PARLIAMENTARY INSPECTOR
OF THE CORRUPTION AND CRIME COMMISSION
OF WESTERN AUSTRALIA

8 February 2008

Hon Nicholas Griffiths MLC
President
Legislative Council
Parliament House
PERTH WA 6000

Hon Fred Riebeling MLA
Speaker
Legislative Assembly
Parliament House
PERTH WA 6000

Dear Mr President
Dear Mr Speaker

In accordance with sections 199 and 206 of the *Corruption and Crime Commission Act* 2003, I am transmitting to the Clerk of the House a copy of my report on the finding of "misconduct" by Mr Paul Frewer, made in the Corruption and Crime Commissions Report of 5 October 2007, of its Investigation of Alleged Public Sector Misconduct Linked to the Smiths Beach Development at Yallingup.

I recommend that that report be laid before each House of Parliament forthwith pursuant to the *Corruption and Crime Commission Act 2003.*

Yours faithfully

Malcolm McCusker AO QC
PARLIAMENTARY INSPECTOR

Locked Bag 123, Perth Business Centre, 6839
Telephone: (08) 9323 2222 Facsimile: (08) 9325 3280
Email: piccc@piccc.wa.gov.au
ABN: 39 838 081 950

PARLIAMENTARY INSPECTOR
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REPORT ON THE CORRUPTION AND CRIME COMMISSION'S FINDINGS OF "MISCONDUCT" BY MR PAUL FREWER

EXECUTIVE SUMMARY

1. There was no justification for the Commissions' finding that Mr Paul Frewer was guilty of "*misconduct*", nor for recommending that a "*relevant authority*" consider taking disciplinary action against him.

2. The independent investigation of "*possible misconduct*", directed by Director General of the DPI, was thorough and its conclusion, that Mr Frewer had "*no case to answer*", well founded.

3. The relevant facts (chronologically) were:

   3.1 At a meeting of the SWRP in July 2001, the Committee resolved that members should in future disclose if they had been "*lobbied*" in respect of any matter going before the Committee. Before that decision, there was no practice or requirement to disclose "*lobbying*" (which is quite different from "*conflicts of interest*", which must always be disclosed).

   3.2 Mr Burke was engaged by Smiths Beach Pty Ltd to assist it in obtaining approval for development of land south of Yallingup. A proposed amendment (No. 92) to the City of Busselton TPS was perceived by the developer as an impediment. Amendment 92 was on the agenda of SWRP Committee meeting for 18 May 2006, for its consideration.

   3.3 At 6:31pm on 18 May 2006, Mr Burke rang Mr Frewer at his home. They had last spoken in early 2005. Mr Burke asked Mr Frewer if he was still in the South West Planning Commission. Mr Frewer said he was, and would be attending a meeting the next morning.

   3.4 Mr Frewer had not told Mr Burke that Amendment 92 was on the agenda for the meeting the next day, but Mr Burke had learned that it was.

   3.5 It is implicit in what Mr Burke said to Mr Frewer that he did not want amendment 92 considered at that meeting. In the (intercepted) telephone discussion, he said (relevantly):

Locked Bag 123, Perth Business Centre, 6839
Telephone: (08) 9323 2222 Facsimile: (08) 9325 3280
Email: piccc@piccc.wa.gov.au
ABN: 39 838 081 950

> "*Nigel Bancroft's just playing funny buggers ... And what he's doing is bringing amendment 92 on ... So I would just like to send you an e-mail with a point of view about dealing with that amendment now*".

3.6 Mr Burke did not request Mr Frewer to seek a deferral of consideration of amendment 92; nor did Mr Frewer agree to do so. There was no apparent reason why he should.

3.7 The e-mail from Mr Burke, which stated a reason for deferring Amendment 92, was not received by Mr Frewer, as it was wrongly addressed.

3.8 At the start of the SWRP meeting of 19 May 2006, the Chairman asked whether there were any "*declarations of interest*". The phone call from Mr Burke did not require any "*declaration of interest*", and there is no evidence, or opinion expressed in the Report, that Mr Frewer had any "*interest*", pecuniary or otherwise. One Committee member said she had been lobbied - and named the lobbyist. Mr Frewer then said:

> "*Someone rang me about the Smith Beach thing and they said they'd send me all this stuff but they didn't ... Anyhow, nothing arrived and I didn't receive anything so if that's called lobbying that's fine*".

No-one asked Mr Frewer the name of the person who had called him. This was not recorded in the Minutes.

3.9 When the question of Amendment 92 was raised, later in the meeting, the reporting officer said that the amendment was inconsistent with the Minutes of the Council meeting. Considerable discussion followed, reference being made to the possibility of legal action and "*ultra vires*". Mr Frewer suggested that it should be sent back to Council for clarification on whether there was an inconsistency. There was further discussion about the legal problem that could arise if amendment 92 did not accurately reflect the Council's decision. All members agreed that the question should be clarified. Towards the end of the discussion, Mr Frewer suggested going to the Council's website (to see if in fact there were any significant inconsistencies) but in the end it was unanimously resolved to refer it back to the Council for clarification.

4. These facts do not support a conclusion or opinion of "*misconduct*" against Mr Frewer.

- He did not have any direct or indirect "*interest*", pecuniary or otherwise, in a deferral of Amendment 92.

- It is at least questionable whether the short telephone call from Mr Burke was "*lobbying*". Mr Frewer did not receive Mr Burke's promised email.

- The practice of reporting "lobbying" was not necessarily to name the lobbyist. No-one at the meeting asked Mr Frewer who had rung him. The members of the Committee consider that, in the circumstances, Mr Frewer acted in accordance with the accepted practice.

- Even it could be said that Mr Burke's call constituted "*lobbying*", and that Mr Frewer's "*declaration*" did not conform with the July 2001 resolution, (because he did not say who had rung him) that would not justify a conclusion that Mr Frewer had failed to act "impartially" or "with integrity". At the <u>most</u> it was a breach of a resolution made in July 2001, that "*lobbying*" be disclosed. The Committee members do not consider that it was.

- He was not "requested" by Mr Burke to seek, nor did he "seek" deferral of consideration of Amendment 92, or "*argue*" for it, as stated in the Commission's report.

- The problem of an inconsistency between the council resolution, and Amendment 92 was raised by the reporting officer, Mr Scibilia. That was followed by considerable discussion and led to the deferral, by unanimous decision.

- All at the meeting agreed that it would be prudent to resolve any doubt on that issue, to avoid a future legal challenge to the validity of Amendment 92 by referring it back to the Council for clarification. There was no argument. Mr Frewer's "*view*" did not "*prevail*", as the Report put it. There was no dissent.

5. The unsoundness of the Commission's opinion of "misconduct" in its report has resulted from

   (a) a failure to check for accuracy the Minutes of the May 2006 meeting against the tape-recording of that meeting, which was in the Commission's possession;

   (b) its failure to consider whether what Mr Frewer did say, at the outset of the meeting, was a sufficient report of lobbying;

(c) its failure to ascertain precisely what were the terms of the SWRPC's resolution to record "*lobbying*", and the views of the Committee members as to whether Mr Frewer's statement was adequate;

(d) its mistaken view that a failure to report "*lobbying*" would be failure to act "*impartially*", or with "*integrity*";

(e) its mistaken view that if a public officer, who has been "lobbied" by someone, subsequently makes a decision or votes in a way which coincides with the wishes of the lobbyist, it follows that the public officer has acted "*at the request of*" the lobbyist, and not with integrity or impartiality.

6. The Commission failed to comply with the requirements of S.86 of the Act, as it did not give Mr Frewer a reasonable (or any) opportunity to respond to the findings in the Commission's report, before it was published, on which its conclusion of "misconduct" was based.

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REPORT ON THE CORRUPTION AND CRIME COMMISSION'S FINDINGS OF "MISCONDUCT" BY MR PAUL FREWER

Background : a finding of Misconduct

1. Williams & Ellison Pty Ltd, solicitors for Mr Paul Frewer have made a complaint on his behalf about the investigation, public examination, and the subsequent report of the Corruption and Crime Commission ("The Commission") dated 5 October 2007 on "*the Smiths Beach Investigation*" ("the Report"). Dealing with the conduct of Mr Frewer the Report stated (page 6) as follows:

> "*On 19 May 2006, at a meeting of the South West Regional Planning Committee, Mr Frewer recommended deferring consideration of a Shire of Busselton proposal to amend Town Planning Scheme (TPS) 20. This deferral was in the interest of Canal Rocks Pty Ltd. Mr Frewer's conduct in failing to declare that he had been approached by Mr Burke to speak in favour of the deferral of Amendment 92 constitutes the performance of functions as a public officer in a manner that was not impartial. The conduct could constitute a serious breach of the Public Sector Code of Ethics in that there was a failure to act with integrity in the performance of official duties. This conduct constitutes misconduct pursuant to sub-paragraphs 4(d)(ii) and (vi) of the CCC Act* " (Emphasis added)

2. That statement is repeated, at paragraph 5.3.1 of the Report (page 77) in identical terms, being there described as "*Commission's opinion on Mr Frewer's conduct*"; and again, at paragraph 7.2.3 (page 106), in Chapter 7 (the heading of which is "*Conclusions, Opinions, and Recommendations*").

3. Recommendation 2 of the Report (at page 77, repeated at page 112) is as follows:

> "*That the appropriate relevant authority should consider taking disciplinary action against Paul Frewer for his lack of integrity in seeking the deferral of Amendment 92 at the request of Mr Burke at the 19 May 2006 meeting of the South West Regional Planning Committee.*" *(Emphasis added)*

Failure to declare an approach made by Mr Burke, a "*failure to act impartially*"?

4. The first aspect of the "*conduct*" of Mr Frewer, which in the opinion of the Commission constituted "*misconduct*", was his "*failure to declare that he had been approached by Mr Burke to speak in favour of the deferral of amendment 92 ...*" at the South West Regional Planning ("SWRP") Committee's meeting of 19 May 2006. The Report does not explain how the failure of Mr Frewer to declare that he had been approached by Mr Burke to support a particular proposal could, of itself, be a failure to act "*impartially*" or "*the performance of functions as a public officer in a manner which was not impartial*", or a "*lack of integrity*", as the Report asserts at pages 6, 77 and 106.

5. The underlying premise of that finding is that if a member of a committee fails to declare that he or she has been approached by someone, urging a particular view about an item on the agenda, that would be a "*failure to act impartially*". That is plainly wrong. "*Impartial*" has a well understood meaning: "*Not favouring, one side more than another, unprejudiced, unbiased*" (Oxford English dictionary). A public officer would fail to act "*impartially*" if he or she espoused a particular proposal, for reasons (financial or otherwise) personal to him or her and not on a purely objective basis. (One example would be a decision by a public officer in favour of a good friend, solely because of the friendship, as against another, who is not a friend). Public officers are "*lobbied*", or approached, regularly by members of the public, espousing particular views on some issue. Public officers should consider those views, and any reasons advanced, and may, or may not, think that they are valid. Their duty is to consider all submissions put to them, and then form their own judgment. If they do not report, to a meeting at which the issue is being considered, that they have been "*lobbied*" it does not follow that they are failing to "*act impartially*", or with "*integrity*". Suppose, for example, members of a committee have been lobbied by people, some supporting, some opposing, a particular proposition. Could it seriously be suggested that if the committee members do not report this "*lobbying*" they are not acting "*impartially*" or "*with integrity*"?

6. For that reason alone (that for Mr Frewer not to report that he had been approached by Mr Burke is <u>not</u> a "*failure to act impartially*" or "*with integrity*") the Commission's finding on this issue is unsoundly based.

Was there an obligation to declare the "approach"?

7. Mr Frewer said in evidence, at a Commission public hearing (TS 704) that the SWRP Committee had decided "*some time ago*" that "*any lobbying that occurred should be registered in the minutes so people were aware of the fact that they might have had contact with an individual or individuals relating to a particular matter*". He said his understanding was that it had been decided that since various Committee members were approached from time to time by developers and

consultants "*it would be desirable to properly record any such approach in the minutes*". He said this, without the opportunity to refresh his memory by referring to the actual decision of the SWRPC, as minuted.

8. The Commission has based its adverse opinion on this evidence. It has done so without determining what the SWRPC's decision actually was. The terms of the relevant resolution of the SWRPC were neither put to Mr Frewer, nor set out in the Report.

9. As noted, Mr Frewer said in his evidence that the matter of recording approaches by lobbyists was raised "*some time ago*". It was, in fact, at a SWRPC meeting on 20 July 2001. The minutes of that meeting (not referred to in the Report) record as follows (emphasis added):

> "*5.2 **Lobbying of Committee Members***
>
> *Mr Priest commented that recording all instances of lobbying in the minutes of each meeting would be an appropriate mechanism to address the circumstances of lobbying. Mr Frewer advised that evidence of discussion was the issue. Mr Stugnell queried what was the criteria for lobbying. Mr Anderson advised that lobbying was confined to dialogue whereas any form of inducement would be covered by the Committee's Code of Conduct or declaration of pecuniary interests.*
>
> *Mr Anderson advised that each member has the choice to determine the amount of lobbying they receive, if any. Cr Drake-Brockman raised the issue of lobbyists requesting information from members information regarding reporting officers' recommendations to the Committee. Mr Anderson advised that as report recommendations had no standing prior to being considered by Committee they could not be released. Mr Anderson also added that he preferred not to release the decisions on proposals considered at the meeting.*
>
> *At the conclusion of the discussion the Committee agreed that the individual members would self regulate any lobbying they receive and that each instance of lobbying would be recorded in the minutes and the Standing Orders would require amendment.*
>
> ***RESOLUTION***
>
> *The Committee resolved to:*
>
> *i) retain the current practise where Members self-regulate any lobbying they receive;*
>
> *ii) advise the WAPC of its decision on the matter;*
>
> *iii) amend the Committee Standing Orders to clearly reflect the Committee's resolution regarding lobbying; and*
>
> *iv) record all future instances of lobbying in the Committee Minutes.*"

I shall refer to this as "*the July 2001 Resolution*".

10. Whether the Committee Standing Orders were amended as per Resolution (iii), to "*clearly reflect the Committee's decision regarding lobbying*" is not clear. Neither the July 2001 Resolution, nor any amendment to the Standing Orders, was put to Mr Frewer in his examination. Clarification was certainly desirable : what was "*the current practice where Members self-regulate any lobbying they receive*", which by Resolution (i) it was decided to "*retain*"? And what were the criteria for a member deciding whether he or she had been "*lobbied*"?

11. Importantly, as Mr Anderson observed at the July 2001 meeting, there is a clear distinction between "*any form of inducement (which) would be covered by the Committee's Code of Conduct or declaration of pecuniary interests*", and simple "*lobbying*". The fact that someone has been "*lobbied*" does not mean that he or she, as a result, will thereby have a pecuniary (or other) "*interest*" in the matter.

12. Before this July 2001 Resolution, it is clear that SWRPC members were being lobbied from time to time. Whether they reported this at meetings was entirely up to them. If they did not, it would be wrong to suggest that they were not acting impartially or with integrity. The July 2001 Resolution did not change that, and transform a mere failure to report lobbying into a "*failure to act impartially and with integrity*".

13. There is no suggestion in the Report, nor any evidence, that Mr Fewer had any direct or indirect interest (pecuniary or otherwise) in the deferral of the SWRPC's consideration of Amendment 92. He said in evidence (T 704) that he understood simply that members of the Committee should record the fact of any approach by "*an individual or individuals relating to a particular matter*". Whether he understood that that required a Committee member not only to state that he or she had been approached in relation to a particular matter, but also to state the name of the individual or individuals who had made the approach, is not clear, as he was not asked. Nor does the July 2001 resolution make it clear. And it is by no means self-evident. Suppose, for example, that a number of people were to approach a Committee member, at different times, about the same subject. Would the member be obliged to report, not only that he or she had been "*approached*", but also the names of every (or any) person? And for what reason? Furthermore, what exactly is meant by "*lobbying*"? As Mr Stugnell, at the July 2001 meeting, asked "*What was (sic) the criteria for lobbying?*".

14. As the taped recording of the meeting of 19 May 2006 shows, when the Chairman asked whether there were any "*declarations of interest*", Mr Frewer said "*someone rang me about the Smiths Beach thing and they said they would send me all this stuff but they didn't ... (indecipherable) and anyhow nothing arrived and I didn't receive anything so if that's called lobbying that's fine.*" (emphasis added). No one at the meeting asked him who had approached him. Nor was it put to

him, when he was questioned by counsel assisting the Commission at the hearing on 1 November 2006, that this was not a sufficient disclosure because he had not said it was Mr Burke who had rung him. Mr Frewer was questioned by counsel on the wholly mistaken premise that he had made no disclosure that he had been approached by anyone about "*the Smiths Beach thing*". He was questioned by counsel solely on the basis of the Minutes of the meeting, which were shown to him on a screen. However, the Minutes did not record what he had in fact said at the beginning of the meeting, about being rung "*about the Smiths beach thing*". He was also questioned on the assumption, also later shown to be erroneous, that he had received an e-mail from Mr Burke, proposing that Mr Frewer suggest that consideration of Amendment 92 be deferred, on the ground that its terms were not consistent with the Council resolution it was supposed to reflect. Had he received it, then he would have been "*lobbied*". But since he did not receive it, the question is whether what was said in a very brief phone call from Mr Burke was "*lobbying*" on the evening of 18 May 2006. So far as is relevant, what Mr Burke said during that phone call was that he proposed to send Mr Frewer an e-mail that night. He then said

> "*I'll tell you why. Nigel Bancroft's playing funny buggers*".
> "*And what he's doing is bringing amendment 92 on*".
> "*So I would just like to send you an e-mail with a point of view about dealing with that amendment now*".

He did not explain what the "*point of view*" was, although it is a fair inference that Mr Frewer would understand that Mr Burke, on behalf of the developer of Smiths Beach, wished the SWRPC to defer consideration of Amendment 92, even though he did not explain the "*point of view*" or advance reasons for it.

15. At T 705.5, Mr Frewer explained in evidence his understanding of what the Committee had decided: "*it could simply be noted that there had been some log ins with respect to a particular issue*". It was not put to him that this was incorrect, and that the disclosure he made at the outset of the May 2006 meeting was therefore inadequate, because he was being questioned on the incorrect assumption that he made no disclosure at all, that he had been approached about the Smiths Beach item on the agenda. He did not then realise (when being questioned) that he had, in fact, told the meeting that he had been approached, because he was only shown the Minutes, which did not record what he had said. It was not until after the publication of the Report, and he later obtained a copy of the tape recording of the SWRPC meeting, that he realised this. Thus, at T1276 this was put to him "*It's compounded by the fact that you didn't make a disclosure at that meeting. Do you see that that's a problem?*" And he answered "*Yes I understand that. I have already said it was an oversight and it's one that I regret.*". He gave that answer because he believed (wrongly) that the Minutes were a complete record of what had been said at the meeting, and that (contrary to the July 2001 resolution to report "*lobbying*") he had not

mentioned that he had been approached, although it is apparent from what he said at the May 2006 meeting that he was not sure whether Mr Burke's brief call to him could be described as "*lobbying*".

16. It would be, of course, unthinkable for counsel assisting, Mr Hall SC, to have questioned Mr Frewer on the basis that he had made no disclosure, had Mr Hall known that the Minutes were incomplete, and that Mr Frewer had in fact disclosed to the meeting that he had been rung by someone about "*the Smiths Beach thing*". Clearly Mr Hall was, like Mr Frewer, labouring under the misconception that the Minutes were a complete record. The Commission has informed me that a recording of the meeting was in the possession of the Commission investigators before Mr Frewer was called to the public examination. Had the Minutes been compared with the recording, it should readily have been realised that the Minutes were an incomplete record. The Commission has also informed me, in its "*Response*" of 31 January 2008 to a draft of this report, sent to it on 4 January 2008, that the investigators had listened to the recording of the meeting, heard what Mr Frewer had said, but did not tell Mr Hall SC because they did not consider that to be "*a statement that he had been lobbied by Mr Burke*"! But it was not, of course for them to judge whether, because he had not mentioned Mr Burke's name, what he said about being rung about "*the Smiths Beach thing*" could be disregarded, and not referred to at the public examination, or in the Report. Furthermore, as Mr Hall SC did not know that the e-mail sent by Mr Burke was not received by Mr Frewer, he questioned Mr Frewer on the mistaken assumption that Mr Frewer had received it, and that this was therefore clearly "*lobbying*".

17. In my view, as I have explained, even if Mr Frewer had said nothing at all about being rung "*about the Smiths Beach thing*", that would not mean that he was failing to act impartially or with integrity. I raised with the Commission for its comment (by letter dated 13 November 2007) the point that Mr Frewer had in fact declared at the May 2006, that he had been rung by someone about "*the Smiths Beach thing*", (which the Report does not mention, because the minute was not checked against the tape recording). In its reply of 18 December 2007, the Commission gave the following answers, in response to questions which I raised in my letter of 13 November 2007, on which I , in turn, comment:

    (a) That the taped recording of the meeting of 19 May 2006 "*does not reveal a disclosure of any conflict*". True - because there is no evidence that any "*conflict*" existed; and certainly there is nothing in the Report referring to evidence of any "*conflict*". It is crucial to distinguish between declarations of conflict of interest (which are mandatory) and declarations, not of "*conflict of interest*", but of the fact that a committee member has been lobbied about a particular matter. The implication in the Commission's letter, that there was a "*conflict*", is not supported by any evidence. It elides "*declarations of interest*" with the quite different

declaration, that a committee member has been "*lobbied*". The two should not be confused. Although in its later Response to the draft of this Report (which pointed out that there was no "*conflict*") the Commission accepted that there was no evidence of any "*conflict of interest*", but went on to refer to "*Rules relating to conflicts of interests or approaches by lobbyists*", as if they were substantially the same. They are not.

(b) That Councillor Pringie had made a declaration at the May 2006 meeting, "*of a conflict of interest*", in which she named the person who had approached her (the City of Busselton CEO), and specified what about. But that was not a "*conflict of interest*". And the fact that she named the person who had approached her does not mean that this was necessary. No-one asked Mr Frewer who, for the record, had rung him. It cannot be concluded, merely from the fact that Ms Pringie named her lobbyist, that this was required, when the July 2001 resolution was silent on the point, and there was no general practice of naming lobbyists, nor any law or Code of Conduct which required it.

(c) That Mr Frewer agreed that he had "*instigated the matter being deferred*". That ignores the actual discussion at the May 2006 meeting, and how the proposal for deferral arose. (See above, paragraph 24.) His "*agreement*" with that proposition, in his examination, was apparently based on the (incomplete) Minute which was shown to him during the public examination.

(d) That Mr Frewer had denied, at the first public examination, having been contacted by Mr Burke prior to the meeting. That is so, and Mr Frewer conceded it, at a later hearing, when he said he had forgotten the approach. He was being questioned, in November 2006, about events of May 2006. His telephone discussion with Mr Burke on 18 May 2006 lasted for only a few minutes. It is not inconceivable that a very busy senior public servant may have forgotten a short phone call, ending with a promise by Mr Burke (with whom he had had no contact for over a year) to send some material by e-mail (which Mr Frewer did not get). It has not been alleged that Mr Frewer deliberately lied on oath. And, in any event, this response by the Commission misses the point. Mr Frewer's initial denial that he had been contacted by Mr Burke has nothing whatever to do with the question of whether his failure to name Mr Burke as the party who had rung him "*about the Smiths Beach thing*" was a failure to act "*impartially*", and was "*therefore*" misconduct.

The Section 86 Notice

18. Following the public hearings, on 19 January 2007 the Commission wrote to Mr Frewer (as required by section 86 of the Act) to give him the opportunity of

responding to two closing submissions made by counsel assisting (Mr Hall SC) at the public examination. They were, in summary (emphasis added):

18.1 that he proposed and spoke in favour of a motion to defer consideration of amendment 92 "*with the improper purpose of gaining a benefit for Canal Rocks*"; or

18.2 alternatively, that his conduct in proposing and speaking in favour of that motion constituted a failure to declare a conflict of interest and a failure to act with integrity in the "*performance of official duties*".

19. Neither of these submissions suggested, as a possible adverse comment to be made in the Report (much less as the basis for a finding of "*misconduct*") the proposition that he had not declared that he had been approached by Mr Burke, and that this of itself amounted to a "*failure to act impartially*", or with "*integrity*", and "*misconduct*". They were directed only to either "*improper purpose*" (the first) or "*failure to declare a conflict of interest*". Both are serious allegations.

20. In response to the "*section 86 notice*", Mr Frewer's solicitors, by letter dated 9 February 2007, made representations to the Commission, directed only to the submissions set out in the notice, that by "*proposing*" and speaking in favour of deferral of amendment 92 he had acted for the "*improper purpose*" of gaining a benefit for Canal Rocks; and that in speaking for the deferral he had failed to declare a "*conflict of interest*". Those representations appear to have been accepted by the Commission, as there was no "*opinion*" or "*conclusion*" in the Report, that Mr Frewer, in speaking in favour of a deferral, was acting with the "*improper purpose*" of gaining a benefit for Canal Rocks (a serious allegation which, if established, could amount to criminal conduct) or that he had failed to declare a "*conflict of interest*". On the evidence, that could not conceivably have been sustained. There was no evidence that he had any "*interest*" in the deferral, which would (by the existing Standing Orders) have required him both to declare that interest and abstain from voting. The Commission has accepted that there was no evidence of a "*conflict of interest*". The submission should never have been made.

21. The "*adverse opinion*" ultimately expressed in the Report was that Mr Frewer had failed to declare that he had been approached by Mr Burke to speak in favour of the deferral of amendment 92, not that he had agreed to do so; nor that, in speaking in favour of the deferral, he had done so for an "*improper purpose*", and in breach of the Standing Orders relating to declaration of pecuniary interests. No further notice, of those proposed findings, was given.

22. The result was that Mr Frewer was given no opportunity to make representations against the finding of misconduct that ultimately appeared in the Report, based on his (alleged) failure to declare that he had been approached by Mr Burke and that that, of itself, constituted "*performance of his*

functions in a manner that was not impartial, and a failure to act with integrity". Had that been put to him in a section 86 notice, he would have had the opportunity to check the recording of the May 2006 meeting, and to point out that he had, in fact, said that he had been phoned by someone about the "*Smiths Beach thing*"; to submit that the July 2001 resolution did not require members to name the individual or individuals who have lobbied a member, and it was not the general practice to do so; that the brief phone call from Mr Burke was not "*lobbying*", or at least he had reasonably doubted whether it was (as the full recording of the May 2006 meeting shows); and that in any event it could not reasonably be said that his failure to state that the approach made to him about the "*Smiths Beach thing*" was by Mr Burke constituted a failure "*to act impartially*" or "*with integrity*".

23. This was one of the matters raised with the Commission for its comment, in a draft of this Report, on 4 January 2008. In its Response of 31 January 2008 it asserted that although the "*Section 86 notice*", sent to Mr Frewer on 19 January 2007, giving him until 9 February 2007 to respond, did not say that a finding of "*misconduct*" might be made on the basis of his failure to declare that he had been "*lobbied by Mr Burke*", it had said that a finding of "*misconduct*" might be made. It also asserted that compliance with the requirements of s.86 should not be "*approached as a matter of strict pleading ...*" as the Commission considers that the s.86 letter "*reasonably alerted Mr Frewer to the potential assessment and opinions which might be made against him*".

24. This proposition must be emphatically rejected. It amounts to saying that although s.86 requires the Commission, before reporting any "*matters adverse*" to a person, to give that person the opportunity to make representations concerning such matters, it is enough for the Commission to give notice to a person that it intends to report "*misconduct*", without saying on what grounds, or (even worse) stating grounds which are responded to, and then reporting a finding of "*misconduct*" on a different and unstated ground. If that were correct, the intention of s.86, to give persons a "*reasonable opportunity*" to respond to potential adverse comment, would be defeated.

The Commission's conclusion unsound

25. For the following reasons, I have concluded that the Commission's opinion, that Mr Frewer's failure to report the approach by Mr Burke was a "*failure to act impartially*" and "*with integrity*" as stated in the Report (see paragraph 1 above) is based on an inadequate investigation and review of the relevant evidence, and is unsoundly based.

    25.1 The July 2001 Resolution, to record "*lobbying*" of members, is unclear. Absent a clear, binding decision of the Committee, incorporated in Standing Orders, no member would be obliged to disclose that he or she

had been "*lobbied*" about a matter to be dealt with by the Committee. The only obligation to make a declaration would be in the case of a "*conflict of interest*". Members of Parliament are regularly approached by constituents about issues that may arise in Parliament, urging a particular point of view (i.e. "*lobbying*"). No-one would suggest that they are even obliged to declare that they have been "*lobbied*", much less to name the constituents. And, as the Commission has conceded, there was no "*conflict of interest*" on Mr Frewer's part.

25.2 The July 2001 resolution was not clear. What was meant by "*self-regulated*"? Did that mean that it was up to individual members to decide what approach should be recorded as "*lobbying*"? Mr Frewer, at the May 2006 Committee meeting, said he had been rung about the "*Smiths Beach thing*", but clearly was not sure whether that of itself was "*lobbying*" - which was understandable, as the papers which Mr Burke had said would be sent to him by email to "*express a point of view*" were never received.

25.3 It is highly debatable whether the brief phone call alone from Mr Burke constituted "*lobbying*". The email Mr Burke, sent to the wrong address, would have been; but it did not get to Mr Frewer, as he said at the May 2006 meeting (and as the Commission later accepted, following representations from Mr Frewer's solicitors).

25.4 It is also unclear whether the July 2001 resolution intended that the names of lobbyists, as distinct from the fact of being lobbied, be disclosed. When Mr Frewer said that "*someone*" had approached him, no Committee member asked him who it was, so it is a fair inference that the members did not consider that names of lobbyists must be disclosed, or surely the members would have asked him who it was.

25.5 Before completing its Report, the Commission made no inquiry of any of the SWRPC members present at the May 2006 meeting, to determine whether Mr Frewer's conduct accorded with the July 2001 decision, and the practice of reporting "*lobbying*". However, the independent investigation later commissioned by the DPI, of a "*suspected breach of discipline by Mr Frewer*", conducted on the recommendation of the Commission, did so. It reported that the Committee members interviewed all considered that Mr Frewer's conduct was consistent with the policy and practice of the SWRPC, and that it was not the general practice to report who had "*lobbied*" (which, of course, is borne out by the fact that no-one at the May 2006 meeting asked Mr Frewer who had rung him about "*the Smiths Beach thing*"). Mr Mike Schramm, the Director of the South West Planning Office, was present at the meeting and took part in the discussion. He, together with other officers of the SW

Planning Office present at the meeting, and Mr Vogel, the Secretary, were all of the view that Mr Frewer had made a sufficient disclosure. Mr Vogel, who had kept the minutes of SWRPC meeting for over 7 years, did not include the disclosure by Mr Frewer in the Minutes because (nothing having been received by Mr Frewer) he didn't think that it "*reached the threshold*" to require inclusion in the Minutes.

25.6 It is important to understand (and the Commission agrees) that there is nothing unlawful or improper in members of the public "*lobbying*" public officers - in other words , to argue for a particular view, or suggest reasons for a particular outcome. For Mr Burke - or anyone else - to "*lobby*" for a deferment of Amendment 92 was perfectly lawful and in no way improper; nor is it unlawful or improper for a public officer to receive, consider, and perhaps accept and adopt, those arguments and reasons. Far from being "*misconduct*", that is how a public officer would be expected to conduct himself or herself - to be open to, and consider, requests and arguments from members of the public. (The Code of Ethics made pursuant to the Public Sector Management Act specifically requires public officers to "*respect peoples' needs to seek advice and support*").

25.7 There is no general legal or ethical obligation for a public officer to declare that he or she has been "*lobbied*" on a particular issue. The law only requires a "*declaration of interest*" to be made, if a public officer has, either directly or indirectly, some pecuniary or personal interest in an issue which comes before him or her, and to abstain from voting on it. But Mr Frewer had no such "*interest*" in the deferment of Amendment 92 requiring a "*declaration of interest*", as the Commission has conceded.

25.8 Under neither the Public Sector Management Act nor the "*Code of Ethics*" issued by the Public Sector Standards Commission, is there any "*ethical*" obligation for a public officer to declare that he or she has been "*lobbied*" on a particular issue. That would be, in very many cases, impractical, anyway.

25.9 At the July 2001 meeting of SWRPC it was agreed, and resolved, that it was up to members of the SWRPC to decide what amount of "*lobbying*" they chose to receive, and that "*each instance of lobbying would be recorded in the minutes*". The reason for that decision is not recorded in the minutes; but is clear that this decision was not intended to reflect the law, or the Code of Ethics. It was no more than an agreement by the Committee members. The views of the SWRPC members, that Mr Frewer had acted in accordance with that agreement, are therefore of considerable importance.

25.10 Finally whatever was intended by the July 2001 Resolution to report "lobbying", it cannot possibly be said that a breach of that resolution (even if the failure to name the lobbyist were a breach) constituted a "*failure to act impartially*" and "*with integrity*" and therefore "*misconduct*".

26. In its Response to this Report in draft, the Commission adhered to its assertion (despite the statement made by Mr Frewer at the beginning of the meeting, which was brought to its attention) that he was still guilty of "*misconduct*", because he had not said that the person who had rung him about "*the Smiths Beach thing*" was Mr Burke. When the Report was written, the author or authors of the Report had not checked the minutes of the May 2006 meeting against the recording, and therefore wrote the Report on the assumption that the minutes were correct. Had the author of the Report been conscious, when it was written, that Mr Frewer had in fact declared, at the beginning of the meeting, that he had been rung by someone about the "*Smith's Beach thing*", one would expect that, in fairness, the Report would have said so, and then (perhaps) attempted to explain why the Commission considered that a report of "*lobbying*" must include the name of the lobbyist (even though the July 2001 Resolution did not say so, no Committee member thought it was necessary and no-one at the May 2006 meeting asked who had lobbied him). And the Report would still need to explain just why that was a "*failure to act impartially*" and "*with integrity*").

The (unanimous) decision to defer Amendment 92

27. The second aspect of Mr Frewer's conduct, said in the Report to amount to a "*lack of integrity*" and "*misconduct*", was "*seeking the deferral of Amendment 92 at the request of Mr Burke*". That finding, again, appears to have been made without the author of the Report having listened to the audio recording of the proceedings of the meeting, and relying solely on the Minutes (which are almost invariably abbreviated). At the SWRPC meeting of 19 May 2006 there was a discussion about the Smiths Beach development guide plan (DGP) as well as the proposed scheme amendment (Amendment 92).

- At the outset, Mr Schramm noted that there had been a "*general feeling*" that the DGP and Amendment 92 "*should go through together*" but the amendment had gone "*a bit quicker*". However, he expressed the view that the amendment "*doesn't introduce anything that would be a problem for the developers*".

- Frank Scibilia, the reporting officer to the Committee, reported that the proponent's consultant (Mr Mike Swift) "*is still a little bit uneasy with this amendment on several points, one being that the amendment document is not following council minutes ...* ". Mr Scibilia was the first to raise this as an issue. It was not raised by Mr Frewer.

- Mr Klem then asked Mr Scibilia to clarify his statement that the amendment was "*not consistent*" with the Busselton Shire Council resolution. There followed a discussion, during which Mr Frewer asked "*what is documented as the resolution is not consistent with the minutes? Is that what you are saying?*" To which Mr Scibilia said "*Yes*". Mr Klem asked whether the "*error*" was with the Council. Mr Scibilia replied that it was.

- Mr Scibilia then gave some further clarification of why the resolution was "*not consistent*" with the minutes of the Council, following which Mr Klem said "*Is it the fact that we are acting is it an ulta vires? It is a situation where we are acting on something that isn't a formal resolution of council? ..So have we got advice on that?*" Scibilia replied "*No*". The Chairman then asked "*Was the actual resolution deficient or was the reporting of it or the minuting of it deficient? I don't understand where the difference between the two arises*"

- Mr Scibilia replied "*Yep. The amending text hasn't been admitted (sic) word for word ... as per the Council resolution ... ".*

- The Chairman asked Scibilia whether the Council's resolution was "*fuller than the amendment itself*" to which Scibilia said "*Yes, in one instance that is the case ... ".*

- Mr Frewer then said "*Well, the effect is that we should send it back to Council?*", to which Mr Klem said "*Exactly*".

- A little later, Mr Frewer said "*We have just got to make sure it is exactly consistent. That's my view anyway*". Klem said "*Yeah that's what I'm worried about*" and Mr Frewer said "*Otherwise you have got an officer's interpretation of a Council resolution*".

- Mr Klem then said "*As I understand Frank (Scibilia) you made the point that the consultant Mr Swift maybe knows that it is inconsistent. Correct?*" Mr Scibilia said "*Yes*".

- Mr Klem then said "*Well, and in those circumstances ... ".* And the Chairman interjected: "*And Minter Ellison were involved are they not? Interesting people*". Further discussion followed, in the course of which the Chairman said "*When the Council advertised the amendment it referred to all of the development investigation area, right?*" Scibilia said "*Yes*". And the Chairman said "*But was it already flawed because of the resolution. I mean are we in a situation where the resolution originally passed whenever that was, last*

year or something, was not consistent with the amendment as advertised and so we may in fact be in a situation where it has to be readvertised?".

- Mr Scibilia said he hadn't double checked, to see whether the resolution was reflected in the amendment document as advertised, that this issue was raised only "*very recently*" by the consultant, and he hadn't had time to investigate the matter. Ms Premji then asked whether the amendment reflected the Council resolution, or an interpretation of the resolution by the Shire Officers.

- Mr Frewer asked whether it changed the intent of the Council resolution, and whether that resolution allowed "*for any further modifications, editing changes or something by staff*". He repeated his earlier question "*With the change made did it actually change the intent of the amendment that was put to Council?*" To which Mr Scibilia said "*The answer is yes*".

- Mr Klem then said "*contrary to the Act you know ... the scheme is made as though its part of ... its contravening the Act that's all. Can't do it*".

- Mr Scibilia then said "*so this will be back to Council. They will need to ... we will get further advice*". And Mr Klem said "*Yes*". Mr Schramm said "*If necessary we send it back to Council so we will let you know*", and Mr Klem said "*the only way, the only legal advice is exactly the question that Paul Frewer has asked. Is it open to legal interpretation or not? And if it had changed the intent I think it is clear cut it must go down*".

- The Chairman said "*and we will check the whole process from the beginning*".

- After some further discussion the Chairman said that the amendments should be sent back to the Council to get it right and Council could think again about whether they wanted the amendment to apply to more than just lot 413 "*It would be open to them in revisiting the thing to decide, to agree with us that it should only be location 413*".

- Mr Klem said that was an excellent suggestion.

- The Chairman then said "*So what (is) our resolution? That the matter be referred back to council?*" Someone, unidentified, said something and then Mr Frewer said "*Basically referring I think subject to clarification of the Council's resolution in the matter. Because that is what we are doing, to clarify what is the resolution compared to what we actually got. I think that keeps it fairly safe*".

- Towards the end of this discussion Mr Frewer said "*I mean I don't know what the differences are so we can't really get too carried away ...*", and then

he suggested "*Why don't we just pull it up on their website now*?". This suggestion appeared not to receive approval, with someone (unidentified) saying "*I think Peter has said to me that if there is an issue there that Council needs to deal with it*".

28. I have set out the discussion about Amendment 92 that took place at the May 2006 meeting at length because the Report does not accurately or fairly portray what occurred at that meeting, no doubt because the author of the Report did not listen to the audio recording. At page 75 of the Report it states "*At that meeting Mr Frewer asked whether there was any difference between the council resolution and the amendment, and argued that the matter should be deferred until the matter was resolved. This view prevailed and the matter was put over to another meeting*"; and at page 6 it states that Mr Frewer "*recommended*" deferring consideration of the amendment. Recommendation 2 cites his "*lack of integrity in seeking the deferral of amendment 92*". (Emphasis added).

29. As the transcript of the taped recording of that meeting clearly reveals (see para 27 above), Mr Frewer did not "*argue*" for the deferral of the amendment. There was no "*argument*", and to say "*this view prevailed*" implies that there were members at the meeting who disagreed. There were not. He did not "*seek*" the deferral. Mr Frewer did not even raise the issue of a possible inconsistency between the Council's actual resolution and the proposed amendment. The reporting officer, Mr Scibilia, did. Indeed, following a discussion which concluded by all members agreeing that Amendment 92 should be deferred, Mr Frewer suggested that the question of whether there was an inconsistency between the Council's resolution and the proposed Amendment 92 might be resolved by going to the Council's website - hardly the action of someone who "*argued for the deferral*".

30. As appears from the audio recording of the May 2006 meeting, the reporting officer Mr Scibilia believed that there were inconsistencies between the Council's resolution and the proposed amendment, and the Committee members also believed that, and considered that this could give rise to legal problems and issues of "*ultra vires*". The Chairman's reference to Minter Ellison, lawyers, is indicative of that concern. As noted, the "*inconsistency*" concern was not raised by Mr Frewer in the first place, but by the reporting officer.

The Commission's account of the meeting is incomplete and unbalanced

31. On any objective view therefore, the Report's account of Mr Frewer's conduct at the Committee meeting of 19 May 2006 is incomplete, and gives an unfair and misleading impression. It fails to mention that it was not Mr Frewer, but Mr Scibilia, who raised the question of inconsistency between Council's resolution and Amendment 92; that it was Mr Klem who asked whether the

Committee had advice (i.e. legal advice) on whether it was "*an ultra vires situation where we are acting on something that isn't a formal resolution of Council*"; that the Chairman asked whether the resolution was deficient or the reporting or minuting of it was deficient; and that it was only when the chairman then said "*what is the effect of this*", that Mr Frewer said he thought that it should be sent back to council, with which Mr Klem and others immediately agreed. Both Mr Klem and the Chairman expressed concern that unless the question of "*inconsistency*" was resolved, there could be a legal challenge to the validity of the amendment.

32. The Report also fails to mention that Mr Scibilia said that he had not had time to double check whether the amendment document that was advertised was consistent with the Council's resolution, nor that Mr Frewer asked whether the variations to the resolution actually changed the intent of the resolution, to which Mr Scibilia said "*the answer is yes*". Finally, it does not mention that Mr Frewer said, towards the conclusion of this discussion, "*Why don't we just pull it up on their website now*" - impliedly suggesting that the whole of the Council resolution might be obtained on the council's website, and then compared with the amendment to see if there was any change in "*the intent*", so that if there was not, there would be no need for a deferral.

33. The Commission's finding, that Mr Frewer "*sought deferral of Amendment 92 at the request of Mr Burke*" carries the implication that Mr Frewer "*sought*" the deferral because Mr Burke had requested he so do. There are several serious flaws in that finding.

34. First, it was made without regard to the audio record of the lengthy discussion which took place at the meeting. The finding that Mr Frewer "*sought*" deferral and statements in the Report (p75) that he "*argued for deferral*"; that "*this view prevailed*"; and that Mr Frewer "*made no real enquiry as to whether there was a material difference that required deferral*" are patently inconsistent with the audio recording of the discussion at the meeting. That reveals, as I have noted, that the "*inconsistency*" question was not raised by Mr Frewer, that there was no "*argument*" about whether the matter should be deferred, and that there was no contrary "*view*" against which the "view" that the matter should be deferred "*prevailed*" - as the Report put it.

35. Secondly, it cannot be said that Mr Frewer supported the decision that the matter should be deferred because Mr Burke had "*requested*" him to do so. Mr Burke did not make any "*request*", nor did he actually tell Mr Frewer that he wanted it to be deferred, or the reason for it. He said he would send an email with a "point of view" to Mr Frewer to consider. He did, but to the wrong email address, and Mr Frewer never got it (as he said at the SWRPC meeting, when reporting that he had been rung about the "*Smiths beach thing*").

36. Thirdly, while it may be assumed that Mr Frewer knew that Mr Burke and the developer wanted a deferral, even though Mr Burke did not "*request*" it, it is simply impossible to conclude, from that and the fact that (by unanimous resolution and without "*argument*") there was a deferral, that therefore Mr Frewer only supported the resolution because this was what Mr Burke wanted. That is to apply the logical fallacy, "*post hoc, ergo proper hoc*". It is equivalent to saying that if a public officer makes a decision which coincides with the wishes of some persons who have previously lobbied him or her, therefore the public officer made the decision solely in order to comply with the lobbyists' wishes - i.e. at "their request". That reasoning is self-evidently fallacious.

37. Fourthly, all the members of the SWRPC at the meeting clearly considered (and have since confirmed their view, according to the DPI Report - see later) that it would be prudent to defer consideration of Amendment 92, to determine whether the difference (which there was) between the Council resolution and the proposed "*Amendment 92*" was sufficiently material that it might invalidate the amendment. The Commission, in its Report says (p75) "*In fact, there was no inconsistency*". But the question having been raised (not by Mr Frewer) it would have been irresponsible of the SWRPC members not to seek advice, and to risk possible litigation about its validity. As an expert planner, interviewed by the DPI's investigator has said:

> "*... in my view it was entirely right that the Committee deferred it for one month ... there may well be parties who simply look to find any chink in the process and take legal action and if that happens, then amendments get deferred indefinitely while the legal action is in the way*".

The fact that (as the Commission's Report said) the difference was ultimately decided (after taking advice) not to be sufficiently "*material*" to cause a problem, and the Amendment was therefore passed at the next monthly meeting, is not to the point. There was a good reason to defer it, until advice was obtained.

38. In the Report, and again in its Response to the draft of this report, the Commission sought to support its finding by reference to an intercepted phone conversation between Mr Burke and Mr Frewer, on 23 May 2006, which began by Mr Burke saying "*Thanks very much for that*" to which Mr Frewer replied:

Frewer: *Alright, no worries. It was, uhm, when the, uh, I mean it go to the committee and, uhm, I sort of waited and listened and the reporting office said, oh, and there appears to be some discrepancies between the, uh, the, the resolution of council and the, ah, the, the, ah, the report that's been presented to us. And I just said, well, we can't deal with it then. Oh.*

Burke: *Yeah.*

Frewer: *And the whole committee sort of looked around and they said, no, we're not gonna do that. So its been sent back to council to clarify exactly what they did resolve and make sure that whatever was minuted.*

Burke: *Yeah, good.*

The Report also refers to discussions between Messrs Burke and Grill, and Messrs Burke and McKenzie, in which Mr Burke said he was "*confident that Mr Frewer would fight this to the death for us*". However, as the Report (p76) acknowledges, claims of that kind by Mr Burke (or any lobbyist) "*must be regarded with suspicion*". They obviously cannot be relied on for any adverse finding against Mr Frewer. There is no evidence that he ever said he would "fight to the death" for Mr Burke (or his client) or anything remotely like that. What Mr Burke said to Mr Grill must be regarded as mere persiflage. As to the phone discussion between Mr Burke and Mr Frewer, when Mr Burke "*thanked*" Mr Frewer, he no doubt assumed that Mr Frewer had assisted him, and was instrumental in getting the deferral, but Mr Frewer in fact was not - he did not raise the subject of inconsistency, and <u>all</u> members considered, and said, that it should be deferred. Comparing what Mr Frewer said about the meeting, and how the deferral occurred, with what actually did occur, it is obvious that Mr Frewer gave a very abbreviated account. From the full record of the discussion it is clear that the members would have resolved to defer the amendment, even if Mr Frewer had not been there - as their recent interviews by the DPI's investigator bear out. The objective evidence - the full record of the meeting not considered in the Report or by its author - reveals that what occurred at the May 2006 meeting was quite different from the description of it in the Report.

The DPI investigation and report

39. Following publication of Recommendation 2 and the findings in the Report, the acting Director General of the DPI considered (as the Report recommended) whether disciplinary action should be taken against Mr Frewer for (as the CCC Report put it) "*lack of integrity in seeking the deferral of Amendment 92, at the request of Mr Burke*". On 6 November 2007 he appointed an independent and highly experienced senior career public officer to conduct an investigation, pursuant to section 81(2) of the *Public Sector Management Act.*

40. The appointed investigator, Petrice Judge (not an officer with DPI) conducted a very thorough and wide-ranging investigation.

41. Her conclusion, as stated in her report to the Director General of DPI, was that there was no evidence of any "*misconduct*" by Mr Frewer, and therefore no basis for "*disciplinary action*" against him, which the Commission had suggested the Director General should consider taking. The result, that Mr

Frewer had "*no case to answer*", was advised to Mr Frewer on 21 January 2008, and I sought and obtained a copy of the DPI report on 29 January 2008.

42. The reasons expressed for the conclusion in the DPI report were substantially the same as the reasons for the conclusion expressed in my draft report of 4 January 2008, but with additional reference to the evidence taken from SWRPC members and expert planners, which fortifies the conclusion .

43. When I sought the DPI report as Parliamentary Inspector I asked the Director General why the report could not be made public. He has provided me, helpfully, with a full explanation. He believed that it would be in the public interest, as well as the interest of Mr Frewer (and Mr Allen, whose conduct was also investigated and who was also found to have no case to answer) for both reports to be released. However, the Director General had been informed that the State Solicitor's Office had advised that the "*confidentiality requirements*" of the *Public Sector Management Act* prohibited release of the reports. In addition, all persons interviewed were assured that the interviews were conducted on a confidential basis. To depart from this would be a breach of that undertaking, and there was also concern that to do so might prejudice future investigations. However, a summary of the essential features and reasons of the report has since been released.

Public Examination of Mr Frewer

44. There is considerable community debate about the fairness, and desirability, of public examinations conducted as part of an "investigation". The Commission has published a useful "*Working Paper*" on the subject, which is also being reviewed by the Standing Committee. One of the "*recommendations*" of the Working Paper is that "*There are sufficient safeguards to protect individual reputations from unfair damage due to either prejudice or privacy infringements resulting from public examination*".

45. Whether or not that is true, as a generalisation, the "*safeguards*" did not operate to protect Mr Frewer, whose good name and professional standing, as a senior public servant, were severely and unfairly damaged by the prejudice which arose from the nationwide media publicity given to the accusations of "*misconduct*" made both during his public examination and by counsel assisting the Commission in his closing submissions.

46. Whilst almost anyone required to attend a public examination is likely to be prejudiced to some extent, by having his or her name and persona exposed to public gaze, however innocent of wrongdoing, Mr Frewer has suffered particularly serious prejudice, because of the following:

    46.1 First, his examination by counsel assisting was conducted on the basis of a mistaken belief (based on the Minutes and not the full recording of the meeting) that he had not said anything at all about being "*lobbied*", and a further mistaken belief that he had received, and acted on, an

email sent by Mr Burke, but which in fact he had not received. Furthermore, the Committee members had not been interviewed, although their views as to what "*disclosure*" was appropriate in the circumstances were clearly relevant. This was not a question of any legal requirement, as there was no law requiring disclosure of "*lobbying*", but of what they had agreed upon, and what the accepted practice was.

46.2 Second, these errors infected counsel's publicised closing address, in which he submitted that Mr Frewer had failed to "*declare a conflict of interest*". There was no basis for that submission. The Commission has since conceded that there was no "*conflict of interest*", a serious allegation generally understood as meaning that he voted for deferral for some personal gain or because it would benefit the developer, which was not the case.

46.3 These public accusations of misconduct were extremely prejudicial to Mr Frewer. He stood "*convicted*" in the public mind. It is an understatement to say that it left a cloud hanging over him.

46.4 This "*cloud*" remained over him for a year - from November 2006 until October 2007 (when the Report made it darker) until January 2008, when the DPI report found he had "*no case to answer*".

47. I have discussed this with the Commissioner, and suggested that he give consideration, for the future, to the following process, as being fairer to individuals, and avoiding the prejudice suffered by Mr Frewer:

- In cases where there are reasons to suspect "*misconduct*", a <u>private</u> examination of the suspect be held, with a further investigation and private examination of any witnesses or evidence he or she may suggest.

- If, after a thorough investigation, the Commission decides that there are grounds for a possible finding of "*misconduct*", to recommend (privately, not publicly) that the authority appropriate to the particular public officer consider disciplinary proceedings.

- That would then precipitate an investigation pursuant to the *Public Sector Management Act*, of the kind conducted for the Director General of DPI in this case.

- If the appropriate authority concluded (as in Mr Frewer's case) that there was "*no case*" then (subject to the Commission's "*monitoring role*" under sections 40 and 41 of the Act) that would be the end of the matter. The "suspect", having been "cleared", would not have suffered the kind of prejudice endured by Mr Frewer for over a year.

- If, on the other hand, the authority decided that disciplinary action was appropriate, the result, and the Commission's part in it, could be included in a report to the Parliament.

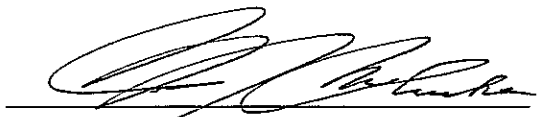
48. The Commissioner has agreed to give consideration to a procedure along these lines.

Recommendations

49. In the draft report, I recommended that the Commission publicly acknowledge that its opinion, that Mr Frewer failed to act "*impartially*", and "*with integrity*", was in error. The Commission, in its Response to the draft report, has rejected that recommendation. I have no power to direct it to do so.

50. The Commission should ensure that any proposed adverse opinion is not expressed in a report without prior compliance with section 86, and acknowledge that it is not sufficient compliance to give notice of a proposed misconduct finding, on a particular basis, and then report such a finding, but on a different factual basis, without giving the person affected reasonable opportunity to make further representations with respect to that different basis. The Commission has agreed, but contends that it did comply with s.86 in this case (see para 23 and 24 above).

51. When relying on minutes of a meeting, as a basis for examination of a witness, or comment in a report, care must be taken to check their accuracy against any recording of the meeting, if one exists (as is now very often the case). The Commission accepts this, and has directed that this procedure is to be followed in the future, so that, where relevant, the full record of a meeting will be put to a witness.



Malcolm McCusker AO QC
PARLIAMENTARY INSPECTOR

8 February 2008