planning Scheme.

23.5.4 During the advertising period, there was considerable activity both within the Council and in the public arena, in particular involving the Scarborough Ward Citizens and Ratepayers Association Inc., more commonly known as the Scarborough Ratepayers Association ("the Ratepayers Association"). The association was vocal and busy in its opposition to any high rise development on the Scarborough beachfront.

23.5.5 We were told that during the 21-day advertising period, submissions were received from 5,327 persons, of which 4,534 were said to be in favour of the development and 793 were opposed. The submissions resulted largely from persons availing themselves of pre-printed response cards located at the various public display areas where the project was explained.

23.5.6 We were also told that a petition containing more than 4,000 signatures opposing high-rise development at Scarborough was presented to the Council by the Ratepayers Association.

23.5.7 The effect of this evidence of community attitudes upon the deliberations of the Planning Department, the Planning Committee and the Council, is not clear. The pressure for high rise development at Scarborough appears to have come from the Planning Department itself, which had long held the view that such development was desirable. It appears against that background, that the Planning Department considered

the proposal by Bond Corporation for Scarborough to be ideal for the locality. The Department would not have needed any encouragement to view the proposal in a favourable light.

23.5.8 Apart from organising a petition, the Ratepayers Association held a meeting on 2 March 1984. This meeting assumed some importance in the hearings of the Commission, chiefly because of a speech made by Mrs Meryl Eitelhuber, a member of the Ratepayers Association, as to her canvassing of Councillors' voting intentions on the project. Bond Corporation had engaged a public relations firm known as Ward Holt who sent a representative named Mr Brendon Cant, to this meeting. Mr Cant prepared a written report about it. There was no dispute as to the accuracy of the report.

23.5.9 The report mentioned the observations of Mrs Eitelhuber. They were to the effect that as a result of her canvassing of the Councillors, it appeared that a majority of them were against the proposal. The feeling at the meeting was that the application for approval would fail when it came to the vote at the Council.

23.5.10 Mrs Eitelhuber appears to have been one of the more articulate and outspoken members of the Ratepayers Association and she lobbied extensively against the proposal. She vigorously put her views to the Councillors at every opportunity.

23.5.11 Mr Cant's report of the meeting is significant because it would have indicated to Bond Corporation the possibility that the application would be refused.

23.5.12 On 9 March 1984, shortly after the advertising period expired, the Department completed a report for the Committee, for its meeting on 13 March 1984. The report set out the results of various submissions received and in particular it dealt fully and fairly with the objections of the Ratepayers Association. It summarised all of the arguments in favour of and against the proposal. The report amounted to a thorough briefing on the issues surrounding the application by Bond Corporation for Observation City. In particular, it included a copy of Mr Cant's report of the meeting of the Ratepayers Association, at which Mrs Eitelhuber had informed the audience that a majority of Councillors were against the proposal.

23.5.13 The Planning Department report recommended that preliminary approval be granted subject to numerous conditions. It is clear that the conditions were onerous, with the Department making every effort to extract a wide array of benefits for the City.

It also suggested that the visual impact of the development would be substantially improved if the number of towers was reduced from four to three. One of the conditions dealt with the provision of a pedestrian overpass over West Coast Highway. The Department recommended that Bond Corporation provide the land for the crossover and pay half the cost of its construction. On 13 March 1984, the Planning Committee resolved to submit the recommendation to the Council.

23.5.14 Following the meeting of the Planning Committee, Bond Corporation responded to certain of the proposed conditions. It was prepared, reluctantly, to reduce the number of towers from four to three. With respect to the crossover, it was prepared to provide the land but resisted making any contribution to the cost.

23.5.15 On 19 March 1984, the Director of City Planning prepared a further submission to the Planning Committee in the light of negotiations that had taken place with Bond Corporation. He recommended approval for a three-tower proposal subject to 26 conditions. The earlier recommendation requiring Bond Corporation to contribute half the cost of the crossover was varied so as to require a contribution of one third.

23.5.16 On 20 March 1984, at 4.00 pm, a special meeting of the Planning Committee was held to consider the modified recommendation. The Committee appears to have accepted the proposed reduction in the contribution by Bond Corporation to the overpass. It also accepted a relaxation of the requirement that a bank guarantee of \$2 million be submitted by the applicant. This was reduced to \$1 million. On the other hand, the Committee resolved to recommend the imposition of three additional conditions. These matters were ventilated during the meeting and nothing emerged to indicate that there was anything untoward in the amendments. As we have said, it is clear that the conditions recommended to the Planning Committee were onerous and designed to attract as much benefit to the City as possible. This is confirmed by the evidence of Councillors referred to later in this report.

23.5.17 At 7.00 pm on the same day, during an ordinary meeting of the Council, the Bond Corporation application was approved subject to the same conditions as had been agreed during the meeting of the Planning Committee.

23.5.18 Following a call for a division, of the 13 Councillors present and entitled to vote, ten voted in favour of the application and three opposed it.

23.5.19 It is convenient here briefly to trace the history of the application after March 1984. On 18 May 1984, the State Planning Commission (formerly the Metropolitan Regional Planning Authority) issued an approval to commence development subject to conditions, valid for three years. On 17 September 1984, the City of Stirling issued a planning approval with 36 conditions, also valid for three years.

23.5.20 On 7 January 1985, a legal agreement in order to ensure compliance with the conditions of approval was signed by the parties.

23.5.21 On 11 January 1985, the initial building licence for the hotel complex was issued.

23.5.22 On 13 September 1985, District Planning Scheme No.2 was gazetted. Paragraph 3.2.3 amended the provisions concerning the Special Beach Development Zone to include the following paragraph:

"Development within this zone shall be restricted to 3 stories in height. However the Council may permit a relaxation of the height requirements if it is satisfied that the proposed development will not have an adverse effect on the amenity, density and character and is considered generally consistent with the objectives of the zone."

23.5.23 Finally, it appears that on 8 December 1986, the State Planning Commission refused an application by the successors in title to Bond Corporation for approval to commence development involving construction of the remaining two towers of Observation City. An appeal was taken to the Town Planning Appeal Tribunal of Western Australia. It was heard in May 1987 and the decision was handed down on 11 August 1987. The appeal was successful. However, the development has not been completed and Observation City remains the only high-rise development building on the Scarborough beachfront.

23.6 The Councillors

23.6.1 There were 13 councillors entitled to vote at the meeting of the Council on 20 March 1984 and all were in attendance. Ten Councillors, namely, Councillors Cash, Strickland, Tyzack, Grierson, McNamara, Satchell, Venville, Hancock, Anderson

and Britton voted in favour of the granting of approval and three Councillors, namely, Messrs Camilleri, Smith and Edwards voted against it. All Councillors gave evidence save for Messrs Anderson, Edwards and Britton.

23.6.2 Mr Cash's evidence of the history of the Council's approach to beachfront development at Scarborough was similar to that given by Mr Glover. His recollection was that prior to the vote on 20 March 1984 there was general acceptance of the need both for the redevelopment of the Scarborough beachfront and for high rise development. Prior to the vote, he had no doubt the project would be approved but that it was simply a question of the details of the conditions that would need to be imposed. He recalled discussions concerning lighting, parking, security, and building height. He stated that he shared the view with other Councillors that there should be high rise. Mr Cash believed that of the 13 councillors, eight were Liberal in their leanings and he named them as being himself, and Councillors Grierson, Camilleri, McNamara, Hancock, Tyzack, Anderson and Strickland.

23.6.3 Mr Cash remembered a telephone call prior to the vote from Mr O'Connor. He could not recall anything in particular about it. He was emphatic in his evidence that there was no impropriety whatsoever in whatever it was that Mr O'Connor mentioned to him. He denied that Mr O'Connor lobbied him in any way and he rejected any suggestion that he had represented to Mr O'Connor that there was a risk that the Council might reject the application.

23.6.4 Mr Strickland in his evidence stated that he was always, although not uncritically, in favour of high rise development at the Scarborough beachfront. He believed that high rise development maximised and preserved the view for the majority of people and he never wavered in that belief. His recollection was that prior to the vote a majority of the Council was in favour of the development.

23.6.5 With respect to the weight that would be given by the Council to the recommendation of the Planning Committee, and before it the Planning Department, Mr Strickland felt that the Council would generally follow the recommendation. Mr Strickland's recollection was that before the meeting he believed that the application by Bond Corporation would be approved.

23.6.6 Mr Tyzack stated that he had always been in favour of high rise development on the Scarborough beachfront. He was a Councillor when the earlier

proposal by Austmark was approved some two years previously. He stated that he had been wrongly described in a letter written by Mr Jack Walsh to Mr Buckley, to which reference will be made, relaying information received from Mr Ron Edwards. Mr Tyzack pointed out several other inaccuracies and misdescriptions in the letter. By way of example, his view was that where Mr Camilleri was described in the letter as probably going to "vote with the majority", Mr Tyzack's view was that Mr Camilleri was always against the project.

23.6.7 Mr Tyzack said it was a feature of Council meetings in general that people who were against an idea tended to speak out much more than those who supported it.

23.6.8 Mr Tyzack recalled a telephone communication from Mr O'Connor who had said that he was calling on behalf of "a businessman" who was unnamed but who Mr Tyzack assumed to be "the Bond Corporation". At Mr O'Connor's request, Mr Tyzack had given his views on the voting intentions of each of the Councillors ward by ward. He felt no sense of impropriety in Mr O'Connor's call. Mr Tyzack explained that the Council generally followed the recommendation of the Planning Department and that for the Council to decline to do so would have been the exception rather than the rule.

23.6.9 Mr Tyzack was a member of the Planning Committee and he attended both the meeting of the Planning Committee and the meeting of the Council on 20 March 1984. He recalled nothing contentious about either meeting. As to the variation by the Planning Committee of some of the conditions recommended by the Planning Department and the eventual approval of the conditions by the Council, Mr Tyzack agreed that some person would have suggested that the conditions proposed were excessive and should be varied but he could not recall the identity of that person. His attention was drawn to the letter dated 19 March 1984 from Bond Corporation, making a number of complaints about the proposed conditions and he agreed that it would appear that this letter resulted in the Planning Committee debating the conditions and recommending variation of some of them to the benefit of Bond Corporation.

23.6.10 It is to be noted that members of the Planning Department were recorded in the minutes as having been in attendance at the Planning Committee meeting. Mr Tyzack observed that the Observation City development was the biggest that had been carried out in the City of Stirling. He felt that each of the conditions imposed

upon the granting of the application for approval would have been discussed at the meeting. The Planning Committee meeting lasted for one and three-quarter hours. Mr Tyzack said that there was nothing significant in the proximity of the Planning Committee meeting to the Council meeting. Although it was not the norm, it was not unprecedented.

23.6.11 Mrs Grierson gave evidence that she had always been in favour of the development and had supported the earlier application by Austmark. She was one of the Councillors from the Scarborough ward. Her co-councillor, Mr Camilleri, had been opposed to the project. She also stated that Mr Britton was very much in favour of the project.

23.6.12 Mr McNamara stated that he was always supportive in principle of the project but that he had had some specific concerns about the proposals for parking. His concerns in due course were resolved through negotiation, with the input of Police Sergeant King. When the vote was taken and seen to be ten to three in favour of approving the application, Mr McNamara stated that he was not surprised.

23.6.13 Mr Satchell thought the development was "a fantastic thing" and his recollection was that before the meeting on 20 March 1984 most Councillors were in favour of high rise development at Scarborough. He also was of the view that the Council, as a matter of principle, should support the recommendations of its planning officers who, he recalled, were very keen for the project to go ahead.

23.6.14 Mrs Venville, a most impressive witness, was a Councillor for 18 years prior to 1991 and she served on the Planning Committee throughout. She spoke of the "dream" of the Planning Department to upgrade Scarborough beach. She was in favour of the project from the beginning and felt that there was general approval and support for it at all material times. She stated that she felt the conditions that were imposed were tough but that tactically this was desirable because it was easier to "back off" from tough conditions than to "get tough" afterwards. She observed that she felt the Council was dealing with "a pretty strong customer".

23.6.15 Mr Hancock stated that prior to the meeting he expected the application to be approved. He was generally in favour of high rise development at Scarborough throughout the relevant period although he had some concerns about certain aspects of the proposal. These concerns were met and he was supportive. He recalled that he

would have been keen "to see the City squeeze as much out of the developer as we possibly could".

23.6.16 Mr Camilleri was always against the development. He could remember believing, however, that when the vote was taken the application would "go through".

23.6.17 Mr Smith voted against the application but he also remembered believing, before the vote was taken, that the vote would be in favour.

23.6.18 Mr Britton was not called to give evidence because of his residence overseas but the evidence of other Councillors was that he voted in favour of the approval and he was always expected to do so. Like Mrs Grierson, Councillor Venville observed that he was "very strong" on high rise development.

23.6.19 Councillor Edwards was not called to give evidence because of his commitments in Parliament and because of the fact that he had voted against the project. Councillor Anderson had voted in support of the project but he was unavailable to give evidence.

23.6.20 Before leaving the evidence of the Councillors concerning the period up to 20 March 1984, it should be observed that the events about which they spoke took place eight years ago. The Councillors stated that they had had no reason to recollect the events that preceded the meeting at which the Bond Corporation application was approved until some time in 1990 when there was publicity in the media concerning an allegation about bribery. We accept that it would be difficult to recall detail concerning the events above described because of the passage of time.

23.7 Advocates for the proposal

23.7.1 As has been mentioned, from the viewpoint of Bond Corporation, it was imperative that the preliminary approvals for Observation City be obtained without delay. The assistance of various people was obtained, some by specific approach from Bond Corporation and others who apparently offered their services for altruistic rather than commercial motives.

23.7.2 Mr Ron Edwards, who was the Federal Member for Stirling at the time, had considerable involvement acting as a go-between or, as he put it, "honest broker",

in negotiations between the Ratepayers Association, the Council, and Bond Corporation. On 9 January 1984, he had a meeting with Mr Walsh. Mr Walsh told him that he was working for Mr Laurie Connell and acting as a consultant to Bond Corporation

"on the question of the proposed Observation City development, and that he had been asked by the then Premier would I act as a mediator between the contending parties; that is the Scarborough Ratepayers Association and the Bond Corporation in its name of Austmark. I thought that that was sensible frankly. I thought it was a very reasonable way to go about proceedings."

23.7.3 It would appear from this evidence that, prior to 9 January 1984, Bond Corporation had already taken significant steps to obtain assistance to ensure that the processes required by the City of Stirling were completed without delay.

23.7.4 On 18 January 1984, Mr Edwards had a meeting with various members of the Ratepayers Association and Bond Corporation. Mr Edwards acted as a mediator during that meeting and it appears that Bond Corporation made a considerable effort to explain its position to the Ratepayers Association so as to set the scene for compromise. Mr Edwards' efforts at the meeting were followed by a letter of appreciation from Bond Corporation dated 19 January 1984. Negotiations appear to have continued and again Bond Corporation expressed its appreciation in writing by way of a letter directed to the Ratepayers Association dated 3 February. That is not to say that progress was necessarily being made towards compromise. Mrs Eitelhuber's letter of 17 February 1984, continued firmly to put the opposing view.

23.7.5 By early February, Bond Corporation was becoming extremely concerned about the lack of compromise with the Ratepayers Association and inquiries along other lines were commenced. Mr Walsh attended meetings of the Ratepayers Association and he also had lengthy discussions with a solicitor representing the Association's interests. As a result, he was able to obtain a broad political perspective of the views of the Association which led him to report by memorandum dated 2 February 1984 to Mr Connell. The information given to Mr Walsh by the solicitor for the Ratepayers Association appeared to indicate a view on her part that the only real obstacle to the Council approving the application was the question of parking. The solicitor was thought to have political ambitions as a Labor candidate and appears to have been regarded by Mr Walsh as being reliable and well informed. The impression given to Mr Walsh by the solicitor, which was conveyed in the report to Mr Connell,

was that approval by the Council for the application for Observation City was more than probable, subject to satisfactory resolution of the question of parking. The memorandum was sent on to Bond Corporation.

23.7.6 Mr Buckley, on the date that he received the memorandum, sent it to Mr Peter Beckwith, the senior executive of Bond Corporation, with a covering observation that the memorandum:

"clearly sets out the political situation, whereby the Government will not endeavour to block our proposal, whilst at the same time it wants to retain the support of the Scarborough Ratepayers Association."

23.7.7 Meanwhile, Bond Corporation, through Mr Buckley, continued to press the Council as to the desirability and urgency of the project. By letter dated 13 February 1984, Mr Buckley wrote to the Mayor of the City of Stirling seeking positive Council support "in all aspects in the shortest possible time".

23.7.8 On 17 February 1984, Mr Edwards had a meeting with Mr Walsh in the latter's office and during that meeting he gave, apparently off the cuff, an opinion to Mr Walsh concerning the political inclinations and predicted voting direction of members of the Council concerning the development.

23.7.9 Mr Walsh kept cryptic notes of the meeting. The gist of Mr Edwards' information was that there was a probability that a majority of the Councillors would vote against the project. Mr Walsh took Mr Edwards' opinion seriously and wrote a letter on the same day to Mr Buckley. In the letter, Mr Walsh detailed the information he had received from Mr Edwards, specifically listing Councillors by ward. His concluding paragraph was in the following terms:

"I would strongly recommend that each one of these people be individually canvassed at the highest possible level. We do of course have the problem that if we win the Liberals, we lose Labour and vice versa, and so perhaps it might be a matter of lining as many Liberals as possible, plus Britton, the Labour man who has already declared himself in favour, and then arranging for one of the Labour blokes to get a flat tyre on the way to the meeting."

23.7.10 Mrs Judy Lynn, who was Mr Walsh's secretary, was of the view that the passing reference by Mr Walsh to a flat tyre was simply evidence of Mr Walsh's sense of humour and should not be taken seriously.

23.7.11 The recommendation by Mr Walsh that the Councillors be canvassed at "the highest possible level" is of some significance bearing in mind the undisputed fact that Mr O'Connor became involved in the matter shortly afterwards.

23.7.12 On 23 February 1984, there was a meeting in Mr Beckwith's office at Bond Corporation, at which Mr O'Connor, Mr Beckwith and Mr Buckley were in attendance. Mr O'Connor had been overseas from approximately December 1983 until February 1984 and presumably, sometime between 17 February and 23 February, he was briefed on the matter and asked to assist in securing approval for the development.

23.7.13 On 2 March 1984, as has been mentioned, Bond Corporation engaged Mr Cant who attended the meeting of the Ratepayers Association. As a result of that meeting a report was prepared indicating the results of the canvassing done by Mrs Eitelhuber and the concern that the majority of the Councillors were against the project.

23.7.14 Thus by 3 March 1984, Bond Corporation had information from two fronts, namely Federal MHR Mr Edwards and the Ratepayers Association, to the effect that a majority of the Councillors were expected to vote against the proposal.

23.7.15 From 2 March 1984 until 20 March when the Council granted planning approval, there is no record of relevant events available to the Commission other than those to which we have referred.

23.7.16 Mr Buckley said that he answered to Mr Beckwith to whom he reported on a daily basis "on what was happening on the property side in Western Australia". Mr Buckley had chief responsibility, on behalf of Bond Corporation, for the Observation City development.

23.7.17 He stated that he had numerous meetings with the Ratepayers Association in the period December 1983 to March 1984 and his recollection was that, at the end of it, he believed that the Association would have had an understanding of the project but that some of the members "just would not accept high rise". Mr Buckley's own view with respect to the project was that it was not a question of whether or not the

application would be approved — "not if but how". He was concerned about the conditions that were being proposed. He felt that from the period when he began talking to and negotiating with the Planning Department in late 1983, he was confident there would be an approval in principle although he was aware that some of the Councillors were sensitive to the views of the Ratepayers Association.

23.7.18 This evidence is consistent with that received from Mr Glover of the Planning Department.

23.7.19 Mr Buckley's recollection was that the conditions that were proposed related to the cost of works that the City of Stirling wanted Bond Corporation to carry out outside the boundaries of the property. He believed that the total cost of those works would exceed \$2 million.

23.7.20 On a date unknown but sometime around February 1984, Mr Buckley stated that Mr Beckwith orally instructed him to brief Mr Walsh on "where the project was at". Mr Buckley understood prior to 17 February 1984 that Mr Walsh worked for L R Connell & Partners and he said that he knew that Mr Walsh had "good political connections" on the Labor side of politics.

23.7.21 Mr Buckley stated that he disagreed at the time with Mr Edwards' assessment as given to Mr Walsh and still does. He disagreed as to the views attributed to the Councillors and he believed at all times that the intentions of the Councillors were different from those expressed in Mr Walsh's letter of 17 February 1984. However, he was instructed to brief Mr Walsh, which he did. Furthermore, approximately two weeks later, on instructions from Mr Beckwith, he briefed Mr O'Connor, who by that time had been retained by Bond Corporation.

23.7.22 Having regard to Mr Walsh's advice to Mr Buckley that an approach should be made to the Councillors "at the highest level", we find that the briefing by Mr Buckley of Mr O'Connor on the instructions of Mr Beckwith is evidence that in this regard Mr Walsh's advice was adopted and that Mr O'Connor, obviously well-qualified for the task, was engaged for the purpose expressed in the correspondence.

23.7.23 With respect to the reduction from four towers to three, Mr Buckley recalled that this was a reduction that was not sought by Bond Corporation. It represented no advantage to the developer but, in fact, a slight disadvantage in that there was a loss of flexibility in the development. He was of the view that the Council had

driven a hard bargain concerning the development, particularly with respect to the conditions that were attached to the approval.

23.7.24 Mr Buckley, perhaps not surprisingly in the light of his subsequent actions, said that he felt at the time that Mr O'Connor had made no useful contribution to the project approval. He generally played down Mr O'Connor's role and criticised his grasp of the issues concerning the local government implications of the application.

23.7.25 Mr Buckley also recalled that Mr O'Connor had an ongoing involvement of one kind or another in the development, beyond March 1984 "through to 86-87".

23.7.26 Mr Bond had little direct personal involvement in the project but he could recall that the schedule for construction of Observation City was "tight". He stated that Mr Beckwith "headed it up" in the sense of being responsible overall, and that Mr Buckley was the manager "concerned with it". Mr Bond distanced himself from detailed control and left it to others.

23.7.27 Mr Bond said that he knew little about the fee of \$1 million charged by L R Connell & Partners to the Bond Corporation some time later. His recollection was that Mr O'Connor was paid the sum of \$50,000.

23.7.28 Mr Connell recalled that Mr O'Connor commenced to do work of various kinds for L R Connell & Partners after he had ceased to be the Leader of the Opposition and whilst he was on the back bench in the Parliament. He said both he and Mr Walsh thought that Mr O'Connor would be a useful contact and potential lobbyist. It was agreed that Mr O'Connor would be paid a retainer to act on behalf of L R Connell & Partners from time to time and that, when he left Parliament, finance would be made available to assist Mr O'Connor in setting up his business.

23.7.29 Mr Connell's recollection was that Mr O'Connor was involved in assisting to obtain planning approval and in getting other approvals "through" for the Observation City project.

23.7.30 Mr Connell chiefly dealt with Mr O'Connor through Mr Walsh. Mr Walsh was regarded by Mr Connell as honest and able and he believed that whatever the arrangements with Mr O'Connor were, they were put in place by Mr Walsh. He simply concurred in them. His recollection was that there was an

agreement that Mr O'Connor be paid an annual retainer of \$25,000 and that any fees upon the success of a particular project were payable in addition. Mr Connell regarded himself as a deal-maker and he agreed that he was also regarded as a problem-solver.

23.7.31 Mr Connell said that he was uncertain concerning the nature of a weekly cash payment of \$500 revealed by the evidence to have been paid during 1987 to Mr O'Connor by Mr Walsh but he understood that Mr O'Connor was being paid the retainer of \$25,000 per annum prior to the establishment of the Ray O'Connor Consultancy, which occurred on 1 July 1984.

23.7.32 Mr Connell felt that there had been a need for confidentiality concerning his relationship with Mr O'Connor but his recollection was that this was for perfectly proper and sensible business reasons that related to Mr O'Connor's ability to work efficiently, and there was no sinister aspect to it. With respect to their business relationship, Mr Connell said that L R Connell & Partners had a capital investment in the consultancy through a trust structure. The firm was not at risk if the venture failed other than to the extent that the capital investment would be lost.

23.7.33 Mr Connell stated that he had considerable, ongoing contact with Mr Beckwith over the years. His recollection was that Observation City was a very difficult project because of the timing and design constraints. He felt that L R Connell & Partners would have been asked to assist with the project by Bond Corporation prior to 16 December 1983 and that when the firm was engaged, he would have left it to Mr Walsh to control the matter and see the project through.

23.7.34 Mr Connell also stated that he was aware that there was a "major problem" with the Council. He could recall being aware that there was a possibility that the Council would not approve the application for planning development of Observation City on "the plans as submitted", referring to timing and design difficulties. He was not able to recall the details more specifically. He stated that Mr Walsh was in control of the matter on behalf of L R Connell & Partners and for a large portion of the relevant time he, Mr Connell, was overseas pursuing equestrian interests. He had no hesitation in agreeing that there would have been lobbying of Councillors and he also agreed that Mr O'Connor was well qualified to assist and that he had been of assistance.

23.7.35 Mr O'Connor gave evidence that he had been approached by Mr Connell with an offer of work before he left Parliament in August 1984. He said that the

proposal had probably hastened his retirement. Mr O'Connor said also that at that time he had not known Mr Connell very long, probably only a year or two.

23.7.36 He stated, however, he had known Mr Walsh for 20 years, he knew him well, and he had never had any reason to doubt his honesty.

23.7.37 It is apparent on the evidence that the Ray O'Connor Consultancy commenced operations on 1 July 1984. Mr O'Connor said the consultancy received financial assistance from L R Connell & Partners which resulted in Mr O'Connor having a one-third interest and L R Connell & Partners a two-third interest in the business.

23.7.38 Mr O'Connor said he had a consultancy fee or retainer agreement with a number of entities in addition to L R Connell & Partners, namely, Bond Corporation, Multiplex and Mr Barry Waller. With respect to Mr Waller and Multiplex, the fee was paid on a monthly basis. He was also entitled to a success fee where appropriate. When a success fee was received, it was payable to the consultancy.

23.7.39 Mr O'Connor described various tasks he performed for a number of people, including Mr Beckwith and Mr Connell. He was active, among other things, in resolving disputes between his clients and local authorities. He could not recall details of success fees that had been paid to him.

23.7.40 It was Mr O'Connor's recollection that he became involved with Observation City when Mr Beckwith approached him and "asked me if I could find out what the position was with it". He said he rang two of the Councillors "to do an assessment", apparently on the question of whether or not the application was likely to be approved.

23.7.41 Mr O'Connor could not recall discussing the matter with Mr Walsh. He said he spoke to only two Councillors, namely, Mr Cash and Mr Tyzack, as a result of Mr Beckwith's request. He denied that he ever tried to persuade the Councillors to vote in favour of the application. His recollection, at the time, was that the chance of a vote in favour of the application was "line ball" and that it may have been as close as seven to six.

23.7.42 Mr O'Connor was unable to give any details as to what he said to either Mr Cash or Mr Tyzack in the course of his telephone conversations with them. He was

aware that the Council comprised a group of persons who could be categorised as either Liberal or Labor. In his evidence, Mr O'Connor minimised his role and said he was merely there to find out who was for the project and who was against it and he had no brief to lobby the Councillors. Mr O'Connor said he spoke to other unidentified Councillors at a social function, but he could not recall any of the details or any discussion, or when the function occurred.

23.7.43 Mr O'Connor could not recollect whether he thought his approach would have any persuasive effect on the Councillors although it appears to us to be obvious that an approach by a former Premier and person of Mr O'Connor's stature would have made some impact on the Councillors.

23.7.44 Mr O'Connor said that he did not recall any meeting with Mr Cash together with Mr Beckwith at any relevant time.

23.7.45 When asked whether he received a success fee for his efforts with respect to Observation City, Mr O'Connor stated that he could not recall. He did not think there was a fee paid to the consultancy for his work. He maintained that he had been unable to locate any documents on the point, they having been shredded in 1988 when he shifted offices.

23.7.46 In general, Mr O'Connor suggested that he did not do a great deal of work on the assignment. However, it would appear that in early 1985, Mr O'Connor must either have thought differently or deliberately misrepresented the amount of work he had performed. On 5 February 1985 he rendered an invoice in the sum of \$50,000 to L R Connell & Partners. A notation on the invoice suggests that it was paid by Bond Corporation. The invoice reads: "Agreed Fee for Work in Relation to Scarborough Towers: \$50,000". Mr O'Connor's recollection of the work done would clearly not justify a fee of \$50,000.

23.8 The Learmonth allegation

23.8.1 Mrs Irene Learmonth, the widow of Mr David Learmonth, a former member of the Ratepayers Association who died on 29 May 1991, gave evidence to the Commission that she was told by her late husband following a meeting held at the office of Mr Edwards MHR, that another person, later identified as Mr Walsh, had told him that in respect of the application for planning approval for Observation City, the

ratepayers were wasting their time and "the money's been paid and the deals have been done". Mrs Learmonth thought that the meeting about which her husband spoke was the last meeting before the application was approved by the Council on 20 March 1984. It is otherwise unclear precisely when the meeting took place. The diary of Mr Edwards is not particularly helpful. The last relevant entry before 20 March 1984 is 5.30 pm on 13 February 1984, reading "Meeting here re high rise Austmark/Ratepayers".

23.8.2 Mrs Learmonth said that her husband gave her four names, namely Councillors Tyzack, Satchell, Britton and Venville. Prior to his death in May 1991, Mr Learmonth asked Mrs Learmonth to make a written note of those names which she duly did and the note was later tendered in evidence.

23.8.3 Mrs Learmonth gave her evidence most reluctantly and she came forward after having read the report of the evidence of Mr Edwards and feeling it should be made known that the names given to her by her late husband were different from the names about which Mr Edwards had spoken in his evidence. The persons named by Mrs Learmonth were perceived as being from the Labor side of politics, apart from Mr Tyzack.

23.8.4 The police interviewed Mr Learmonth sometime around November 1990, about six months prior to his death. Mr Learmonth stated that at one stage the Ratepayers Association held some hope that the development would not go ahead because of comments made by Mr Burke prior to his election as Premier in February 1983. However, after the Burke Government came into power, there was little optimism that the application would be refused. Prior to the vote taken in March 1984, Mr Learmonth said that the members of the Ratepayers Association had realised that they "didn't have a hope". He also indicated that it was obvious the City Planner was "directing traffic" on the question and was supportive.

23.8.5 Mr Learmonth told the police that he did not know of any Councillors who changed their minds. He said "I knew we were going to get done — but I thought there would be two or three others that would support it — but they went the other way". Mr Learmonth said he thought the vote could be as much as nine to four in favour.

23.8.6 Mr Learmonth told the police that he was at a meeting with Mr Edwards when he was called into the passageway by Mr Walsh who said: "You

can't win, the deals have been made and the money has been paid". Mr Walsh made no mention of an amount of money or to whom the money was paid. He was not able to recall the date of the meeting at which this conversation took place but he believed that it occurred in the morning. It is to be observed that the meeting on 13 February 1984, being the last meeting entered in Mr Edwards' diary before the vote taken on 20 March 1984, commenced at 5.30 pm. Mr Learmonth did not tell the police that Mr Walsh had told him the names of the persons nor that he had passed those names onto his wife.

23.8.7 According to the evidence of Mr Ron Edwards, on 23 March 1984 at a meeting in the ante room of the Rothwell's boardroom, Mr Walsh told him words to the effect that a sum of \$30,000 had been paid over by the Bond Corporation, with some involvement of Mr Beckwith, and that it had been paid over to Councillors of the City of Stirling. Mr Walsh allegedly said that the money had been passed over and received by a Councillor who had then divided it amongst other Councillors. The Councillor who was said to have received the money was Councillor Cash and monies were said to have been divided up equally amongst Councillors Strickland, Hancock, Grierson and Tyzack.

23.8.8 From Mr Edwards' diary, the only relevant meetings as indicated in the extract that was tendered in evidence was a meeting on 13 February followed by a meeting on 23 March 1984. However, in his evidence, Mr Edwards recalled that there was an entry on 15 March, "4.30 — Scarborough Ratepayers".

23.8.9 Mr Edwards said that Mr Walsh told him that the information was strictly confidential and that "if this comes out, it will be told that it's a campaign donation". Mr Edwards told no person, not even the police, about what Mr Walsh had said because of Mr Walsh's indication as to what would be said if Mr Edwards revealed the conversation and also because of some prior personal difficulties Mr Edwards had had with the administrative committee of the Labor Party concerning public statements.

23.8.10 In cross-examination Mr Edwards stated that he had not received any benefit from his role in the "honest broking" process. In his view, Mr Walsh was always "sensible, rational and thorough" during the meetings that he had with him. He was quite certain that Mr Walsh had told him that a figure of \$30,000 had been paid because he divided the sum by five and reached the view that \$6,000 seemed a small sum per head in all the circumstances. He acknowledged that the five Councillors named were all of the Liberal persuasion and that Mr Walsh was a very strong Labor

supporter. He admitted to feeling some concern at the time he was given this information by Mr Walsh as to whether it might be "disinformation" and he did not exclude the possibility, nor could he in all the circumstances. In general, Mr Edwards' evidence seemed to be to the effect that he felt the approval would be granted and that it was a question of negotiation of conditions and that he could not see, in retrospect, why any "bribe" would have been required in any event.

23.8.11 At or about 23 March 1984, but possibly prior to the meeting of the Council on 20 March, Mr Learmonth told Councillor Kevin Smith, words to the effect that a bribe had been paid to some of the Councillors, each of whom received \$5,000. The Councillors named were Councillors Cash, Strickland, Tyzack, Hancock and Grierson. It is to be noted that those were the same names given to Mr Edwards by Mr Walsh but were different from those given by Mr Learmonth to his wife. As to the date of the conversation, Mr Smith was only able to put it as being "close to the vote" and "at a Council meeting".

23.8.12 To summarise this part of the evidence, it seems that at some time around 20 March 1984, Mr Walsh told Mr Edwards that some Councillors had received \$30,000 between them, namely Councillors Cash, Strickland, Hancock, Grierson and Tyzack. Mr Walsh also gave the same information including the name of the same five Councillors to the late Mr Learmonth. Shortly thereafter, Mr Learmonth gave the same information to Councillor Smith, identifying the same five Councillors. At or about the same time Mr Learmonth gave four different names to Mrs Learmonth. He confirmed this information shortly prior to his death in May 1991 and asked his wife to write them down.

23.8.13 The death of Mr Walsh has deprived the Commission of the benefit of his recollection of the conversations that apparently took place around March 1984 as indicated above. The significant differences in detail make it dangerous to accord weight to these matters.

23.9 The role of Mr Jack Walsh

23.9.1 On 22 March 1984, two days after the Council granted the application for approval, Mr Walsh sent a memorandum to Mr Connell. The memorandum speaks of continuing concern about the support by the Councillors for the project and reports a request from Mr Beckwith that Mr O'Connor be kept active on the matter. Paragraph

2 of the memorandum stated that Mr Beckwith had expressed the view that there was a "need to keep Ray talking to the Councillors who supported the project so they don't get cold feet".

23.9.2 On 2 April 1984, Mr Walsh sent another memorandum to Mr Connell. Because of the importance of the memorandum, it is appropriate that parts of it be set out in full. It is entitled "Project status" and the relevant parts are as follows:

"I understand that you are having a meeting with Mr Peter Beckwith this morning and therefore wish to report in respect of the various projects that we are involved in with his group of companies.

1. Scarborough

The position at Scarborough is that we initially proceeded via the Member for Stirling, Mr Ron Edwards, to try and win over the Ratepayers Association through a series of meetings with them, some of which I attended. It was thought that after making a number of concessions, that the ratepayers' objection to the project could, if not eliminated, be muted. At one stage Mr Edwards gave me a list of Councillors and how they were expected to vote on the issue. This gave us some reason to believe that the project would be approved.

After you had made certain arrangements with Mr Ray O'Connor, I discussed with him his view of how he thought the project would be received by the Council. As a result of this, he made certain inquiries of the leader of the Liberal majority in the Council and was informed that the Liberal majority had decided to reject the proposal, which would have meant the end of it. It is my understanding that Mr O'Connor took Mr Cash to see Mr Beckwith to explain that position. As a result of Mr O'Connor's influence, and certain other undertakings, the Liberal majority was convinced to change its mind and the project has since been approved by Council. *A cost of \$25,000 was involved* [our emphasis] plus whatever arrangement you have with Mr O'Connor, and prior to accepting the liability of the \$25,000 I obtained Mr Beckwith's authority to do so on the understanding that we would share part of that cost from any commission we earned on the project. You are aware that there has been a public outcry associated with the approval and there is an on-going need to insure not only that the Councillors stand fast, but that the

Metropolitan Regional Planning Authority and the Government do not interfere.

I have had discussions with the Premier's Department and have been assured that the project will be allowed to proceed, however, I was told that modifications to the final plan might be sought to demonstrate to the electors that the Government had done a good job for them. I have protested that major concessions have already been made and that there is no room for further concessions. I believe this is understood by the Government.

Mr Ray O'Connor is playing a continuing role in monitoring individual Councillors to ensure their continued support.

... The only fly I see in the ointment is that public opinion could influence the Minister, Mr Dowding, to the point to where he might express a contrary view to that of the Premier in Cabinet. It is therefore essential that the public clamour be reduced if at all possible. I have kept in touch with the Member for Stirling, Mr Ron Edwards, who seems to have the best feel for the situation locally. He came to see me last Friday week and said that we had lost a lot of ground with the ratepayers by varying the proposal submitted to the Council significantly from the proposal discussed with them. He does not say that the proposal as submitted is less desirable than the proposal discussed with them, but he says there is great mistrust by the ratepayers of the Stirling Council and they were highly incensed at not being aware of the proposal in its final form. He says that the situation is capable of being remedied and he says in fact that there would be a better than even chance that the ratepayers would go along with a four unit development rather than the three unit development now proposed. I believe that there are two things that need to be followed up.

(a) ...

(b) ...

(c) Ray O'Connor negotiated with Cash to relieve Austmark of two thirds of liability for road pass over resulting in saving of \$400,000... ."

23.9.3 The salient features of this memorandum are:

- (a) it is in the nature of a briefing by an employee for his employer prior to what appears to have been an important meeting with the senior executive of a large corporation, namely Mr Beckwith;
- (b) the reference to Mr Ron Edwards having previously given Mr Walsh some reason to believe the project would be approved — which does not sit very comfortably with Mr Walsh's letter to Mr Buckley on 17 February 1984 where the need for an approach at the highest possible level was discussed;
- (c) the reference to Mr O'Connor communicating the view that the Liberal majority in the Council "had decided to reject the proposal" — when there does not appear to be any evidence of such a possibility save for the conclusions of Mrs Eitelhuber as expressed to the meeting attended by Mr Cant on 2 March 1984 and contained in his report;
- (d) the reference to Mr O'Connor having taken Mr Cash to see Mr Beckwith "to explain that position" — a meeting denied by Mr Cash and in respect of which there was no reference in Mr Beckwith's diary;
- (e) the weight put on Mr O'Connor's "influence" being instrumental in "convincing" the majority to change their minds;
- (f) the reference to the fact that "a cost of \$25,000 was involved plus whatever arrangement you [Mr Connell] have with Mr O'Connor" but then the use of the words "prior to accepting the liability of the \$25,000 I obtained Mr Beckwith's authority to do so..." which may indicate the \$25,000 had not been in fact paid at the time the report was made although it had been committed;
- (g) the reference in paragraph 1(c) of the memorandum to some success Mr O'Connor had in negotiating a reduced liability for a road pass over;
- (h) the liaison apparently maintained by Mr Walsh with the Premier's Department in order to ensure Government support for the development.

23.9.4 With respect to paragraph (g) mentioned above, the Commission recalls that the question of a reduced liability imposed on Bond Corporation in connection with an overpass was discussed earlier (see paragraphs 23.5.13 to 23.5.16 of this chapter). We observe that the reduction was only from one half of the total cost to one third. It was not, as Mr Walsh apparently thought, a reduction of "two thirds of liability". Whether the actual saving to Bond Corporation would have amounted to \$400,000 must remain a matter of conjecture.

23.9.5 Mr O'Connor was the member for Mt Lawley, having held the seat for many years. Early in 1984 he announced his intention to retire. Mr Cash's pre-selection for the seat was ratified by the Liberal Party on 16 April 1984 and notice of the fact was published in the newspaper. The by-election was held in November 1984.

23.10 The Bond cheque for \$25,000

23.10.1 On 18 April 1984, a Bond Corporation cheque in the amount of \$25,000 drawn in favour of "Cash — Mt Lawley Campaign Fund" was requested, drawn and dispatched to Mr Walsh. The cheque requisition does not disclose the identity of the person who requested the cheque. The details of the expense were described as being "political party donation".

23.10.2 A memorandum of the same date was sent from Mr Buckley to Mr Walsh in the following brief words:

"As arranged with Peter Beckwith, yourself and myself, I am enclosing a cheque for you to distribute."

23.10.3 We find that the memorandum referred to was accompanied by the cheque dated 18 April 1984 in the amount of \$25,000 drawn in favour of "Cash — Mt Lawley Campaign Fund" and being number 080 720.

23.10.4 We accept the view that the words "for you to distribute" suggests that the proceeds of the cheque were to be distributed amongst more than one person.

23.10.5 The payment of the cheque occurred approximately one month after the Council granted planning approval to the project but we do not find that delay to be significant. The fact that the cheque was drawn a mere two days after the announcement of Mr Cash's preselection may simply be coincidence and does not

suggest that any inference is to be drawn in that regard from the evidence. However we do find that the cheque represents the \$25,000 "cost" indicated in Mr Walsh's memorandum of 2 April 1984 set out above. The description of the payee as being "Cash — Mt Lawley Campaign Fund" raises obvious questions. It might be said that the reference to "Cash" is a reference to Mr George Cash, bearing in mind that Mr Cash became the endorsed candidate for Mt Lawley on 16 April. On the other hand, it may be that the document was in the nature of a cheque "drawn to Cash" but the addition of the words "Mt Lawley Campaign Fund" would seem to show a desire on the part of the drawer to demonstrate, if the question should ever be asked, that the money was in the nature of a political party donation. The fact that such a description was written on the face of the cheque itself may show some concern to avoid an appearance of impropriety. Mr Buckley was not able to explain the cheque save to say that he had no doubt that it was a cheque destined for Mr O'Connor.

23.10.6 The cheque was negotiated on 19 April 1984. It was paid into an account at the Town Hall branch of the Rural and Industries Bank ("R & I Bank") in Perth. It was debited to the National Australia Bank account of the Bond Corporation on that date.

23.10.7 The R & I Bank was not able to identify the account into which the proceeds of the cheque were paid on 19 April 1984 because in 1987, in accordance with Bank policy, all of the records that would have established that fact were destroyed. The operation of the policy was most unfortunate in the circumstances.

23.10.8 In April 1984, Mr O'Connor had a personal account at the Town Hall branch of the R & I Bank. On 19 April, being the same date that the Bond Corporation cheque was negotiated, a sum of \$25,000 was deposited into Mr O'Connor's account.

23.10.9 At that time Mr O'Connor had a tax liability in the sum of \$27,069. On 14 April 1984, he drew a cheque in that amount. However the cheque was not debited to his account until 24 April 1984.

23.10.10 An examination of the ledger sheets of Mr O'Connor's personal account at the R & I Bank at the time has revealed that the deposit of \$25,000 on 19 April 1984 was the first deposit of any kind into that account since 28 December 1983. As at 28 December 1983, the account was in overdraft in a sum exceeding \$59,700. By

19 April 1984, prior to the deposit of the said cheque, the account was in overdraft in the sum of \$95,651. A perusal of documents from Mr O'Connor's personal R & I Bank file revealed that Mr O'Connor was having liquidity problems. If the \$25,000 deposit had not gone into his account on 19 April, he would have exceeded his then recently extended overdraft limit. Mr O'Connor denied his personal account needed funds in April 1984 and maintained that, if it had, there were substantial unencumbered assets against which he could have borrowed funds. However, the Commission finds that Mr O'Connor had a need for an injection of funds into his personal account on 19 April 1984.

23.10.11 The question whether the proceeds of the Bond cheque were received to the benefit of any other relevant entity was explored during the hearing and we heard evidence from various persons associated with the Liberal Party at the time, including Mr Cash, Mr Hancock and Mr Tyzack, to the effect that the Liberal Party did not receive the funds. Mr Hancock testified that he had made exhaustive enquiries and was satisfied that the \$25,000 had not been received by the Liberal Party.

23.10.12 Mr Buckley had "no doubt" that the Bond cheque was destined for Mr O'Connor. There is also no doubt it was presented at the Town Hall Branch of the R & I Bank on 19 April 1984 and a sum of \$25,000 was credited to Mr O'Connor's account on that day. All of the established facts lead to a compelling inference that it was the Bond cheque that was presented by Mr O'Connor, the proceeds of which were credited to his account. Mr O'Connor's financial records including ledger sheets, cheque and cheque butts, were unhelpful save to say that there was no obvious contemporaneous disposal of the \$25,000 out of Mr O'Connor's account. Indeed, the debiting of the cheque in the sum of \$27,069 to pay a tax liability on 24 April 1984 is the only debit to the account of any consequence following the deposit of the \$25,000. The next significant entry is a further deposit on 14 May in the sum of \$63,350. We were not provided with any documentation from Mr O'Connor indicating the nature of his deposits in the form of deposit slips or a cash deposit book for the period. Mr O'Connor was given every opportunity to explain the source of the sum deposited to the credit of his account on 19 April 1984 but was unable to do so in any believable way.

23.10.13 As we have said, on 5 February 1985, Mr O'Connor rendered an invoice to L R Connell & Partners in the sum of \$50,000 being "agreed fee for work in relation to Scarborough Towers". In evidence Mr O'Connor played down his role in the

negotiations relating to the Observation City development but it would seem that his contribution, especially when bearing in mind the references to his activities in the various memoranda discussed above, may have been greater than he was prepared to concede.

23.11 The Ray O'Connor consultancy

23.11.1 From 1 July 1984, Mr O'Connor conducted the Ray O'Connor Consultancy in Perth. In the period between 1984 and 1987 the Consultancy performed a range of work for the Government.

23.11.2 In his valedictory speech to the Parliament in August 1984 Mr O'Connor put forward the idea that other sporting activities be arranged to complement the America's Cup event races so as to provide continual sporting entertainment of one kind or another for the influx of tourists into Western Australia. The proposal was named "The America's Cup Festival of Sport".

23.11.3 Mr O'Connor approached the Government in the following month and persuaded it to sponsor the proposal by contributing funds through the Quit Campaign, being a Government sponsored anti-smoking campaign.

23.11.4 By 1985 the America's Cup Festival of Sport began to encounter financial difficulty and Mr O'Connor sought and received substantial financial assistance from the Burke Government. At one stage it appears that there was a risk of the venture failing altogether with the possibility of a loss in excess of \$1 million. Funding from the State Government exceeding \$700,000 was obtained and eventually, Mr O'Connor weathered the storm without loss. Consequently, by the end of 1986, Mr O'Connor had cause to feel grateful to Mr Burke and the State Government for the assistance provided to him. Indeed he had no hesitation in agreeing with that proposition and he went so far as to agree that he "owed the Burkes a favour" because of Government support received during the period.

23.11.5 It appears that by early 1987 Mr O'Connor had become a provider of miscellaneous information to the Premier Mr Burke, concerning the activities of the Liberal Opposition.

23.11.6 Moreover, Mr O'Connor did other work for the Government, particularly for the Public Service Commissioner during the period.

23.11.7 Another background factor referred to in the evidence from time to time which may have some relevance concerns the course of debate in Parliament. Mr Cash was elected to the seat of Mt Lawley in November 1984 and it seems that in the period to about March 1987, he became a very effective opponent of the Labor Government. Although we heard no specific evidence concerning the details of Parliamentary debate, being inhibited by the privilege claimed by Parliament, it appears that in late 1986 and early 1987 one of the features of such debate was that politicians from all sides felt a need to obtain information about their opponents, to "dig for dirt" with a view to obtaining "ammunition" for use in Parliament against their more troublesome adversaries.

23.11.8 In March 1987 Mr O'Connor had a conversation with Mr Burke during which the discussion turned to the question of the identity of any likely future leaders of the Opposition. The conversation took place in the Premier's office at Parliament House.

23.11.9 Mr O'Connor's account of the conversation warrants detailed consideration. His evidence was as follows:

Q: How did that come about?

A: It was in connection with the Americas Cup Festival of Sport that it occurred and when I was there Burke asked me several questions.

Q: What did he ask you?

A: He was concerned about the leadership of the Liberal Party — he wanted Hassell to stay there as leader — and he was concerned that Lawrence or someone else might take over. He asked me who I thought was the best man to lead the Liberal Party and I said "George Cash". He then said to me "I have heard some detail about a tape that Joe Scarfo took from him where he tried to do certain things". He asked me had I heard about it and I said that I had. He then also said that he had heard that there had been something in connection with Observation City and that George Cash had

been offered or been given — I am just trying to think of the words; that \$30,000 had been passed over to Cash. He asked me if I knew about it or if I done it and I said "sure; I did".

Q: He asked you what?

A: If I knew anything about it or who had handed the cash over to Cash.

Q: I thought you just said "He asked me if I knew about it or if I had done it". Is that ...?

A: Yeah. I am just trying to recollect. He either asked me if I had given the cash or did I know anything about it.

Q: Mr Burke asked you that?

A: Correct.

Q: He must have — you said what?

A: I said "sure; I did". Now, I hadn't, but what I was trying to do was to get the information that he might have had on Cash. I thought that he might have had something on Cash and I was trying to see if there was anything in that particular regard. This is when they then got Terry to take the tape at a later stage and I tried to keep that conversation in line with what I had said to Brian Burke.

Q: Are you saying that Mr Brian Burke put it to you that you had taken the money or paid the money? Did he?

A: To that effect — he either said did I know who did it or had I done it. I am not sure which it was.

Q: There is a huge difference, isn't there?

A: Well it's a fair while back to — I think he said did I know who had done it. I think that that was the wording he said.

...

Q: So did he ask you whether you knew who had done it or did he ask you whether you had done it?

A: I am not quite sure but I think he asked me if I knew who had done it. I remember my reply. I said "sure; I did"

...

Q: Well how did you feel?

A: I think it was on the spur of the moment. Yes."

Q: How did you feel when you told him that?

A: Well, I did it on the basis that he had indicated that they might have something on Cash and I was interested in finding out what they had on Cash or if they had anything on him because, if you go back to that time, you will find that there was a lot of shenanigans going on the Labor Party, where they were doing certain things to injure people in the Liberal Party. You can look at the Lawrence and Lightfoot issues and things such as that. I thought that they may have something on Cash and that's why I asked. That's why I spoke that way, rather.

23.11.10 After this conversation the Premier mentioned the matter to his brother Mr Terry Burke, who had either just retired from Parliament or was about to do so. A decision was made to attempt to obtain Mr O'Connor's incriminating admission about being involved in a bribe payment on a tape recording. The purpose of wanting to have the admission recorded was never satisfactorily explained. An approach was made to Mr Robert Smith, then a private investigator with whom Mr Brian Burke had had some dealings in the previous few days. On or about 2 April 1987, Mr Terry Burke received from Mr Smith equipment and instructions to enable him to tape a conversation.

23.12 The taped conversation between Mr Terry Burke and Mr O'Connor

23.12.1 On 2 April 1987, a conversation took place in Mr Terry Burke's electoral office between himself and Mr O'Connor, the meeting apparently having been arranged by Mr Terry Burke. A tape recorder was located somewhere on Mr Terry Burke's desk and it was secreted in such a way that it was not apparent to Mr O'Connor. The

conversation was recorded. Towards the end of it, Mr O'Connor said he got the feeling that he was being recorded but the precise moment when he came to that realisation is unclear. It appears to have been as a result of the nature of questions put by Mr Burke.

23.12.2 After the meeting the tape was returned to Mr Smith who arranged for it to be transcribed. A copy of the transcript was provided to both Mr Brian Burke and Mr Terry Burke. The tape was not a good recording. The resources available to the Royal Commission enabled the production of a more accurate transcript and with amplification and other electronic assistance, the tape was played, in most parts intelligibly so.

23.12.3 Mr O'Connor agreed that the conversation as transcribed contained the same basic facts as the earlier conversation he had had with Mr Brian Burke. In essence Mr O'Connor stated or agreed that he had received \$30,000 in cash in \$50 notes from Mr Beckwith and that he had given that sum to Mr Cash, then a Councillor with the City of Stirling, in consideration of the Council approving the application with respect to Observation City. Mr O'Connor agreed with Mr Terry Burke that this had occurred "between the week that they deferred the decision on Observation City and the following week when they put it through". As we have seen, there was a meeting of the Planning Committee on 13 March 1984 followed by another meeting of the Committee on 20 March 1984 being the same day that the Council approved the application. Of course, the Bond Corporation cheque for \$25,000, to which we refer later, was not drawn until 18 April 1984.

23.12.4 One only has to read the transcript of the entire conversation to conclude that Mr O'Connor was acting as an informer gathering information for the Premier. However Mr O'Connor, despite being pressed, declined to concede this in examination.

23.12.5 From the transcript of the tape there arises an implication that the prior conversation which had occurred was between Mr O'Connor and Mr Terry Burke. That implication is quite clear from the words used. However, in evidence Mr O'Connor was adamant that his prior conversation was with the Premier. Mr Brian Burke confirmed that he held a conversation with Mr O'Connor as a result of which he arranged for his brother to record the later conversation.

23.12.6 The relevant portions of the transcript read as follows:

"page 4 Burke: That he came up...Cash came up to you himself...

 O'Connor: I was disgusted.

 Burke: Where were you?

 O'Connor: At home.

 Burke: At your house? He came to your house? Was he in Parliament at that stage?

 O'Connor: No, I don't think he was.

page 5 Burke: And he came to your home?

 O'Connor: Yes.

 Burke: Between the week that they deferred the decision on Observation City and the following week they put it through?

 O'Connor: Yes, unbelievable isn't it?

 Burke: And he asked you for \$30,000. Cash?

 O'Connor: Had to be. See I thought Cash was a pretty straight bloke...

page 6 Burke: And you went to Beckwith at Bond and he gave you \$30,000 cash?

 O'Connor: No. No, he came away ... the money arrived at my office (inaudible)...

page 6 Burke: ... you told me he came to see you one week before the decision on Observation was reversed by the Stirling Council.

 O'Connor: Well I'd approached a few of them there to try and use his influence (inaudible) in particular (inaudible).

 Burke: So who did you approach?

 O'Connor: Cash.

page 15 Burke: ... the fact of the matter is that Cash is bad.

 O'Connor: Yeah. Oh yeah.

 Burke: For him to come to you and...

page 15

O'Connor: (interrupts) Yeah — I've never had that in my career before.

Burke: Yes, I haven't had it either. In fact, I find it unbelievable that he would come to your home...

O'Connor: (interrupts) So blatantly.

Burke: Was he shy or self-effacing at all or just straight out...

O'Connor: (interrupts) Just straight out, no shyness about it at all.

Burke: And when you gave him the money what was given to him? Just in cash. What — twenties or what?

O'Connor: Fifties.

Burke: What did he do with the cash? What did he do with the \$30,000 cash?

O'Connor: Wouldn't have a clue.

23.12.7 It appears that either Mr O'Connor was telling the truth as he knew it or he went to some lengths to give an air of authenticity to the information he was giving. In his testimony, Mr O'Connor agreed that he wanted to make his statements consistent with his previous statement to the Premier and this would enhance the possibility that his statements would be accepted as true.

23.12.8 Mr O'Connor asserted that he confessed to being the "bag man" for the bribe on an impulse to ingratiate himself with the Premier and to find out what the Government had by way of information concerning Mr George Cash. However, the transcript of the taped conversation suggests that Mr O'Connor was simply providing information. He did not seek to elicit any pertinent information in return. He stated that he knew that the Premier would do nothing, having heard the confession, but that if he had taken the matter further then there was no difficulty or potential risk for Mr O'Connor "because no money changed hands".

23.12.9 Mr O'Connor agreed that his statements would cause an enormous embarrassment to Mr Cash and he expressed some regret in that regard. When the lack of logic of his answer was put to him he explained it simply by saying that his statement was made on the "spur of the moment".

23.12.10 When Mr O'Connor was confronted with the fact of his repetition of the "confession" to Mr Terry Burke some weeks later on 2 April 1984, he responded by

saying that there was some need in his perception for there to be consistency. He intimated that he realised at some stage that he was being taped but that this did not concern him because he felt that the tape recording was illegal.

23.12.11 In discussing the proposition that he wanted information on what the Government had on Mr Cash for transmission back to the Liberal Party, Mr O'Connor denied such a suggestion and asserted that he was personally interested in the information on Mr Cash. Later in his evidence he stated that any information that he had obtained from Mr Brian Burke or Mr Terry Burke about Mr Cash would have been passed on to the Liberal Party and/or Mr Cash.

23.12.12 It might be thought quite bizarre that Mr O'Connor would believe he could ingratiate himself with the Burkes by confessing to criminal activity. It is difficult to see how such a tactic would result in him extracting information from them.

23.12.13 Further it was observed during the hearing that Mr O'Connor did not attempt to take advantage of having made the admissions by specifically asking the Burkes, on any occasion, what information they had on Mr Cash. Mr O'Connor said that he did ascertain that they had nothing on Mr Cash because after he had made his admission, nothing was volunteered. At the end of the day, he found he made the admissions for nothing.

23.12.14 Mr O'Connor also agreed that the other statements of fact made by him as recorded on the tape were generally true. He agreed that there were no intentional untruths in any of the remainder of the transcript. He disputed the truth only of those matters which incriminated him.

23.12.15 It must be recognised that the evidence of admissions made by Mr O'Connor on 2 April 1987 is not admissible evidence in civil or criminal proceedings against any other person whatsoever and in particular against Mr Cash and Mr Beckwith. It should be observed that in general Mr O'Connor's explanation for making the statements recorded on the tape was so unsatisfactory as to be unbelievable. His demeanour and the answers that he gave generally in the course of his evidence leave us unable to place reliance on his testimony in any respect, including what he said

in the taped conversation concerning Mr Cash. Reverting to the question of why Mr O'Connor should engage in the conversation, in the course of his evidence a question and answer proceeded as follows.

Q: I just can't quite follow how it would help you to discover what Mr Burke may or may not have had on Cash by telling him that it was you that was in effect a bag man?

A: Off the cuff, I thought that it might gain his confidence and if he had anything on Cash he would let me have it. It was a spur of the moment decision and probably a wrong one, but it was done at the time.

23.12.16 In his evidence Mr O'Connor frequently answered the question concerning his knowledge that he was admitting to a breaking of the law by a response along the lines that he knew there was no risk to him because "no money changed hands". His assertion that he knew that no money had changed hands was relied upon by him to combat the implications of his confessional statements.

23.12.17 Mr O'Connor was cross-examined at some length by counsel appearing for interested parties. He said that there had been a rumour about Mr Cash receiving a bribe that had been around the circles in which he moved before he spoke to the Premier in March 1987 and that he never thought of the possibility, when having his conversations with the Burkes, that they might inform the police. He also never thought of setting the Premier up by giving him false information. He denied that he invented the story because he thought the Burkes wanted something with which to attack Mr Cash although he agreed that the Burkes seemed to be obsessed with Mr Cash and he also agreed that he felt that he owed the Burkes a favour at that time. Mr O'Connor denied that he received \$25,000 from Bond Corporation and he denied that he told the Burkes that he had given the money to Mr Cash "because he had kept it himself". He said:

"There was no money came from Bond Corporation to me in that regard excepting the money that went through my account which is shown there clearly."

23.12.18 Interestingly, Mr O'Connor denied having had any knowledge at the relevant time that the majority of the Councillors and the Planning Department were in favour of the project and that it was likely to be approved in any event. He also agreed

that his references to Mr Cash's involvement with a Mr Scarfo and a suggestion of some other misconduct were misinformed. There is no evidence of misconduct on the part of Mr Cash concerning a man named Joe Scarfo as was referred to in the transcript.

23.13 The response of the Burkes to the tape-recorded conversation

23.13.1 At no time did either Mr Brian Burke or Mr Terry Burke report details of Mr O'Connor's admissions concerning being a bagman to the police. After the initial conversation between the Premier and Mr O'Connor, it was the former who organised with Mr Terry Burke for a second conversation to take place and for it to be recorded. When the tape was made and a transcript was produced, it was provided to both the Burkes.

23.13.2 The Premier said that he took no action on the matter because he did not believe the truth of what Mr O'Connor was saying. He testified that he informed members of his Cabinet about the matter and that some of them were keen to use the admissions of Mr O'Connor for political purposes but Mr Burke prevented them from doing so.

23.13.3 The Premier gave no adequate explanation for the fact that the conversation was recorded. That fact in itself does not sit well with Mr Burke's explanation that his lack of action concerning the tape was because he did not believe it. In our view, once having come into possession of material pointing to the commission of a serious crime, however discreditable the circumstances of its creation, it was his clear duty even as a citizen, but much more so as the Premier of the State, to bring the matter to the attention of the Commissioner of Police. He does not appear to have done anything about it at all except to report it to the Cabinet. The transcript appears to have remained in his custody until it was misplaced later. A similar situation prevailed with respect to Mr Terry Burke although he told us that he left the decision concerning any action to be taken about the tape with his brother.

23.13.4 In April 1987, it was not unlawful for a person to tape secretly a conversation in which he was participating but it was an offence against section 4 of the *Listening Devices Act 1978* for that person to provide a copy of the tape to another. There is no doubt that Mr Terry Burke committed an offence against that Act and that he was aided and abetted by his brother, Mr Brian Burke. While section 51 of the *Justices Act 1903* has long since precluded any prosecution, we find that it was

improper for Mr Brian Burke and his brother, Mr Terry Burke, to conduct themselves in the way they did in arranging to tape the conversation and then in failing to bring the matter to the attention of the Police Commissioner.

23.14 The question of corruption

23.14.1 The event which is crucial to the resolution of this question occurred on 18 April 1984, when a Bond Corporation cheque in the sum of \$25,000 was sent by Mr Buckley to Mr Walsh with a covering memorandum which said, tersely:

"As arranged with Peter Beckwith, yourself and myself, I am enclosing a cheque for you to distribute."

In his evidence, Mr Buckley said that he had no doubt that it was a cheque destined for Mr O'Connor.

23.14.2 The deaths of Mr Walsh and Mr Beckwith have deprived the Commission of important and relevant evidence. Nevertheless, we believe that the documents that have been produced speak largely for themselves. The evidence before us, including documentary evidence, covering the period from January to March 1984, reveals an anxiety within Bond Corporation that the Council might not approve the Observation City development or might surround it with impossible conditions. That anxiety led to the engagement of Mr O'Connor to lobby those members of the Council whose sympathies lay with the Liberal Party and to the recognition that there would be a cost involved. With this background, the Commission finds that the delivery to Mr Walsh on 18 April 1984 of a cheque for \$25,000 destined for Mr O'Connor for him to distribute occurred in pursuance of a corrupt arrangement made earlier. It was intended by Bond Corporation that Mr O'Connor should distribute the money to those members of the Council whom the Corporation had been led to believe, no doubt by Mr O'Connor, had been swayed in their voting intentions by the promise of reward. The payment itself was corrupt. We deliberately refer to "Bond Corporation" as a generic term, recognising the possibility of injustice arising from this finding, but forced to use it because the evidence does not enable us to identify precisely the person or persons within the Corporation who should take responsibility for the decision.

23.14.3 It remains to determine who received the corrupt payment. As has been mentioned 10 of the 13 Councillors of the City of Stirling gave evidence before the

Commission. Each of them provided details of financial records to Commission staff and some of them were cross-examined on their personal finances.

23.14.4 In particular, Mr Cash's personal financial arrangements were scrutinised because of the fact that Mr O'Connor stated on the tape that he had paid Mr Cash \$30,000.

23.14.5 In the result, no evidence whatsoever was forthcoming that would lead to any suggestion that Mr Cash or any of the Councillors received illicit monies in connection with the Observation City planning approval decision. Neither Mr O'Connor's admissions as recorded on the tape, nor any references in the memoranda written by Mr Buckley or Mr Walsh, are capable of proving a receipt of monies by any of the Councillors. We find that the City of Stirling Planning Department was always strongly in favour of high rise development, and that the approval by the Council was consistent with the known dispositions of a majority of its members.

23.14.6 The Planning Department having made its recommendation for approval subject to conditions, it was likely that the application for approval would be granted. Considerable attention was focussed on the substance of the conditions sought to be imposed. There is no basis for any suggestion, on the evidence, that any suspicion attaches to the benefits achieved for Bond Corporation by the Council's decision to vary those conditions.

23.14.7 What, then, happened to the Bond Corporation's \$25,000? On a consideration of all of the evidence the Commission finds that Mr O'Connor received this \$25,000 on 19 April 1984. Mr O'Connor has always denied that the deposit of \$25,000 into his account at the R & I Bank Town Hall branch on 19 April 1984 was the proceeds of the Bond Corporation cheque. A considerable amount of time was spent in attempting to ascertain the source of the deposit that was paid into Mr O'Connor's account and there is no explanation for the deposit other than that it was the proceeds of the Bond Corporation cheque. Various possible explanations were advanced by Mr O'Connor during the hearing as to the deposit's origins but we find that none of them was credible.

23.14.8 Furthermore, it appears from the evidence, and we so find, that Mr O'Connor misappropriated for his own purposes the monies which were the proceeds of the Bond Corporation cheque. The admissions made on the bribe tape, as we have

said, would constitute some evidence against Mr O'Connor and they amount to a confession that he received \$30,000 in cash from Mr Beckwith and gave it to Mr Cash. He repeatedly stated in his evidence that he did not feel that there was a risk in making these admissions to the Burkes because no money in fact changed hands. In this regard, he appeared to be concentrating his attention, not on whether he had received any bribe money, but on the fact, as we have found, that he did not pass any money on to Mr Cash or any of the other Councillors. The figure of \$30,000 referred to on the bribe tape is different from the figure indicated in contemporaneous documents which have been mentioned above. We are of the view that little weight should be attached to the discrepancy in this regard. It must be said that the circumstances surrounding the taped confession are most bizarre. The only conclusion to which we can come on the evidence is that Mr O'Connor did falsely confess to passing bribe money to Mr Cash. He made that confession believing that no crime had been committed because he had not paid any monies to Mr Cash or any other Councillor. Of course he could be confident in that assertion to the Commission because he kept for himself monies paid to him by Bond Corporation supposedly for the corrupt purpose of bribing Councillors.

23.14.9 An analysis of the evidence both documentary and testimonial that we have discussed with reference to the progress of the Bond Corporation application through the Council, points to the fact that Mr O'Connor was the source of information upon which Mr Walsh relied. We find that Mr O'Connor represented to Mr Walsh, falsely, that a payment was required to be promised to certain of the Councillors in order for approval to be guaranteed.

23.14.10 The only evidence whatsoever that suggests that the Councillors or some of them may have changed their view at a relevant time and voted in favour of the project, having previously indicated a contrary intention, is that of Mrs Eitelhuber, to which reference has already been made. The report of the meeting of the Ratepayers Association on 2 March 1984 shows that Mrs Eitelhuber canvassed the Councillors by telephone some weeks prior to that date. She has always been firmly, and we find honestly, of the view that Councillors indicated to her that there was a majority opposing the project and that the application would be rejected. However when one examines that material against the total background one cannot discount the possibility in the circumstances that Mrs Eitelhuber misconstrued the responses she obtained on the telephone from the Councillors and confused a desire on the part of Councillors to

appear open minded with an assertion of opposition to the project. Mrs Eitelhuber rejected this possibility in her evidence but we are unable to do so.

23.14.11 There is no other evidence whatsoever that suggests that the Councillors' vote in favour of the application was anything other than expected by all concerned.

23.14.12 The implications of our findings in paragraph 23.14.8 of this chapter are discussed in a confidential appendix to this report.

23.15 Bribe tape — criminal defamation

23.15.1 As has been recognised, Mr O'Connor denies the truth of the allegations that he made about Mr Cash which are recorded on the tape and in the transcript. The question whether the evidence warrants further consideration is discussed in a confidential appendix to this report.

23.16 Conclusion

23.16.1 Considerable public controversy over the so-called Observation City bribery allegations, the subject of this term of reference, developed shortly before the Commission was announced. Although not directly related to the affairs of the State Government, the inquiry into this matter affected the conduct of two former Premiers, Mr O'Connor and Mr Burke, and Bond Corporation.

23.16.2 **Mr O'Connor.** The Commission has found that Mr O'Connor acted improperly and his misconduct may be summarised as follows:

- (a) in fostering a belief, in Mr Walsh and Bond Corporation, that was false in fact, that a cost was involved in ensuring that the Council would approve the Observation City proposal subject to reasonable conditions;
- (b) in receiving from Bond Corporation, through Mr Walsh, a cheque for \$25,000, intended by the drawer to be distributed among certain councillors of the City of Stirling and given to Mr O'Connor for that purpose;

- (c) in using the proceeds of that cheque for his own purposes;
- (d) in publishing statements, in March and April 1987, capable of causing injury to the reputation of one or more third parties.

23.16.3 The evidence did not enable the Commission to find whether any other person presently alive was party to this misconduct.

23.16.4 **Mr Brian Burke and Mr Terry Burke.** The Commission found that the conduct of the Burke brothers over the secret recording of the conversation between Mr Terry Burke and Mr O'Connor and the subsequent failure to bring the matter to the attention of the Commissioner of Police was improper.

23.16.5 **Mr Cash and the Councillors.** The Commission has received no evidence whatsoever to suggest that Mr Cash or any of the other Councillors of the City of Stirling received any money or other benefit intended to influence their conduct as Councillors in relation to the Observation City proposal or were otherwise involved in the improper conduct found to have occurred in relation to it.

23.16.6 We also found no evidence of misconduct by Mr Cash involving a Mr Joe Scarfo, as referred to during the hearings.

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

- (a) These are matters addressed in the chapter which are discussed in a confidential appendix to this report; and
- (b) There are no 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.

* * *