



***JOINT STANDING COMMITTEE ON
THE CORRUPTION AND CRIME
COMMISSION***

**PARLIAMENTARY INSPECTORS
INVESTIGATION AND REVIEW OF THE
ACTS AND PROCEEDINGS OF THE
CORRUPTION AND CRIME COMMISSION
CONCERNING MR JOHN D'ORAZIO**

**Report No. 28
in the 37th Parliament**

2007

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Report No. 28

Presented by:

Hon Ken Travers, MLC

Laid on the Table of the Legislative Council and Legislative Assembly
on 18 July 2007

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COMMITTEE'S FUNCTIONS AND POWERS

On 31 May 2005 the Legislative Council concurred with a resolution of the Legislative Assembly to establish the Joint Standing Committee on the Corruption and Crime Commission.

The Joint Standing Committee's functions and powers are defined in the Legislative Assembly's Standing Orders 289-293 and other Assembly Standing Orders relating to standing and select committees, as far as they can be applied. Certain standing orders of the Legislative Council also apply.

It is the function of the Joint Standing Committee to -

- (a) monitor and report to Parliament on the exercise of the functions of the Corruption and Crime Commission and the Parliamentary Inspector of the Corruption and Crime Commission;
- (b) inquire into, and report to Parliament on the means by which corruption prevention practices may be enhanced within the public sector; and
- (c) carry out any other functions conferred on the Committee under the *Corruption and Crime Commission Act 2003*.

The Committee consists of four members, two from the Legislative Assembly and two from the Legislative Council.

CHAIRMAN'S FOREWORD

On the 17 July 2007 the Joint Standing Committee on the Corruption and Crime Commission met with the Parliamentary Inspector, Mr Malcolm McCusker AO QC.

Mr McCusker presented to the Committee a report, *Report Made Pursuant To Section 199 Of The Corruption and Crime Commission Act On The Parliamentary Inspector's Investigation and Review of the Acts and Proceedings of the Corruption and Crime Commission Concerning Mr John D'Orazio*.

The Committee resolved that the Parliamentary Inspectors report be tabled before both Houses of Parliament at the earliest opportunity.

The Parliamentary Inspectors Report is attached as Appendix Two and a Summary of Findings and Recommendations is attached as Appendix Three

HON KEN TRAVERS, MLC
CHAIRMAN

ABBREVIATIONS AND ACRONYMS

Act	Corruption and Crime Commission Act, 2003
CCC	Corruption and Crime Commission of Western Australia
Committee	Joint Standing Committee on the Corruption and Crime Commission
Parliamentary Inspector	Parliamentary Inspector of the Corruption and Crime Commission of Western Australia

CHAPTER 1 PARLIAMENTARY INSPECTORS INVESTIGATION AND REVIEW

1.1 Background

On Friday 15 June 2007, the Parliamentary Inspector of the Corruption and Crime Commission of Western Australia, Mr Malcolm McCusker AO QC, notified the Commission, pursuant to Section 196 (5) of the *Corruption and Crime Commission Act 2003* that the following matters are removed to the Parliamentary Inspector for consideration and determination:

1. Whether as required by Section 86 of the Act, the Corruption and Crime Commission gave Mr John D’Orazio MLA a reasonable opportunity to make representations to the Commission before reporting matters adverse to Mr D’Orazio in a report made by the Commission under Section 84 of the Act, and in particular (without limiting that inquiry) whether Mr D’Orazio or some person on his behalf received from the Commission a letter dated 2 April 2007 signed by the Acting Commissioner Mr Neil McKerracher QC, inviting him to make representations to the Commission by close of business Friday 13 April 2007, and if not, the circumstances surrounding the non-receipt of that letter.
2. Determination of the circumstances and persons involved (including but not limited to public officers) in the provision of the said report, or extract from it, to members of the media, including but not limited to Mr Robert Taylor and Mr Gary Adshead.
3. A complaint made by Mr John Quigley MLA that the release by the Commission to the Premier and the Leader of the Opposition of embargoed copies of a Commission Report in the matter of Mr Pascale Minniti and others, prior to the tabling of the Report before Parliament, constituted a breach of Section 152 of the Act; and, further whether the publication of an extract from that Report was also a breach of Section 152.

For the purpose of investigating these matters, the Parliamentary Inspector, resolved to hold an inquiry pursuant to Section 197 (1) of the Act. Section 197 (4) of the *Corruption and Crime Commission Act* provides that an inquiry held by the Parliamentary Inspector “must not be open to the public” and therefore all evidence was taken in a series of private hearings.

Subsequent to the Parliamentary Inspectors inquiries a meeting was held on 17 July 2007 with the Joint Standing Committee on the Corruption and Crime Commission at which time the Parliamentary Inspector submitted his report.

The Committee resolved shortly thereafter that the report be tabled before both Houses of Parliament as soon as possible.

APPENDIX ONE

BRIEFING HELD

Date	Name	Position	Organisation
17 July 2007	Mr Malcolm McCusker	Parliamentary Inspector	Parliamentary Inspector of the Corruption and Crime Commission

APPENDIX TWO

***REPORT MADE PURSUANT TO SECTION 199 OF THE
CORRUPTION AND CRIME COMMISSION ACT (“THE ACT”)
ON THE PARLIAMENTARY INSPECTOR’S INVESTIGATION
AND REVIEW OF THE ACTS AND PROCEEDINGS OF THE
CORRUPTION AND CRIME COMMISSION (“THE
COMMISSION”) CONCERNING MR JOHN D’ORAZIO MLA***



**PARLIAMENTARY INSPECTOR
OF THE CORRUPTION AND CRIME COMMISSION
OF WESTERN AUSTRALIA**

**REPORT MADE PURSUANT TO SECTION 199 OF *THE CORRUPTION AND
CRIME COMMISSION ACT* ("THE ACT") ON THE PARLIAMENTARY
INSPECTOR'S INVESTIGATION AND REVIEW OF THE ACTS AND
PROCEEDINGS OF THE CORRUPTION AND CRIME COMMISSION ("THE
COMMISSION") CONCERNING MR JOHN D'ORAZIO MLA**

Introduction

I have received two separate but related complaints, one from Hammond Worthington, Lawyers for Mr John D'Orazio MLA, the other from Mr John Quigley MLA, concerning some aspects of a draft report by the Commission of an investigation called "Operation Caroline". In broad terms, the subject matter of those complaints is described in a Media Release which I issued following receipt of the complaint:

The allegations made in the complaints were also received by the Commission, which notified them to me pursuant to Section 196 (4) of the Act, which gives me the power to "review" the Commission's "acts and proceedings with respect to its consideration of" any allegation that concerns an officer of the Commission.

Section 197 (1) empowers me to hold an "inquiry", which by Section 197 (4) "must not be open to the public".

Section 196 (3) confers wide powers on the Parliamentary Inspector, including the power to "investigate any aspect of the Commission's operations or any conduct of officers".

The Act does not specify what the Parliamentary Inspector shall do, following a "review", an "inquiry", or an investigation. Section 199 (1) provides that the Parliamentary Inspector "may at any time prepare a report as to" (inter alia) "any matters affecting the Commission"; Section 199 (2) provides that the Parliamentary Inspector may cause such a report "to be laid before each House of Parliament", but the Parliamentary Inspector may, instead, make a report to the Standing Committee.

Section 205, relevantly, provides that such a report by the Parliamentary Inspector "must not include"

information that may reveal the identity of a person who has been is, or is reasonably likely to be investigated by the Commission or has been, is, or is likely to be a witness at an examination or a person who makes an allegation to or provides information to, the Commission;

information that may indicate that a particular investigation has been, is, or is reasonably likely to be, undertaken by the Commission;

information that may reveal the identity of a person who has been, is, or is reasonably likely to be investigated by the Police Force or has been, is, or is reasonably likely to be a person who makes an allegation to, or an informant of, the police Force.

These prohibitions, if literally construed, would have the anomalous result that the Parliamentary Inspector could not make a report which names any person who has been a witness at an examination conducted by the Commission under Part 7 of the Act, even if the examination was conducted in public. I do not consider that such a literal interpretation is tenable. The proper and purposive, interpretation in my opinion is that the Parliamentary Inspector's report must not "reveal" the identity of witnesses who have given evidence at an examination, which means if that is not already a matter of public knowledge. So, if a person has given evidence at a private examination by the Commission, the Parliamentary Inspector could not "reveal" the identity of that person.

Section 207 applies the provisions of Section 151 to the Parliamentary Inspector. The effect of that is, relevantly, that the Parliamentary Inspector is prohibited from disclosing any evidence given before the Parliamentary Inspector in a private hearing unless it is contained in a report laid before each House of Parliament; or, if the Parliamentary Inspector makes a report to the Standing Committee, it approves the disclosure.

Section 208 (relevantly) prohibits the Parliamentary Inspector or any officer of the Parliamentary Inspector from disclosing any information acquired by the Parliamentary Inspector by reason of or in the course of the performance of the functions of the Parliamentary Inspector or such officer, except for the purposes of the Act. However, Section 208 (6) permits disclosure of "*The fact that an allegation has been received or initiated by the Commission or the details of an allegation*".

From these provisions it is clear that, although I may investigate (pursuant to Section 195 (3)) any aspect of the Commission's operations or conduct or review (pursuant to Section 196 (4)) the Commission's "acts and proceedings" with respect to an allegation concerning an officer of the Commission, its officers and, in either case, if I think fit, hold an inquiry (in private), it is not mandatory that I should then report on that inquiry either to the Parliament, or to the Standing Committee; but if I do, constraints on the content of any report are imposed by Section 205. Thus, I may complete a review, or investigation, and do no more than make "recommendations" to the Commission and/or the Standing Committee. However, I have decided that in view of the public interest in the matters the subject of my inquiry it is appropriate that I report to the Standing Committee.

For the purpose of carrying out the Parliamentary Inspector's statutory functions, the Parliamentary Inspector may (by Section 212) second or engage any officer or employee in the Public Service, a State agency, or otherwise in the service of the State. Because of their familiarity with the Commission's procedures, and their investigative skills, I seconded a number of officers from the Commission, and swore

them in as officers of the Parliamentary Inspector, to help in gathering information and conducting the inquiry. All of those officers showed commendable professionalism and objectivity. In particular, I commend Mr Trevor Wynn who, assisted by Mr Phillip Werhmann, provided me with great assistance in identifying witnesses and preparing materials for the private hearings, which were held on 28 and 29 June and 4 July, 2007. Evidence on oath was taken from 21 witnesses.

Background

1. In August 2006 Mr John D'Orazio MLA was summoned as a witness by the Commission to give evidence at an examination by the Commission held in public, for the purpose of investigating possible "inappropriate relationships" between certain police officers and one Pasquale Minniti ("Minniti"). The "inappropriate relationships" specified by the Commission were such that, if established, the police officers would be guilty of "misconduct", as defined by Section 4 of the Act.
2. It was not alleged that Mr D'Orazio had been guilty of, or a party to that (or any other) misconduct. The reason given to Mr D'Orazio by the Commission for calling him to give evidence at the public examination was that, in the course of its investigation, the Commission had intercepted several telephone discussions between Mr D'Orazio and Minniti during which Minniti had offered to use "contacts" which he claimed to have within DPI, to assist in locating a notification of change of address which Mr D'Orazio said he had faxed to DPI, and also that he had met once with Minniti at his panel beating shop.
3. In explanation of that, Mr D'Orazio has given the following sworn evidence:
 - 3.1 In August 2006, Mr D'Orazio was given a traffic infringement notice by a police officer, to whom he gave his address, 137 Leake Street, Bayswater, as required by the Road Traffic Act. That address was recorded by the officer on the infringement notice.
 - 3.2 On 25 October 2005, he was given another infringement notice by a police officer, to whom he gave his address, 137 Leake Street, Bayswater, which was recorded on the infringement notice.
 - 3.3 In November 2005, Mr D'Orazio gave his wife a cheque to pay the fine, but when she went to pay it at the Post Office, she was told the 28 day period for payment had expired (by one day) and therefore the Post Office could not accept payment. She was advised to wait until a further notice as required by law, was sent. No such notice was received by Mr D'Orazio.
 - 3.4 On 24 April 2006, a letter from the Fines Enforcement Registry (FER), addressed to Mr D'Orazio at his former address, 8 Forster Way, Noranda, was handed in at Mr D'Orazio's electorate office by the then

resident of 8 Forster Way, who had written on the envelope words to the effect "RTS - told you before, does not live here".

- 3.5 It appears that the FER had sent notices to Mr D'Orazio at Forster Way, Noranda, where he had not lived since February 2002, and those notices had been returned to FER, the sender, by the resident, with a note "*Not at this address*". Mr D'Orazio had previously notified his change of address, by phone and facsimile.
- 3.6 The letter received on 24 April 2006 was a notice that Mr D'Orazio's licence was suspended as from 13 April 2006, for non payment of the traffic fine relating to the infringement notice of 25 October 2005.
- 3.7 Within hours of receiving the suspension notice on 24 April, Mr D'Orazio's wife paid the outstanding fine.
- 3.8 She was then informed that there had been an earlier notice of suspension of Mr D'Orazio's licence, effective 22 February 2006, relating to the speeding offence of August 2005. That notice had also been sent to Noranda, and was never received by Mr D'Orazio. His wife then paid that fine.
- 3.9 Mr D'Orazio subsequently attended the FER, spoke to the Acting Registrar, and contended that both the suspensions should be cancelled, because Section 5 (2) of the Fines, Penalties and Infringement Notices Enforcement Act 1994 stipulates that notices "must be sent to a person's last known address", and Mr D'Orazio's Bayswater address was shown on both of the infringement notices, which was therefore his "last known address".
- 3.10 The Acting Registrar said that the orders could be cancelled if there was "good reason", and that it seemed that there was "good reason". He requested Mr D'Orazio to leave copies of all relevant documents. However, on 4 May 2006, Mr D'Orazio received a letter from the FER stating that the suspensions would not be cancelled.
- 3.11 On 8 May 2006, in an urgent hearing in the Supreme Court of Western Australia, Mr D'Orazio sought an order that the suspensions were invalid. The application was adjourned, and has not yet been dealt with. The matter had been raised in Parliament, and was given considerable publicity, adverse to Mr D'Orazio, who resigned as a Minister on 9 May 2006, as a result.
- 3.12 On 29 June 2006, the State Solicitor confirmed to Mr D'Orazio's lawyers its opinion that the suspensions were invalid, because the notices were not sent to Mr D'Orazio's "last known address". In a letter of 7 July 2006, Assistant State Counsel, stated:

"In our view, the consequence of the invalidly (sic) of the licence suspension orders is that they were invalid from the time they were made and for all purposes. Therefore, they can be treated as if they were never made in the first place ... Further, he (the Acting Registrar) has notified the Department of Planning and Infrastructure of the steps he has taken and of the consequence that your client's licence was never suspended".

4. On 8 May 2006, Minniti rang Mr D'Orazio, having read of his problem with his driving licence. He asked him about his *"unfair fines"* and said *"I've got something good up my sleeve. Very good."* Mr D'Orazio agreed to *"catch up"* with Minniti on Wednesday 10 May, at his workshop. In his evidence to the Commission, Mr D'Orazio said that he did so because Minniti was *"so insistent"*; that he had previously told Minniti he would catch up with him some time, and couldn't find a way of getting out of it. He didn't believe that Minniti had *"something good"*, as he had got to know Minniti, after 20 years, as someone who would say that kind of thing, and that he had learned that it was best just to listen and *"then ignore it"*.
5. Mr D'Orazio knew Minniti, who had been a constituent in his ward, when Mr D'Orazio was a councillor. He described him, in evidence to the Commissioner, Mr Hammond, as

"... one of those people who never leaves you alone ... all us politicians have some of these people in (our) electorates. He would constantly ring you, to talk about all sorts of things."

He said Minniti always boasted about how many police friends he had.

6. On 10 May 2007 Mr D'Orazio met Minniti at his panel beating shop. Minniti claimed to know *"people in DPI"* (the Department of Planning and Infrastructure, which had the responsibility of recording the addresses of motor drivers licences). He said that he would ask them to look for Mr D'Orazio's faxed notice of change of address. However, Mr D'Orazio said he had already spoken to the appropriate person in the DPI, going through proper channels, to request that the DPI locate the faxed notice. He told Minniti this, to which Minniti said *"I know somebody in DPI, I'll ask them. They can look as well"*. Mr D'Orazio said he replied *"Pasquale, I don't want you to do anything"*.
7. In a later telephone call, Minniti left a message for Mr D'Orazio that he had spoken to *"someone at DPI"* and that *"we're gonna try to find that form"* - and asked Mr D'Orazio to call him back. On 11 May 2006 Minniti spoke again, by phone, to Mr D'Orazio. He told Mr D'Orazio *"it's on its way, of them, looking for it okay"* to which Mr D'Orazio said *"Well I know they are looking for it because I instructed them yesterday"*. Mr Minniti then said *"Yeah, okay I know that but I am letting you know I spoke to someone who is high up in the DPI you know the licensing department and he is going to start looking for me if they could find it"*. Mr D'Orazio said *"Okay"* Minniti said *"Okay eh"*. Mr D'Orazio

then said "Excellent". During the discussion that followed, Mr D'Orazio, in response to Minniti's offer to help him, made it clear he did not want or need his "help": He said "... I've got it under control ... please don't ... say anything to anyone". "Don't do anything..."

8. At the conclusion of Mr D'Orazio's evidence at the public hearing held by the Commission, on 25 August 2006, the Commissioner, Mr Kevin Hammond, observed

"this was not an enquiry into Mr D'Orazio ... more or less by accident Mr D'Orazio walked into it and attracted the attention and publicity which has evolved ... he was there but as part of the Minniti enquiry ... it is clear that Mr D'Orazio this morning has answered all questions of the Commission in full".

9. Mr D'Orazio assumed from that, that he would be fully cleared of any suggestion of wrongdoing. He was therefore anxious for the Commission's report on the investigation to be published as soon as possible. He believed that this would help to repair the damage to his reputation, which, in his view, had been caused by the adverse publicity that had attended his appearance before the Commission in the public examination.
10. Mr D'Orazio therefore began making telephone calls to Mr Silverstone, the Executive Director of the Commission, asking him when the report was going to be tabled. At one point, he asked whether the Commission might issue some form of interim report, to make it clear that he had done nothing wrong. He was told that an interim report was not possible. In early 2007, Mr D'Orazio again called Mr Silverstone, and was told that the draft report was ready, but that persons who were the subject of adverse comment first had to be notified and given the opportunity to make representations, as required by the Act, before the report could be finalised and tabled. It was not suggested to Mr D'Orazio that he would be the subject of any adverse comment.

Compliance by the Commission with Section 86 of the Act

11. However, included in the report as then drafted was a part ("the D'Orazio section") in which, although the Commission said that in its opinion Mr D'Orazio had not committed any act of misconduct

"The very fact that Mr D'Orazio discussed [his problem with the suspension of his licence] and that he did not strongly discourage Mr Minniti's offer of assistance showed poor judgment and left him open to a perception of misconduct"

It also read

"While, Mr D'Orazio's appearance before the Commission adversely affected him, the Commission considers that any damage to Mr D'Orazio's reputation was caused, not by the revelation of his conduct by the Commission, but by the conduct alone".

12. Although this completely cleared Mr D'Orazio of any "misconduct", it also contained "matters adverse" to him, and likely to damage him.
13. The Commission was therefore obliged, by Section 86 of the Act, to give Mr D'Orazio a reasonable opportunity to make representations to the Commission concerning this proposed expression of opinion, before finalising its report and causing it to be laid before each House of Parliament.
14. Recognising this, on Monday 2 April 2007 the Commission sent a letter to Mr D'Orazio signed by Acting Commissioner McKerracher QC, enclosing the draft D'Orazio section and offering him the opportunity to make representations to the Commission.
15. That letter with the enclosure were delivered by a courier delivery service to Parliament House and received by a security guard, Mr Christopher Sloan, in the foyer of Parliament House at 4.44pm on 2 April 2007. Mr Sloan signed the courier's delivery receipt. In his sworn evidence to me, Mr Sloan accepted that he received the letter, and stated that he then attempted, several times, to contact Mr D'Orazio, or someone from his office, to come and pick it up. But it was a non-sitting day (a Monday) and Mr D'Orazio was not present. Ultimately, according to Mr Sloan, he put the sealed envelope into a mail receptacle in the mail room (the adjoining office of Mr Lance Rosich) an officer of Parliamentary Services, whose responsibilities included delivering mail and other articles received at the front desk, to the addressee. Mr Rosich (who also gave sworn evidence to me) was not there. He has no recollection of seeing it, or of delivering the letter. His usual procedure was to take any letter addressed to a member of parliament to that member's office, and either deliver it personally, or if the member was not there, to leave it on the member's desk.
16. No record was usually kept by Mr Rosich of deliveries made by him, and no receipt obtained from an addressee. Mr D'Orazio shared an office with another MLA, Ms Radisich. Neither was present on Monday 2 April 2007, and neither of them recalls seeing the letter addressed to Mr D'Orazio from the Commission. In particular, Mr D'Orazio has given sworn evidence that he definitely never saw the letter.
17. Apart from that evidence, and the fact that there is no positive evidence from which it could safely be concluded that the letter was in fact delivered to him or to his desk, there is the salient fact that Mr D'Orazio continued, after 2 April 2007, to make telephone calls to Mr Silverstone, seeking to know when the report would be tabled. In one such call, on 14 May 2007, Mr Silverstone told

Mr D'Orazio that the completion of the Report was delayed by some "legal issues", and he would contact Mr D'Orazio when tabling was imminent. Mr D'Orazio's reason for wishing the report to be tabled was his continuing belief that the report would fully clear him and help to undo the damage to his reputation. Had he seen the D'Orazio section, commenting on his "poor judgment" and conduct said to leave him "open to a perception of misconduct" (albeit stating that there was none) rather than press for the report to be tabled, he would have been pressing for it to be amended before it was finalised and tabled. That is borne out by the fact that when, later, he did receive a copy of the "matters adverse" to him, proposed to be in the Report, he responded immediately, by telephone, pointing out two factual errors; and he has since made lengthy written representations through his solicitors to the Commission, concerning the "adverse comment".

18. When Mr D'Orazio spoke to Mr Silverstone on Tuesday 5 June 2007, he was told that the Report would probably be tabled on Friday 8 June 2007. He asked whether he could have a copy of it in advance. It may be inferred from this that he continued to believe (as he has said) that the report would exonerate him, and that it contained no matters adverse to him. Mr Silverstone did not say that it did; and no-one from the Commission had spoken or written to him about it (although no reply was received to the letter of 2 April 2007) to ascertain whether he had received the report. Mr Silverstone replied that he could not have a copy, and that no-one else could have a copy until the report was tabled in Parliament.
19. Mr D'Orazio told the media on Wednesday 6 June 2007 (having been told by Mr Silverstone that the Report would be tabled on Friday 8 June), that he expected to be given "a clean bill of health" by the report. I have therefore concluded that, although on 2 April 2007 the Commission, to comply with its obligations under Section 88 of the Act, forwarded to Mr D'Orazio at care of Parliament House a letter enclosing the D'Orazio section and inviting Mr D'Orazio to make representations, Mr D'Orazio did not receive it or see it; and that he had no reason to believe there would be any matters adverse to him in the report.
20. On Thursday 7 June 2007 at 3pm Mr Silverstone met Acting Commissioners Shanahan and McKerracher. Mr Shanahan was told of the arrangements to table the Report the next day. He asked what version had been supplied to Mr D'Orazio, and suggested that, to ensure compliance with Section 88, a copy of the final version, proposed to be tabled, be sent to him. At about 5.30pm, Mr Silverstone telephoned Mr D'Orazio to inform him that the Report would be tabled on Friday 8 June 2007 at 9.30am, that it would be handed to the Clerk of Parliament at that time, and that an extra copy of the report would be given to the Clerk, to be provided to Mr D'Orazio.
21. Very shortly after that call, Mr Silverstone called Mr D'Orazio again after taking some advice. He said that he was going to fax to him a copy of three pages

from the report, relating to Mr D'Orazio, and that he should draw Mr D'Orazio's attention to the second last paragraph of that section of the report. This was not because changes had been made to the Mr D'Orazio section sent to him at Parliament House on 2 April 2007 (although in fact changes had been made) but because Acting Commissioner Shanahan SC was unable to satisfy himself as to what version of the Report (which had undergone numerous re-drafts including at least one from which the "adverse comment" had been removed) had been sent to Mr D'Orazio on 2 April 2007.

22. The D'Orazio section then sent to him was, in fact, different from that sent on 2 April 2007. It now contained the following expressions of opinion, which were more "adverse" than before, although still preceded by the finding that he was not guilty of any "misconduct":

After assessing all of the information and material obtained in the course of its investigation, the Commission is of the opinion that Mr D'Orazio has not committed an act of misconduct as defined by section 4 of the Act in respect to these matters. That is to say, there is no evidence to support a conclusion that he has acted corruptly or that he has engaged in conduct that could constitute an offence against a written law or a disciplinary offence providing reasonable grounds for termination under the Public Sector Management Act 1994.

Regardless of the above opinion, the Commission questions the appropriateness of Mr D'Orazio's actions, as a Government Minister, in, at the very least, implicitly encouraging Mr Minniti to use his informal contacts in DPI to seek to locate the missing DPI fax. Such activity and special access by a member of the public is highly inappropriate.

While Mr D'Orazio's appearance before the Commission adversely affected him, in his subsequent loss of public office as a Minister, the Commission considers that any damage to Mr D'Orazio's reputation or standing was caused, not by the public revelation of his conduct by the Commission, but by the conduct itself.

23. When Mr D'Orazio received this fax, he immediately telephoned Mr Silverstone, first to point out several factual errors in the excerpt, and secondly to complain that he had not previously been given the opportunity to make representations to the Commission about any proposed adverse comment on him, as the Act required. As to the factual errors, he was not a Minister when he gave evidence, so it was incorrect to say that his appearance before the Commission had "adversely affected him in his subsequent loss of public office as a Minister". Nor was it correct to refer to his "actions as a Government Minister" in "implicitly encouraging Minniti" (as it was put in the excerpt) "to use his informal contacts in the DPI to seek to locate the missing DPI fax". He had, as noted earlier, resigned as a Government Minister on 9 May 2006.

24. But more importantly, until that evening he had never seen any excerpt from the report. Mr Silverstone was taken aback by this, and later telephoned Mr D'Orazio to tell him that the report would now not be tabled, as previously proposed, on Friday 8 June 2007. And, subsequently, an amended excerpt, deleting the incorrect reference to Mr D'Orazio's actions "as a Government Minister" and his "loss of public office as a Government Minister" was sent to him. He has responded with lengthy representations, challenging the opinions expressed in it.

The "embargoed" copies

25. However, unbeknownst to Mr D'Orazio the report had, by 7 June 2007, already been printed (having been sent to the State Law Publishers on 1 June 2007), and on the morning of that day copies of it, under a covering letter stating that it was "embargoed", had been delivered to the office of the Premier and the office of the Leader of the Opposition.
26. At about 10.30am on 7 June 2007, after the embargoed report had been received at the office of the Leader of the Opposition, a member of that office, Mr Shane Hart, had casually mentioned to Mr Robert Taylor, a senior journalist with The West Australian, that a copy of the report had been received by the office of the Leader of the Opposition Mr Paul Omodei. Following up on that, Mr Taylor went to that office, without any prior arrangement, and saw Mr John Kime, Chief of Staff to Mr Omodei. He said that he understood a copy of the report had been received. Mr Kime said that was true. He then asked if he could read the report, and Mr Kime produced it and let him read it. Mr Taylor then asked him for a photocopy of the D'Orazio section. Mr Kime gave him a copy, and Mr Taylor took it with him.
27. He then used it for an article which appeared on the front page of The West Australian newspaper on Friday 8 June 2007, under the headline "CCC dashes D'Orazio revival". The article said that the report of the CCC, to be tabled that day, was "expected to brand his actions as seriously inappropriate" (for what it is worth, the excerpt given to Mr Taylor by Mr Kime actually expressed the opinion, "highly inappropriate").
28. When Mr D'Orazio read this in an early edition of the West Australian of 8 June 2007 he was incensed. He convened a press conference that day, to voice his concerns: First, that he had not been given an opportunity, as required by Section 86 of the Act, to make representations to the Commission concerning the "adverse matters" to him before they were made public. Secondly, that there were factual inaccuracies in the Report. Thirdly, that there had been a "leak" of the report to the media (which at that stage he believed to have come from the Commission).

Mr D'Orazio's complaint

29. The Commission has not yet tabled the report in its final form. It is still considering Mr D'Orazio's representations, and whether in the light of them, the adverse comment should be amended or removed.
30. The complaints made by Mr D'Orazio were sent to me, on Mr D'Orazio's behalf, by his solicitors' letters of 11 June 2007 and 28 June 2007.

The "leak"

31. It was alleged on Mr D'Orazio's behalf that the draft D'Orazio section, containing proposed adverse comment, had only been sent to him, to enable him to make representations, on the evening of 7 June 2007, that it was faxed under cover of a letter stating that it was "embargoed"; but that the Report had by then already been sent to the Premier and the Leader of the Opposition; and that *"it would appear that the Report was leaked by the CCC to The West Australian and various members of Parliament including the Premier and the Leader of the Opposition"*.
32. However, I am satisfied that although the Commission did send an "embargoed copy" of the Report to the office of the Premier, and to the office of the Leader of the Opposition on 7 June 2007, before Mr D'Orazio had an opportunity to see it or make representations, the only "leak" (the disclosure of its contents to The West Australian) was by Mr Kime, who gave a copy of that part of the Report relating to Mr D'Orazio to Mr Robert Taylor, a senior journalist with The West Australian. Both Mr Kime and Mr Taylor knew that the Report was "embargoed" until it was tabled (as then expected) the following morning in Parliament. Both knew that that meant that it was intended that the contents of the Report were not to be disclosed until tabled in the Parliament. There is no evidence to suggest that Mr Kime acted "corruptly" in giving the excerpt to Mr Taylor. He received no payment or other benefit, and they were not friends. Nor was the release made by Mr Kime with the intention that it be used to damage Mr D'Orazio. Mr Kime's expectation was that the excerpt would be used as "the basis" for a story in the West Australian, and not actually quoted; and that the Report was to be tabled the following morning.
33. There was no "leak" of the contents of the Report to The West Australian by the Commission or any of its officers, as alleged by Mr D'Orazio. I understand that he now accepts that, although he initially assumed that the Commission was at fault.

Compliance with Section 86

34. Mr D'Orazio further complains that Mr Silverstone, later issued a media statement to the effect that a copy of the Report had been couriered to Mr D'Orazio at Parliament House in April 2007, but that in fact this was "never the case". As I have already explained, there is clear evidence that Mr Silverstone's statement was correct; but although the relevant extract from the Report (as it was drafted in April 2007) was couriered to Mr D'Orazio at Parliament House, Mr D'Orazio never in fact received it.
35. Mr D'Orazio has also complained that he was "denied a draft copy of the Report, and was only provided a copy of the draft after a submission was made by [his lawyers] to the CCC". Mr D'Orazio would not ordinarily be entitled to a copy of the whole of the Report, but only to that part containing any "adverse comment" on him. However, it may sometimes be necessary, in order for a person the subject of proposed adverse comment to put it in context, to provide the person with more than an extract of the Report, confined to the "adverse comment". That is a matter of judgment for the Commission to make, in each case.

Opinion as to "inappropriate" conduct

36. Several issues have been raised by Mr D'Orazio concerning the proposed "adverse comment". The first is an assertion that the Commission would be acting in excess of its statutory powers and function (to investigate allegations of "misconduct") by expressing opinions or findings as to the "appropriateness" of conduct which it accepts does not constitute misconduct.
37. There is a statutory definition of "misconduct", but none of "appropriate" conduct, or "inappropriate conduct". And the question of what is "appropriate", or "inappropriate conduct" is no doubt one on which reasonable minds may differ.
38. Section 16 of the Act ("General Functions") states that "The Commission has the functions conferred or imposed by or under this Act or any other written law". Section 18 states that the Commission has a "misconduct function", and details various means whereby it may perform that "function". There is also a "prevention and education function" (Section 17); a "function in relation to the Police Royal Commission" (Section 19); a "function in relation to the A-CC" (Section 20); and an "organised crime function" (Section 21). Section 22 provides that the Commission may make assessments and form opinions as to whether "misconduct" has occurred.
39. There is no provision in the Act which expressly confers or imposes on the Commission the "function" of investigating whether there has been, or may have been, "inappropriate conduct", or the power to make "assessments or form opinions" with regard to "inappropriate" conduct.

40. Although Section 86 provides that before "reporting any matters adverse to a person or body in a report", the Commission must give the person or body a reasonable opportunity to make representations to the Commission concerning those matters that does not either expressly or impliedly extend the "functions" of the Commission to the expression of opinions on what is "inappropriate".
41. Nor does the Act state it to be a "function" of the Commission to express an opinion as to the cause of any damage to the reputation of a person appearing as a witness before it, in a public hearing.
42. I have considered whether the Parliamentary Inspector is empowered to direct the Commission as to what may or may not be included in a Report. Section 196 (5), provides that an "allegation" concerning an officer of the Commission must be notified by the Commission to the Parliamentary Inspector, who may then "review" the Commission's "acts and proceedings with respect to such an allegation". Section 196 (5) provides that, upon such review, the Parliamentary Inspector may "notify the Commission that the matter is to be removed to the Parliamentary Inspector for consideration and determination". And Section 196 (7) provides that upon such "removal" the Parliamentary Inspector may "annul" the Commission's determination, and "make any decision the Parliamentary Inspector might otherwise have made had the Parliamentary Inspector exercised original jurisdiction".
43. The application of those provisions hinges on the meaning of "allegation", in Section 196 (5). That term is defined by Section 3 as follows:
- "allegation" means —*
- (a) a report made to the Commission under section 25;
 - (b) a proposition initiated by the Commission under section 28;
 - (c) a matter notified under section 28(2); or
 - (d) a received matter
44. None of those definitions applies to a complaint by a person that the Commission proposes to include in a Report a matter "adverse" to that person, either on the ground that to do so is beyond the jurisdiction of the Commission, or that it is not supported by the evidence. Such a complaint, although in a broad sense it may be called an "allegation" is not an "allegation" for the purpose of Section 196 (5) of the Act. I have therefore concluded that, although I am empowered (relevantly) by Section 195 (1) to "audit the operations of the Act", "audit the operations of the Commission for the purpose of monitoring compliance with the laws of the State", and to "make recommendations to the Commission", those powers do not enable me to direct the Commission as to what it may or may not include in a Report which it may make pursuant to Section 84.
45. Hence, although I have recommended to the Commission that it reconsider (in the light of Mr D'Orazio's representations) the inclusion in its Report of the "matters adverse" to Mr D'Orazio, and the expression of an opinion which is not

one of "misconduct", I cannot direct the Commission as to what it may include in its Report; nor can I "annul" its decision on what, ultimately, it may include.

46. I should add, for the sake of completeness, that whether or not it is a "function" of the Commission to express such an opinion, there remains the question, raised by Mr D'Orazio, of whether the adverse comment is justified. This, too, is a matter which the Commission is further considering.
47. The following facts are, in my view, relevant to that question, and no doubt will be taken into account by the Commission in its review:
- (a) Mr D'Orazio said that he did not believe that Mr Minniti had any such contact within the DPI.
 - (b) Several times during his conversation with Mr Minniti he had told Mr Minniti that he did not want him to do anything.
 - (c) Before his discussion with Minniti, he had already set in train (through the lady in charge of locating such material at the DPI) a search for the fax, and did not either request or need the assistance of Mr Minniti, whom he knew to be a person who, in the vernacular, was one who "big noted" himself about alleged contacts and influence with the police and others.
 - (d) It was in responding to a claim by Mr Minniti (which Mr D'Orazio said he did not believe) that he had spoken to someone in the DPI, to help locate the missing fax, that Mr D'Orazio said "Excellent"; not in response to an offer that he would speak to someone.
48. It appears that the "implicit encouragement" comment is (at least partly) based on Mr D'Orazio's response, "Excellent", made to a statement by Mr Minniti, during a telephone conversation of 11 May 2006, which lasted in all about 2½ minutes, that he had spoken to someone "high up" in the Licensing Department who was going to start looking for the fax "if they could find it". Mr D'Orazio had already told Mr Minniti that he knew that they were looking for it because he had instructed them the previous day. He also knew that the person responsible was not a male person but a female. It was in that context that he replied "Excellent". At the most, that reply is ambiguous, and susceptible of two possible inferences: One, that he was merely trying to cut the conversation off (as he has said); the other that he was "implicitly encouraging" Minniti to use his alleged "contacts" in the DPI.
49. Since Mr D'Orazio was not questioned by counsel assisting the Commission, when he gave evidence in August 2008, on what he had meant by saying "Excellent", and it was never suggested to him, when he gave evidence, that he was thereby "implicitly encouraging Minniti", it would have been unfair to include such a proposition in the Report, (at least without giving Mr D'Orazio

the opportunity to make representations, which he has now done); and also referring to the evidence supportive of that adverse inference.

50. It is also debatable whether it would be a universally held view, if Mr D'Orazio had "implicitly encouraged" Minniti to speak to someone "higher up" in the DPI to see if an important notice faxed to the DPI could be located, that that would be "inappropriate" conduct.
51. There was no suggestion that Mr D'Orazio had sought to use Mr Minniti in order to obtain some improper advantage from the DPI. There was no evidence of that, nor that Mr Minniti did speak to anyone in DPI about locating the missing fax; nor that he in fact knew anyone "higher up" in DPI. And Mr D'Orazio has said, on oath, that he did not believe that Minniti had any such contacts.

Mr Quigley's allegation: breach of Section 152 (1)

52. In a detailed submission made to me on 14 June 2007, Mr John Quigley MLA has alleged that the sending of a copy of the Report to the office of the Leader of the Opposition contravened Section 152 (1) of the Act, because it contained "official information".
53. The letter accompanying the "embargoed" copy of the Report was signed by the newly appointed Commissioner, Mr Roberts-Smith RFD QC, who accepts ultimate responsibility for it, although it must be said that he was informed (correctly) that was an established practice, to enable the recipient of an advance copy to be prepared to comment on it, after tabling in the Parliament. The letter stated: *"I request that you treat it as confidential, and consider it "embargoed" until it is tabled in Parliament"*.
54. "Official information" is defined by Section 152 (1) as *"information acquired by an officer of the Commission or a Commission lawyer by reason of or in the course of the person's functions under the Act"*. Disclosure of "official information" by an officer of the Commission or a Commission lawyer is (subject to a number of important exceptions) prohibited by Section 152 (2). It is by no means certain that the contents of the embargoed Report were "official information". For example, it is questionable whether opinions expressed in the Report constitute "information" acquired by an officer of the Commission". And evidence given in a public hearing would not be, in my opinion, "official information", or even if it were, it would not be a "disclosure" to repeat what was already in the public domain. Hence, to the extent that the Report contained a summary of such evidence, or expressions of opinion, it is doubtful whether its release, in advance of tabling, would be a disclosure of "official information". In particular, I do not consider that the D'Orazio section contained "official information", consisting as it did of references to evidence given at public hearings and expressions of opinion by the Commission.
55. Even if it were "official information", its disclosure is not a breach if the disclosure is "under or for the purposes of the Act"; or if the Commission has

certified that the disclosure is "necessary in the public interest" or "otherwise in performance of the (Commission officers') functions under (the) Act": Section 152(4).

56. The Commission's view is that the provision of the embargoed copies was "under and for the purposes of the Act". Section 7A states that the "main purposes of the Act" are to combat and reduce the incidence of organised crime and (relevantly) to "*improve continuously the integrity of, and to reduce the incidence of, misconduct in the public sector.*"
57. The Commission may prepare a report on any matter that has been the subject of an investigation in respect of "misconduct" and may cause a report so prepared to be tabled in Parliament: Sections 84(1) and 84 (4).
58. The Premier is the Minister responsible for the public sector and the administration of the *Public Sector Management Act 1994*, and therefore disclosure to the Premier (although not an express exception to the prohibition) could be justified as being "under or for the purposes of the Act". Mr Quigley accepts that. The question, therefore, is whether disclosure of "official information" (if that is what the Report contains) by the provision of an advance, confidential and embargoed report to the Leader of the Opposition is also justified. It has been put to me that the Commission is a creature of the Parliament, overseen by a bi-partisan Joint Standing Committee under Part 13A of the Act, and that this would, on a broad view, support disclosure as being "under or for the purposes of the Act".
59. The practice of releasing embargoed copies undoubtedly provides the opportunity for both the Premier and the Leader of the Opposition to analyse key issues and to prepare appropriate and informed responses upon the tabling of the Commission's report. Appropriate and informed comment by the Premier and the Leader of the Opposition may be "in the public interest", as helping indirectly to educate, to reduce misconduct, and to increase integrity in the public sector, by virtue of the consequent greater public awareness of what may constitute "misconduct".
60. Section 152 should not be read in isolation. Sections 84 and following of the Act deal with reports by the Commission. By Section 84(3) the Commission may include in a report statements as to any of the Commission's assessments or opinions, and its reasons for those assessments and opinions. Section 87 provides that if such a report is laid before either House of Parliament then a matter included in that report may be disclosed, despite Section 151. There is no express provision in the Act for the disclosure of the contents of a report, by way of an embargoed copy, to the Premier, the Leader of the Opposition, or any other person. The practice of providing, in advance, "embargoed" copies of a report containing "official information" carries with it the danger that the contents of the report will become a matter of public knowledge before, as Section 87 of the Act clearly intends, the report has been laid before

Parliament. Once an "embargoed" copy is released, the Commission loses control. No undertaking is obtained by the Commission, that information in the Report will not be released before it is tabled. No restriction is placed on the copies that may be made. And there is the further danger that, as here, after the release of the embargoed copy, a change may at the last moment become necessary. In this case, part of the "advance copy" was provided to the West Australian, and excerpts published before Mr D'Orazio had a chance to make representations to the Commission about them, as was his statutory right. This was a most unfortunate consequence of having released the "embargoed" copies.

61. I have therefore **recommended** that the practice of providing embargoed copies of reports be discontinued.

The Commission's procedures in reporting

62. In view of the importance to individuals of the statutory right (under Section 86) to make representations concerning any "matters adverse" to that person proposed to be made in a report by the Commission, it is essential that the Commission take all reasonable steps to ensure that any such person is in fact given that opportunity.
63. Whilst in this case the Commission assumed that a letter addressed to Mr D'Orazio and delivered to Parliament House would in turn be delivered to him, the fact is that, for whatever reason, he did not receive it and therefore did not have an opportunity to make representations to the Commission about the adverse comment then proposed to be in the report.
64. To avoid that happening in future I have **recommended** that the Commission adopt the following procedure:
- (a) Where practicable, a notice of a proposed adverse comment should be delivered personally to the addressee, and a receipt obtained. In the present case, the only evidence that the letter to Mr D'Orazio was even delivered to Parliament House was the courier company's documentation, with Mr Sloan's signature showing that a letter addressed to Mr D'Orazio was delivered to Parliament House on 2 April 2007.
 - (b) If for any reason (eg if the addressee is unavailable) the notification cannot be delivered to him or her personally, then it should be delivered to someone prepared to accept responsibility for it being delivered to the addressee, and a receipt, with an undertaking to deliver it to the addressee, obtained from that person. In that case, there should be a "follow up" by the Commission, to ensure that the addressee has actually received the notification.

65. In every case where the time stipulated for making representations has elapsed, and no representations have been received from the person concerned (where such representations would be expected, as here) there should be direct contact with that person by the Commission, to enquire whether that person intends to make representations, or has done so. The purpose of that is to ensure that the person concerned has not been prevented, by accident or otherwise, from making representations; or to meet the possibility that the person concerned has submitted representations, which have gone astray.
66. The suggestion made by Acting Commissioner Shanahan SC, on the afternoon of 7 June 2007, to give Mr D'Orazio the opportunity to make representations on the amended D'Orazio section, was clearly correct. However, at that point the draft report had been finalised and printed, and was ready to be tabled the following day, and "embargoed" copies had been sent to the Premier and Leader of the Opposition. Where a person is to be given an "opportunity" to make representations concerning an adverse comment, and there is a later change in the material which comprised the adverse comment, a further opportunity to make representations must be afforded to that person, as soon as possible.
67. A significant change to the D'Orazio section was made on or about 15 May 2007, when Mr Silverstone made handwritten amendments to Version 5 of the Report, which were then incorporated in a new (Version 6) Report on 24 May 2007 (Version 5 of the draft contained no "adverse comments" on Mr D'Orazio). No steps were taken, at that point, to ensure that this amended version was substantially the same as that sent to Mr D'Orazio on 2 April 2007. In fact, it was not the same, but no-one in the Commission appreciated that, with the result that the new version (with some further amendments, ultimately "Version 9") went to the printers without Mr D'Orazio having been given the opportunity to make representations concerning the matters adverse to him in the Report.
68. When a report is being drafted, I **recommend** there should be one Commission officer with the responsibility of ensuring that, whenever any significant change is made to an adverse comment in a draft report, the person the subject of the adverse comment is given a further opportunity to respond to it. I have discussed that with the Commissioner. I understand that he agrees. A possible cause of what occurred in this case was that Commissioner Hammond had resigned on 31 March 2007, and there was an "*inter regnum*" until Commissioner Roberts-Smith was appointed, during which that responsibility was not specifically given to one person. Another problem was that, instead of being diverted to the Commission officer whose responsibility it was to deal with Section 88 compliance, Mr D'Orazio made his telephone enquires of Mr Silverstone, who had no direct involvement in such matters.

69. A copy of the "embargoed" report was also provided to Ms Marie Mills, a public relations consultant of Mills Wilson, Media Consultants on 6 June 2007. This was for the purpose of enabling her to brief officers of the Commission, I am told, to enable them to deal with media questions. It is not clear why this was necessary. I would have thought that the Commission would appoint only one officer to deal with media questions, and that the kind of responses appropriate for Commission officers to make to media enquiries would not require any "media coaching".
70. However, if the Commission does intend, for good reason, to continue to engage Ms Mills (or any other media consultant) and for that purpose to supply an advance copy of a report it should ensure that any such person has signed a confidentiality agreement with an undertaking, with respect to any such copy, to keep it secure, and not to release any information from it, and that he or she has security clearance. Neither existed in the case of Ms Mills, and although there is no reason to think that she provided any information about the report to any other person (and she has assured me on oath that she did not) in my opinion this arrangement (if it does continue) needs to be considerably "tightened up".



Malcolm McCusker AO QC
PARLIAMENTARY INSPECTOR

17 July 2007

APPENDIX THREE

SUMMARY OF FINDINGS AND RECOMMENDATIONS RESULTING FROM PARLIAMENTARY INSPECTOR'S REVIEW AND INQUIRY



**PARLIAMENTARY INSPECTOR
OF THE CORRUPTION AND CRIME COMMISSION
OF WESTERN AUSTRALIA**

**SUMMARY OF FINDINGS AND RECOMMENDATIONS RESULTING FROM
PARLIAMENTARY INSPECTOR'S REVIEW AND INQUIRY**

Allegation of "leak" by Commission of draft Report

1. The Commission did not disclose the contents of its Report relating to Mr D'Orazio to The West Australian Newspaper, or to any other media outlet.
2. The sole source of the information used by The West Australian for the purpose of its front page article June 8, 2007 was Mr John Kime, Chief of Staff to the Leader of the Opposition, who on 7 June 2007 gave an extract from the "embargoed" Report to Mr Robert Taylor, a journalist with The West Australian. This has been confirmed by sworn evidence from Mr Kime, and Mr Taylor (after receiving a "release" from Mr Kime, authorising him to disclose that he, Mr Kime, was his source). And the sole source of the information used by Mr Gary Adshead in a news story on Channel 7 on 8 June 2007, in which he held a copy of what he said, and what in fact was, a copy of the excerpt from the embargoed report was Mr Taylor, who gave it to him after receiving it from Mr Kime.
3. Both Mr Kime and Mr Taylor knew that the Report was "embargoed". The understanding of each was that this meant that it was intended that its contents were not to be disclosed until the Report was tabled before each House of Parliament.
4. Mr Kime released the excerpt from the Report to Mr Taylor without the knowledge or authority of either the Leader of the Opposition, Mr Omodei or any other person. There is no evidence that he acted corruptly in doing so.

Provision of embargoed copies of the Report, in advance of tabling

5. On 7 June 2007 the Commission forwarded, to the Office of the Premier and the Office of the Leader of the Opposition, a copy of the Report under cover of a letter which stipulated that the Report had not yet been tabled, was "embargoed" until it was tabled, and that it was scheduled to be tabled the next day.
6. The letter was signed by the newly appointed Commissioner, Mr Roberts-Smith RFD QC. This was in accordance with an established practice of the Commission. Whether or not this was a disclosure of "official information" is debatable. Only if it was, would it be necessary to consider whether the "exceptions" to the prohibition of disclosure of "official information" applied.

7. The Premier is, and was, the Minister responsible for the Public Sector and the administration of the Public Sector Management Act 1994. Disclosure of the Report to him, having regard to his responsibilities, could therefore be justified by Section 152(4)(a) as being "under or for the purposes of the Act".
8. It is less clear whether sending an advance copy to the Leader of the Opposition is "under or for the purposes of the Act". However, Section 152(4) of the Act provides that "official information" may be disclosed by the Commission or its officers, not only "under or for the purposes of the Act", but also (relevantly) "(c) when the Commission has certified that disclosure is necessary in the public interest"; and "(f) otherwise in connection with the performance of [the Commission Officers'] functions under the Act".
9. The sending of "embargoed" copies in advance of the Report being tabled was, in the Commission's view, "under and for the purposes of the Act". Arguably, it was also "in the public interest", as facilitating informed comment on the contents of the Report, once tabled. I do not consider that the sending of the embargoed copy to the Leader of the Opposition was, as alleged, a breach of Section 152 of the Act. First, it is debatable whether the Report contained "official information". Secondly, the sending of embargoed copies was, arguably, "under or for the purpose of the Act", and in the public interest. Certainly, in my view it would not, in the circumstances, be in the public interest to prosecute for an alleged breach.
10. However, the events that occurred in this case illustrate the potential dangers inherent in that practice. Once an "embargoed" copy is released, the Commission has lost control, and the potential exists for it to be "leaked" before, as the Act intends, it is tabled. I have therefore recommended that the Commission discontinue the practice of sending advance or "embargoed" copies of a report to anyone, before the report is finalised and tabled in Parliament. The Commission has accepted that recommendation.

Compliance with Section 86

11. The Commission was conscious of its statutory obligation under Section 86 to give Mr D'Orazio a reasonable opportunity to make representations to the Commission concerning any "matters adverse" to him in the proposed Report. It sent the relevant extract from the draft Report (as it then stood) to him at care of Parliament House on 2 April 2007 and it was delivered by courier to Parliament House on that day, which was Monday, a non-sitting day.
12. Mr D'Orazio did not receive it, and therefore did not, in fact, have a "reasonable opportunity" to make representations concerning the matters adverse to him in the draft, as stipulated by Section 86, although the Commission was unaware of that.
13. Although no receipt or acknowledgement from Mr D'Orazio was received, no attempt was made by the Commission to confirm that he had received it, although he might have been expected to make representations had he received it; and

although he was pressing for the Report to be tabled, from which it might reasonably have been inferred that he was unaware that the Report contained any "matters adverse" to him. But that inference was not, in fact, drawn by anyone within the Commission.

14. The "matters adverse" to him in the draft Report, as it was in 2 April 2007, were significantly changed in May 2007. That required the Commission to give Mr D'Orazio a reasonable opportunity to make representations concerning that adverse comment. The opportunity should have been given to him on 30 May 2007, but it was only on the evening of 7 June 2007, after the Report had been printed, and embargoed copies sent to the Office of the Premier and the Office of the Leader of the Opposition, that, fortuitously, the relevant pages of the Report containing adverse comment were faxed to Mr D'Orazio. The Report was due to be tabled the next day.
15. Mr D'Orazio told Mr Silverstone, on the evening of 7 June 2007 (and after he was faxed a copy of the extract) that he had not previously seen the adverse comment, that it contained factual errors, and that he wished to make representations regarding the adverse comment. The Commission then decided not to table the Report on 8 June 2007 (as proposed) and still has not done so. However by then The West Australian had been "leaked" the relevant extract through Mr Kline. This was used for an article, damaging to Mr D'Orazio, on the front page of The West Australian on the morning of 8 June 2007, and was the subject of report on Channel 7, by Mr Gary Adshead.

Opinion of the Commission as to "inappropriate" conduct

16. It has been put on behalf of Mr D'Orazio that the Commission would exceed its statutory "functions" by expressing any opinion in a Report about "inappropriate conduct" (which is not "misconduct", and not defined or mentioned in the Act) or an opinion that any damage to the reputation of a witness called to a public hearing was not caused by the public hearing, but by that witness' conduct.
17. It is not open to me, as Parliamentary Inspector, to direct the Commission as to what it may or may not include in a Report, in particular as to whether conduct found not to be "misconduct" may be censured as "inappropriate" in a Report. I observe that different opinions as to whether particular conduct is "inappropriate" may be held by reasonable persons; and if the Commission expresses a view that certain conduct is "inappropriate" that will carry considerable weight, and therefore be damaging to the person concerned.
18. Although I have no power to direct the Commission in that regard, one of the functions of the Parliamentary Inspector, under Section 190(1)(d) is to make "recommendations" to the Commission. I have discussed this question with the Commissioner, and I have **recommended** that the Commission refrain from expressing an opinion on the conduct of any witness or other person, unless such conduct constitutes "misconduct", as defined, or else it is necessary to refer to

such conduct because of its relevance or relationship to a finding of "misconduct" by some other person, being a "public officer".

19. I have also **recommended** that where those circumstances exist, and it is considered justifiable by the Commission to opine that a person's conduct is "inappropriate", reasons for that opinion should be given, supported by a summary of the relevant evidence (as well as the reason for expressing that opinion in the Report) in the interests of fairness and transparency.
20. Representations have also been made on behalf of Mr D'Orazio to the effect that even if it is a "function", or within the power, of the Commission to express an opinion as to "inappropriate" conduct, on an objective analysis of all of the evidence before the Commission, it could not fairly be said that his conduct, in talking to Mr Minniti, was "inappropriate"; and that to infer from his comment, "Excellent", an "implicit encouragement" of Mr Minniti, was a proposition never put to Mr D'Orazio.
21. However, as all of these representations are, at the time of this Report, still (quite properly) under consideration by the Commission, it is not appropriate for me to deal with them, or to express any view on them. It may be that the final version of the Report will not, in the light of the representations made on Mr D'Orazio's behalf, contain any "matters adverse" to him, but be confined to the finding that there has been no "misconduct" by him; or the "matters adverse" contained in the "leaked" report may be modified.



Malcolm McCusker AO QC
PARLIAMENTARY INSPECTOR

17 July 2007