

WALSH BAY



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REPORT ON INVESTIGATION
INTO THE WALSH BAY
REDEVELOPMENT PROJECT

OCTOBER 1990



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INDEPENDENT COMMISSION AGAINST CORRUPTION

The Hon J.R. Johnson, MLC
President
Legislative Council
Parliament House
SYDNEY NSW 2000

The Hon K.R. Rozzoli, MP
Speaker
Legislative Assembly
Parliament House
SYDNEY NSW 2000

Dear Sirs

In accordance with section 74 of the Independent Commission Against Corruption Act 1988, the Commission hereby furnishes to each of you its Report in relation to the Walsh Bay Redevelopment Project.

The hearing held for the purposes of the investigation was conducted by the Hon. Michael Helsham QC, Assistant Commissioner, who also had the responsibility for preparation of the Report. The views of Mr Helsham as to the Independent Commission Against Corruption Act 1988 in its present form are to be found in Appendix 7.

I draw attention to the recommendation pursuant to section 78(3) of the Act, which is contained in Chapter 1.

Yours faithfully

A handwritten signature in black ink, appearing to read 'Ian Temby', written over a white background.

Ian Temby QC
Commissioner

PREFACE

The effort of a number of people at the ICAC who assisted in the investigation into the Walsh Bay Redevelopment Project deserves recognition. They are too numerous to mention by name, although many deserve to be acknowledged individually. I must content myself by referring to them in four groups - the assessment team who went through thousands of documents and interviewed numerous persons in preparation for the hearing, those lawyers and others who assisted in connection with the hearing, those who cheerfully took on the tedious tasks of typing, proof reading, checking and assembling this Report, and finally, but by no means least, those engaged in the sound recording and transcription services.

They all deserve thanks, and they have my gratitude. Their cheerful and generous assistance has made my task easier.

It is an even greater pleasure to have many of them become my friends.

Redfern
28 September 1990

Michael M Helsham

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Chapter 1

INTRODUCTION

Inquiry

Pursuant to s.20 of the Independent Commission Against Corruption Act 1988, as amended (the Act), the Independent Commission Against Corruption (the Commission) conducted an investigation into a site development activity known as the Walsh Bay Redevelopment Project.

The matter was referred to the Commission by a letter dated 28 February 1990 to the Commissioner from the Honourable W J T Murray MP, Deputy Premier and Minister for State Development. (Appendix 1). Earlier on that day there had been allegations or suggestions of corrupt conduct in relation to the project made in a speech in Parliament by the Honourable R J Carr MP, Leader of the Opposition. (Appendix 2).

The investigation was commenced on 6 March 1990. On that day the Commissioner signed a document setting forth the general scope and purpose of the investigation in the following terms, namely:

TO INVESTIGATE

- . the conduct of persons involved in the calling and processing of tenders in relation to the Walsh Bay Redevelopment Project, and all matters consequential thereto;
- . whether, to what extent, and with what consequences persons not so involved received confidential information as to any aspects thereof.

TO ASCERTAIN whether any corrupt conduct within the meaning of s.7 of the ICAC Act 1988 has occurred.

On 20 April 1990 the Commissioner delegated to an Assistant Commissioner, namely the Honourable M M Helsham QC, certain of the functions of the Commission and of the Commissioner pursuant to s.107 of the Act. Thereafter the investigation was conducted by the said Assistant Commissioner.

Hearings of the Commission were commenced on 20 April 1990 and thereafter held on 40 days, concluding on 6 August 1990.

Peter Neil of counsel was appointed to assist the Commission in relation to this inquiry. He was assisted by Kevin Zervos, General Counsel to the Commission, and Louise Fisher and Roger Brown, legal practitioners employed by the Commission.

Various applications were made from time to time for the Commission to authorise certain persons or bodies to appear at the hearing and to be represented by a legal practitioner (see ss.32 and 33 of the Act). Applications to alter the representations were also made from time to time. The eventual position is as set out in Appendix 3.

There were 34 witnesses called to give evidence during the hearings. A list of the witnesses is Appendix 4.

Topographical Background

Walsh Bay lies on the western side of the southern approaches to the Sydney Harbour Bridge. It is situated between Dawes Point and Darling Harbour. It was in former times a commercial waterfront area of Sydney Harbour, with a number of wharves, warehouses, bond stores, roads and other buildings. The wharves are known as finger wharves, and project out into Walsh Bay from the shoreline. There can conveniently be said to be five of them, wooden, mostly two storied, old, long and massive. There are buildings that form a link between most of them along the shoreline which are old and quite large. So are the buildings that stand elsewhere in the area.

A very wide road, known as Hickson Road, runs right through the area from Dawes Point or the east end to the western or Millers Point end. It then turns south and runs alongside a number of wharves and open storage areas known as the Darling Harbour wharves. Another road known as Towns Place runs out of the area on the western end to the Darling Harbour wharves. There are other roads in the Walsh Bay area but they can be ignored.

There are four bridges which cross above Hickson Road from high ground on the southern side of the area to the upper floors of each of four finger wharves or buildings adjacent thereto. A map showing the general nature and situation of the area is at Appendix 5.

The Maritime Services Board (MSB)

At all material times the ownership of the area in general terms was and is vested in a statutory corporation known as the Maritime Services Board, referred to hereafter for convenience as the MSB or the Board. This is subject to two qualifications, Hickson Road and Towns Place. These two public roads were and are vested in the Sydney City Council. The harbour bed is also vested in the MSB.

At the commencement of events leading up to the problems which are the subject of this inquiry, the Maritime Services Board of New South Wales was a statutory corporation constituted under the provisions of the Maritime Services Act, 1935. Under that Act the Board consisted of not less than five and not more than seven members, of whom the General Manager (appointed by the Governor) was ex-officio a member. Mr Hoy was Chairman of the Board up to about July 1989, and thereafter Mr Yonge. The Board inherited its very wide powers, authorities, duties, functions and obligations from those vested in previous governing persons or bodies, and acquired new ones under its Act. However, it could be described as a quasi-autonomous government agency because s.3A of the Maritime Services Act provided:

The Board shall, in the exercise and discharge of its powers, authorities, duties and functions ... be subject to the control and direction of the Minister.

At all times material to this inquiry the Honourable B G Baird MP was the relevant Minister.

In June 1989 the Board was reconstituted as a new corporate entity under the provisions of the Marine Administration Act 1989 under virtually the same name. It was given wide powers under s.6, including, strangely enough, a power to conduct any business, whether or not related to its port management or waterways management functions. However, the Minister retained a power to "give the directors of the Board written directions in relation to the exercise of the Board's functions" (s.11).

The new Act came into operation in August 1989.

Other Government and Local Government Agencies Involved

By proclamation dated 25 March 1988 and its gazettal on the same day, there was established a new Government department, viz the Department of State Development. It is referred to in this Report as the DSD or the Department. This had risen perhaps phoenix-like from the ashes of a small group in the Premier's Department known as the Office of State Development, following a review of all Government departments. The *raison d'être* and functions of the new Department are succinctly described by Miss S A Jones, a project manager there, as follows (T1326):

The Department was established to promote economic development in the State. It was established as a co-ordinating group, as an interface with the private sector. It was established along commercial lines. It has no legislative powers. The Department - and the Minister - does not have any act that it is responsible for implementing. The Deputy Premier has a title so as well as being Minister for State Development, he is the co-ordinator-general. What that means is for the Department to work on projects, it needs Cabinet approval. We make a submission, there is agreement and then we work with other Government agencies to promote and co-ordinate individual developments and to prepare strategies to encourage economic development.

Mr Murray was at all material times Deputy Premier and Minister for State Development.

Before the same date, 25 March 1988, there had been a Government department known as the Department for Environment and Planning. On that day its name was changed to the Department of Planning. At all times relevant to this Report its Director was Mrs G Kibble and the Minister for Planning was the Honourable H A Hay MP.

There had also been involved in the redevelopment activities in the fairly early stages a unit of the Department of Public Works known as the Property Development Unit. It seems to have acted as adviser to Mr Brereton, the then Minister for Public Works, and as supervisor of major projects. While it had some significant input in 1987 into what was then happening in relation to Walsh Bay, it ceased to exist or to play any part when the DSD was set up in 1988 as already noted. (See generally T234-5, 898-9.)

As to the Sydney City Council, three Commissioners were exercising its powers and functions during much of the relevant period, and would have had a planning role in relation to any proposed development in the Walsh Bay area. The coming into being of a Regional Environmental Plan (discussed later in this Report) removed the planning role of the Sydney City Council and placed it in the hands of the Department of Planning. However, the Sydney City Council came into the picture as the proprietor of Hickson Road and Towns Place in connection with certain road narrowing and road closure proposals, part of the developer's plans. This will be explained later.

Other Dramatis Personae et Corpora

The firm known as Freehill Hollingdale & Page (Freehills), solicitors, acted as the legal advisers to the MSB at all times up to the second half of 1988, from which time it was the legal advisers to the DSD. Mr Back of that firm was the partner involved with the Walsh Bay matter, and was closely connected with policy making activities and decisions concerning tendering and contracts.

A firm then known as Ian Turner & Partners, later as Turner Consultant Services (Turners), specialising among other things as consultants in project management, was engaged by the MSB as project managers and advisers at the very early stages of the Walsh Bay redevelopment, and remained as such until some time in 1989. Mr Farmer was the partner of that firm most closely involved in the matter, and probably had a closer working acquaintance with and knowledge of the mechanics and financial aspects of the scheme than anyone else. He was also very closely connected with all manner of decisions and discussions attendant upon the progress of the project from its inception right up to the time it was in effect removed from the MSB and taken over by the Department of State Development after mid-1988.

Horwath & Horwath, a firm of consultant accountants, probably had some connection with the Walsh Bay redevelopment idea in the very early stages of its life under the company name of Horwath HRC Services Pty. Ltd. It does not matter. The firm was engaged to provide some financial advice in August and September 1988, and again in June 1989.

The general manager of the MSB at all relevant times relating to the Walsh Bay Redevelopment Project was Mr L A MacDonald. The person from the MSB most closely involved with the project, at least until early

1989, was Beth McIntyre. She was seconded to the MSB in May 1987 at the request of Mr MacDonal and became project supervisor of this project for the MSB. She probably had a closer association with and more intimate knowledge of every aspect of it than anyone else, at least until she eased herself out of close contact with it in early 1989. She held the position of Director of the Special Development Unit.

The other officer of the MSB most closely associated with this project was John Sturday, probably best described as a project officer, who became involved in the Walsh Bay affair in mid-1985 and has continued to be so involved. He took over in effect from Miss McIntyre in early 1989. He also was closer to the project and had a better working knowledge of it than anyone else in what might be called the nuts and bolts aspects (he is a BE and M.ESc). He was not as closely involved in the decision making activities or the negotiations as Miss McIntyre.

There were two persons employed in the DSD who came into the picture shortly after that Department came into existence in March 1988, and who were at all relevant times the officers in that Department most closely associated with the Walsh Bay project. One was Rosemary Howard, a director of that Department who joined it in late April 1988. She probably did not become involved or start to be acquainted with the Walsh Bay project until about late May 1988, and it seems that her state of knowledge was minimal as at the end of June 1988 (T1648).

The other was Suzanne Jones, previously mentioned, who became associated with the Walsh Bay project in late May 1988 and thereafter became and remained very closely involved in the matter right up to the present.

The persons that have been mentioned were the main protagonists in the drama of the Walsh Bay affair. There are many others who appear and whose role it will be necessary to examine. It is convenient to mention some at this stage. They are:

Ian Kortlang, Director-General of Department of State Development. He had been appointed as an acting Director of that Department on 2 May 1988 and took over as Director-General on 5 August 1988. He resigned as Director-General on 11 May 1989.

Gregory J W Bunbury, head of the State Superannuation Board, was chairman of a committee known as the Evaluation Committee formed in

August 1988 which functioned until 7 September 1988. He was consulted in a desultory fashion about the Walsh Bay matter for a few months thereafter (T2906-17).

Gary Sturgess, Director-General of the Cabinet Office, appointed to this position on 13 June 1988.

Ross Bruce Hawker, adviser to the Leader of the Opposition in NSW, who has held this position since April 1988.

Peter J Wills, Managing Director and Chairman of CRI Limited, who established this company in 1981. He also holds office with Walsh Bay Development Pty Ltd as Chairman of the Board of Directors. This lastnamed company is the entity that eventually became the contractor for the development.

James V Barrett, Managing Director of Ipoh Garden (Australia) Ltd since approximately 1982.

Alan G Moyes, non-executive Director of IBM.

Alexander T Dix, Chairman of the NSW Science and Technology Council.

Bob White, ex-Managing Director of Westpac Banking Corporation.

The last three persons named above formed the Committee of Review, also known as the Committee of Angels. The activities of this Committee will be dealt with in detail later in this Report.

Explanation

Although it is the Commission that is required to report to Parliament the hearings were conducted and this Report was prepared by the Assistant Commissioner. Therefore the personal pronoun has been used to express opinions, conclusions and so on.

Throughout this Report Mr Murray, Mr Baird and Mr Carr and perhaps other members of Parliament have been referred to without quoting their proper titles. This has been done as a space saving measure only and no discourtesy is intended.

The excellence of the recording and transcription services provided to the

Commission during the Walsh Bay hearing should be mentioned. It is always inevitable that some errors will crop up in the transcript. It was decided that except for those which were material and needed to be corrected, time would not be taken up with correcting minor errors. Where extracts from the transcript have been reproduced in this Report, they have been reproduced as they appear in the transcript, and not because the proofs of the Report have not been properly read. The same approach exactly has been taken with respect to the reproduction of documents or extracts of documents.

In the Report the letter T followed by a number denotes reference to a particular page or pages of transcript. Exhibits are referred to by the letter E, and the addition of a number as appropriate.

Section 78(3)

The Commission is empowered, in s.78(3) of the Act, to include in a report a recommendation that the Report be made public forthwith. If that happens, the presiding officers of the Houses of Parliament are entitled, but not bound, to make the Report public forthwith.

The issues dealt with in this Report are of public importance, and this Report matters to a number of individuals and corporations. Accordingly a recommendation pursuant to s.78(3) is now made.

Chapter 2

THE PROJECT - PRELIMINARY

Use of Project Area

The project area comprises some 8.5 hectares. The land and buildings are outlined in the plan Appendix 6.

The project area is little used. Its wharves and buildings, once used for the docking of vessels and as bond stores, wool stores, warehouses and so on as part of the busy commercial waterside activity of the Port of Sydney, have fallen into a questionable state of repair. This applies also to the wharves themselves; a figure of \$18 million has been mentioned as the cost of repairing or renewing the piles of one of the wharves.

There has been and is, however, some use of some of the buildings and wharves in the project area. Portions of the buildings are the subject of leases to various tenants, and the MSB itself occupies an area as a garage and motor repair workshop. Some of the wharves are in use for the mooring of harbour cruise and other small vessels, and some fishing vessels, but the use is minimal.

There are wharves in the Darling Harbour area immediately adjacent to Walsh Bay. The Darling Harbour wharves are used as berths for container and other cargo vessels, and it seems that Hickson Road and Towns Place are used by trucks engaged in servicing the loading and unloading of vessels there and the movement of cargo to and from those wharves.

There are two exceptions to the absence of use of the finger wharves referred to above. Pier 1, the easternmost wharf (closest to the Bridge and the Rocks area) is in use for mixed retail purposes (restaurants, cafes, shops, etc), and is the subject of a lease from the MSB the term of which has about 30 years to run. It is not included in the project area nor in the redevelopment plans, although it is not unlikely that the developer will wish to strike some kind of bargain with the lessee to enable its inclusion. However, at the end of the present lease of Pier 1, or any extension thereof it will become part of the project area. The position about earlier acquisition figures in an incident mentioned later in this Report.

The other exception is Pier 4/5, the middle finger wharf. This has been completely re-furbished and is occupied and used by the Sydney Theatre Company and the Sydney Dance Company. It is not included in the project area nor in the redevelopment plans, and the bridge over Hickson Road leading to the upper level of this pier is also excluded.

Tenure of Developer of Project Area

One important facet of the redevelopment proposal, basic to the project, is that the MSB would retain ownership of the project area, and that any developer would acquire rights to occupy and develop as a tenant. This is because the area is alongside shipping channels and areas of harbour traffic for which the MSB is responsible, and because it adjoins the wharves and other facilities at Darling Harbour. Any developer would be granted a lease of the project area for 85 years.

Another important facet implicit in what has just been said about tenure is that it was always intended that any redevelopment should be by private enterprise and not by means of any Government instrumentality. The MSB was seeking a financial reward in effect from selling a right to develop, the developer knowing that it, or anyone that might obtain an interest in that right from the developer, had 85 years to get the project up and running and derive a return from it. This created all sorts of problems in calculating or assessing the value of the right to develop, and made it equally difficult to assess what was a proper price to be paid to the MSB to obtain the right.

Genesis of Development of Project Area

For some years the whole area of Walsh Bay has been regarded as an historic area of Sydney, particularly of the Sydney waterfront, although somewhat down at heel and fallen on hard times, as it were. It is a prime harbour site and lies between two tourist cum recreational areas, namely the Rocks area and the new Darling Harbour complex (which lies generally to the south of the Darling Harbour wharves). The area of Sydney known as the Millers Point area, which is situated directly to the south of the project area, is a closely settled residential and historical area.

Before 1984 the MSB or the Government received some overtures about the redevelopment of the area. In October 1984 a report was prepared for the MSB by the Government Architects Branch of the Public Works

Department. This led to the MSB seeking submissions for the preparation of a development plan, and in about February or March 1985 a company called Travis Partners Pty Ltd, consultant managers *et al*, was commissioned to co-ordinate a team of consultants to come up with "a development plan for the future re-use of the Walsh Bay wharves and associated properties". They did so in June 1985. It was called the Development Plan Proposal. It indicated that a mix of uses was preferred, with emphasis on residential and commercial use, and maintenance of the historic fabric of the buildings and the historic value of the site.

In August 1985 the development plan proposal was announced, and expressions of interest about and comments on it were sought. Some 30 responses were received.

About the end of 1985 or early 1986 a decision was made by the MSB to appoint Turners as consultants or project managers. The reason why this course was taken and the role to be played by Turners is adequately described by Mr Farmer (T1111-2):

The Maritime Services Board are a port authority, they were aware that they had a site at Walsh Bay with substantial redevelopment potential, but they acknowledged themselves that they did not have the expertise in-house of sufficient calibre to be able to handle a job of that size, and even if they did have the expertise in-house they determined from their own management and strategic point of view that they didn't want to set themselves up as a quasi property developer. So internally the decision had been made that while the board itself would provide direction and leadership to the process that they would utilise expertise from outside their organisation. It was against that sort of background that we were retained by the MSB to provide advice to them on tendering procedures, indeed, to develop a whole strategy as to how - what was a disused or under-utilised port facility might be converted into something that ultimately would bring some financial reward back to the Government. That initial role, because of the political pressures to be seen to be doing something quickly and because a lot of the pre-planning was not in place, we went through the registration of interest route. It was not possible immediately to go straight to tender just because of the volume of contract and tender documentation that would have been necessary. So our first step in early '86 was to prepare registration of interest documents, and they were put out into the industry early in February '86, if I remember correctly. That was part of the general approach to the industry, to enliven interest by the property development sector. Property developers generally were a bit sceptical about dealing with

Government. We were trying to act as facilitators to try and open up the processes so that it could be seen to be commercial.

As mentioned by Mr Farmer registrations of interest were sought and the project widely advertised, at home and abroad. When the registration period closed in March 1986 there were some 23 responses.

A project management policy committee had in January 1986 been set up in the MSB. Two of its members were Mr Sturday of the MSB and Mr Farmer of Turners. Its task was to deal with a great number of matters necessary to be decided before the actual tendering process began (EIS, traffic generation, registrations, etc.). These two were also members of a co-ordinating committee set up in September 1986 to manage the Walsh Bay project, which had regular meetings until April 1987.

By October 1986 a developer brief had been prepared, and was issued to all 23 registrants. By its closing date on 12 December 1986 there were eight responses. These were then evaluated by the MSB, Turners and the Property Development Unit, and an evaluation report recommended that there be a short list of four, viz:

Comrealty Limited

Ipoh Gardens (Australia) Pty. Limited (Ipoh)

White Industries

CRI Limited with Wardley Australia Limited and Australian Industry Development Corporation (AIDC), hereafter referred to as CRI or the Consortium.

On 23 February 1987 the then Minister for Public Works, Ports and Roads announced the names of these four organisations as those to be invited to tender for the redevelopment of Walsh Bay. Then up to August 1987 tender documents were being prepared. And perhaps a pause should be made here to explain some matters concerning the project.

It had been decided that the wharves and buildings on the site should be retained as far as possible. The Board's view as to this and conservation generally had, it seems, been expressed in a document issued to tenderers titled "Examination of Conservation Issues". Although this was not put into evidence, no-one disagreed with the description of Miss McIntyre that

the area was to be conserved "through adaptive reuse of existing buildings" (T228). It was also stated to be "the largest single urban conservation through adaptive reuse of waterfront area in the world". That is the first matter.

Secondly, in case it may be thought that progress up to August 1987 had been tardy, the huge range of matters that it was necessary to cover in order to ensure that all relevant topics had been considered before tender documents were issued should dispel such a thought. Leaving on one side heritage and local residential problems, it is possible to scratch the surface by mentioning a few of them.

There had to be consideration of the rezoning of the area to enable a mix of new uses and planning jurisdiction, the existing tenancies and problems relating to title. There was to be considered the inclusion of a tram system from Circular Quay which would involve the Sydney City Council and the Traffic Authority. There were what is called "antiquities" in the area, as well as the condition of the existing buildings and remedial works. How were financial offers running into millions of dollars to be made and assessed? What was to be the form of the development agreement and lease to the successful tenderer? Conservation, traffic generation, parking, pollution, financial projection, Foreign Investment Review Board approval, operation and management plus safeguards - the list could be many times extended; these matters and many more were canvassed. On the evidence before me the progress of the project in the hands of the Board with its consultants up to the tendering stage cannot properly be criticised.

Miss McIntyre joined the MSB at the request of Mr MacDonald in May 1987, became the project manager, and was immersed in it thereafter.

The Tender Document

It is unnecessary to refer to the tender document in detail. It comprised approximately 141 pages, and invited the four selected tenderers to submit fully developed tender submissions in accordance with the Board's redevelopment guidelines, stated to be as follows (E4 Part 4.1):

The Board intends the Walsh Bay Redevelopment scheme to be appropriate for such a significant position on Sydney Harbour. Inter alia, the scheme should introduce new attractive uses sympathetic with the historic nature and aesthetic value of the area, provide increased opportunities for

the public enjoyment of the waterfront and revitalise the Dawes Point/Millers Point area.

It is probably apposite to mention the following matters dealt with in the tender document, viz:

- (a) the selected tenderer was to be granted exclusive development rights and a single or series of long term leases over the development area;
- (b) submissions by tenderers were to remain valid for 150 days from the closing date or an extended period as agreed;
- (c) the Board reserved the right to accept or reject any submission and to call for fresh submissions if none were accepted;
- (d) attention was drawn to the fact that the Board had planning jurisdiction over the area below Mean High Water Mark and the Council of the City of Sydney over the remainder;
- (e) there were some guidelines of a mandatory nature and some of a desirable nature; failure of a submission to adhere to mandatory ones would make it liable to outright rejection by the Board;
- (f) the submissions were to contain financial offers which showed income return to the Board from the development; \$1 million was to be paid to the Board at an early stage; subject to compliance with certain requirements there was no limitation on the number or arrangement of offers that might be included in a tender submission;
- (g) the submissions were also to contain information showing that the tenderer was financially capable of undertaking and completing the project and how this was to be done; in the outline of the agreement to develop to be entered into between the Board and the developer it was specified that the latter "shall at its sole cost undertake and complete the works", ie. the project;

- (h) there was to be a project performance bond deposited with the Board;
- (i) two mandatory requirements were that there be no substantial development on Hickson Road and a restriction on height of buildings;
- (j) tenderers had to state their proposed treatment of buildings and other items of heritage significance; it was made clear that conservation aspects were of importance and the Board's views that "maintenance of the essential character of individual buildings and items, and the area for redevelopment as a whole" should be borne in mind; the "policy of adaptive re-use is seen as most appropriate for the Wharves, Shoresheds and Bond Stores". The segment attached to the tender document, "Examination of Conservation Issues", from which the above extracts are taken, indicated the structures, artefacts and elements which fell into the category of items that should be conserved, and into the category of those that should be conserved unless valid reasons for not doing so could be demonstrated (E4, "Examination of Conservation Issues").

There were, of course, many other provisions in the tender document. It was issued on 23 August 1987.

Chapter 3

TENDERING AND FIRST ASSESSMENT PERIOD

The Five Periods

The period that came under close scrutiny in the inquiry ran from about March 1988 to about June 1989. This covered matters such as the choice of a developer, the entering into of a development agreement with the chosen developer, and the events subsequent to that relating to the obtaining of development approval to the scheme which had been chosen. This was, of course, part of one continuous process. However, for convenience of handling and for the compilation of this Report, the entire process can be divided into five stages or periods, namely the tendering period, the first assessment period, the second assessment period, the exclusive negotiation period, and the development approval period. This chapter deals with the first two periods.

The Tendering Period

Tender documents (E4) were prepared and ready for dispatch to or collection by the four chosen potential developers by 23 August 1987. A letter to each of them fixed the time for lodging tenders as 90 days from that date; the time therefore expired on 20 November 1987. All four developers responded, and lodged their respective tenders within the allotted period.

On 29 November 1987, that is to say some nine days after the expiry of the period for the lodging of tenders, the then Premier of New South Wales announced the Government's intention to have a Permanent Conservation Order (to be made pursuant to the provisions of the Heritage Act) placed on the whole redevelopment area of Walsh Bay. This Order (PCO) was in fact made and gazetted on 25 February 1988. It included in its terms the wharves and buildings.

In the light of the requirements of the tender document relating to conservation issues (see Chapter 2), the MSB decided that the PCO constituted a material change from the conditions which applied at the time the tender submissions were received, and therefore on 2 March 1988 a letter was sent to each of the four tenderers affording them a three weeks' opportunity for revision of their tenders; the PCO had, after its

gazettal, been added to and made a formal part of the tender document (Addendum No. 6) and included in the letter.

Revised tenders were submitted and all received by 23 March 1988, the date fixed in the letter of 2 March 1988.

Evidence was given as to the reasons for the imposition and announcement of the PCO, and there was criticism of the reaction of the MSB in reopening the tenders for a short period as a result. It is unnecessary to deal with the former matter, and as to the latter I express the opinion that the action of the MSB was in all the circumstances not only justified but probably obligatory.

The First Assessment Period

The 150 day assessment period commenced on 23 March 1988 and was due to expire on 20 August 1988. To evaluate the tenders there had been set up by the MSB an assessment committee comprising Miss McIntyre and Mr Sturday from MSB, two representatives of the Department of Planning, Mr Back, Mr Farmer and one other representative of Turners. It had the assistance of a sub-committee of three from the Heritage Council. This assessment committee became known as the MSB Tender Assessment Group.

The assessment committee adopted as a ground rule that at the end of the assessment period one preferred tenderer would be selected, and thereafter exclusive negotiations would take place with that tenderer for a certain period with the object of there being agreement reached and a contract signed at the end of that period. If that happened the preferred tenderer would become the developer.

Only in the event of no agreement being reached and contract signed as a result of the negotiations would the MSB take up negotiations with any of the other tenderers or adopt any other process, such as calling for fresh tenders.

Although not spelt out in so many words in the tender documents, this ground rule was known to and accepted as fundamental by all those involved in the tendering process, and by others who came later into the act, as will be seen.

A tender system based on this premise would have the effect of ensuring that each developer's final and highest financial bid was, as it were, put on the table. Negotiations that followed might have an effect on this, particularly if changes were desirable that fell outside the scope and concept of the tender or the area of the redevelopment. But basically each tenderer would be expected to submit its top offer, and that top offer would, as in any other tendering process, be likely to have a significant, perhaps decisive, effect upon the ultimate choice of developer.

A tender process based on the same premise would probably have the result, although not designed to do so, of making it not of great consequence if, after tenders had closed, details of the financial package offered by one tenderer were to become known to any other tenderer. Undesirable, but as each tenderer had put in its top and final bid, advantage in the tendering process was unlikely to result from such knowledge.

Returning to the assessment committee, the second matter about its approach to the tendering process was the selection of criteria against which the tenders were to be evaluated, and the weight to be given to each criterion.

It appears from a document produced about late April or early May 1988, (E7), that three such criteria had been adopted as proper ones by the previous Government, namely the conservation and aesthetic aspects, the financial aspect and urban planning considerations. The document sought the advice of the Minister responsible for the MSB as to the applicability of these criteria in the selection process. It was never suggested that they were not appropriate and those criteria were accepted by the assessment committee as being the proper ones; however, because of the action of that Government in imposing the PCO, a real question arose as to whether the conservation aspect should not be given more emphasis or weight. By July 1988 it had been decided that each financial and planning criterion should be given a weighting of one, and that the conservation and aesthetic criterion a weighting of two (E8).

There is nothing explicit in the tender documents of the MSB relating to this criteria or any weighting. There is no evidence that these matters were ever disclosed to the four tenderers.

There is no question but that the whole tender process ran off the rails during this tender assessment period, and it never got back on to an even

track. There were a number of reasons for this, and they must be examined in detail, particularly as suggestions of possible corruption were made concerning events occurring during this period by Mr Carr in his speech in Parliament on 28 February 1990. An outline will provide the perspective and enable the picture to be completed.

Enter the Department of State Development

The DSD set out to take control of, and no doubt hoped to get the credit for the successful completion of, the tendering process and the subsequent contract finalisation following negotiations. Miss Jones prepared an issues paper for the Department on 31 May 1988 which reflected the views of its directors (T1328-30). It included (E154):

Comment:

Senior officers of the MSB were very hesitant in discussing the current status of the project as it was felt that the Public Works Department were trying to gain involvement with the development. ...

At present neither Public Works Department nor the Department of State Development have any involvement with this project. This is the largest development proposal at the moment in Sydney and certainly the biggest State/private sector project. Accordingly, it would be appropriate for the Department of State Development to be involved in the assessment of tenders and co-ordination of Government activity in response to the development.

Mr Kortlang explained it further (T3096-7):

COMMISSIONER: Why was the Department of State Development becoming more involved in the project?---Mr Commissioner, it was becoming more involved following an exchange of letters between Minister Baird and Minister Murray.

And that was the information you'd had, was it?---That's correct.

MR NEIL: An exchange of letters which, as you understood it, meant that the ministers had agreed that there would be a greater role played by DSD?---Correct.

Did you know what the role was or was to be? In other words was DSD effectively to take over control of the project?---That

would have been the import of my minister's letter to Minister Baird, yes.

Are you indicating that Minister Murray was putting to Minister Baird that DSD should effectively take over the control of the project?---Yes, which would have been consistent with government policy.

And Minister Baird, in conformity with what you understood to be the policy, agreed?---Yes.

And when did that happen?---My recollection is that they'd had a conversation in cabinet which had subsequently been confirmed and an exchange of letter somewhere either in the middle or late May. I'm not quite sure of the exact time.

The DSD succeeded in taking over the project in about six months. It was inexperienced, and, as someone said, "on a steep learning curve".

The thing got into a mess, as will be seen. It is appropriate at this stage to record the views of the Director of Planning about it by the time it had come to her Department with its attendant problems. Part of a minute sent by Mrs Kibble to the Senior Policy Officer in the office of her Minister dated 30 August 1989 read (E179):

It has become apparent that the Government tendering process and negotiations over Walsh Bay leave significant problems for the planning process in general, and the Director's consent role in this case.

In January 1989, the Government signed a contract with C.R.I. subject to conditions. The contract was signed for the Government by Ian Kortlang in his role as Director-General of the Department of State Development. In essence there are two problems:

- (i) ...
- (ii) It now appears that if any conditions are to be on the development consent which are unsatisfactory to C.R.I., the position is that C.R.I. can get out of the tender commitments. The Director is then put in the position that if any conditions are attached to the consent the possibility emerges of the Government losing the project.

It would appear to me that this position is completely untenable.

Issues have arisen during the exhibition process and discussions with the Central Sydney Planning Committee which would clearly indicate a need for conditions which will not be 100% satisfactory to C.R.I.

It would appear to me that there is very little negotiating room in this case and I will do my best to resolve it in a satisfactory manner. However, I consider that after this case is over it is imperative that the Minister write to the Premier and make it quite clear that the planning process cannot be put in this position again. State Development has, in essence, committed a planning approval without discussion with the Department of Planning and has, in a major way, totally fettered discretion to place any conditions on a planning approval without severe embarrassment to the State Government.

This outcome of the project was aided by an unfortunate clash of personalities between Miss McIntyre of MSB on the one hand and Mrs Howard and Miss Jones of DSD on the other. Miss Jones expressed what must have been the commencement of problems in this area when she said (T1326-7) in relation to her issues paper (E154 mentioned above):

It appears that she was hesitant in discussing the project for a number of reasons, but one appears to have been Mr Punch's known prior involvement with Comrealty?---That's right. The other reason was she felt that Public Works were trying to muscle in on her project and the Department of Public Works was also responsible to the same minister, Mr Murray.

Did she say that?---Yes, that's why it is in my report. She specifically didn't want to talk about it because of her concerns with both Public Works and

A feeling of resentment grew as the DSD became more and more involved, no doubt accompanied by frustration as Miss McIntyre saw it being bungled by that Department, as she put it. There was also antagonism; to put it in milder terms than that would not be stating the position correctly. I am sure that the discord developed during the course of the involvement of the two Departments in this project, although it was manifest from the time the DSD became involved in the matter in mid-1988. Indeed at the commencement of his involvement with the Walsh Bay project as a director of that Department in late May 1988, Mr

Kortlang was introduced to the subject of Walsh Bay by Mrs Howard with a remark found in his evidence (T3095):

Did you become aware of any disharmony between DSD and the MSB in relation to Walsh Bay?---Yes, I did.

When did you first become conscious of that?---The first time Mrs. Howard mentioned Ms. McIntyre to me.

When was that?---That would have been in late May 1988.

What was the substance of what Mrs. Howard said to you?---That 'We'll be dealing with Ms. McIntyre on this issue. I've had' - this is her speaking - 'I've had previous dealings with her in the previous government. It'll be difficult'.

Later, was that subject raised again?---Constantly.

In what sort of context?---In the context of dealing with MSB, it was going to be difficult every inch of the way dealing with Ms. McIntyre.

I think it coloured Mr Kortlang's approach to Miss McIntyre as will be seen.

The tender assessment period saw the genesis of the departmental rivalry (labelling the MSB as a department for this purpose) or competition as it was put by Mr Kortlang, and the personal antagonism that contributed greatly to later problems. By December 1988 the MSB had decided that it should virtually get out of the whole thing (E91), and it did so.

Different versions of many events occurring after the advent of the DSD were given by various witnesses. The recollections of some of those witnesses were undoubtedly coloured by the remnants of the feelings of hostility that had existed. When versions by witnesses differed it has been necessary from time to time to make decisions as to which account is to be accepted in whole or in part. Seeing that the hearings were conducted virtually as adversary proceedings the usual approach for assessment of evidence in the judicial process was able to be adopted. This assessment was aided by the existence of a great number of contemporary documents prepared by various persons.

In this Report it has not been deemed necessary to pause at each point where conflict existed and to state which version of events has been

accepted and why. It can be assumed that any choice was made after due consideration had been given.

Enter the Committee of Review

The tender assessment period also saw the formation of an independent Committee of Review (ie. not drawn from either of the Government instrumentalities involved), which became known as the Committee of Angels. The injection into the selection process of an evaluation by independent experts had been foreshadowed by the MSB shortly after the receipt of the four tenders back on 23 March 1988 (E7). However the idea was not taken up until about June 1988. The choice of members was made by the DSD, and the actual appointment was made by Mr Murray. The three members of the Committee of Review comprised Messrs Moyes, Dix and White.

It was appointed by mid-July 1988 and required to complete its review by 5 August 1988. Because of the quantity and complexity of the material referable to the four tenderers and their development proposals, as well as the time within which the Committee was required to report, it was quite impossible for this Committee to review these proposals, to make any adequate independent assessment of them, or to make any worthwhile recommendations as to possible choice of preferred tenderer. Indeed the terms of reference given to this Committee were very narrow and quite concise. They were (E28):

- (i) review the procedures used by the MSB to evaluate the four of the listed tenders received on 23 March 1988;
- (ii) ensure that the MSB has followed these procedures appropriately; and
- (iii) report to Minister Murray on these issues, including the confirmation or otherwise of the MSB's recommendation.

The Committee of Review had before it a lengthy document prepared by the MSB and containing the initial recommendations of the MSB Tender Assessment Group (E8). This Group had recommended that Ipoh be selected as the preferred tenderer. In accordance with the ground rules mentioned earlier, it went on to suggest that should (exclusive) negotiations with Ipoh fail to secure the signing of a development agreement within three months, negotiations should immediately commence with CRI and White Industries.

The Committee of Review held meetings with interested parties and visited the site. It prepared a report which was ready on 5 August 1988 (E28). This report will be the subject of critical analysis later; it is sufficient to state here that the Committee reported on the three terms of reference, as to the third of which, so far as relevant here, it said (E28):

We believe the assessment and evaluation process reasonably supports a view that Comrealty and White Industries be eliminated but we do not support the elimination of CRI. Hence, we recommend proceeding on a short list of 2 - Ipoh and CRI.

We also recommend for this final process the appointment of an outside Chairman of the evaluating committee and a second independent and expert assessment of the financial aspects of the two tender responses. In our view risk assessment should weigh heavily in the final choice.

...

Finally, we are not convinced that this project should not return more to the MSB and pressure should be put on the final selected tenderer to increase financial returns.

Its report went outside its terms of reference and suggested a departure from the ground rules.

Consequences

The report of the Committee of Review brought in its train consequences that were to have unfortunate results. It was placed before a Cabinet Subcommittee on the same day at it was finalized viz 5 August 1988. There were present, during any deliberations about it by the Cabinet Subcommittee, three representatives of the DSD and no representatives of the MSB; probably no one told the Cabinet Subcommittee of the departures from its brief by the Committee of Review, nor how its recommendations departed from the ground rules.

The Cabinet Subcommittee was handed a report by a high powered triumvirate appointed for the very purpose of making an independent review. In the circumstances it was almost inevitable that the recommendations in that review would be accepted and adopted. They were. The minutes of the Cabinet Subcommittee meeting record (E30):

- (i) financial consultants will be appointed to provide an in depth comparison of the financial offers made by both IPOH and CRI. The consultants, recommended as Howarth and Howarth, would also advise as to the appropriateness of the financial offers being made and ways of achieving the best return to the Government;
- (ii) that an independent chairman will be appointed to the existing MSB evaluation committee (possibly the current President of the State Superannuation Board), and
- (iii) that both IPOH and CRI will be granted preferred tender status with a 60 day extension being negotiated to extend the validity of their tenders. Both Comrealty and White Industries would be informed that their tenders have been unsuccessful.

The object was primarily to squeeze more money out of two tenderers. The decisions gave CRI an opportunity to get "back in the hunt" as Mr Kortlang put it, and to put in a further tender; they opened up a new approach.

Chapter 4

THE SECOND ASSESSMENT PERIOD

Re-opening of Tenders

Following the decision of the Cabinet subcommittee of 5 August 1988, the firm of Horwath and Horwath were engaged to compare the financial bids already made of Ipoh and CRI. That firm was given instructions from the Department of State Development which enabled it to commence on 11 August 1988 and which required a report by 15 August.

A report was produced on 15 August 1988. Because of the shortness of time Horwath and Horwath was unable to express an opinion on the quantum of the offers (ie. whether more money might be got), and reported that as to the financial offers made by Ipoh and CRI "neither of the tender offers is, on financial grounds alone, significantly better than the other". It went on to indicate that if any choice between them was to be made on financial grounds alone, "the choice must be based on Government's relative preference for early returns rather than long term income" (E33). Ipoh had offered \$55 million in its tender, payable as to \$27.5 million by December 1989 and \$27.5 million in four instalments to February 1993. CRI had offered \$20.75 million payable by December 1989 and thereafter a percentage of gross rentals for 80 years; the latter was assessed as being likely to return something between \$19.9 million and \$46.4 million. The firm of Horwath & Horwath assessed the net present value for the purposes of making a comparison and came up with the equation mentioned above. The report concluded:

We understand that MSB intends negotiating with one of the tenderers to improve the terms of its offer. Given the time and effort invested in the current tender process to date it appears advantageous to continue that process with the aim of achieving satisfactory agreement.

Such a procedure would not have caused any departure from the ground rules.

On the day before the receipt of the report from Horwath and Horwath, viz 14 August 1988, the MSB had received a report from Professor Abelson of Macquarie University; he had been commissioned to do a

financial comparison of all four tenderers. He reached the conclusion that Ipoh and CRI's offers should be assessed respectively at a net present value of: Ipoh \$33 million - \$40 million, CRI \$27 million - \$30 million, both well behind Comrealty at \$65 million - \$75 million and White Industries at \$45 million - \$55 million (E34).

It is desirable to mention one event during this period that had very far reaching effects. At the Cabinet subcommittee meeting of 5th August, one of the decisions made was that there should be preferred tender status given to CRI and Ipoh, and that the other two, Comrealty and White Industries, should be told that their tenders had been unsuccessful. Mr Baird was to be responsible for informing the tenderers of this decision. The DSD had by this stage virtually taken over the negotiations.

Mr Kortlang went on holidays on 7 August, and did not return until 15 August. He discovered that letters informing the two unsuccessful tenderers of the decision had not gone out. What had been going on in the meantime is quite confused; however, it is proper to conclude that there was ample reason for the letters not having gone. Mr Kortlang would not have a bar of that. He roasted his own senior officers (Mrs Howard and Mr Gilligan) for in effect being naive and for "the failings of their personal management techniques" and other deficiencies (T3145). In return Mr Gilligan told him that "McIntyre's been bad mouthing you to Sturgess last week". He also said: "She's alleged that you've leaked information to Wills" (T3146) - which he had. Mr Kortlang went to see Mr Sturgess the same day and confessed that he had done just that. By next day he was not in a good frame of mind. He rang Miss McIntyre and flew off the handle at her. Her note of this conversation (E37) he agrees accurately records the substance of it (T3155):

V. angry - how dare you presume that you should have a major say in the matter - its out of your hands - how dare you spread stories that I leaked information to CRI - had a long talk with Gary Sturgess - Cabinet furious that letters didn't issue to the unsuccessful 2 - definitely want the financials checked You delay the whole process.

I replied that I was only trying to stop the Govt shooting itself in the foot - I had never said that he leaked info, in fact I'd never even thought it - I had only said that the story was that Peter Wills had said it was down to 2 and that he was about to be appointed a Tourism Commissioner.

He said that he and Minister Murray had, in all good faith, told Peter Wills of the Cabinet Sub C'tee decision revealed at functions last week, that it was down to 2 - didn't know letters hadn't issued.

I re-iterated that I knew nothing about their conversations and hadn't in any way suggested he had leaked info....

Conversation ended relatively amicably with Kortlang saying that he accepted my assurances and that it was now "forgotten".

Now the point is that neither he nor Mr Murray had spoken to Mr Wills during the previous week. They denied it. It was simply not true. Mr Kortlang admitted this in evidence. Miss McIntyre accepted what he said. Also what he said to her about Cabinet being furious was untrue. By way of contrast it might be noted that Miss McIntyre had heard that Mr Wills was saying it was down to two (Mr Kortlang had virtually told him so in July), and also that Mr Wills was appointed a Tourism Commissioner.

The untruth about Mr Murray had unfortunate consequences.

There was a further Cabinet Subcommittee meeting held on 17 August 1988. Mr G Bunbury, head of the State Superannuation Board, had, following the Cabinet Subcommittee decisions on 5 August 1988 (see Chapter 3), been appointed to head up what was called an Evaluation Committee. There was a meeting between him and the Director-General (I Kortlang), the two directors (R Howard and K Gilligan) of the DSD, Miss McIntyre and Mr Farmer on the morning of 17 August ie. before the Cabinet Subcommittee meeting due to be held that afternoon.

A "note to the Minister" by Miss McIntyre (E41) records that at the end of this meeting it was clear (a) that the Government should proceed with one developer and negotiate with that one with a view to entering into a contract, (b) that this would, she believed, be acceptable to the Review Committee (Committee of Angels) and (c) that nothing that had happened since the report of the Review Committee altered the MSB's recommendation that negotiations should now commence with Ipoh. She pointed out, in a note made the day before which assessed the current state of play, and which is attached to the note to the Minister, that the matters raised by the Review Committee had all been anticipated in the tender documents as being the subject of negotiations after preferred tenderer status had been granted to one of the four, and that to proceed in any other way would represent "yet another change by the State

Government for this project" (E41). She pointed out that, save and except for one developer, if any developer was going to be given a chance to put in a fresh tender before the exclusive negotiating period with a chosen one began, then three ought to be given the same opportunity.

Not only did Miss McIntyre get hauled over the coals for what she described as her attempts to stop the Government from "shooting itself in the foot", a precaution that she alone seemed desirous of taking, but the Cabinet Subcommittee was effectively saddled with the report of the Committee of Review and its recommendations including, "We recommend proceeding on a short list of two - Ipoh and CRI". There is no evidence of what other material the Subcommittee had before it, but whatever it was, it comes as no surprise that it decided that "... negotiations should occur with Ipoh and CRI ...". It seems hardly likely that it could have decided otherwise.

The Second Tendering Period

So the tender assessment period did not end on 20 August 1988 with the choice of one tenderer with whom exclusive negotiations would then be undertaken; Ipoh and CRI were, on 18 August 1988, invited to participate in further negotiations over the next three weeks, following which, on 9 September, one would then be chosen with whom exclusive negotiations would be conducted over the ensuing 90 days. The remaining two tenderers were notified that they were out. Meetings were arranged with two ongoing tenderers for 22 August 1988.

The first meeting was with CRI. Mr Wills, managing director of that company, expressed no surprise or concern. He had been told by Mr Kortlang, his friend, that it looked as though "CRI were back in the hunt with one other", a week before the Committee of Review (Angels) had given its report. It appears that by 22 August CRI was aware of Ipoh's offer, and no doubt expected that it would have to "up the ante". With an assumption no doubt made by him that he had previously been out of the "hunt", Mr Wills was not likely to make any complaint about the change in the ground rules. More particularly is that the case as CRI also knew that Ipoh was the choice of the Heritage Commission.

A different approach was adopted by Mr Barrett of Ipoh when he and other representatives of his company were interviewed by Mr Bunbury's Committee later the same afternoon, 22 August 1988. He immediately complained. He said that Ipoh's bid was known to CRI, that his company

had spent \$1 million on preparing its tender, that the offer had been made and that he expected the winner to be selected (E 51). He added that because CRI knew Ipoh's offer, Ipoh had no alternative but to increase its offer, that this was grossly unfair and that an assessment should be made on existing tenders as they stood. He made other complaints, including one that CRI knew that the MSB had recommended Ipoh as the preferred tenderer. He said he was aghast at the decision to reopen tenders. He was very angry.

Mr Barrett said this about what was announced by Mr Bunbury, and his reaction (T2111):

... I mean - thought that they were just wanting to get some matter clarified, "What did you mean by this?" or "How can we commit on this particular element of the offer?" I would have thought we were just going to be talking about details like that. Of course what was the absolute bombshell was the announcement that they were going to give an offer to two remaining tenderers to increase their financial offer, and that was the area that was always totally contrary to what we understood the situation was as far as the procedure to be followed. As the commissioner asked me the other day, "Was there anything to suggest that there would be any reason why it had to go from four straight to one?" My response to that is, no there was nothing to suggest that it couldn't go from four to two to one, but certainly that in that process there would be no reopening as far as the -well, reopening of the tenders, no opportunity to increase or no demand to increase the offer before we got to one.

Both tenderers were given until 29 August 1988 to submit further offers. The meetings were followed by letters from Mr Bunbury to CRI and Ipoh dated 23 August 1988 setting out the terms of the invitation, including an expectation that "you would take the opportunity to revise/strengthen the quantum of the offer contained in the tender already received" (E213, 242).

The result was that Ipoh refused to increase its offer. Mr Barrett complained next day (23 August 1988) to Miss McIntyre about a "Dutch auction", and on 25 August 1988 wrote a letter to Mr Murray, the Minister and Deputy Premier, complaining in very strong terms about the reopening of tenders (E55):

We believe it to be both unfair and potentially damaging to the Government, for the Government now to persist with its

invitation to each party to submit a new tender, as such action is a form of auction and appears to encourage gazumping. It is unfair because the opportunity has been extended to CRI, having knowledge of the confidential details of Ipoh's bid, to submit a new proposal. It is potentially damaging because the procedure, if seen as a precedent, could well have the effect of dissuading potential tenderers for future Government projects from doing so.

A copy of the letter was sent to Mr Bunbury. Neither the Deputy Premier nor Mr Bunbury replied.

CRI put in a new bid. The relevant part is that it offered "a single perfect upfront payment" of \$73,566,000 (E58). This was in addition to the sums of \$1 million and \$250,000 required to be paid under the tender document.

Ipoh did reply to the invitation of 22 August, in a letter of 29 August 1988 (E57) in which it refused to increase its offer, a difficult decision, it explained, "but we must make a rational and we believe, an ethical decision". The letter continued:

We have made this high risk decision, fully aware that our opposition, is most likely to take full advantage of the opportunity and second chance and increase its financial offer, possibly to a level that both it and the Government, should it accept it, live to regret.

The Second Assessment Period

The MSB did a very cogent analysis for Mr Bunbury of the proposals of two contenders as they stood at 29 August 1988, which analysis was discussed at a meeting of the Evaluation Committee on 1 September 1988. The analysis dealt with a number of matters, and reached a conclusion that, on the raw data that had been presented, "both the Ipoh and CRI offers are effectively equivalent" (E59). It raised a number of problems concerning the new offer by CRI, and it stressed again the Board's view that preferred developer status should be conferred upon Ipoh and negotiations commence with it. The analysis, or commentary as it was called, noted that Ipoh was prepared to negotiate on its financial offer but under "preferred developer" status and not in a "Dutch Auction", and concluded:

Quite apart from the foregoing, the question of business ethics in relation to the particular tender selection process has not been addressed in this commentary. The four short-listed developers were specifically advised that preferred developer status would be granted to one developer before any negotiations were entered into.

The analysis was coldly received at the Evaluation Committee meeting on 1 September. Indeed Mrs Howard is reported as saying that it "prejudges the situation and should not have been prepared" (E63). On the other hand the committee was presented with a draft report from Horwath and Horwath, who had been commissioned to do another analysis of the financial position following the letters of 29 August 1988, and which advised that, "The revised offer from CRI is substantially higher than Ipoh's and on financial grounds alone is preferable".

The Evaluation Committee met again on Sunday 4 September 1988. Apparently it had to have a report or recommendation ready for a further meeting of the Cabinet Subcommittee to be held on 6 September, presumably to make a decision as to which of the two should be the preferred tenderer with whom negotiations would thereafter be conducted, hopefully leading to the signing of a development agreement. Mr Bunbury prepared a draft of a report to go forward with a recommendation. He presented it at the meeting.

The witnesses do not agree about what went on at the Sunday afternoon meeting. It was not a happy meeting. It was confined by Mr Bunbury to what has been described as the Bunbury/Howard line of consideration of the financial and on-going management implications of the offers by both developers, in spite of attempts by Miss McIntyre and Mr Farmer to discuss the full merits of the proposals and the alleged incorrect conclusion of the Committee of Review. Mr Bunbury refused to incorporate in the already prepared draft a disclaimer prepared by Miss McIntyre (E69) nor a form of words by which the MSB and Turner's representatives wished the overall recommendation to be qualified (E66). The report that went forward suggested that "the CRI Consortium should be awarded preferred developer status" E71 Part 2 p19).

The Cabinet subcommittee met on 6 September 1988. It selected CRI as preferred tenderer for a period of 90 days upon the basis of its upfront offer of \$75 million. It decided that the DSD was thenceforth to chair negotiations with CRI; that Department was to co-ordinate a project team

to facilitate the necessary approvals (E75). Ipoh was informed on 7 September 1988 (E214).

Although the Minister for Transport, Mr Baird, had been appraised of all the concerns of the MSB and of Ipoh's reaction, and although according to Mrs Howard, "Wal Murray is well informed on what has happened" (E63 - he was of course the Minister in charge of her Department), it can be concluded that the Cabinet subcommittee really had no choice. The Evaluation Committee that it had caused to be set up under an independent chairman had recommended CRI as the preferred developer. The Cabinet subcommittee's hands were effectively tied. And the DSD effectively took over the control of the project.

CRI was informed of its preferred tenderer status by letter dated 7 September 1988.

Chapter 5

EXCLUSIVE NEGOTIATION PERIOD

The Period

The selection of CRI as the preferred tenderer was "on Basis 4, ie. a single upfront payment of \$73,566 million on signing the Development agreement" (E220). Basis 4 referred back to CRI's offer in its letter of 29 August 1988 (E58):

BASIS 4

"A single upfront payment on signing Development Agreement."

The consortium offers as a single upfront payment covering the full term of the Head Lease and payable on signing the Development Agreement (anticipated December 1988):

\$73,566,000

This sum is to remain refundable to the Consortium, together with accrued interest, until approved Development Applications (or similar) to proceed with the development substantially as proposed is received.

An exclusive negotiation agreement with CRI as preferred tenderer seems to have been executed on 26 September 1988, so that the 90 day period ran out on 26 December 1988.

By letter sent on 7 September 1988 Ipoh was informed of the decision, and advised by the Director-General of the Department of State Development that "if these negotiations are unsuccessful and if Ipoh be still interested in proceeding with the project, I would look forward to further discussions" (E214).

Events

The period 7 September to 23 December 1988 saw the withdrawal and removal of the MSB from the negotiating process.

It saw a decision that a regional environmental plan (REP) should be prepared so as to place in the hands of the Department of Planning sole consenting responsibility for all necessary development approvals (E196 and 198, 181 and 180).

It saw a number of expressions of concern about the ability of CRI to make the payment of \$73,566 million on the signing of a development agreement as well as to "remain in for the development phase" (eg. E77, 16 September 1988).

It saw an immediate attempt by CRI (by 20 September) to "turn all the rules of negotiation on their head", to use Mr MacDonald's phrase (E9). This referred to a suggestion made by it to the DSD, to which it seems Mrs Howard and Miss Jones were prepared to accede until they were persuaded to the contrary. The matter is dealt with in E78, 79 and 80 and 9; 20 and 21 September 1988, and at various parts of the evidence.

The period saw the commencement of negotiations between CRI and the DSD directed to departure from a basic requirement of the Board, that is to say assignment by the developer of all or any part of the project, and to the upfront payment of \$74,566 million (which included an additional amount of \$1 million, see page 31). It is convenient to deal with the latter aspect first.

The Payment of \$74,566 Million

The offer by CRI which had caused or contributed to the selection of the consortium as the preferred developer was contained in Basis 4 set out above. There was nothing equivocal about that. The period within which the development agreement was to be signed ran out on 26 December 1988.

Apparently it had been floated at a meeting on 20 October 1988 that the payment of \$74,566 million be treated as some form of "security deposit" or that it be placed in escrow (E84). The Board, to which the money was to be paid, indicated that it would not entertain any such suggestion.

However, the matter was raised again by CRI with the DSD at a meeting on 27 October. It was there suggested that instead of the payment being made on the signing of the development agreement "the ability of financiers to charge the up-front lump sum payment until such

time as all development approvals are obtained on terms and conditions acceptable to the consortium and its financiers" was one of the "critical issues relating to financing the overall development proposal" (E243). At this stage development approvals were an indefinite time down the track.

The Department sought the advice of Mr Bunbury. On 31 October he replied with the thought that "the up-front payment could be made by the consortium subject to all development approvals being obtained on terms and conditions, refundable with interest in the event of arrangements irrevocably collapsing" (E244). That appears to be the same as CRI's original offer.

On 1 November CRI wrote to the DSD (E195). In that letter it indicated that the consortium would prefer to provide the upfront payment in the form of a bank guarantee for the \$73,566 million. Failing that, the money, it argued, should be placed "in escrow", or failing that, for the MSB to arrange for the issue of an irrevocable letter of credit by a bank to secure the repayment. Various reasons for these proposals were advanced. The letter concluded:

The issues of security and the potential refundability of the upfront payment are essential elements that will impact the ability of the Consortium to raise funds for the development. As such, it is imperative that these issues are resolved to the satisfaction of both the Government and the Consortium.

It appears that funding problems were starting to emerge. Also to be noted is that at this time the withdrawal or partial withdrawal of Wardleys and AIDC (the other two members of the Consortium) from the project was being mooted. This will be referred to again later.

By letter dated 4 November 1988 (E165) the DSD notified CRI that its proposals concerning the upfront payment were rejected and that payment by cash or bank cheque was required. The money was to be paid to the Board; in the event of a refund interest would be paid, namely "that percentage interest earned by the Board on monies invested by it as part of its then current short term investments"; "neither the Board nor the DSD will consider any further variations to the method of payment or refund of the lump sum payment." The letter was signed by Mrs Howard.

this offer until after the event (E89, 12 December 1988).

By about 21 December the DSD had agreed that the money would be placed in joint names in a bank account, probably a Hong Kong bank associated with Wardleys, with the final destination of interest to await the outcome of the project (E189, 190).

So the Government (MSB) finished up without the benefit of the capital sum of \$73,566 million or the interest or other income it might have been able to obtain from having it.

By this time the MSB had completely severed itself from negotiations and responsibility (E12).

Postscript

The deed of agreement (E13, 12th January 1989) provided that the sum of \$74,566,000 was to be paid within three days of signing, that it was to be placed in the Hongkong Bank of Australia at interest in a trust account in the joint names. In the event of termination of the agreement the capital sum was to be returned to the developer, the interest was to be equally shared, except that the MSB was not entitled to have more than \$1 million.

Assignment of Rights

The period between 26 September 1988 and 26 December 1988 also saw the approach of CRI to the assignment of the interest that the Consortium was to have in the project. This involves two aspects, the share of the three members of the Consortium and the quasi-property interest to be obtained in effect in the site itself.

The consortium comprised the three entities CRI, Wardleys and AIDC who would hold the respective percentage interests in the development, namely 40, 40, 20.

A document in evidence discloses that both Wardleys and AIDC were invited by CRI into the consortium, the one "in the capacity as financier", and the other "with the intention that it share the financing responsibility". Insofar as it is necessary to do so, I order that these extracts from the document E223 be disclosed; the order made pursuant to s.112 of the Act continues to apply to the remainder of the

By letter dated the same date (4 November) Miss Jones informed Mr Bunbury that "agreement has been reached that the upfront payment must be in cash only but there is still considerable concern from the consortium with regard to where it is placed until development approval is issued". According to her, State Development "has agreed to consider any proposals which are at no cost to the Government and do not diminish the return to the MSB" (E248).

The MSB was not told of this. Nor did it shift its ground. The first draft of the development agreement provided for payment to the MSB, release of the money to the MSB and repayment with interest if the money became refundable.

CRI came back on 6 December 1988 with, in effect, three new proposals (E88 and 245). Mr Bunbury did not favour any of them (E188 and 246). He suggested that the money might be placed in a trust account. He did not indicate how interest should be disposed of.

The proposals were referred to the MSB. Not surprisingly it regarded the proposals as being "a completely new financial offer" (which it was) and said so in a reply to Miss Jones (E87). Miss McIntyre added:

In our view, the consortium's new offer would:

- (a) have to be submitted to the Cabinet Sub-Committee and
- (b) substantiates the Board's opinion, expressed in its report of September 1988 to Mr Bunbury, that the consortium does not and did not have the financial strength to meet the payment proposed in its Basis 4 offer.

There was a further warning about checking "the financial capacity of CRI".

Apparently Miss Jones ignored the MSB attitude and acted immediately on the suggestion of Mr Bunbury. She put an offer or proposal to CRI on 8 December "which would place the upfront premium in a joint account with neither party having access to the funds until the development application was approved". She further proposed "that the interest would be split between ourselves (MSB) and the consortium in the event that a DA was not achieved". The MSB was not appraised of

document. Although there is nothing explicit in the evidence, the clear expectation of the Government was that the consortium would retain its structure until development was complete. The tender document of August 1987 (E4) required the successful tenderer to undertake and complete the development.

By a letter dated 27 October 1988 (part of E243) CRI informed the DSD that "whilst CRI has no present intention of selling down its interest, Wardley has flagged that it may wish to sell down half of its interest" in the project. It went on, "AIDC similarly may wish to sell down its interest during the development stage". The consortium "required" this flexibility during the development phase, and added that it "may be prepared" to remain responsible for any development by an approved assignee.

Mr Bunbury was concerned (E244). On 31 October he advised the Department:

It is worrying that consortium members may wish to sell down their interest during the development phase. I would not have thought it unreasonable to prohibit this action. As I understand it, the basis on which these negotiations are being conducted requires the consortium to commit to responsibility for the full development period.

He was not very impressed by the suggestion that CRI "may be prepared" to remain responsible.

By 3 November the DSD had agreed that the consortium should have the ability to assign, but upon certain conditions (E187, 248). Eventually provisions enabling assignment were inserted in the development agreement (E13, Part 12).

Mr Yonge was at the time Chairman of Wardleys and associated with the Hongkong & Shanghai Banking Corporation of which Wardleys was a subsidiary. He became Chairman of the MSB board in July 1989.

It can be mentioned that Mr Wills of CRI was, in August 1988, appointed Commissioner of the NSW Tourism Commission. The relevant Minister sought and acted on the advice of Mr Kortlang in relation to the appointment. Mr Wills has since resigned.

Assignment of Interest in Land

It had always been one of the MSB ground rules that there would be a development agreement entered into with the successful tenderer, and that there would be one lease of the MSB property to the developer for the period of 85 years. This was to avoid the Board thereafter having to negotiate or deal separately with a number of occupants or lessees who were or might be occupying parts of the area - there were, for example, in 1987 not less than eight lessees of various portions of the Walsh Bay Project area, some with more than one lease. The tender document reflected this basic position (eg. E4, paras 3.4, 9.8). The tender document did however make provision for staged development areas, contemplating that the project might be progressively completed in stages, following acceptance of and written agreement to staged development proposals. However, assignment of portions of the head lease for any of such areas was not to take place until a certificate of compliance (for the development on such an area) had been issued (E4, Part 11, para 5.3). The Board did not envisage that this aspect would be the subject of negotiations (para 6.0).

When forwarding a draft of the exclusive negotiation agreement to Mr Wills of CRI on 16 September 1988 Mrs Howard indicated that one of the first issues would be verification of "the commitment of the developer to remain in for the development phase" (E77, 72). By 20 September 1988 CRI had indicated a desire to delete the requirement that the developer should enter into a head lease, a suggestion to which apparently Miss Jones and Mrs Howard were prepared to agree, notwithstanding that Mr Bunbury's report to the Cabinet Subcommittee had specified (E71 part 2 p 19):

This awarding of preferred developer status on the CRI consortium should be conditional upon its immediately agreeing to terms that would lock the consortium into the project until completion of the development, provided the terms of the development agreement and agreement to lease are satisfactorily negotiated within the period referred to in item 4.

Miss McIntyre suggested that the idea was nonsense and expressed great concern (see generally E78, 79; T374). By the next day, after advice from Freehills, the DSD agreed that the proposal was "not on" (E80).

The MSB reiterated its position about assignment on 24 October 1988 (E84, T385-6).

However, the matter was taken up again by CRI by 27 October. CRI set out its requirements as to an ability to assign in a letter dated that day (E243). They were referred to Mr Bunbury, who, apart from finding "worrying" the proposals of the Consortium to "sell down" its interest during the development phase, expressed qualified approval for CRI's proposal (E244). By 4 November the DSD agreed that the developer would have the ability to assign subject to certain conditions (E248). The way it was put to the Minister was this (E190):

The Board's tender documents did not provide for any assignability prior to the completion of the entire project. Given the 7-8 year life span of construction, DSD was advised by Greg Bunbury, DBSM and Freehills that it would be uncommercial for any one company not to be able to assign their interest during this length of time and with such a large project.

The arrangement was incorporated into the deed of agreement (E13 pp 25, 40).

Other Matters

The 90 day exclusive negotiation period commencing on or about 26 September 1988 saw some other matters that assumed some importance in the inquiry. One concerned the payment by CRI of monies towards the costs of the Department of Planning in connection with the preparation of a regional environment plan. Another concerned alteration to the plans for development that had been submitted on behalf of the Consortium and which had formed the basis of the eventual choice of the consortium as the successful tenderer. A third concerned Hickson Road, and the matter of a possible land swap. However, it is more convenient to deal with these as topics relating to the final period of the development process.

Post-Exclusive Negotiation Period

The exclusive negotiation period expired on or about 26 December 1988. A draft deed of agreement prepared by Freehills had been the subject of discussion for some time before 24 December 1988. On that date an ultimatum was issued by that firm to the solicitors for the Consortium

that the deed of agreement was to be executed on that day or the Government would treat the period at an end and that no extension would be considered (E167). It was not executed.

Nevertheless exclusive negotiations continued with the consortium. Ipoh learnt of this by 4 January 1989, and in a letter dated 5 January 1989 (E178) reminded the DSD of the contents of a letter from Mr Kortlang to Ipoh (7 September, E214) in which he had said that if "negotiations (with CRI) are unsuccessful and if Ipoh is still interested in proceeding with the project, I would look forward to further discussions". There was no reply.

Chapter 6

THE DEVELOPMENT APPROVAL PERIOD

History

This chapter contains a brief outline of the period from 12 January 1989, the date upon which the development agreement was signed, to about the end of 1989. Significant changes made to the project during this period are dealt with in Chapter 13. There are other matters that were raised in evidence.

Attitudes

A summary of the atmosphere that prevailed during the post-agreement period may help to explain subsequent events and how problems developed.

The MSB had in essence been removed by events and by the DSD from the process of choosing a preferred developer, and its own choice of one had been rejected. It had then been in essence removed by that Department from the exclusive negotiations with CRI that led up to the signing of the deed of agreement in January 1989. The situation was acknowledged in a letter from the Minister responsible for the MSB to the Deputy Premier dated 13 December 1988 (E91).

The period here under review followed that immediately, and was largely occupied with the obtaining of development approvals. The MSB were brought back into this process as being the negotiating party on the Government side, although such was the degree of authority that the DSD still exercised that at one stage, in June 1989, the MSB asked that it should acknowledge in writing its dominant role, a request that was refused (E129). A Steering Committee was brought into being by 14 February 1989 (E103) for the purpose of facilitating completion of the project in the shortest possible time and guiding it through the development approval process.

Changes to the Project Plans - Background

It was always understood and envisaged that development approval or approvals for the project would need to be obtained from the relevant statutory authority or authorities after the deed of agreement had been

executed and before work on the project could proceed. While the deed of agreement had annexed to it certain concept plans and specifications, these had to be worked up by the developer to the extent necessary to support a development application.

In that form they were to be submitted to the Board for approval before going forward to the development approval authority. The Board could not withhold its approval if those plans and specifications were substantially in accordance with the concept plans and specifications and with the "Total Development Objective" as defined in the deed (E13, section 4.1). Either party might terminate if, in effect, the development authority imposed any condition that materially and adversely affected the commercial viability of the project (section 4.4, 4.5).

Neither Hickson Road nor Towns Place (see Appendix 6) were included in the project area. However, the deed of agreement referred to works which the developer proposed to carry out on Hickson Road, which included some narrowing of the roadway, and provided that the Board would give "reasonable assistance" to the developer to enable it to obtain necessary approvals (E13, section 4.19). It is not easy to ascertain from the material before the Commission the exact nature and extent of these works. Hickson Road was very wide - approximately 26 metres.

However, the deed contained a proviso that the Hickson Road works should not include "any work necessary for the rerouting or regulation of traffic" along the part of Hickson Road that lay within the boundaries of the development area (section 1.1). This no doubt stemmed from the use of Hickson Road by traffic servicing the container wharves at Darling Harbour. Should development approval not be forthcoming for whatever was proposed by the developer to be done in Hickson Road, then this was to furnish a ground for terminating the agreement by the developer (section 4.19(c)).

The deed also referred to development proposed in Towns Place. This included the closure and relocation of Towns Place (sections 1.1, 4.20). The closure was indicated on the concept plans, but not any relocation. The Board was required to use its best endeavours to assist this proposal, but apart from that, these works did not form part of the deed of agreement. The closure and relocation were described in the evidence as the "land swap". The suggested relocation appeared on 14th February 1989 (E106).

Development Approvals

A suggestion had been put up in October 1988 that there should be a regional environment plan (REP) prepared for this area, a proposal to which the Minister for Planning and the Minister for State Development had agreed. This was prompted at least partly by the fact that more than two authorities were necessary parties to any development approval for the area (MSB, City Council and Heritage Council). The idea was that by the introduction of a regional environmental plan there would be substituted for these only one planning authority for the whole area, namely the Department of Planning (DOP). This suggestion was implemented, an REP was prepared and the DOP became the approving authority.

The situation was not quite as simple as this. It was complicated by subdivision applications by the MSB which had to be approved by the City Council and which had not been approved by September 1989. According to Mr Sturday of the MSB (T975), these subdivisions were rendered necessary by the departure from the original concept that there should be one lease of the whole area to the developer, a concept thought basic to the idea that the MSB would only have to deal with one entity so far as ongoing management was concerned; it seems that the change meant that the MSB would have to obtain a number of subdivisions, something less than 16 he thought. It seems these were not finalised until March 1990 (E147), and only then subject to conditions. The matter was complicated further by the fact that the City Council was a necessary party to the land swap in connection with the Towns Place proposals. The land swap had not taken place by the time this inquiry commenced.

Hickson Road and Towns Place

The implementation of the proposed land swap involved road narrowing proposals. This caught up Hickson Road. Relating to the period between 12 January 1989 and August 1989 there were tendered in evidence no less than 20 documents in which problems relating to the two roads appear; evidence about them covers many pages of transcript.

It was outlined to the Steering Committee meeting of 6 March 1989 thus (E105):

MSB is not happy with present design for Towns Place as it would seriously affect the Port operations in the locality. The Port of Sydney is concerned about the affect the proposal has

on parking of MSB trucks at Towns Place where up to 50 trucks may have to be accommodated at any one time. A preferred option was presented to CRI by the Port of Sydney.

There is considerable disagreement as to whether this matter had been previously raised by the MSB with any developer or adverted to in the tender documents or process. CRI asserted that it had not (E116). I am inclined to the view that it had not, seeing that parking and traffic on such a scale in a new development would almost certainly have been raised somewhere along the line as a problem before this time.

Thereafter the matter was the subject of further examination by both the MSB and CRI, of further discussion and of further information gathering. It got nowhere. At a meeting of the Committee on 30 May 1989, the MSB raised for the first time the matter of road width, the MSB asserting that a road width of 15.5 metres was too narrow and CRI asserting that it was not - 20 metres was the minimum according to the MSB (E117). It appears that the Roads and Traffic Authority and the City Council only required a road width of 15.6 metres (E128, 21).

The last information is that the Department of Planning had approved a road width of 16.5 metres (T1858), which was less than that sought by the MSB and more than that sought by CRI. The land swap, when last heard of, was in abeyance, with the Sydney City Council asking for \$5 million. CRI wanted it for nothing (E146, 2 March 1990). On 13th June 1990 this was still "under discussion" (T2297).

Major Changes to Project

The greatest problem that emerged during this period was the changes to the project that the MSB considered were departures from the total development objective and the concept plans and specifications. It argued that if such changes were to be adopted, then the Government ought to be compensated in proportion to the increase in the value of the project to the developer. The DSD took the opposite view, and furthermore obtained advice from Horwath & Horwath that the changes would not work to the financial advantage of the developer, rather to its detriment. Not surprisingly, CRI took the same view. This matter is dealt with in Chapter 13.

There were other matters that caused discord between the MSB and the DSD during this period. It is not necessary to deal with them.

Finale

According to a letter from the Department of Planning to CRI dated 8 December 1989 (E144), development approval or consent was given on 21 September 1989. It was modified on 8 December. There is no question that the development consent(s) were subject to a number of conditions. About this time CRI indicated that it contested the interpretation of the development agreement concerning conditions in the development consents, and was seeking to delay the payment of the \$73 million plus interest from the trust account to the MSB (see E143, 30 November 1989).

Exactly what went on after that does not really matter. During the course of the inquiry CRI announced it was pulling out of the project.

Chapter 7

THE ALLEGATIONS MADE IN PARLIAMENT

Opposition Sources of Information - Minutes

Towards the end of 1989 copies of minutes of nine board meetings of the directors of the MSB were delivered to the office of the Leader of the Opposition (E261). They covered a great number of different topics. The first related to a meeting on 8 April 1986 and the last to one held on 15 December 1988. It occurred in this way.

Trevor Nayler, an industrial officer with the Municipal Officers Association, was, in 1984, and whilst he was then an employee of the board, elected to the board of the MSB as staff elected board member. He held that position until January 1989 when he left the MSB. As a board member he received and kept a number of documents and records, including minutes of board meetings. When he left the MSB he had all the material he had collected shredded, but kept the minutes as a memento of the time that he had spent on the board. They were in two lever arch binders. He realised that they were confidential documents and had no intention of making them available to anyone else. He kept them in his office at the Municipal Officers Association.

Things which had occurred in relation to the Walsh Bay project had caused Mr Nayler to have some concerns while he was a member of the board of the MSB. After he left, the project received a considerable amount of publicity in the news media. It became a topic of discussion, and he discussed it with a Mr Morison.

Mr Morison, assistant secretary of the Municipal Officers Association, had, up to about July-August 1989, been co-ordinator of the unions in the MSB and had had other close associations with the labour force of that authority. He had become aware of problems affecting the Walsh Bay Redevelopment Project and other matters affecting the MSB. He knew Mr Nayler before the latter joined the Association. They discussed the Walsh Bay affair, and he was aware of the unease that Mr Nayler had about it. He also knew that Mr Nayler had the minutes, and "I took it upon myself to make some further investigations" (T3683). That means he borrowed the minutes and made copies of those relating to nine meetings. He then discussed with Mr Nayler the topics referred to in the

minutes that related to Walsh Bay, and made handwritten notes on his copies (E261).

The only matters of any relevance to the inquiry in the minutes themselves are the various references to attempts from September 1988 to persuade the Department of State Development formally to take over the negotiations associated with the Walsh Bay project. There is a handwritten note by Mr Morison on one that "Trevor is available for a 'CONFIDENTIAL' briefing on this matter and advise appropriate questions to ask" (E234).

There was a meeting between Mr Baueris, research officer for the Leader of the Opposition, and Mr Nayler in late 1989 or early 1990. Mr Nayler related to him that the board of the MSB was in 1988 worried about what was going on after the Department of State Development had got into the act, and the Board's concern to have itself and its officers properly protected from allegations of incompetence or whatever by means of appropriate letters; he may have mentioned possible corruption. Mr Nayler was aware that the Opposition was making some kind of investigation into Walsh Bay (T3643).

Mr Morison sent or gave the copies he had made of the minutes to Mr Baueris and told him of the unease expressed by Mr Nayler. He felt it was appropriate to bring it to the attention of the Opposition (T3690). It seems quite clear that questions in Parliament about the matter were being considered (T3690-3692, 3704-3705). The whole exercise by Mr Morison was of course politically motivated. There is no evidence that he had any intention of discrediting any particular person or company.

Opposition Sources of Information - Mr MacDonald

In about August 1989 Mr MacDonald went from the position of General Manager of the MSB to become Director of the State-owned Corporations Implementation Unit in the Premier's Department, a position which he held at the time of the commencement of the inquiry.

Mr MacDonald had a friend, Mr Crawford, ex-member (Labor) for Balmain. He told Mr Crawford about December 1989 that he did not think that Mr Carr was making very much of an impact on the Government. A few weeks later Mr Crawford rang Mr MacDonald and told him that he, Mr Crawford, was with Mr Carr, and asked if Mr MacDonald would be prepared to talk to Mr Carr. Mr Carr came on to

the telephone and Mr MacDonald agreed to talk to him. Mr Carr came to Mr MacDonald's house two or three weeks later. It was probably in the evening of 5 February 1990 (T120-121, 2313).

It is necessary to recount the conversation, although it can be done in general terms. Parts of the evidence of the conversation and parts of the contents of E230 (notes of Mr Carr of the conversation) were the subject of a direction by me, pursuant to s.112 of the Act, that they should not be published until further direction. A further direction is now given that to the extent to which that evidence and those contents are disclosed in this report, but not otherwise, the direction preventing publication no longer applies.

Mr Carr did not arrange the meeting or approach it on the basis that the discussion was to be about the MSB or Walsh Bay. He believed that the meeting was to talk "about the Opposition's" performance on public sector management issues, in particular corporatisation" (T2314). He took notes (E226; 230).

The conversation covered public sector management (railways), Government changes to the Sydney County Council, changes to the Premier's Department and the Government's attempt to attract talent from the private sector. It covered the senior executive service, the Port Kembla coal loader, Graincorp, the State Bank, and the number of staff in central agencies. Whether the topics were initially raised in the discussion by Mr MacDonald or introduced by Mr Carr, they were matters about which Mr MacDonald was critical of the Government's performance and which he supported by reference to considerable detail. There is no doubt that both of them considered that the Opposition could make such use of the material as it saw fit. There is little doubt that some at least of the information dealt with by Mr MacDonald could be regarded as being confidential.

So far as concerns the Walsh Bay matter, Mr Carr gave the following evidence (T2321):

In relation to Walsh Bay, what was said?---First, that after having won the tender CRI emerged with additional development - to quote my notes - 'squeezed in'. That was outside the original tender yet there was no renegotiation of the price. Beyond that, another element that I noted was the appointment of Horwath and Horwath to determine whether any additional payment should be made as a consequence of that additional development. Two

points were made by Mr. MacDonald in that respect: first, that they as a firm had worked for CRI on this same development and, second, that Mr. Kortlang had had them look at the books of the Community Polling Organisation. Horwath and Horwath came back with the recommendation that no additional payment was required, notwithstanding the substantial additional - the substantial additions made to the development proposal. It was agreed at my suggestion that Bruce Hawker from my staff meet Beth McIntyre to discuss these matters further.

Mr Carr stated that the name of Beth McIntyre would have been first raised by Mr MacDonald, and that she "would in all likelihood talk to the Opposition". The conversation covered other matters including the various changes to the plans that have earlier been discussed in this Report. The time occupied on Walsh Bay was about one-fifth of the total time (T2324). These matters were not denied by Mr MacDonald.

Mr Carr decided he should pursue the matter of Walsh Bay further (T2328). He was asked this (T2333):

From anything that Mr. MacDonald said to you at your meeting with him on 5 February did you understand him to be making any allegation of corruption?---He wouldn't have used, I'm certain, the expression, 'This is a corrupt deal' or 'The tendering process is corrupt'. I must say, looking at the bare bones of the information he gave to me, I at the very least drew the conclusion of high impropriety and potential corruption.

Opposition Sources of Information - Miss McIntyre

Mr Hawker, adviser to the Leader of the Opposition, by arrangement met Miss McIntyre on 15 February 1990. It was expressly to talk about Walsh Bay. The meeting lasted for a period in excess of two hours. Miss McIntyre brought with her a large quantity of documents, many or most or all of which were quite clearly confidential. Mr Hawker took handwritten notes (E231). Although he saw documents to which Miss McIntyre referred and from which she read from time to time, Mr Hawker did not take or obtain any copies. There is not the slightest doubt that Miss McIntyre knew that the information was being sought for use in Parliament (see eg. T2452, 2460, 2474, 2495). Mr Hawker had, at best, a very sketchy knowledge of the Walsh Bay matter, and the information that he acquired came from her.

Mr Hawker made typed notes from his handwritten ones. He also made a page of handwritten questions which he asked Miss McIntyre in a subsequent telephone call, before or on 20 February 1990. In that telephone conversation he went through with Miss McIntyre the typed notes. He noted down any amendments or changes that she wished to make. Both the handwritten and typed notes are in evidence (E232, 233); apart from obliterations of some of the names of persons involved and the addition of two or three comments of Mr Hawker that may not be attributable to Miss McIntyre, the alterations and additions to the typed notes were made by Mr Hawker during the course of reading them over to Miss McIntyre (see generally T2433-2480).

Mr Hawker prepared a draft speech for Mr Carr. It went through several drafts before Mr Carr delivered his speech to the House on 28 February 1990.

Miss McIntyre asserts that she did not allege corruption in her discussion with Mr Hawker. This may be true, if one confines that expression to the exact words that she used in the conversations (exhibits 231, 232). However, it is inconceivable from the matters that she raised and the information that she gave that she was not alleging or suggesting corruption. It is almost impossible not to share the conclusion to which Mr Hawker came (T2459):

Did you get an appreciation of some level of concern which Ms. McIntyre had about Walsh Bay?---Yes.

Did you form any opinion at the time as to her motive of giving you this information?---Yes.

What was that?---I felt that she was genuinely concerned that they - Walsh Bay development had been undermined - undermined and corrupted and that she felt that she had to talk about that and if possible expose it.

Did she say anything to you to that effect or was that a conclusion you drew from the way the meeting went?---That was certainly the conclusion that I drew from the meeting and she referred to specific instances to support that view.

Mr Hawker's evidence continued:

Was there discussion of corruption?---Yes.

Was she, I think - - -

COMMISSIONER: So far as you remember, did that topic arise for discussion or is that some inferences that you drew or - - -?--No. The question of corruption did arise and I in fact said to her that the - at some stage of our meeting - I can't recall precisely when, but I think it would have been towards the end of it -that the whole matter was one which the ICAC would be very interested in. She said that this was why she'd kept the copies of the file and had insisted that the originals be kept in the safe at the MSB.

MR NEIL: Was there any talk at the meeting about anyone referring the matter to the ICAC?---In fact there was and my memory of it was jogged during cross-examination of Mr. Carr yesterday. The - we actually discussed why she would not refer it to the ICAC, and she was concerned that the matter would be - that in referring it herself to the ICAC she would get dragged into it, and she was - preferred to talk to the opposition about it.

(See also T2451, 2499-2500).

Chapter 8

TOPICS FOR CONSIDERATION

List of Topics

To facilitate the preparation of written submissions by representatives of witnesses who had been given leave to be represented at the hearing pursuant to s.33 of the Act, I handed down a list of topics in respect of which I sought assistance by way of submissions and addresses. It was not suggested that each of the topics necessarily involved corrupt conduct. However, each one had emerged from the evidence as suggesting some problems that may have constituted or involved corrupt conduct, and it was thought proper that they should be dealt with in the Report. The list was as follows:

SUGGESTED TOPICS

1. The information given by Miss McIntyre to Mr Hawker.
2. The information given by Mr MacDonald to Mr Carr MP.
3. The provision of \$25,000 by CRI for expenses connected with the REP.
4. The claim that CRI was aware of Ipoh's bid.
5. The pre-Development Approval changes to the development proposal of the Consortium.
6. The Horwath & Horwath assessment of the value of the pre-Development Approval changes in the development proposal of the Consortium.
7. The report of the Evaluation Committee of 5 September 1988 and the procedures adopted by that Committee.
8. The events during the period 26 December 1988 to 12 January 1989.
9. The changes made to the procedures for tendering adopted by the MSB, and the SCRA procedures.

10. The disclosures relating to the minutes of MSB board meetings.
11. The procedures adopted by the Committee of Review and its report.
12. Information alleged to have come from the Heritage Council to Ipoh.

It must not be taken that the Commission will confine itself to these topics.

It is convenient to deal with these topics in the order listed above.

The Commission also indicated that the representatives need not confine their submissions to the list of topics, but might include any other topics thought proper for consideration by the Commission. No other topics were advanced for consideration except what might be called criminal offences.

Criminal Offences

The submissions made to the Commission during and at the end of the hearing included submissions that certain persons involved in the making of Mr Carr's speech in Parliament on 28 February 1990 (Annexure 2, E227) and in making available information that was incorporated into or referred to in it, were engaged in conduct that constituted or involved one or more criminal offences.

It was considered more appropriate to gather together the discussion of this topic in one place, and deal with it all there. This has been done in Chapter 20.

Chapter 9

THE INFORMATION GIVEN BY MISS McINTYRE TO MR HAWKER

Meeting

There is no question but that Miss McIntyre "spilt the beans" in connection with Walsh Bay. She did so in her conversation with Mr Hawker on 15 February 1990. Some little time before this, she had received a telephone call from Mr MacDonald, who said to her "that he'd had a meeting with Mr Carr who had wanted further information on Walsh Bay, and that he had said to Mr Carr that he didn't have the information, the detail in his head and ... would I be prepared to speak to Mr Carr about Walsh Bay". Miss McIntyre replied: "I suppose so" (T566). Mr MacDonald indicated that it might be Mr Hawker who would speak to her. A few days later Mr Hawker rang her, and the meeting on 15 February 1990 was arranged. It may have been that in her conversation with Mr MacDonald the matter of the documents that Miss McIntyre had taken with her from the MSB was mentioned; more probably she took the documents along with her to the meeting with Mr Hawker of her own volition.

Belief About Corruption

Mr Hawker gave this evidence about Miss McIntyre (T2447):

Did you get the impression that she was seriously unhappy with State Development?---Yes.

He said that "she started the discussion with a rush of information" (T2438). She agreed with a proposition that the removal of the contract negotiations from the MSB had left her "hopping mad" (T614).

Miss McIntyre suspected that there had been corrupt conduct somewhere along the line after the MSB had lost control of the project. She denied this. She said (and Mr MacDonald agreed T151-152) that she and Mr MacDonald had discussed the question of whether there had been corruption, and had dismissed it, putting it down to incompetence (T573, 829) or "simply a bureaucratic mess" (T152).

It is interesting to note however, that when Miss McIntyre was asked

whether she held the view that there had been any corruption in the process, she replied: "Not of the sort that was evident in those accusations or allegations" (meaning those made in Parliament by Mr Carr) (T600).

It is also probable that discussions between herself and Mr MacDonald about bungling and incompetence took place in 1988. If so, a number of relevant events occurred afterwards.

If one assesses those accusations or allegations made in Parliament as being directed mainly at Mr Murray, then one can give some credence to Miss McIntyre's evidence. But I am quite satisfied Miss McIntyre did not attribute all the problems and questions that arose to mere bureaucratic mishandling. To take one example, on 22 June 1989, at a meeting with representatives of CRI, including Mr Chambers of that company, a meeting at which Miss Jones of the Department of State Development was present, the matter of the changes sought by CRI to its scheme was discussed. Miss McIntyre expressed the view that the changes were "outside the tender guidelines". Her notes of the meeting continue (E128):

J. Chambers asked if there were any other issues.

B. McIntyre stated issues such as exceedence of height guidelines and public access to wharves were concerns of the MSB, however, the MSB would lease DOP to assess these issues as? authority although the Board intends advising DOP of the areas which are outside the tender guidelines. J. Chambers objected strongly and was supported by S. Jones who stated that it was outside the MSB's role as a port authority and that the government had taken the determining authority role away from the MSB.

B. McIntyre responded that this matter was to do with probity in tendering and the possibility of investigation by ICAC as the scheme had moved significantly from the tender.

B. McIntyre stated that the MSB's concerns in this area would be removed if State Development wrote to the Board stating that they would take responsibility for any changes to the scheme and instructing the Board not to comment further.

On the same day Miss McIntyre had a conversation with Miss Jones, when it became known that Horwath & Horwath would report that the "revenue generating aspects of the development are now slightly less because the

changes such as 3 to 5 star hotel are 'higher risk'"(E129); Miss McIntyre's note of that conversation continues:

I asked whether the letter (sending a copy of the report of Horwath and Horwath to the MSB) will also cover the other aspects in all other variations from tender conditions such as height guidelines and public access to wharves ... She said "no" but said the Government had directed that the Department of Planning should handle/be the arbiter of those matters. I said that in that case it was appropriate for her to issue a letter saying just that and referred to the Board's need to be "covered" in deviating from tender conditions she said she would not provide the Board's insurance.

(See also T524-9).

Other Matters

Further legacies of Miss McIntyre's time at the MSB, and her relationship with the DSD likely to affect her state of mind were taken with her when she left the MSB on 22 December 1989. Some extracts from the evidence will indicate what she believed (T559):

In the latter part of 1989 did you receive information that Mrs Howard had wanted you replaced on interdepartmental committees dealing with the number of matters concerning the board including Pyrmont, White Bay, Glebe Island?---I did.

and (T560-1)

Later did you have any conversation with Mr O'Farrell as to anything that Mr Murray had said regarding your position? ---Yes, I did.

...

What did he say to you?--- He told me that Mr Murray had indicated to Mr Moore Wilton that I was not to be appointed to that position in which I was acting.

...

In any of these discussions with Mr O'Farrell, was any expression to the effect that Mr Murray had laid it on the line used?---Yes. Yes, I believe so, words to that effect.

Mr O'Farrell was the Chief Policy Advisor to the Minister responsible for the MSB.

Miss McIntyre was informed that she would not be appointed to the position in which she had been acting. It was suggested that she stay on (with the MSB) until some other position was made or found for her. She decided to leave (T561).

MSB Documents

As to how Miss McIntyre came to have the documents which she took with her to the interview with Mr Hawker, I start with the evidence of Mr MacDonald (T141):

MR NEIL: From a short time after the introduction of DSD into the matter you became concerned firstly that Ms. McIntyre should take full notes for the file?--- Yes.

Because you thought that at some stage this matter was likely to blow up?---Yes. The reason for doing that is because either contemporaneous with or not long before the board had been subjected to inquiries over its new head office building, over some land at Port Botany and another one that - and the Curran Report and the report - the inquiry into the board, and I - there'd been about half a dozen of these major inquiries that we'd had to participate in and the lesson I think that I was learning out of those is that many of us had been operating, and I was probably the worst offender, without the benefit of taking notes of a lot of the things that happened, and subsequently when these inquiries came up you were left in a very difficult position. You simply couldn't remember what had happened because there were no notes of what - so I - as I'd recognised that I was still a bad note taker I suggested to Beth and to other people that they should take copious notes so that they're on the file."

The MSB files produced to the Commission show that this advice was carefully followed by Miss McIntyre.

Secondly, Mr MacDonald gave Miss McIntyre permission to copy documents in the files:

You were aware, were you not, that confidential documents had been copied by Ms. McIntyre?---I was.

Was it the case that she copied them at your request?---I had indicated to her that I thought she should select whatever documents she thought were appropriate to protect her own position in the future and to keep copies of those.

...

You say that you gave her permission to copy those documents as the general manager of the MSB. Is that right?---That's correct.

(T3025). See also T143, 3084.

Thirdly, Mr MacDonald gave Miss McIntyre permission to take away copies of documents she made and to keep them herself. He said (T153-154):

You gave her permission to take the file - - -?---Not to take the file, but take certain documents, to take copies of those documents and to keep them herself.

Did you put that permission in writing?---I'm not sure, I don't think so. I'm not sure, I'd have to check the files on that, but I don't think so. It was - it came out of a conversation really where I indicated to her that - my concern about this project and the fact that ultimately there would be likely to be some kind of inquiry into it, as had been my experience with so many of these other large projects, and that she needed to make sure that she had the documents there that showed what she had done."

The concern which caused Mr MacDonald to suggest the taking of notes arose in June 1988, when the DSD came into the act (T3085). Miss McIntyre confirmed these instructions or advices (T228-231).

Contents of Disclosures

It is unnecessary to set out in detail the matters that Miss McIntyre raised with Mr Hawker. There were over 40 different aspects of the Walsh Bay Redevelopment Project that she touched upon, most of them critical of or questioning what had happened. The matters are recorded in Mr Hawker's notes that he took at the interview (E231). This, the subsequent telephone conversation and the reading over of the typewritten notes have already been covered in Chapter 7.

Two things ought to be explained about the disclosures made by Miss McIntyre to Mr Hawker.

The first is that the word "corruption" or the words "corrupt conduct" do not appear in Mr Hawker's notes or in his later typewritten script. Miss McIntyre asserts that she never told Mr Hawker that there was any corrupt conduct, only bungling. Mr Hawker was quite certain that she was alleging corruption, and says that she might have described it as such.

A great number of the matters she raised with Mr Hawker smacked of some funny business having gone on, such as were appropriate to be exposed or investigated. Perhaps she did not label the events as being the result of corruption, although at least in some respects there may have been some justification for doing so. For example, she raised the matter of a telephone conversation she had had when Mr Kortlang rang her in which he told her that both he and Mr Murray, on separate occasions, had spoken to Mr Wills of CRI, and at which CRI had been given certain confidential information. She raised the matter of the post-development agreement alterations, concerning which she had, in June, 1989, talked about "probity in tendering" and the ICAC. So that there is no doubt that in her conversation with Mr Hawker corruption was in the air, whether or not the word was used.

The second thing is that it is important to understand that what was said in Parliament on 28 February 1990 (E227) was not the way Miss McIntyre told her story to Mr Hawker at their meeting on 15 February; the speech contains a very different emphasis. In their discussion on 15 February, Miss McIntyre referred to Mr Murray only twice, probably only once in any critical way. That was the recounting of what she had been told by Mr Kortlang in the telephone conversation of 16 August 1988, namely that both he and Mr Murray had separately informed Mr Wills of CRI that CRI was back in the race - the falsity of Mr Kortlang's remark to her was not disclosed until Mr Kortlang gave evidence to the Commission on 28 June 1990.

Some further references to Mr Murray were prompted by specific questions put by Mr Hawker to Miss McIntyre in the telephone call that followed their discussion; by the time he had typed up the notes of their conversation, which Mr Hawker read over to her on 23 February 1990, he had had access to other information, clearly at least one of the minutes of the MSB board meetings.

Miss McIntyre was very critical of the role of the Department of State Development, of Horwath & Horwath, of Mr Kortlang and others in the

remarks she made to Mr Hawker. She made no critical reference to Mr Murray except the remark referred to above, about the falsity of which she had not been informed.

Corrupt Conduct

In the light of these facts it is necessary to decide whether Miss McIntyre's conduct could constitute or involve a criminal offence, a disciplinary offence or afford reasonable grounds for dismissal etc.

As Miss McIntyre was not a public official at the time of any of her conversations with Mr Hawker, her conduct in relation to the disclosures does not fall for any consideration as conduct of a public official within the meaning of s.8 (see Appendix 7).

An assessment of that conduct in relation to any relevant criminal offence is made later in Chapter 20. "Relevant" is used because although it was suggested that the taking of any copies of MSB documents or the material in them when she left the Board in December 1989 could constitute the criminal offence by Miss McIntyre of larceny by a servant, this is clearly not open.

Assuming for the moment that the taking of those documents occurred while Miss McIntyre was still a public official, as she would have been whilst in the employ of the MSB - an assumption which may well not be the fact - it is not suggested that, in circumstances in which it occurred, that could amount to any of the categories of misconduct referred to in s.8(1) of the Act.

It was not argued, but it is possible to suggest, that Miss McIntyre's conduct in disclosing the information that she had about suspected corruption to Mr Hawker amounted to conduct as a private citizen or as a former public official that brought her within the ambit of s.8(1)(a) or (d) (see Appendix 7 for these subsections).

In the case of s.8(1)(a), that would mean that the disclosure of the confidential information did or could adversely affect the honest or impartial exercise of official functions by a public official, ie. Mr Carr. Seeing that Miss McIntyre would have been perfectly entitled, in all the circumstances, to make a complaint to the ICAC about the matters that she disclosed to Mr Hawker, I am certainly not disposed to hold that in making the same disclosures to the Leader of the Opposition, this might

amount to corrupt conduct. Besides, in order to qualify as such in her case, it would need to be something that constituted or involved a criminal offence - which it did not (see Chapter 20).

In the case of s.8(1)(d), that would mean that Miss McIntyre's conduct as a former public official could, in the same circumstances, be said to amount to a misuse of information. If it were, the same response would apply.

Of course there were circumstances implying, and allegations that corrupt conduct may have occurred. In Miss McIntyre's case there was no corrupt conduct.

Miss McIntyre is a person substantially and directly interested in the subject-matter of the investigation concerned in this inquiry. As there was no conduct that could, in her case, constitute or involve a disciplinary offence or provide reasonable grounds for any dismissal etc, (because these aspects do not apply) quite clearly there is no reason for any statement of the nature referred to in s.74(5). If, contrary to this view, there is a requirement for such a statement, and leaving till later any criminal offence, there is no evidence or no sufficient evidence to warrant consideration of the taking of any action as described in s.74(5)(b) and (c).

Chapter 10

THE INFORMATION GIVEN BY MR MACDONALD TO MR CARR

Conduct

The conduct of Mr MacDonald in imparting information about Walsh Bay to Mr Carr, and the nature of the information, were properly examined by the Commission as being conduct which might amount to corrupt conduct or as being circumstances implying that corrupt conduct may have occurred. A factor in the conduct was the motive that prompted Mr MacDonald's behaviour or his state of mind at the time he took the course that he did.

In addition to the information about Walsh Bay that Mr MacDonald gave to Mr Carr, the aspects of this topic that need to be looked at are:

- a) confidentiality;
- b) the reason and motive for the divulgence; and
- c) Mr MacDonald's claims of justification.

There is no doubt that the matters to which Mr MacDonald adverted were confidential. There is no suggestion that they had become public although Mr MacDonald tried to assert that most MSB material would be available by reference to the Freedom of Information Act, an attempt which was not impressive and quite failed (T3042-3). I have no doubt that he knew that he was giving away secrets, as it were.

Motive

The reason and motives for Mr MacDonald's exposures are quite clear. He gave this evidence (T128):

What information in relation to Walsh Bay did you understand Mr Carr was seeking? --- I think he was - I mean, the thrust of his questions to me were that he was trying to discover whether there had been any impropriety in the process.

So Mr MacDonald gave him the information set out above, and referred him to Miss McIntyre.

The matters concerning Walsh Bay apart from suggestions of impropriety, were, on their face, critical of and likely to embarrass the Government in relation to the new Department it had set up, in relation to a Liberal party appointee and supporter, Mr Kortlang, and perhaps as to money that the Government should have got and did not (T134). Mr MacDonald knew that Miss McIntyre was "probably fairly annoyed" when she left the MSB (T144) and would be likely to talk to the Opposition. The other matters that were canvassed in the conversation between Mr MacDonald and Mr Carr were critical of the Government or the performance of one quasi-Government authority or another. He had met Mr Carr because he had let it be known that he was critical of the Opposition's performance. There is no doubt that he was furnishing the Opposition with material that he realised was to be used in some way or other - "Opposition politicians are always seeking some sort of ammunition against the government", he said (T130). Mr MacDonald's assertion (T150) that he did not think that any information that he or Miss McIntyre gave to Mr Carr would be used in public or for political purposes is not accepted.

Justification

Mr MacDonald claimed at various stages that he believed that he had a general approval to brief members of the Opposition. He asserts that he got it from Mr Sturgess, Director-General of the Cabinet Office from June 1988. The latter has no recollection of Mr MacDonald ever consulting him and thinks it highly unlikely. He certainly would not have given Mr MacDonald *carte blanche* to talk to former Ministers, and would have referred Mr MacDonald to the appropriate Minister as he had no authority to give any permission of that sort (see generally T2068-2072). Mr MacDonald's evidence is very vague about his supposed authority, and I do not accept that he had any or believed that he had any. If he did believe that he had any authority, to suggest that an authority to "brief" the Opposition extended to disclosing the matters that he did in relation to Walsh Bay is quite unacceptable. It is to be remembered that he was not connected with the MSB when he spoke to Mr Carr about it.

Application of Act

Mr MacDonald was, at all material times, a "public official" as defined in s.3. He is a person substantially and directly interested in the subject-matter of the investigation into the Walsh Bay Redevelopment Project.

All the matters that have been the subject of investigation so far as

concerns his conduct occurred while he was a public official. He is amenable to all the subsections of s.8(1).

It was submitted that the conduct of Mr MacDonald in so far as it related to the furnishing of information that was used by Mr Carr in his speech, could constitute or involve a criminal offence. This aspect is dealt with separately in Chapter 20 of this Report. Seeing that his conduct took place whilst he was a public official, a finding about it is not precluded (s.9(2)).

Corrupt Conduct

There are a number of matters which are relevant in this context.

Firstly, there is his advice to Miss McIntyre to make and keep notes and copies of documents, and to take them away with her when she left.

There was nothing to suggest that Mr MacDonald acted any way improperly or imprudently in suggesting to Miss McIntyre that she should take and keep secure copies of documents relating to the tendering process or contentious issues relating to the Walsh Bay Redevelopment Project. The only evidence is that the advice was proffered to her by Mr MacDonald against the possibility of an inquiry at some time in the future and the necessity to make sure that everything was preserved. Considering the state of the Walsh Bay Project when the advice was given, there is no fault to be found in giving it.

Secondly, there was the reason why the information about Walsh Bay was imparted to Mr Carr. This has been dealt with earlier.

Thirdly, there was the state of Mr MacDonald's belief about what happened. He asserts that he did not believe there was corruption, only bureaucratic bungling (eg. T157, 3032, 3050). What Mr MacDonald said to Mr Carr itself gives the lie direct to this assertion. He spoke about additional development being "squeezed in" after CRI had won the tender; it was outside the original tender and "they refused to re-negotiate price". Horwath & Horwath had been appointed to determine whether there should be any additional payments "but: They worked for CRI. Kortlang had worked for them" (E226). Mr MacDonald did not make a direct allegation of corruption, but from the information imparted to him Mr Carr drew the conclusion he was alleging impropriety and potential corruption (T2333).

Fourthly, in relation to the topic of Walsh Bay, Mr MacDonald advised that Miss McIntyre was the person who could and probably would tell Mr Carr all about it. That suggestion was made either to furnish the Opposition with more ammunition or to explore further the matter of corruption. It probably does not matter.

Fifthly, there was Mr MacDonald's duty. The MSB was a "public authority" within the meaning of those words as used in the Act. He was its chief executive when he left it. That made him "the principal officer of a public authority" within the meaning of s.11 of the Act. He had a duty to report to the ICAC "any matter that the officer suspects on reasonable grounds concerns or may concern corrupt conduct". It is not really necessary to decide this matter. I do not believe that it was proper of Mr MacDonald, in the position that he held in February 1990, to run off to the Opposition and feed it with material of the nature that he did for the purpose of enabling it to improve its performance or to attack the Government. Indeed, Mr MacDonald gave his evidence (T151):

You would not have given information willingly to Mr Carr or anyone else which would have suggested any form of corruption?--No. If there had been a belief in my mind that there had been corruption at work, it would have been my duty a long time ago to have reported it to ICAC....

Conduct such as that of Mr MacDonald in the circumstances could fail within any of the categories of corrupt conduct as defined in s.8(1) of the Act.

Disciplinary Offence or Reasonable Grounds for Dismissal etc

Mr MacDonald was not, as at 5 February 1990, a chief executive officer as defined in the Public Sector Management Act 1988. In his position as Director of the Corporatisation Secretariat, Office of Public Management in the Premier's Department at that date, he came within the meaning of an officer in the Public Service in s.65A of that last mentioned Act, consequently Part 5 - "Discipline and Conduct of Officers of the Public Service" applied to him. His contract of employment in that position expressly made him subject to the provisions of that Act. Section 66 of that Act, so far as relevant provides:

66. An officer is guilty of a breach of discipline if the officer:

...

(b) engages in any misconduct; or

...

(f) engages in any disgraceful or improper conduct.

"Misconduct" and "improper conduct" are not defined. It is not necessary to pursue any problem about engaging in misconduct.

Conduct capable of qualifying as corrupt conduct within the meaning of s.8 of the Act would amount to misconduct or improper conduct within the meaning of s.66. Therefore it could constitute or involve a disciplinary offence. The way in which any alleged breach of discipline is to be handled by a Departmental Head is dealt with in the Regulation made under the Act. It is not necessary to take it any further.

If an alleged breach of discipline is dealt with in accordance with the regulations, and the officer is found to have committed the breach, then the Department Head may dismiss or otherwise terminate the services of the officer - see Public Sector Management Act 1988 s.75. There are other lesser punishments.

Conclusion

The conduct of Mr MacDonald in disclosing confidential information to Mr Carr, and in referring him to Miss McIntyre, in order to arm Mr Carr with further and better information about the Walsh Bay affair, (she "would in all likelihood talk to the Opposition", T2321), was, in all the circumstances, conduct that fell within the definition of corrupt conduct in s.8 and was conduct that could constitute or involve a disciplinary offence.

Mr MacDonald was a person substantially and directly interested in the subject-matter of the investigation into the Walsh Bay Redevelopment Project. He was General Manager for the MSB from December 1984 to August 1989; it was he who probably sparked off the investigation as it turns out by priming Mr Carr. As such a person the Commission is required to include in its Report a statement pursuant to s.74(5) of the Act in relation to him.

The statement is that there was evidence warranting consideration of the taking of action against Mr MacDonald for a disciplinary offence pursuant to s.66 of the Public Sector Management Act 1988 and the Regulation

made thereunder. The same applies to the taking of action on the same grounds with a view to his dismissal or the termination of his services.

The evidence is to be found in the evidence of Mr MacDonald and of Mr Carr given to the Commission, and particularly in the portions to which transcript references have been made in this Report. The evidence given before the Commission by Mr Carr to be found from pp 2414 to 2429 of the transcript both inclusive, and that of Mr MacDonald from pp 3057 to 3092 both inclusive, was covered in a direction given pursuant to s.112 of the Act.

The Commission now directs that such evidence may be published to such Departmental Head or authority in connection with any such action as that Head or authority may consider necessary or desirable, but not otherwise.

The whole of this aspect of the Report is probably academic, because Mr MacDonald resigned from the Public Service of New South Wales with effect from 10 August 1990. He was, but no longer is, a public official within the meaning of the Act.

Chapter 11

EXPENSES OF R.E.P.

Background

The genesis of a Regional Environmental Plan was the suggestion that it would be preferable to have one authority concerned with the granting of necessary development approvals for the implementation of the scheme of the developer. Otherwise there would have been at least two and probably more authorities whose approvals would have been necessary. It can be inferred that time and money were important factors in this. CRI was anxious to have the development approval process completed as soon as possible.

CRI's Offer

The members of the Committee, which became what was known as the "Section 22 Committee" to deal with planning matters, first met on 30 November 1988. Ms Holliday of the Department of Planning was the chairman of that Committee. Minutes of meetings were kept. At the first meeting, the minutes record (E181):

3. RESOURCES

The meeting was informed by Ms Holliday that discussions were continuing with Sydney City Council and Maritime Services Board for staff to assist Departmental officers with preparation of the Regional Environmental Plan and Regional Environmental Study. Ms Jaffe on behalf of CRI Limited offered to hire consultants for this purpose or to contribute towards costs involved in exhibition or publications. There was a general agreement to leave this matter on the table.

How that item arose is described by Ms Holliday (T1978):

Do you remember how it came about at this meeting that the question of an offer on behalf of CRI Limited to hire consultants or contribute towards costs arose?--I believe the minutes report that I had expressed to all parties that we were to work with a tight timetable and therefore I would appreciate maximum support from all present and in that context the Maritime Services Board and

the city council agreed to make resources available, and in that context Ms Jaffe on behalf of CRI made that suggestion.

What was meant by the statement that there was a general agreement to leave the matter on the table?---Well, at that stage there was no formal section 22 committee and CRI at that stage were merely preferred tenderers and it was agreed at that time that we should take that matter no further.

Miss Cleary was the representative of the MSB on this committee. It is not difficult to surmise why the matter was left "on the table". She said (T3560):

I might just invite your attention to the top of page 2 of exhibit 181 and, in particular, the first sentence, and ask if you have a recollection of the subject arising in the way indicated there, or any other recollection about it?---Well, my recollection is that Miss Jaffe offered to provide money to pay for the consultants, and I believe that this followed a statement by Sue Holliday that no money had been allowed for in the Department of Planning's budget for this REP, and therefore they were rather strapped financially. And the question was raised about us providing resources, if you like, departmental ones, and Miss Jaffe offered to pay for any consultants that would be needed for this REP.

Did you say something to the meeting about that?---Yes, I did. I spoke up and said I thought it was quite inappropriate for CRI to be providing any finance in relation to the regional environmental plan.

Did you say why you thought it was inappropriate?---Yes, because they had a vested interest.

Was there any response by anyone at the meeting to what you said?---I don't recall getting any oral support from anybody, though I believe I did see a head shaking on the other side of the table, sort of in support. But I believe I was a voice in the wilderness at the meeting.

Miss Jones, representing the DSD, took a different view. Miss Cleary went on (T3561):

Thank you. Now, you've said, I think, that after telling the meeting your opinion of the matter, you were a voice - you regarded yourself as a voice in the wilderness. Did anybody at the

meeting say anything at all about the matter?---Yes. If I recall correctly, Suzie Jones was sitting on my left at the meeting and she spoke out and said she thought it was quite appropriate that CRI contribute money.

(See also per Ms Dryden T3532-3).

So the matter was left "on the table". There is no dispute that the DOP had not budgeted for the expenses of preparing and exhibiting an REP in the then current financial year. It was agreed at the meeting that any money by CRI would be considered as a contribution for the preparation and publication of an REP, not for consultants.

It is probable that the matter was tossed about more than the minutes indicate, because Miss Cleary left the meeting with the impression that the developer would make some contribution towards publication costs.

Consideration of Offer

There is a considerable amount of evidence from various sources (eg Mrs Kibble, (T1924 et seq) and Ms Holliday (T1983)) that the DOP felt no sensitivity about accepting financial assistance from CRI towards the costs of preparing the REP.

What may be stressed, however, are the facts (i) that the Minister for State Development, Mr Murray had, on 15 November, requested the Minister for Planning, Mr Hay, to have an REP prepared as soon as possible (ii) that at the meeting of 30 November the DOP had indicated that an REP could not be completed until the end of March and that this was extremely optimistic; (iii) that the preparation of such a plan had been unexpectedly placed on them and that they had made no allocation in their work programme or budget for it, and (iv) that CRI were most concerned about any delay (see E204).

One is entitled to feel a little sceptical about the DOP alleging no sensitivity about accepting money for this purpose when there was at that time no provision in the Environmental Planning and Assessment Act for monies to be paid to or recovered by it in connection with the preparation of an REP, contrary to the express provision enabling Councils to do so, and when, in the issues paper written some five days after the meeting (E204), Miss Jones recorded:

If the consortium paid for any costs, this would have to be handled with great care but it should be noted that there are lots of precedences where developers have paid council's costs in preparing Local Environmental Plans.

The alleged insouciance of the DOP towards receiving money from CRI is thrown into some further doubt by the approach taken to payment. Some time in the next ten days, by 15 December 1988, a clause had been inserted in the draft deed of agreement due to be executed by developer and the MSB on or before 26 December 1988 (E8). It read:

4.16 ...

- (e) The Developer shall at the request of the Department of Planning pay to that department the sum of [] to be applied toward the cost of preparing and implementing the REP.

But at a meeting on 15 December the DSD was not very keen on this. Its solicitors wrote to the solicitors for the developers on 16 December (E239):

You will recall last night that we discussed the inclusion of a clause which provides that the Developer would pay to the Department of Planning the sum of \$25,000.00 as a payment towards the costs of preparing and implementing the REP. Upon reflection and discussion with our client, it appears that the more appropriate course of action would be for such an agreement to be dealt with by way of a side letter between the Developer and the Board. Would you please seek your client's urgent instructions on this.

The provision was deleted from the deed. A letter from Mr Kortlang of 25 January 1989 throws no light on the non-adoption of the simple course of having the money paid by CRI directly to the DOP. He wrote to Mr Wills of CRI (E101):

Dear Peter

I refer to discussions held this afternoon at the Department of State Development in relation to the Walsh Bay Project, and in particular to the outstanding matter of the \$25,000 required to assist the Department of Planning in the preparation of its Regional Environmental Plan for the area.

My officers have since had the opportunity to discuss this matter with our legal advisers. It is our definite understanding that CRI offered financial assistance to the Department of Planning in relation to their requirements for the preparation of the Regional Environmental Plan.

Clause 4.16(e) was added to the Deed of Agreement dated 14 December 1988, but without the nomination of a specific amount. When it was known that the amount was \$25,000 I understand that our respective solicitors agreed that it would be most appropriate to remove the clause from the Deed while acknowledging that a separate cheque would be supplied by the consortium at the time of execution of the Agreement. This cheque was to be made in favour of the Maritime Services Board who would then transfer the money to the Department of Planning.

Your earliest attention to this matter would be much appreciated.

Yours faithfully

Ian Kortlang
Director-General

He signed it Ian K.

Further Difficulties

The assertion that there was no impediment to the payment of these monies by CRI directly to the DOP is further belied by other matters that occurred at the meeting of 30 November. Perhaps it can be noted *en passant* that Ms Cleary of the MSB objected to CRI representatives being present at the meeting at all, but was told politely to mind her own business (T3563-4). At that meeting Ms Cleary was told by Miss Jones of the DSD and by Ms Holliday from the DOP that neither of these Departments was structured financially to accept cheques because they were not revenue earning Departments (T3566-9). While one is inclined to doubt the correctness of this so far as concerns the DSD, in the case of the DOP it was just nonsense, as common sense would dictate and later events demonstrate. The evidence is entirely consistent with the other facts that have previously been adverted to about reluctance to accept the

money. It also establishes, along with the other evidence, that the DOP for some reason did not want the money paid directly to it by CRI. Miss Jones confirms this. She said (T1412):

To your knowledge, was an arrangement made that the consortium would be asked to pay the \$25,000 to the Maritime Services Board so that the Maritime Services Board could on-pay it to the Department of Planning so that it would appear to have been received by the department from the MSB?---Yes, it was.

To make things look good?---It was at the Department of Planning's request.

They didn't want to be seen to be receiving \$25,000 direct from the developer at whose behest the REP was being proposed?---I think that's a fair point.

Payment to MSB

Ms Cleary agreed that the money should be paid to the MSB. The evidence does not disclose why she agreed that the payment by CRI should be channelled in this fashion. It does disclose that she did not tell Miss McIntyre. The cheque for \$25,000 arrived at the MSB on 9 February 1989, made out in favour of the MSB, enclosed in a letter from CRI (E100):

Please find enclosed a cheque payable to the Maritime Services Board for \$25,000.00.

This cheque has been requested by the Department of State Development to be paid to the Maritime Services Board and is intended to assist the Department of Planning in the preparation of the Regional Environmental Plan for the Walsh Bay area.

Reaction

Miss McIntyre hit the roof. She had no knowledge of this, and was at a loss to understand why the MSB was being paid a cheque for \$25,000. She rang Ms Holliday of the DOP. She made a file note of the conversation (E100):

9.2.89 Cheque for \$25,000 from CRI

I spoke to Sue Holliday who said it was to be paid to MSB as part of the Agreement but CRI's lawyers knocked it out & Suzie Jones forgot to put it back.

She wants us to bank it & then draw another cheque to pay it on to DOP.

She added (T421-2):

I said I couldn't understand why it had - I think I used the words, why it had to be 'laundered' through the MSB, and I said, 'If the developer is to make some contribution to the preparation of the regional environmental plan, then that should be - then that contribution should be paid directly either to the Department of Planning or to the printer or the consultants or whatever it was to be spent on, and I couldn't see why it had to go in this particular route when we knew nothing about it. And I also said that I didn't really think it was very appropriate for the developer to actually pay for part of the regional environmental plan.

...

What happened with the cheque?---I kept it in the safe. I refused to bank it, and I also told State Development that we - that the Maritime Services Board at that time had to pay a 6 per cent - I'm trying to think of the word. All the MSBs income is, if you like, taxed at 6 per cent and six percent goes to Treasury, into consolidated revenue, and I also said, 'If you give us the \$25,000, do you expect us to pay the 6 per cent on and still give you \$25,000? It would be much better for the money to be paid directly, or are you asking us to contribute 6 per cent to the whole thing?' It just seemed odd to me and Sue Holliday, as I've said in this file note here, she said that it was to be included in the agreement but CRI's lawyer knocked it out and Suzie Jones forgot to put it back, those were her words.

...

What ultimately happened to the - - -?---I returned the cheque to CRI with a covering letter, as I recall, and took a photocopy, which is the one here of the original cheque, and sent it back to them under cover of a letter saying, 'Here's your cheque back. I understand it's being dealt with in some other way.

The matter was dealt with in a meeting of the Steering Committee held on 14 February 1989 (E103).

On 20 February 1989 a cheque for \$25,000 in favour of the DOP was sent under cover of a letter from CRI to that Department (E203).

Circumstances and Assessment

The evidence makes it clear that right up to 9 February 1989 the DOP were reluctant to accept the money directly from the developer. The attitude of the DSD is quite apparent from the documents, without the aid of oral evidence.

It is no wonder that it was decided that the provision of \$25,000 by the developer for expenses connected with the REP was a topic proper for consideration when investigating whether any corrupt conduct had occurred. But what emerges is that CRI and all connected with the developer were in no way concerned or involved with any of the above described machinations. Its offer was a genuine offer to assist. It did not even fix the amount, that was fixed between Miss Jones of the DSD and the DOP (T1412). CRI was anxious to get the project through the development approval process, and as late as 14 February 1989 was told that "the Department of Planning will not send the REP to the printers unless the money is available" (E103). There is simply no evidence to suggest that any conduct on its part was directed in any way other than to aid the process of the development in a legitimate manner, and to have Government departments get on with it. The process of having someone accept its money took almost three months.

There was no wrongful conduct in this affair by any public official, I so find, if entitled to do so.

I have formed the view that the persons relevantly involved in this aspect who could be said to be substantially and directly interested in the subject-matter of the investigation are Mrs Holliday and Miss Jones. As to s.74(5), in relation to neither person is there any evidence warranting consideration of the doing of any of the things specified in that subsection.

Chapter 12

CRI'S AWARENESS OF IPOH'S BID

General

It is clear that CRI became aware of Ipoh's bid of \$55 million. An inference could be drawn that this knowledge was a factor in CRI fixing its final bid at \$75 million odd, a figure that made its financial offer well ahead of Ipoh's when revised bids were sought.

CRI had been informed by Mr Kortlang in July 1988 that it was "back in the hunt with one other". The official notification occurred in August. In the same month both CRI and Ipoh were invited to increase their bids. Ipoh refused, but CRI increased its from somewhere in the order of \$45 million to approximately \$75 million.

The knowledge that CRI had acquired was "leaked" to it by someone. At the time there were only two possible sources, someone who was or had been in Ipoh's camp, or someone who had been or was in or associated with one of the two Government authorities involved, the DSD or the MSB. The information was of course highly confidential; the knowledge came to CRI during the tendering process; it came at a time when the better financial offer of two contestants was likely to be the determinant of choice of developer. It was obviously fundamental for an honest and impartial tendering process that offers remain confidential. If the leak had come from someone involved in the process on the Government side, then the conduct could qualify as corrupt conduct within the meaning of any of the four categories described in s.8(1) of the Act.

Time

There is some confusion about when CRI became aware of Ipoh's offer. It seems probable that Mr McInnes, Development Manager of Ipoh, heard the news that CRI had learnt of Ipoh's offer on Monday 18 July 1988, and relayed it to Mr Barrett, Managing Director of Ipoh on Tuesday 19 July 1988, upon the latter's return to the office from overseas (T2101, 3720-30).

Circumstances

Ipoh had, on 24 June 1988, made an offer to the MSB of \$58 million as its bid in the Walsh Bay tender (E207). Following a letter from the MSB of 13 July 1988 (E208), it made a revised bid of \$55 million in a letter to the MSB dated 15 July 1988. The letter was probably delivered by Mr McInnes himself to the MSB on that day, a Friday.

On the following Monday, 18 July, Mr McInnes had a conversation with a Mr Brooks, sometime about 11 or 11.30am. Mr Brooks was an architect who had been doing some work for Ipoh, not in connection with Walsh Bay. Mr Brooks said, "I hear you've revised your offer for Walsh Bay and the figure is \$55,000,000" (T3720). Mr Brooks went on to tell him that he had learnt it at dinner the previous night from another architect who at that time was working for CRI, and who had previously been employed by Ipoh.

Later on in July or August, after CRI knew of the Ipoh offer, Mr Barrett was rung by the gentleman in charge of Comrealty, one of the tenderers who was at that stage still in the running, who told Mr Barrett that he was aware of Ipoh's tender. The news had got about.

There were denials and some problems of recollection in relation to this evidence. The sources from which it is said that Mr McInnes obtained his information have either denied giving it or do not remember. This has all been taken into account.

Disclosure

Mr Barrett told the Commission that when he learnt in July that an opposition tenderer knew of Ipoh's bid, it was annoying but not devastating. This was the attitude that he adopted when being interviewed shortly afterwards by the Committee of Review (22 July). The report of the latter (E28) of 17 August 1988 notes that he "(g)enerally left the impression of being quite relaxed with the whole process except for non-specific complaint about leaks of information". As Mr Barrett explained, the tenders had gone in; all four were being assessed; everyone knew the ground rules, ie. that one would be chosen as the preferred tenderer, and exclusive negotiations would thereafter commence with that one with a view to entering into a development agreement. Everyone had put in their top bid, so that the knowledge, while raising lots of problems and queries,

would not affect the choice. He had no reason to suspect at the time of the interview with the Committee of Angels, that tenders would be re-opened.

Reaction

On 22 August 1988 when Ipoh was invited to re-tender by Mr Bunbury, Mr Barrett's reaction was very different. It has been described in Chapter 4. He was aghast. His first reaction was to state that CRI knew of Ipoh's bid (E51). The fact that tenders were being re-opened put an entirely different complexion on the whole matter. If CRI were aware of Ipoh's bid, and the reverse was not the case, then it put CRI in a very strong position to outbid its rival. If there were only two left in the race, then this gave it an enormous and unfair advantage. He expressed those views then and later.

By 6.20 pm on the same day, Mr Kortlang and Mrs Howard were aware of Mr Barrett's allegations, and Mr Murray also, according to them (E52). The fact that Mr Murray was "well informed" of Ipoh's complaint is confirmed by Mrs Howard of his Department on 1 September 1988 (E63).

A report on the latter's reaction was given by Mr Bunbury to Miss McIntyre on the following day, 23 August (E53):

...

He (Mr Bunbury) said that Wal Murray had phoned him that morning & had said that he would see nobody re Mr Barrett's allegations & no other Minister would see anyone - the group should complete its task. Mr Murray had suggested that Jim Barrett was trying to discredit the process and he may have "other objectives"...

Complaints

On the same day, 23 August, Mr Barrett wrote to the MSB (E192):

We have been requested to give further particulars of, inter alia, the financial terms of our offer for Walsh Bay, and have been advised that both Ipoh and our remaining competitor CRI Limited are being given the opportunity to reconsider the financial terms of our respective offers.

In effect, the tenders have been re-opened.

We feel obliged to express our grave disquiet at this procedure and the events which have led up to it, including the 'extension of time' advised on 7 August 1988.

May we commence by restating some obvious but important matters:

...

3. We have been led to believe from several sources that the Ipoh scheme is preferred by all relevant Government bodies, principally of course the Heritage Council and Maritime Services Board and their respective advisors.
4. We are aware that CRI Limited has, from whatever source, learnt of the details of Ipoh's financial offer. Ipoh, on the other hand, is unaware of the terms of CRI's present bid.

We have been assured that the re-opening of the Walsh Bay tenders is not the result of pressure from CRI but is merely the result of advice received that both offers are 'inadequate'. We accept these assurances. However, we respectfully suggest that the old adage of 'justice being seen to be done' is most apt to the present circumstances. Providing to the second-ranked tenderer (which has recently been awarded two major Government tenders at Campbells Cove and Lilydale) the opportunity to match the preferred bidder is hardly consistent with such an approach.

We believe it to be both unfair and potentially damaging to the Government, for the Government now to persist with its invitation to each party to submit a new tender. It is unfair because the opportunity has been extended to CRI, having knowledge of the confidential details of Ipoh's bid (and possibly of any further bid which Ipoh may elect to submit), to submit a new proposal. It is potentially damaging because the procedure, if seen as a precedent, could well have the effect of dissuading potential tenderers for future Government projects from doing so.

CRI were the developers at Campbells Cove and Lilyvale.

That letter was not sent. Following a discussion between Mrs Howard of

the DSD and Mr Barrett, he faxed a copy to Mrs Howard, who in effect advised him to send it to Mr Murray, seeing that he was now responsible for co-ordinating the project (see T1696-1698).

A letter in almost identical terms addressed to Mr Murray was sent by Mr Barrett on 25 August 1988 (E55). Mrs Howard checked up to see if the Deputy Premier had received it, and was told that he had (T1699). However Mr Murray gave evidence to the Commission that he had never received the letter nor was aware of its contents before this inquiry commenced (T3320-3324). A copy was sent to Mr Bunbury. He did nothing about it (T2886).

On 29 August Mr Barrett wrote to Mr Bunbury (E57). He stated that Ipoh was not prepared to increase its offer, complained about the action the Government proposed to take and refused to involve Ipoh in what he called a Dutch auction. With what might be called prescience, the letter added:

We have made this high risk decision, fully aware that our opposition, is most likely to take full advantage of the opportunity and second chance and increase its financial offer, possibly to a level that both it and the Government, should it accept it, live to regret.

We do not propose to 'on sell' the project. Ipoh will develop the project and as with the Queen Victoria Building, be there to honour and implement the agreement. We are not prepared to pay a silly price for an 'image loss leader' and worry about how to make it work later or worse, let someone else worry, or seek to change the deal.

Some support for the fact that CRI was aware of Ipoh's bid comes from Mr Farmer (T1131 et seq, 1201 et seq, 1307-1320).

Conclusion

This analysis has been done in order to demonstrate the difficulty of ascertaining how CRI became aware of Ipoh's bid, ie. the source of the leak, and to indicate why I thought it proper to pursue this matter as indicative of corruption.

The DSD had not been greatly involved in the Walsh Bay Project before early July 1988, and then largely in relation to the appointment of a

committee of review, although by 28 June it had been decided that the MSB would not be making the decision regarding the award of the Walsh Bay tender (E27, T246 et seq, 1125-1126, E153-156, T1641 et seq). The "Initial Recommendations of the MSB's Tender Assessment Group" (E8) was produced on 18 July 1988, and contained the Ipoh figure of \$55 million. There is no evidence whether or not the DSD were aware of this figure before that. Seeing that Ipoh's bid of \$55 million had only been delivered to the MSB on the previous Friday (15 July), it is unlikely that the Department was aware of the figure before it received the MSB's initial recommendations on Monday, 18 July.

CRI, or someone associated with CRI, was aware of the Ipoh tender figure of \$55 million by the morning of 18 July 1988. The source of that information has not been ascertained. In the light of the above, the leak probably came from Ipoh or the MSB.

It should be added that there is no approbrium to be attached to CRI in relation to its receipt of the information that gave it its awareness. No doubt that company was very pleased to be in possession of the information, but there is no suggestion that it caused this to happen or was responsible. The information must have come from someone external to CRI.

Chapter 13

PRE-DEVELOPMENT APPROVAL CHANGES AND EVALUATION

General

It was always understood that there would need to be alterations, refinements, deletions and other matters to be attended to and problems ironed out before the plans, part of the development agreement between the MSB and the Consortium, would be the subject of formal development approval by the Department of Planning.

The deed of agreement of 12 January 1989 (E13) required that the Board approve the plans and specifications that were to go forward for development approval, and provided that it could not withhold its approval if such were "in accordance or substantially in accordance with the Concept Plans and Specifications and the Total Development Objective" (ibid cl.4.1(c)). The concept plans and specifications were those that accompanied the deed. The total development objective was defined, but it is unnecessary to set out its terms.

The Walsh Bay Steering Committee, was set up to enable agreement between the parties to the development agreement to be reached on matters of alterations, ongoing management and other issues, and "to facilitate completion of the Walsh Bay Project in the shortest possible time" (E103, notes of inaugural meeting, 14 February 1989). It comprised representatives of both parties (CRI and MSB) plus Miss Jones of the DSD.

Suggestion of Corruption

Although some of the alterations and other matters mentioned in Chapter 5 did not have a smooth passage through the Committee, it is not those that were made the subject of attack in Parliament. It was the alterations that were, in the words of Mr MacDonald, "squeezed in" to which criticisms were directed, and to which attention has been focused in this inquiry. It was also partly the involvement of Horwath & Horwath in evaluating these changes that caused suspicion and allegations of possible corrupt conduct to arise and to be made.

Indeed, it was these two matters that really sparked off the whole of this inquiry, seeing that they were the only matters about Walsh Bay raised by Mr MacDonald with Mr Carr, they were put in a way that suggested to Mr Carr "high impropriety and potential corruption".

It is also the case that it was the attitude of the officers of the DSD to these alterations together with the assessment of Horwath & Horwath, that caused Miss McIntyre to mention the ICAC (T524).

History

Attempts to make alterations of the nature that later became contentious were floated in December 1988, and were rejected by the Board. For example, a suggestion that the marina berths be increased to 130 was rejected. Town houses at Towns Place had not been in the original scheme but "(c)ould be accepted on offer of further income to Board" (E92). The density of the development had been sought to be increased (E93). There were other changes sought. It is not necessary to be more specific.

Negotiations about changes commenced not later than 25 January 1989. They continued up to about 26 September 1989, when development approvals were issued (E139). The Towns Place land swap had not been finalised by 2 March 1990 (E146).

The suggestions, problems, negotiations and acrimony about changes to the development proposals are dealt with in more than 34 different exhibits, and discussed over a great number of pages of evidence. The essentials for the purpose of this inquiry are as follows.

In January 1989, CRI proposed some changes of use of the area. By March 1989 the MSB was indicating that the two matters raised in December would cause it to request the DSD to undertake further commercial negotiations with CRI (E108). By 29 March 1989 this internal memorandum was prepared by the Chairman of the Steering Committee (E109):

*SUBJECT: VARIATIONS TO WALSH BAY CONTRACT
BETWEEN MSB & CRI*

Would you, as a matter of urgency, obtain both a legal and commercial position re whether or not, and in what circumstances, if all or any, the Board could legally expect

additional income from an agreed variation in the Walsh Bay contract.

It is asked that we also look at the normal commercial position that one should take with variations that are likely to be sought.

CRI are taking the position of stating that as they get down to details, variations to the conceptual thinking, which in their terms is all the contract is about, will of necessity create opportunities to increase their return. The Board should not be expected to gain from their expertise!?

We need both a legal and commercial opinion.

The basis for the stand taken by the MSB was that the changes departed from the Concept Plans and Specifications and the Total Development Objective. "The Developer has countered this by stating that it holds that the Agreement reflects concepts only and that the Board should not expect to gain from any changes which increase the Developer's return on the development" (E14). It may perhaps be noted that there was no suggestion that any such changes might decrease the return on the development.

By April 1989 suggested changes included increasing the amount of office space that had originally been agreed to, increasing the number of marina berths from 30, the original number, to 105, which included some being located outside the project area, the introduction of townhouses and the extension of wharf areas.

The MSB sought advice as to its position about changes from both Freehills and Turners. It was told that it did not have to agree to the proposals and that it was entitled to negotiate for an increased return by both Freehills (E15) and Turners (E16). "In summary, the current request to vary the development consent without adjustment to the financial offer is both commercially unrealistic and not in accord with the intent of the tender documentation ... and of subsequent negotiations ..." (E16).

By June there had been a proposition for a second hotel to be constructed, in addition to the one already planned, which was to be situated on one of the wharves and replace commercial premises. This was in addition to the increase in marina berths and additional townhouses. A proposed backpackers hostel had disappeared at some stage from the

plans, and one of the hotels was to be upgraded from a four star to a five star rating.

On 8 June the General Manager of the MSB sent a letter to the Acting Director-General of the DSD (E18). He advised that the changes had caused Freehills and Turners to advise that the Board was entitled to seek monetary compensation in return for agreeing to the substantial changes in the development proposals, and enclosed the letters of advice (E15 and 16, above). He asked for the Department's advice. He listed as substantial changes four matters, viz. the increased marina berths, reduction of public access to wharves, increased number of townhouses and increase in total development area. He did not close off the list.

However, on the same day, 8 June, Miss Jones of the Department had written an issues paper for the Acting Director-General and Mrs Howard (E122), in which she, in effect, stated that except for proposed additional marina berths to be located outside the development area, the MSB was not entitled to any compensation. The paper was very carefully worded, but that was the message it conveyed. Her assertion that Mr Back agreed with this is denied by him (T1100). She repeated this view at a meeting held on 19 June 1989 (E124).

At that meeting it was proposed by Mr Back of Freehills that Horwath & Horwath could be engaged to do an assessment of the value of the changes. The Acting Director-General of the DSD, who had expressed the view that "the Government should not be presenting another 'bill' after the Developer had already paid", endorsed this suggestion, and added that "it would be good if the report from Horwath and Horwath obviated the need for a further payment from the Developer", (E124). Miss Jones denied that this had been said (T1499).

Assessment of Value of Changes

Horwath & Horwath were commissioned to do an assessment. That firm disclosed to the DSD that it was, at that time, engaged to advise CRI on the Walsh Bay proposed hotel development. It was nevertheless asked to proceed with suitable safeguards.

Two things should be said. Firstly, there was evidence that some large firms engaged in professional work do not consider it unwise or improper to be occupied in advising at the same time two parties with possibly conflicting interests in the same matter. The concept that a "Chinese

Wall", as someone called it, could in some way be erected or established so as to isolate within the one firm a professional engagement the acceptance of which would clearly be seen to create a conflict of interest, is properly the subject of two comments in this Report. One is that historically the wall referred to was not intended to protect against any internal danger. The other is that the erosion of professional standards in the interests of business can lead to allegations of corruption, as happened here.

Secondly, the Commission is satisfied that the officer from Horwath & Horwath who undertook the assessment, and did it personally, maintained the strictest confidence and was completely impartial in his approach to the task.

On or about 20 June 1989 the DSD received a list of the changes to the project prepared by CRI (E126). It was sent on to Horwath & Horwath. At about the same time the MSB with assistance from Turners did its own list of changes and an assessment of their value. It was as follows (E127):

Variations to the Scheme

The following significant changes have occurred in the Scheme:

- * An overall increase in developed nett floor area from 124,400 sq m. to 142,600 sq m. i.e. an increase of 14.5%. (This excludes the 6300 sq m. approx. of wharf apron previously open space and now reserved for the exclusive use of residents and occupants of the hotel.)
- * An increase from 30 (max) to 105 private marina berths.
- * Inclusion of 24 town houses on the Towns Place site (previously none)
- * Increase from 125 to 211 residential apartments for sale (incl. 24 above)
- * Conversion of Wharf 6/7 from office/retail usage to hotel in conjunction with Wharf 8/9 and inclusion of an additional floor within the wharf structure.
- * Deletion of 184 bed backpackers hostel and replacement with office block.

Justification for Additional Return to the Government

Indicative figures for justifying an increase in return to the Government for the new scheme have been calculated. These are:

- * An overall increase of 14.5% in nett area equates to an additional \$10.7 million based on the original offer of \$73.566 million. In addition, the Government could expect a share of several million dollars for the additional 70 marina berths.
- * The residential and hotel components of the development have moved up market. The additional private marina berths and exclusive use of wharf aprons will also contribute to an increase in the value of the development and therefore the potential returns to the developer.

The estimated increase in land value (i.e. the Government share in the development) is estimated to be in the range of \$10 to \$20 million.

On 23 June 1989 Horwath & Horwath produced its assessment (E131). Its assessment was as follows:

BASE ANNUAL REVENUE CHANGES

	1988 BASE REVENUE <u>PER UNIT</u>	<u>CHANGE</u>	<u>ANNUAL REVENUE POTENTIAL</u>
Serviced Apartments (Units)	\$16,119	(112)	(\$1,805,328)
Office (m ²)	\$308	(4,580)	(1,410,640)
Retail/Restaurant (m ²)	\$325	(3,352)	(1,089,400)
Cinema (m ²)	\$123.20	(1,025)	(126,280)
Revenue est reduced to \$50	\$73.20	(1,000)	(73,200)
Hotel (Units)	\$30,553	154	4,705,162
Lodge (Beds)	\$2,967	(184)	(545,928)
Marina (Moorings)	\$4,320	75	324,000
Parking (No.)	\$3,000	(582)	(1,746,000)
TOTAL CHANGE			<u>(\$1,767,614)</u>

The changes were taken from CRI's list.

The Horwath & Horwath assessment indicated a potential loss to CRI from the proposed changes. As was said in evidence, it must be the first time ever that a developer has proposed changes that are going to operate to its detriment.

Outcome

Unfriendly meetings and telephone calls between representatives of the DSD and the MSB followed about these changes. In one of them Miss McIntyre referred to "probity in tendering" and mentioned the ICAC. In another she was threatened by a director of CRI (E128, 130). The Board was accused of being obstructive. It must have been an unpleasant time.

However, the Board eventually went quietly. It signed the development application, but advised the Director of Planning of at least some of its concerns about the proposal in its new form (E23).

On or about 26 September 1989 approvals to the development application were received. It appears that a further approval was received in November 1989 (E142), probably to one of the subdivision applications. One or the other, probably the September approval, placed 90 or more conditions to the development (T3876).

Possible Corruption

It is not surprising that this aspect of the Walsh Bay Redevelopment Project raised suspicions or that it was made a topic for investigation in this inquiry.

First of all the director from Horwath & Horwath who carried out the assessment in June 1989 was the person in charge of the department which had, in May 1989, commenced to undertake and was in June making a feasibility study on the hotel component at Walsh Bay for CRI, although he himself had had no direct involvement in it; his staff was doing that, so he undertook the DSD job himself (T2843-44).

Secondly he had in effect three days to do it. His instructions came from the DSD on 20 June 1989, and he delivered his report on 23 June; in fact he had in effect completed it by 22 June (E129). His information came

only from a letter written by CRI to the DSD on 20 June (E126), which set out the differences between the "concept scheme" and the proposals to be embodied in the development application. He sought further information from CRI, and made use of material that Horwath and Horwath held from its previous assessments. This was material relating to the position as at August 1988.

Thirdly, he was not supplied by the DSD with the assessment done by the MSB (E127), showing the potential return as being between \$10 and \$20 million, although this had been supplied to that Department on 19 June (T1628, 1634). He was not told by Miss Jones that the Department had any further information, although he spoke to her sometime on 21 or 22 June (T2847), and asked whether there was any other material or documentation available. Among other things that Department had the advice of Freehills and of Turners. In particular it also had a detailed assessment of the charges done by Mr Sturday of the MSB which showed an increased project value to the developer of \$88,876,973. For some reason Miss Jones did not send any of this material to Horwath & Horwath, although she had it, and was asked.

Assessment

In assessing the facts which have been adverted to in this Chapter, it is important not to lose sight of the background.

The Walsh Bay Project was the first major development undertaking that the DSD had moved into since the Department had been set up in about March 1988. It had been directed to take over the project, and had effectively done so. There is no doubt at all that it regarded the successful conclusion of the project as being very important to it, it resented interference by the MSB and regarded the latter as being obstructive on occasions, probably with some justification. There was the clash of personalities which no doubt made it more important for the Department to "bring it off" as it were.

As to the proposed changes, by 8 June 1989 the DSD, upon some basis, had formed the view that no further money should be sought by the Government. In an issues paper of that date, Miss Jones wrote (E122):

COMMENT:

- * It is considered that any changes that have taken

place during refining should be agreed to as long as they are in accordance with the total development objective as defined in the legal document, and that the MSB should not be entitled to any additional financial claim due to these changes.

- * It was the Consortium that took the commercial risk and during refining it could easily have been the case that a lesser development may have resulted. If comparing to the normal sale of land, once commercial transactions are completed, any change in use would be at the developer's risk and may result in a profit or loss situation.

Mr MacDonald was informed accordingly.

The attitude of the DSD is a little difficult to understand. I put it down to two factors: (i) its determination to ensure that it brought this deal off, for reasons that have earlier been given and (ii) its wish to demonstrate that the Department was "the developer's friend", as was stated in evidence on a number of occasions (see e.g. T263). Perhaps this stemmed from the attitude of Mrs Howard of "being commercial" (T1650-1, E90), which included being businesslike and "meeting all of the government's needs but not unnecessarily obstructing and preventing the private sector from implementing its development" (T1642).

Whether this accounts for the attitude of Mrs Howard and Miss Jones that in no way was the Government to seek any benefit from the changes, and for the failure to arm Horwath & Horwath with all the information that might assist that firm in an assessment remains an enigma.

Horwath & Horwath was chosen as the arbiter - an unfortunate choice in some ways, as has been mentioned. On 22 June it came up with the right answer so far as the Department was concerned.

On the same day, at a meeting between the Department, MSB and CRI, Miss McIntyre expressed the view (E128):

... this matter has to do with probity in tendering and the possibility of investigation by ICAC as the scheme had moved significantly from the tender.

Conclusion

The matter has been investigated. It was probed by the Commission as far as it could be. There is no evidence upon which any finding of corrupt conduct can be based.

In the light of that finding the only person involved in this topic who in any relevant sense could possibly be a person substantially and directly involved in the subject-matter of the investigation is Miss Jones. In case in the circumstances it is necessary to include in this Report a statement pursuant to s.74(5) of the Act, then such statement is that there was not sufficient evidence warranting consideration of the doing of any of the things specified in that subsection.

Chapter 14

EVALUATION COMMITTEE - ACTIVITIES AND REPORT

General

The report of the committee known as the Evaluation Committee, the Bunbury report (E71), was prepared on 4 and 5 September 1988, and presented to a Cabinet Subcommittee meeting on 6 September 1988 (E75). It was as a result of this report that the Cabinet Subcommittee decided that CRI should be chosen as the preferred tenderer, and that exclusive negotiations were thereupon undertaken with it.

History

To recap briefly the relevant history, the MSB tender assessment group had produced its report on 18 July 1988; it recommended that Ipoh be given preferred tenderer status, and that negotiations with a view to entering into a development agreement should proceed with it (E8). In July there was the appointment of the Committee of Review (Angels). That Committee presented its report to a Ministers' meeting on 5 August 1988. That meeting endorsed the recommendations of the Committee of Review that negotiations with two of the tenderers, Ipoh and CRI, be put on hold, that a financial report be obtained and that an independent chairman be appointed to head up the MSB's assessment committee. Mr Bunbury, President of the State Superannuation Board was chosen as such Chairman.

A financial report was obtained from Horwath & Horwath on 15 and 16 August 1988 (E32 and 33). It said, in effect, that the financial offers of Ipoh and CRI were a line ball. The report was presented to a Cabinet Subcommittee meeting on 17 August 1988. The result was the decision to negotiate with them both for a higher price. Mr Bunbury was appointed (E49).

Role of Mr Bunbury

The story of Mr Bunbury's involvement can be simply told. He decided that the tenderers had not offered enough money to the Government for the right to develop Walsh Bay; they could and should be pressed to

pay more. He told them so. One increased its bid. Therefore it was to be chosen. End of story.

He gave this evidence (T2879):

For your part, had you relied on the report of the Committee of Angels to - as the basis of the statement that there was no doubt that the Government was looking to an increase in financial bids?---Yes, I - there were a few legs to this. One was that report that the review committee - Committee of Angels - stated quite definitely that the offers were lighter; that in their view they appeared to be lighter than they should be. I also understood that they understood that that was the view of the Government.

...

COMMISSIONER: How were you aware from a source other than the Committee of Angels that the view of the Government was that these offers were light on?---That's the impression I was given in the discussions I would have had by this time with Mrs. Howard, Ian Kortlang - - -

So somebody from that source told you that, 'The Government thinks these are - offers - are light on'?---If not in so many words, that was certainly the impression that I was given.

And that would have been from that source?---I had no other contact.

See also T2871.

Activities of Committee

A letter was sent to both Ipoh and CRI on 18 August 1988 inviting each to attend a meeting "to have further negotiations with you and one other tenderer concerning finance and on-going management of the project". Although it indicated that the tender assessment period, which ran out on 20 August, would be extended for three weeks, it stated that at the end of the period one developer would be given exclusive negotiating rights (E45). There was nothing to indicate that more money would be sought. Indeed on the day before, 17 August, a letter had gone to the same two tenderers in the following terms (E39):

Prior to making a decision on the tenders we wish to hold further discussions with you and one other tenderer. To assist our analysis of the tenders we require further clarification of your financial and ongoing management proposals.

There was no indication that the ground rules were being changed except as to the extension of time.

The MSB was against the proposal. It indicated its view that Ipoh should be selected. It expressed its view on 16 August (E41):

The alternative of going beyond the tender process to negotiate with two or three developers will be outside the existing document procedures and will represent yet another change by the State Government for this project.

This view was expressed in an issues paper prepared by the MSB for its Minister, obviously in anticipation of the next meeting of the Cabinet Subcommittee due to be held on the following day.

The meeting between the Evaluation Committee and each of the two tenderers took place on 22 August. Mr Wills, of CRI, asked if the offer could be changed, and accepted with equanimity the suggestion of Mr Bunbury that the "offer can be strengthened ..." (E50). Mr Barrett of Ipoh was aghast at learning that the proposal was in effect to reopen the tenders. His reaction has been described in Chapter 4. Mr Bunbury agrees (T2884):

Thank you. Did you notice any reaction from Mr Barrett when the subject of increased offers came up?---A strong reaction which is indicated in these minutes. He said that it was - largely I think what the minutes reflect here, that he thought that it was unfair and inequitable Dutch auction and he thought that CRI were privy to the terms of the tender that had been made by Ipoh. I suggested to him that he lay his problems and difficulties in regard to the matter out in writing, either to the committee or to the department - - -

In fact Mr Barrett did lay his problems and difficulties out in writing both to the Committee and to the Government. His letter of strong complaint of 25 August 1988 (E55) was sent to the Minister (Mr Murray) with a copy to Mr Bunbury. Mr Bunbury did nothing and spoke

to no-one about it (T2885-2886). The letter to Mr Murray, he says, never reached him. Certainly it provoked no response.

Both tenderers were invited to put in a revised offer (E242). Ipoh refused, and again complained (E57). CRI increased its offer by about \$30 million or more to \$74,566,000 in a letter dated 29 August 1988 (E58).

Committee's Report

Horwath & Horwath were asked to make a further comparison of the offers as they then stood. It did so on 31 August 1988. "The revised offer from CRI is substantially higher than Ipoh's and on financial grounds alone is preferable" (E60).

That document was explained at a meeting of the Committee on 1 September 1988. Representatives from Turners were there. Mr Farmer from that firm (BF) is recorded in the notes of that meeting thus (E63):

BF How can CRI increase their offer substantially from 23.11.87 to 23.3.88 and then again by 29.8.88 submission. Concern expressed that project could fail if offer too high.

No answer available.

It appears from the notes that Mr Bunbury had by 1 September, already prepared some kind of report to the Cabinet Subcommittee on the matter. It is perfectly clear that both he, and the representative of the DSD on the Evaluation Committee, had decided that CRI should be chosen as the preferred developer. However, when Miss McIntyre produced a document "Commentary to Mr C. Bunbury on Submissions dated 29 August 1988 from CRI and Ipoh" (E59, which recommended that preferred developer status be conferred upon Ipoh), Mrs Howard from the Department is recorded as having said (E63):

Questioned status of MSB commentary. Stated that the commentary prejudices the situation and should not have been prepared.

When informed that it was the MSB contribution to the meeting, Mr Bunbury "asked if the Board had seen the Commentary" and went on:

We should be working together and not preparing a double report.

There is no doubt what he considered any report should advise. He was not moved by the summary to the MSB commentary (E59):

Quite apart from the foregoing, the question of business ethics in relation to the particular tender selection process has not been addressed in this commentary. The four short-listed developers were specifically advised that preferred developer status would be granted to one developer before any negotiations were entered into.

It is quite clear that no agreement as to what should be the Committee's conclusion was reached at the meeting of 1 September 1988. Indeed a majority of those present supported Ipoh's position. It was on Thursday afternoon at 5pm that the meeting finished. A draft report was promised by Mr Bunbury to be sent to the participants on Friday, so that it could be read before a further meeting scheduled for Sunday 4 September. A decision had to be available by Monday 5 September.

A draft report was prepared at some stage by Mr Bunbury. It was not available to the other participants at the meeting of 4 September until Mr Bunbury arrived there with multiple copies. The Horwath & Horwath report of 1 September had been available, and although there had been no opportunity to see or analyse the figures, no doubt was cast upon its conclusions.

The draft report of Mr Bunbury recommended that preferred status be awarded to CRI and that exclusive negotiations be thereafter conducted with it. Neither the representative from Turners nor those from MSB agreed. Mr Bunbury would not however brook any debate about this, only "factual and grammatical errors" in his draft (per Mr Farmer, E70). The MSB sought a qualification to the recommendations, a request which was rejected. Eventually it agreed that the report should go forward with a qualification that was in fact incorporated in it. It read (E71):

In view of the Independent Review Committee's finding, (accepted by Cabinet Sub-Committee) that 'at least two tenders (namely those of Ipoh and the CRI consortium) were equally acceptable on conservation and heritage issues', then

in the light of 29th August submissions the CRI Consortium should be awarded preferred developer status.

The final report was completed on 5 September 1988. The view of the MSB was expressed by Miss McIntyre (E66):

... the final report still does not adequately reflect the Board's concern that the report's final recommendation is predicated upon the erroneous conclusion of the Independent Review Committee that the Ipoh and CRI tenders were equal on the conservation and urban planning aspects.

Conclusion

There was no corrupt conduct. Mr Bunbury was appointed to conduct further negotiations with two tenderers with the object of getting more money for the Government. In the light of what had gone on before, this in effect meant recommending the one which, following those negotiations, came up with the highest bid. He did not see his role as being there to go back over territory that had already been covered; it is not surprising that he was a bit impatient and terse with those who sought to persuade him to do so. The latter were not happy with the way he got on with what he saw as his job when it meant that he refused to listen to them. Mr Farmer probably summed up the position accurately in his note of how the meeting of the Committee on 4 September finished (E70):

The overall conclusion reached by the meeting was justified by Bunbury/Howard on the limited parameters of their brief rather than on the full merits of the proposals.

In the light of the above finding the only persons who in any relevant sense could possibly be persons substantially and directly interested in the subject-matter of the investigation are Mr Bunbury and Mrs Howard. In case, in the circumstances, it is necessary to include in this Report a statement pursuant to s.74(5), then such statement is that there is no evidence warranting consideration of the doing of any of the things mentioned in that subsection.

Chapter 15

THE PERIOD 26 DECEMBER 1988 TO 12 JANUARY 1989

General

The period here involved is that between the date upon which the exclusive negotiating period with CRI ran out and the signing of the development agreement with it on 12 January 1989. During this period Ipoh was not invited to recommence negotiations, although it had indicated its willingness to do so, and although CRI was told that it was no longer the exclusive tenderer. Ipoh had been informed on 7th September 1988 by Mr Kortlang that if a three month period of negotiation with CRI failed to result in an agreement with it, Ipoh could expect further discussions to commence with it (E214). In fact CRI was allowed to retain its position as exclusive tenderer after the period ran out and until a contract was entered into.

In the light of all other circumstances, it seemed appropriate to inquire why.

Circumstances

Following the Bunbury report (see Chapter 14), exclusive negotiating rights were conferred on CRI for a period of 90 days (E75). The period expired without any development agreement being signed. Mr Kortlang gave evidence of attempts to get the representatives of CRI to the signing table by 26 December 1988, without success (T3182-5; see also E166, 167). Mr Murray then made a public announcement that CRI no longer had exclusive negotiating rights (T3315).

Further Negotiations

The next step was a meeting with CRI representatives on 3 January 1989. It had been decided that because the matter had gone so far, a further effort should be made to bring the thing to fruition, and it seems as though 14 days was fixed (T3315). Mr Kortlang was surprised at the conciliatory approach taken by Mr Murray at that meeting. It can best be described in his own words (T3188):

Yes and what do you recall occurring at that meeting?---It was an

anticlimax in terms of the manner in which I thought CRI would be dealt with.

What do you mean by that?---In the discussion we'd had earlier in the morning with the Minister, I thought that he would read the Riot Act to them but he was firm but it was not a - it was not that sort of meeting.

What did he say to them as to what the position was?---That they were no longer an exclusive - in an exclusive position but, given that the Government had gone so far with them, they would proceed to negotiate with them to attempt to finalise the matter, words to that - you know, it's very - it's a big paraphrase of what he said, but that's the import of his words to them.

COMMISSIONER: I take it that you didn't regard it as what I would call 'an orderly room parade'?---It certainly was not an orderly room parade, Mr Commissioner, which is what I expected.

Miss McIntyre was of the same opinion (T404).

Further negotiations with CRI ensued. There were problems but they were adjusted. One arose from CRI's insistence upon retaining that part of its proposal which involved beautification of Hickson Road. This meant narrowing the road. As a result cl.4.19 was inserted in the deed of agreement (E13). That clause in effect provided that if CRI did not get what it wanted so far as its proposals for Hickson Road were concerned, it could terminate the agreement. This clause was agreed to by the DSD after consultation with Mr Murray (T1403). The MSB were not made aware of this.

Ipoh wrote to the DSD on 5 January 1989 stating that the exclusive negotiation period with CRI had expired and reminding Mrs Howard of the letter of 7 September. The letter from Ipoh went on to state that it was still interested, and had been told on the day before that further discussions would take place (E178). There was no reply. Mr Barrett tried to speak to Mr Murray about this, without success. Mr Yap of Ipoh flew to see Mr Murray. Mr Barrett records Mr Yap's account of what Mr Murray said:

Look, it's too late anyhow. It's all but over. The decision has been made.

Ipoh did not offer to match CRI's bid (T2129).

The development agreement with the consortium was executed on 12 January 1989.

A news release of 17 January 1989 from the DSD announced, "The Deputy Premier and Minister for State Development, Mr Wal Murray, today accepted a cheque for \$75,182,548.60 from the consortium who will be carrying out the redevelopment of the Walsh Bay area of Sydney Harbour". It went on, " 'In the past week more than \$130 million has been received by the State from this development and the sale of the NSW Investment Corporation,' Mr Murray said." (E175). In fact of course the money for Walsh Bay was never received by the Government, nor was it intended that it should be, at least at this stage. It was paid to the MSB and pursuant to the terms of the deed immediately deposited in a trust account in the Hong Kong Bank, with which a member of the Consortium was associated, not to be released to the Government until development approvals had been obtained. Somewhat prophetically Miss McIntyre prepared a note for her Minister (E104), part of which read:

4. The deal negotiated on the placement and investment of the \$74,566M for the period until the development application succeeds or fails is fine if it succeeds.

However, there is a significant criticism of the deal negotiated in the event the DA fails:

- * assuming that it takes 12 months to reach a conclusion of the DA process
- * at the start of the negotiating period, the potential best outcome for the MSB was that it would retain the whole \$10.2M investment income

The worst outcome was that it would retain \$1.2M.

- * the deal done provides that the MSB gets a maximum of \$1M.

All the Government ever got was \$1 million.

Conclusions

There is no problem about corrupt conduct in relation to this topic. Having come as far as it had with CRI at the end of the exclusive

negotiation period, it was natural that a final effort to bring the deal to fruition should be made by the DSD, particularly as the Department was in the position of having cancelled CRI's exclusive status, and of having Ipoh waiting in the wings.

Mr Murray is the only person who, in relation to this topic, could be said to be a person substantially and directly interested in the subject-matter of the investigation. If, notwithstanding the conclusion reached in the preceding paragraph, it is necessary to include in this Report a statement pursuant to s.74(5) of the Act, then such statement is that there is not sufficient evidence warranting consideration of the doing of any of the things mentioned in that subsection.

Chapter 16

CHANGES TO TENDERING PROCEDURES

Background

The Cabinet Subcommittee which dealt with matters concerning Walsh Bay was, at its meeting on 5 August 1988, presented with the Report of the Committee of Review (Angels) (E28). It decided that Horwath & Horwath should be appointed to do a financial review, that an independent chairman be appointed to the MSB assessment committee, and Ipoh and CRI be granted preferred tender status (E30).

The Cabinet Subcommittee met on 17 August 1988 to consider the Horwath & Horwath report. It decided that "negotiations should occur with Ipoh and CRI out of tender mode with respect to both finance and on-going management issues, and that these negotiations be based on the SCRA procedures as applied to the Lilyvale project" (E49). It also agreed to the appointment of Mr Bunbury. The initials stand for Sydney Cove Redevelopment Authority.

Decision

From the minutes of the meeting of the Subcommittee of 17 August it appears that no-one was at it other than five Ministers. Whether they understood what "out of tender mode" or "SCRA procedures" meant is not known. Mrs Howard had prepared a briefing note for the Deputy Premier, which under "options" mentioned (E159) "Negotiations to occur with Ipoh and CRI out of tender mode re financial and ongoing management issues."

Miss Jones of the same department had procured on 17 August a copy of a document "Procedures Used by S.C.R.A. For Advertising Development Sites" (E160). Whether the substance of these procedures or merely their existence was known to the Cabinet Subcommittee is not revealed by the evidence. The procedures were inappropriate and never used.

It is not quite accurate to assert that they were totally inappropriate. On page 1 the third paragraph reads:

The most important aspect is - "never change anything once the

process has started". I can't emphasise enough how important this is ...

I feel certain that the Ministers were not aware of this bit.

Problem

The problem that caused me to list this aspect as a topic for consideration was the apparent volte-face of the DSD in its approach to how the process of choosing a preferred tenderer should proceed, and, if possible, to find out why it occurred.

On 12 August 1988 Mrs Howard of the DSD produced an "issues paper". It appears to have been prepared for Mr Murray. It takes up the Cabinet Subcommittee decision of 5 August, mentions the Horwath & Horwath report (E33), the results of which must somehow have been known to the Department by then, and made recommendations thus (E161):

It is recommended that:

- (i) as a matter of urgency the Minister discuss the situation with Minister Baird to agree that on the basis of the Horwath and Horwath advice, the Cabinet Subcommittee reconvene as soon as possible to resolve action on this matter;
- (ii) at the Cabinet Sub-Committee meeting:
 - Ipoh be given preferred tender status, and the announcement be made by 20 August 1988;
 - Mr G. Bunbury, President, NSW State Superannuation Board, be appointed to work with MSB during negotiations with Ipoh to ensure adequate provisions are made for ongoing management issues.

That is the first matter.

The second is that on 15 August 1988 there was a meeting at which Mr Kortlang, Mrs Howard and Mr Gilligan of the DSD were present, together with the representatives of Horwath & Horwath, who presented the draft report, and Miss McIntyre. Her notes of that meeting disclose (E32):

J. Trathen presented Horwath and Horwath's draft report on the financial aspects of 2 of the tenders (CRI and Ipoh). B. McIntyre tabled Professor Abelson's draft report on the financial aspects of the 4 tenders.

...

It was agreed that the Cabinet Subcommittee should be reconvened and advised that preferred tenderer status should be given to Ipoh.

In relation to the issue of ongoing management capacity, B. McIntyre advised the meeting that the MSB would be very pleased to have Mr. G. Bunbury (State Superannuation Board) to assist it in refining its negotiating position with the preferred tenderer. However, it was not seen as appropriate that he actually conduct the negotiations.

Two days later, at a meeting of the same people, plus Mr Bunbury and Mr Farmer of Turners, a meeting which took place some six hours before the Cabinet Subcommittee was due to meet, Miss McIntyre recorded (E41):

By the end of the meeting it was clear that:

...

3. G. Bunbury advised that *there was no time to obtain detailed responses on further issues before Friday (end of tender period).

* the Government must appear to the development industry to act decisively on Walsh Bay.

* the finance industry will not enter into serious negotiations if there is more than one developer in the market place.

* the Government should proceed with one developer, conditional upon satisfactory conclusion of negotiations on the following matters within a three month period:

...

4. R. Howard indicated that whilst the Review Committee would have preferred all the ongoing management issues

... tied up before preferred developer status is granted, she believed the conditional approach outlined by G. Bunbury would be acceptable to it.

5. K. Gilligan commented that he believed the Review Committee's queries on the financial aspects had been adequately answered.
6. B. McIntyre advised that none of the information arising from the Review Committee, subsequent discussions and re-assessments had altered the MSB's recommendation that detailed negotiations should now commence with Ipoh. (This is in line with G. Bunbury's advice in 3 above).

This is a note prepared for the Minister responsible for the MSB. It was accompanied by a briefing note which concluded thus:

The alternative of going beyond the tender process to negotiate with two or three developers will be outside the existing document procedures and will represent yet another change by the State Government for this project.

Apart from one developer, which it is agreed should be excluded, it would be a denial of natural justice if any one of these three were excluded if the decision is made to allow changes to be made to the tabled proposals prior to granting exclusive negotiating rights (Preferred Tender Status).

Notwithstanding this lead up to the Cabinet Subcommittee meeting of 17 August, the DSD, through Mrs Howard, recommended the option number 2 in her briefing note (E159), namely that there be negotiations with two tenderers, CRI and Ipoh. Recommended is correct, because the other three options listed for consideration by the Ministers were each accompanied by negative comments, that is to say, suggestions why it might not be wise to choose them. In relation to option number 2 the comment was:

(the Government is seen as being relatively decisive, while at the same time is in a position to obtain the best possible return and solution to ongoing management);...

In addition to this, Mr Kortlang told Miss McIntyre on 16 August, the day before the Cabinet Subcommittee meeting, that "Cabinet furious that letters

didn't issue to the unsuccessful 2" (E37). He was not telling the truth, (T3157-8).

Resolution

There was much confusion in the oral evidence given to the Commission about what decisions were reached and who said what to whom. It is not necessary to set that evidence out. The documentary evidence is there. It apparently shows a shift of ground. Mr Kortlang's attitude is again reflected in the untrue remarks he made to Miss McIntyre on 16 August 1988, the day before the Cabinet Subcommittee meeting (E37):

He (Mr. Kortlang) said that he & Minister Murray had, in all good faith, told Peter Wills of the Cabinet Subcommittee decision separately at functions last week, that it was down to 2 - didn't know letters hadn't issued.

Mr Kortlang admitted to the Commission that what he said was untrue. Both he, Mr Wills and Mr Murray denied any such occasion. However, there is no doubt at all that before 17 August Mr Wills knew that the short list of tenderers was down to two, one of which was CRI.

Mr Wills was recommended as a Commissioner of the Tourism Commission of New South Wales in about mid-August 1988 (T2280).

Conclusion

It is not open on the evidence to find that there was any corruption in relation to this aspect of the inquiry.

The only persons relevantly connected with this topic who could possibly be said to be substantially and directly interested in the subject matter of the investigation are Mr Kortlang and Mrs Howard. If, notwithstanding that there was no conduct that could come within the definition of corrupt conduct in the Act, it is necessary to include in this Report a statement pursuant to s.74(5), then such statement is that there is not sufficient evidence warranting consideration of the doing of any of the things referred to in that subsection.

Chapter 17

MINUTES OF MSB BOARD MEETINGS

History

The route by which and the reason why copies of the minutes of board meetings of the MSB reached Mr Carr has been covered in Chapter 7. It is not necessary to go over these matters again. The persons involved were Mr Nayler, Mr Morison and Mr Baueris.

When Mr Nayler went to see Mr Baueris in early 1990 the topic was raised. Mr Nayler gave evidence that they discussed Walsh Bay (T3639-44):

MR NEIL: Did you say anything to Mr Baueris to the effect that you thought that there was any corruption involved in the Walsh Bay process?---I never mentioned the word "corruption."

MR NEIL: Did you say anything to the effect that you thought there might have been possible corruption?---I'm unsure of that. I may have done.

Salient Points

Firstly, motive. In spite of Mr Morison's denial that he had no political motive in putting the documents into the hands of the Opposition, it is quite clear that both he and Mr Nayler had such a motive. Mr Morison had arranged for copies of the minutes to be delivered to Mr Carr's office, and had noted on his copy of the minutes that Mr Nayler was available for a briefing and that he could "... advise appropriate questions to ask" (E234). There is no doubt that Mr Nayler knew why he was being asked to see Mr Baueris, and why he went.

Secondly, confidentiality. In spite of Mr Morison's denial that he thought the minutes were confidential, I am of the view that both Mr Morison and Mr Nayler knew that the information in the minutes, or some of it anyway, relating to Walsh Bay was confidential. Mr Morison arranged for a "confidential" briefing, and there is no doubt that he did so in order to arm the Opposition with material about Walsh Bay which he felt would not otherwise be known and which could be used to political advantage.

Mr Nayler said that he regarded the meetings of the board of the MSB and its minutes as confidential (T3631), but attempted to justify release of copies to Mr Baueris by asserting that he thought that at the time he gave the information that it was nothing more than historical "in the majority of circumstances" (T3675). That assertion is not accepted.

In further support of his assertion Mr Nayler revealed that he was permitted to disseminate and did disseminate decisions made at board meetings, as well as other material, to members of the MSB staff by means of "Staff Bulletins" that he put out regularly. That he had such permission is correct, but he did not claim to have it in respect of confidential information, or that he ever included confidential information in any of his bulletins. The minutes of the board meeting of 15 December 1988 (the last meeting he attended) contained an item about the DSD taking over the Walsh Bay development from the MSB. Discussion between Mr Nayler and Mr Morison caused the latter to make some notes on it, including "Baird trying to protect his situation", and the one about Trevor being available for a "confidential" briefing (E234 and see Chapter 7). The staff bulletin which Mr Nayler put out after this board meeting of 15th December 1988 omitted that reference to Walsh Bay. I do not doubt that Mr Naylor considered it confidential.

Thirdly, the removal of his copies of the minutes by Mr Nayler when he left the MSB. When Mr Nayler left he took these as a personal memento and had no intention of making them available to anyone else. There is nothing wrong with this.

Fourthly, the relevant position of Mr Morison and Mr Nayler. Mr Morison at no relevant time was a public official within the meaning of those words as defined in the Act. Mr Nayler probably ceased to be a public official before he took his copies of the minutes. It does not matter. There is no fault to be found in his having taken them. Certainly he was no longer a public official when he confided in Mr Morison or when he went to see Mr Baueris.

Mr Baueris

Mr Baueris may have been a public official at the time he interviewed Mr Nayler and when he received the copies of the minutes (see definition of "public official" in s.3 of the Act, subclause (m)). It does not matter. He was a conduit by which the information that he obtained was relayed, if he thought it politically appropriate to do so (T3810). As far as he was

concerned it was not to be kept confidential and he was not a party to any decision about how it was to be used (T3811 - 2, 3817).

Conclusion

There is no matter in this aspect of the inquiry that raises any matter of corruption.

I have not overlooked a possible basis of corrupt conduct by Mr Nayler pursuant to s.8(1)(d) of the Act namely:

- (d) any conduct of a ... former public official that involves the misuse of information or material that he ... has acquired in the course of his ... official functions, whether or not ... for the benefit of any other person.

The information and material was acquired by Mr Nayler in the course of his official functions. It is not proposed to categorise his use of it as a "misuse" or something else, although I am inclined to the view that there was no misuse of it by Mr Nayler in all the circumstances, including Mr Nayler's belief and concern. Whatever use was made of it did not constitute or involve a criminal offence, and, at the time of its use, it could not constitute or involve a disciplinary offence or provide reasonable ground for dismissal etc. (s.9 (1)).

I have formed the view that there are no persons involved in this topic, except Mr Nayler, who can be said to be, in any relevant sense, substantially and directly interested in the subject-matter of the investigation. If it is necessary, in these circumstances, to include a statement in the Report pursuant to s.74(5) of the Act, then the statement is that there was no evidence warranting consideration of the doing of any of the matters specified in that subsection.

Chapter 18

THE COMMITTEE OF REVIEW

Opening

The whole matter of the Committee of Review (Angels), how it went about its task, its report, and the public explanation of its activities, is so strange that it merited investigation as a separate topic. As mentioned in Chapter 3, it was the point at which the Walsh Bay Redevelopment Project ran off the rails; it never recovered, but events that flowed from this aspect of the history of the Project have given rise to the matters that have elsewhere been discussed in this Report.

The odd thing about it is that it was the report of the Committee of Review which recommended that CRI should be brought back into the tendering process after the MSB assessment committee had decided that Ipoh should be the preferred tenderer. It did so notwithstanding that it endorsed the evaluation procedures adopted by the MSB, and had "no reason to conclude that the MSB team did not follow the procedures set for themselves" (E28). There were other peculiar features. They will be discussed.

History

The idea of some form of involvement in an evaluation process by an independent person or persons which would result in the choice of a developer seems to have been suggested by Mr Sturgess and Miss McIntyre about April 1988 (T2060-1). The idea was taken up by the DSD (E156), and two Ministers (for the MSB and the DSD - E155). By 28 June the MSB was advised that it would not be making the decision regarding the award of the Walsh Bay tender, that the DSD was taking over the matter of the evaluation of tenders, and that it would appoint a committee of review (E27). The three directors of that Department, Mr Kortlang, Mrs Howard and Mr Gilligan, made the choice of members of the committee, and it was instructed to report to Minister Murray.

The members were appointed somewhere between 14 and 21 July 1988 (E249). Apparently Mr Murray made the appointment (E209). They were Messrs Moyes, White and Dix. The positions held by and qualifications of these gentlemen are set out in Chapter 1. They are mentioned in that

order because on the evidence there is no doubt about who was in charge. There is also no doubt that the review function which the Committee of Review was authorised to undertake comprised two aspects and no more viz "to review the adequacy of the MSB procedures and to ensure they have been followed appropriately" (E210). It was to report on these "issues" and to confirm or otherwise the MSB's recommendation of preferred tenderer (E28). The limited nature of the task set for the Committee was prompted by the fact that it could not possibly go over or be expected to go over the enormous quantity of material held by the MSB relating to the tenders, procedures and the submissions of the four selected tenderers, and it had a very restricted time in which to produce a report. Its terms of reference were therefore very limited. They were (E28):

- (i) review the procedures used by the MSB to evaluate 4 of the listed tenders received on 28 March 1988;
- (ii) ensure that the MSB has followed these procedures appropriately; and
- (iii) report to Minister Murray on these issues, including the confirmation or otherwise of the MSB's recommendation.

The first working meeting of the Committee of Review seems to have taken place on 21 July 1988. By that date the Committee had been supplied with certain information. This apparently consisted of (E249):

- (i) confidential overview report prepared by the Maritime Services Board (MSB);
- (ii) the tender document; and
- (iii) conservation guidelines.

The overview report referred to in (i) was said by Miss McIntyre (T244-6) to be background information about this project, and dated apparently 11 July 1988. In particular it recorded that the "three main areas to be considered in the assessment of tenders were the conservation and aesthetic aspects, the financial return, the urban planning consideration, and they have been given a relative weighting of two one one in accordance with Mrs. R. Howard's directions." It noted that the initial recommendations of the assessment group (MSB) would be "available by 18 July in the form of a report containing both the analysis and assessment of the proposals in terms of the above three areas and weightings" (T246).

The MSB tender evaluation team produced a report on 18 July 1988 called "Initial Recommendations of the MSB Tender Assessment Group" (E8). It was a very detailed analysis setting out the history of the project, the material supplied to tenderers and many other matters. It contained a detailed review of the tenders of each of the four tenderers with respect to the three criteria upon which it had been agreed that the tenders be assessed, and made a recommendation, using the weighting agreed upon, "that Ipoh Garden (Aust) Pty Limited be selected the preferred tenderer".

Perhaps it can be noted that even if a weighting equal to the other two had been given to conservation, the relative order of choice would not have differed. It can also be noted that the White Industries group and the Comrealty group were both ahead of Ipoh and CRI with respect to the financial return.

This document was available to the Committee of Review. It is mentioned in the report of that Committee (E28).

One other matter should be mentioned. There was some conflicting evidence about whether the members of the Committee of Review were aware of the ground rule upon which the whole process had been proceeding, namely that at the end of the tender assessment period (which was due to expire on 20 August 1988) one preferred tender would be chosen, and exclusive negotiations would be continued with that one tenderer with a view to signing a development agreement within three months. There are two reasons why I am satisfied that it was so aware.

The first is that the MSB's initial recommendation document (E8 - see above) set out on page two the methodology adopted by the MSB assessment group, with the assistance of a Subcommittee of the Heritage Council. It concluded:

It is envisaged that a preferred tenderer will be selected by 20 August 1988 (the end of the 150 day tender validity period). Intensive negotiations will then be undertaken with the preferred tenderer with the objective of signing a Development Agreement within three months. Should agreement fail to be reached within that time, the MSB would approach the second tenderer. Selected developer status would only be conferred upon signing the Development Agreement.

At page 30, headed "Recommendation - Preferred Tenderer", the final paragraph reads:

Should negotiations with Ipoh Garden fail to secure the signing of a Development Agreement within three months, negotiations would commence immediately with both the CRI and White Industries groups to resolve various matters precedent to signing a Development Agreement with one of them.

Mr Moyes agrees that he was aware of these references to procedures (T3841-2).

The second is that Mr Back of Freehills was asked to attend a meeting with members of the Committee of Review. He gave evidence of what was said (T1045-6). He said in part:

... I was asked one specific question by the Committee and that was whether they could essentially short-list two tenderers from the four that had submitted proposals.

...

... As I understand tendering practice, if the short-listing was not on a basis that was justifiable under the terms of the tender they were likely to be criticised generally in the industry for changing the ground rules midway through the process. So all I was saying was they had to be very careful to ensure that the criteria for short-listing was consistent with the tender documentation.

There is nothing in the tender document itself that refers to this ground rule. I have already stated that the four tenderers were aware it.

Activities of the Committee

The activities of the Committee are listed in their report (E28). For the purposes of this Report it is only necessary to deal with some aspects.

There was an initial session with the officers of the DSD on 21 July 1988. The Committee made some requests for further information which was sent on by that Department to Miss McIntyre. She was asked to supply as soon as possible (E250):

- (i) A list of the mandatory requirements in non-conservation and conservation areas and a summary indicating whether

each of these was met or not by the four tenderers.

- (ii) Copies of Minutes of meetings held between the MSB or the Heritage Council Committee with the tenderers which would have conveyed to the tenderers information regarding the meaning of the word mandatory in respect of non-conservation areas and other areas. Information indicating the way in which the tenders would be evaluated particularly with respect to weighting for heritage, planning and financial matters should also be included.

The memorandum requested other information including a summary of the financial aspects of the tenderers.

The information was supplied by the MSB in a memorandum of 26 July 1988. It contained a summary as requested. That showed that in non-conservation areas (urban planning) CRI and Ipoh had complied with all mandatory guidelines, and that in conservation areas no tenderer had complied with all mandatory guidelines, but that CRI had complied with the most, followed by White Industries, Ipoh and Comrealty in that order. The memorandum referred to compliance with guidelines thus (E251):

The guidelines are not of equal importance and this has been reflected in the grouping and scoring. The scoring also made it possible to allow for degrees of compliance since a "yes" or "no" is not necessarily an adequate measure.

The memorandum further stated that the evaluation of tenders was not discussed with the tenderers before 2 March and apparently after that only to indicate to them that the PCO clearly gave the conservation aspect "great weight". As to the weightings, these were only adopted in June 1988 (after consultation with the DSD - see above) and that "even if the weightings were changed to make them equal, or to make financial return of greater importance, Ipoh Gardens would still remain the preferred tenderer". In the initial recommendations of 18 July (E8) CRI had been rated last of the four for its financial offer.

The point about this prelude is simply this. Almost at once, by 21 July 1988, the Committee decided that CRI should be brought back into the tendering process, and that there should be "two out and two in". The two out were White Industries and Comrealty. What this had to do with the terms of the brief under which the Committee was supposed to be

operating remains a mystery. Mr Dix thought it would be a "good idea" to keep two tenderers in "so that there would be competition between them to increase their financial offers" (T2986). What this had to do with the terms of the brief remains a mystery also. Indeed Mr Moyes explained the way pressure could be applied (T3852):

MR NEIL: What the committee recommended as the mechanism of the application of pressure to get an increased financial return was to achieve a situation where two tenderers were left in and were made aware that they were bargaining with each other on the financial aspect?---Yes, I think that that's - they certainly would be aware in that final round that they were - they there were two of them still in it, and certainly that pressure would be there.

When it was put to him that in the report of the Committee where it was recommended that "pressure should be put on the final selected tenderer to increase financial returns", this was quite outside the Committee's terms of reference, he said: "Yes - I think that's probably fair to say" (T3854). He had earlier explained:

But the question of determining the reasonableness or otherwise of the financial offers are limited to Ipoh and CRI, but really any of them, was not one of the functions of the Committee at all, was it?--- No, not really. Except to be satisfied that the basis of those evaluations had fairly taken into account all these other issues...

There were other peculiarities in the activities of the Committee of Review.

It was mentioned earlier that the Committee had formed a view early in the piece about bringing CRI back into the tendering process. This view was expressed within a day or so after the Committee took up its task, and certainly before the Committee had received the document from Miss McIntyre that indicated the compliance or otherwise with what has been called 'mandatories' (E251).

The next activity of the Committee, after the initial meeting of 21 July with representatives of the Department of State Development, was to interview Miss McIntyre and other MSB officers. Miss McIntyre was not impressed with the attitude adopted by Mr Moyes. This is not surprising.

According to Mr Kortlang there was a discussion at a meeting on 21 July which included reference to the "mandatories". On the same day he and Mrs Howard from the Department and at least two of the members of

the Committee of Review were introduced to the models of the project prepared by each of the four tenderers, and viewed the huge amount of documentary material that had been assembled by the MSB relating to the project. It is probable that on this occasion Mr Moyes expressed the clear view that there were two in two out. On 28 July 1988, Mr Kortlang spoke to his friend Mr Wills of CRI at a social gathering. The topic of Walsh Bay came up. Mr Kortlang said (T3109):

Yes?---My wife then asked Peter, "How's Walsh Bay going?" Peter then replied in - I don't recall his exact words, but very much in a - "it's going on, it continues to go on, it continues" - he was very - I suppose indicated he's very tired of the process. I then interposed and said to him, "I think now there's at last some objectivity in the process with the appointment of the committee of the - committee of angels. I think you're back in the hunt with one other.

It was what happened on 21 July that prompted this remark. Mr Kortlang said (T3109-10):

What was the basis for your statement to him that "I think you're back in the hunt with one other"?---It was really my assessment of referring in my mind to the discussion on mandatories.

The meeting of 21 July?---Correct.

*What was it that occurred at that meeting which caused you to think that CRI was back in the hunt, possibly with one other?--
-Two issues. One, the - Mr Moyes' very clear separation of two in, two out, and secondly, the general direction that was developing, that the weighting was inappropriate. I, in that meeting, had assumed that the weighting favoured Ipoh.*

Mr Moyes gave this evidence (T3848):

Now, would you dispute Mr Kortlang's evidence that on 21 July, which was the model inspection, he concluded from what you said that you were making it clear that because of mandatories there should be two in and two out?---That was certainly my view. Whether it was at that meeting or at another time, that was certainly my view.

Well, do you accept that it is possible that at that meeting you said something which would reasonably have conveyed that impression to Mr Kortlang?---I would think that's quite likely, yes.

This attitude is endorsed by Miss McIntyre. She said (T281):

Well, I don't recall when you'd argued forcibly or forcefully with the committee of angels. Can you remind me when that was?--That was in July, preceding their report of 5 August. It had in fact been an inquisitorial process and - over the conservation issues, over almost all the things that were in our assessment report. They had taken a very - what I felt was an unusual attitude towards questioning us.

Well, they were, I take it, appointed to be critical, without using that word in a pejorative sense, of the methods used by the Maritime Services Board?---That's correct.

And they were examining, I take it, those methods?---That's correct.

Well, you say there was a degree of acrimony about that in the meetings with you, or meeting or whatever it was?---It was certainly in relation to particularly Mr Moyse, who tended to be the main - the person who did most of the questioning...

She had previously given evidence about Mr Moyes' approach to the mandatories, and her reaction (T250-1).

The point is that this conclusion was expressed by Mr Moyes at the outset of the evaluation process, almost before it had begun. It seems that Mr Dix was in the same position (see also T3832)

There were other matters of criticism directed to the activities of the Committee of Review. What has been said is sufficient to explain why the Commission considered its activities as proper for investigation.

Assessment

The Committee of Review decided that attempts should be made to get more money out of the Walsh Bay Redevelopment Project. Mr Dix gave evidence (T2982-3):

What was the basis upon which the committee expressed the view that it was not convinced that there should not be a greater financial return?---The Committee did not look in detail at the financial returns but recognised them as being a critical issue and a complex one, and it - as the report makes clear we recommended that, in our view, it merited specialised attention so

that the return to the government could be maximised.

The Committee did not have the time to examine the financial offers or reach any conclusion as to whether they were reasonable or unreasonable. But to leave two tenderers in for "competitive negotiations" was the best way to ensure the best result (per Mr Moyes T3854). Mr Dix described it as a good idea to have a bargaining position. That this was the approach of the Committee is made abundantly clear by Mr Barrett (T2106-7):

MR NEIL: How long did the meeting take?---Half an hour, maximum.

As best you can, what were the matters discussed at the meeting?--Well, they did discuss the question of were we satisfied with the procedures that had been followed and the way that the Maritime Services Board had conducted themselves during the tender process and I responded, yes, I was, except that I would imagine I said that it's taking a long time for them to get some resolution. That was the minor part of the meeting. The major part of the meeting was to talk about the fact that they in - they believed that for - the words they used were something along the lines of, "We are unconvinced that the returns to government is adequate" or some term like that. And that was the position they took. The position I took was that, "Okay, you're quite entitled to form that opinion, but how did you form that opinion? You've never talked to me about any of the numbers we have supplied." And this is very important to understand, that we would have supplied documents 6 inches thick detailing every element of the scheme from how much it was going to cost ...

... And everything else was supported in how we arrived at it. Now, we've supported all - submitted all of this information - as I say, reams of it - and not once had anybody asked us anything about the details, including this committee of angels, so I made the point, "Well okay, we have given you all the information that we have been asked to. If you believe some of those figures are wrong, we're happy to sit down and talk about it but until you can show me that there's something wrong there, how can you expect us to offer more money? It's quite clearly a competitive tender."

...

MR NEIL: Was there any response to you from the committee when you put your position?---I reflected upon that. I remember sitting in my office and saying to myself, "What's going on?"

because they were unbelievably arrogant in their position that, "Well, if I didn't want to pay more money, that's fine, that's my problem but they believed they'd -get it type of inference all the way through the conference and I was trying to think, "Are they trying to frighten me into saying I'll come up with more money, but we haven't talked about it..."

This role was presaged by the Committee's requirement voiced at its first meeting on 21 July, with the DSD (E250). It sought information as to:

- (a) the minimum return from each proposal;
- (b) the opportunity for further potential from each tenderer.

It is reflected in the conclusions expressed in its report (E28):

Finally, we are not convinced that this project should not return more to the MSB and pressure should be put on the final selected tenderer to increase financial returns.

Perhaps this is underscored by an earlier comment in the conclusions:

On the financial side, we should have had more confidence in the final recommendation (of the MSB) if there had been a more detailed analysis which could be used as a basis for further negotiation.

So the Committee of Review ignored the ground rules, reassessed the tenders on urban planning guidelines, brought CRI back into the process, and decided that two tenderers should be set off one against the other to try and increase the financial return to the Government. What all this had to do with the brief that was given to the Committee is anyone's guess.

Postscript

On 28 February 1990, Mr Dix authorised a press statement concerning the activities of the Committee of Review. He said (T3001):

Was it prepared by Minister Murray's office and checked with you before release. Is that the position?---Yes

The press statement is in evidence (E254). It is headed "Media Release" and a note on it states that it was "released at Murray's Press Conference".

As to the function and activities of the Committee of Review, it said:

A committee Member, Mr Dix said: "We were brought into the process by the Deputy Premier as three independent business people who could review and advise on the adequacy of both the tender evaluation process and its implementation.

"We overviewed every stage of the tender evaluation process set in place by the NSW Government.

"We were satisfied that the best and highest possible price was achieved; and that the preferred tenderer - a consortium which comprised Wardley's Australia, AIDC and CRI - was the appropriate choice.

"This was in view of the significantly greater return to Government offered by this consortium and submitted to the government after the consortium has met all essential technical, financial and managerial, heritage and planning requirements for the project."

Apart from the first sentence none of it was correct or had anything to do with the activities of the Committee.

Conclusion

Both of the members of the Committee who gave evidence stated that the Committee of Review was not influenced in its activities or conclusions by any person, meaning improperly influenced. I accept that. It appears that the Committee considered that more money could be obtained, and that this could best be achieved by keeping two tenderers in the process and putting pressure on them. The process the Committee recommended departed from the tender procedure and was quite outside the Committee's terms of reference. The Cabinet Subcommittee, which adopted the Committee's recommendations at its meeting on 5 August 1988, really had no choice but to adopt it.

There was no corrupt conduct. It has not been established that the process adopted was to enable CRI to get "back in the hunt".

The three members of the Committee of Review were undoubtedly persons substantially and directly interested in the subject-matter of the investigation. In case the Act requires a statement pursuant to s.74(5) to be included in this Report, then such statement is that there is not

sufficient evidence warranting consideration of the doing of any of the things listed in that subsection.

As can be seen there was ample evidence of circumstances implying that corrupt conduct may have occurred.

Chapter 19

ALLEGED LEAK FROM HERITAGE COUNCIL

Background

After the tenders of the four chosen tenderers were submitted in March 1988, the MSB Tender Assessment Group set about a review and analysis of those tenders. In this they were assisted, so far as conservation and heritage aspects were concerned, by a Subcommittee established by the Heritage Council of NSW. That Subcommittee comprised three members and was headed by Mr R Irving (see generally E8). It was involved by February 1988.

During the tender assessment period that followed 23 March 1988, two members of this Subcommittee were addressed by each of the developers and their consultants "on the heritage issues and merits of each of the development proposals", and thereafter discussed them with the MSB Tender Assessment Group. The Heritage Council, on conservation and aesthetic aspects, scored Ipoh so that it ranked first (E8, at 12-13).

The document "Initial Recommendations of the MSB Tender Assessment Group" (E8) which contained the above information was forwarded to the DSD on or about 18 July 1988, and thereafter went to the Committee of Review (Angels) (see Chapter 18).

That Committee produced its report on 5 August 1988, and that report was considered by the Cabinet Subcommittee on that day. After the Horwath & Horwath report was received and considered by a Cabinet Subcommittee meeting of 17 August 1988, the Subcommittee decided that negotiations should be taken up with both Ipoh and CRI "out of tender mode" (see Chapters 4, 14).

By letter dated 18 August 1988 Ipoh and CRI were advised that the Board wished to have further negotiations (E45). On 22 August there was the meeting with Mr Barrett and representatives of Ipoh which has been described elsewhere (Chapter 4, 14). According to the notes of that meeting (E51) Mr Barrett of Ipoh alleged that a CRI associate had asserted that the MSB had recommended Ipoh. There is no note of any allegation that the Heritage Council had preferred Ipoh.

Allegations

On 23 August 1988, in a draft letter to the MSB (E192), Mr Barrett said:

3. We have been led to believe from several sources that the Ipoh scheme is preferred by all relevant Government bodies, principally of course the Heritage Council and Maritime Services and their respective advisors.

On 25 August 1988, in a letter to the Deputy Premier, Mr Murray (E55), Mr Barrett made the same assertion as that contained in his draft letter of 23 August, set out above. There was no reply to that letter.

On 29 August 1988, in a letter to Mr Bunbury (E57), Mr Barrett said:

We understand Ipoh was adjudged the highest offer and the scheme preferred by the representatives of the Heritage Council and therefore is the tenderer with whom Government should negotiate. If our information is incorrect, and no one has challenged or denied our statements, and CRI did "win" in these areas, then Government should negotiate with CRI.

There was no reply to that letter.

In the meantime, on 25 or 26 August, Mr Irving of the Heritage Council, spoke by telephone to Miss McIntyre. She made a note of the conversation (E56):

Bob Irving (Heritage C'tee)

Telephoned us 25 or 26 August to say that he had a message to ring Jim Barrett and wondered what it was about. I told him that Jim had made allegations about a leak to CRI and that he was saying that he knew that Council had preferred his scheme. Bob said that George Kringas had rung him a couple of times and had talked vaguely and Bob had not told him anything.

I advised Bob to be completely non-committal with Barrett and to say he could not discuss the tenders. He said he would follow my advice.

Source of Information to Mr Barrett

Sometime after 23 March 1988, a presentation of Ipoh's revised scheme

had been made to the Heritage Council, at which presentation Mr Irving had been present. Two architects from Ipoh were there. One of them, Mr Jahn, expressed a view to Mr Barrett about the reaction of the Heritage Council (T2044):

What did he say to you?----He said that he thought Bob Irving liked - was very enthusiastic about our scheme or liked our scheme very much, something quite positive.

The other architect present representing Ipoh was Mr Kringas. Although he did not seem to have such a positive reaction to the attitude of the Heritage Council members, later on he had a conversation with Mr Barrett (T2047):

At some time before the end of July 1988, did Mr Kringas tell you of any contact he had had with the Heritage Council and anything in relation to his view of the reaction of the Heritage Council to the Ipoh proposal?

----Yes. George Kringas had some friends or associates on the Heritage Council and they had advised him that our scheme was the preferred scheme.

Is that what Mr Kringas said to you?----Yes.

This was sometime in July or August. Mr Barrett added (T2181):

....George Kringas' advice to me was not only that the Heritage Council preferred our scheme but why, and one of the reasons they gave in addition to those limited - listed there is the fact that there was a large residential component and that they saw that the likelihood of the whole project being maintained by owner occupiers was very great and much better than likely financially questionable commercial usages.

It just so happens that in the MSB's assessment (E8, which indicated its preference to Ipoh's scheme) this appears:

The scheme (Ipoh) has a major emphasis on residential accommodation...

Source of Information to Mr Kringas

Mr Kringas gave the following evidence to the Commission about a

conversation that he had with Mr Irving in July or August 1988 (T3592-3):

MR NEIL: Mr Kringas, would this be a correct statement to attribute to you, as of 13 June 1990, and I'll just read it to you:

I was very concerned about the whole process so I rang Bob Irving, who I know, because he's an architect and he was very propitious. I mean he wouldn't disclose that we were the favoured ones, but he did say that the majority did favour our scheme. We were very scared about the fact that we'd included a canal - half of Hickson Road, for instance.

Would that be a correct statement to attribute to you as of 13 June 1990?----Except the word "propitious" should be "proper".

"Proper", thank you. He was very proper?---Yes. Yes, basically. I think if you have specific questions about it I'd like to hear them, but I mean that was basically it. There was a concern about the two things I've mentioned before, the canal and whether another assessment panel had been appointed.

Really what I want to suggest to you is that on 13 June 1990, you made a statement in the terms that I read to you?---Yes.

Mr Kringas gave this further evidence (T3594):

MR NEIL: I'd like to suggest that as at 13 June 1990 your stated position was this, in relation to your telephone conversation with Mr Irving:

He was very judicious in how he put it and very appropriately so and I didn't want to get information that was very confidential, but it was enough for me to assume that we did gain the confidence - not only the confidence, but the top medal from the heritage team?

---I made that statement, I've had recollection since, which is a little bit more guarded, on what my assumptions were....

Mr Kringas gave this further evidence (T3596):

And would this be a true statement of the position in relation to your contacts with Mr Irving and Mr Sturday, and I'm quoting:

I mean, I definitely went out to get the opinion of Bob Irving on his choice. I tried to get the opinion of the Maritime Services Board on their choice. They wouldn't give it.

----No, that's not accurate at all. That was a statement that was made and I've since revised that in a further statement to you.

As to the statement in the last mentioned evidence, Mr Kringas went on to say that he had since thought about the matter and now adopted a different position.

The most that Mr Irving would say is that the committee of the Heritage Council favoured the Ipoh scheme and it is possible that he told Mr Kringas so (T3800).

Established Facts

The following facts are established.

First, the Subcommittee of the Heritage Council placed the Ipoh scheme first on heritage considerations (T3793).

Second, Mr Irving's personal preference was for the Ipoh scheme (T3794).

Third, Mr Kringas had spoken to Mr Irving on the telephone "a couple of times" by 25 or 26 August 1988 (E56).

Beyond this, Mr Irving was not able to give any assistance about how Mr Barrett obtained his information.

Mr Irving ceased to be a member of the Heritage Council in March 1989.

Conclusion

Mr Barrett received information that Ipoh's scheme was the preferred scheme of the Heritage Council. He received that information from Mr Kringas, and the latter's denial that he imparted any such information to Mr Barrett is rejected.

Mr Kringas received his information from Mr Irving. Whether he got it by means of a wink or a nod is not known. He obtained it by telephone after he set out to get it.

Mr Irving supplied the information, whether wittingly or unwittingly.

Mr Barrett had the information by 23 August 1988. The probabilities are that it was communicated to him before 22 August but no finding can be made about this.

Application of Act

The Heritage Council is constituted under the Heritage Act 1977. It consists of members appointed by the Minister plus two ex-officio appointees. Mr Irving was a member. Members are entitled to remuneration. The Minister may for any cause which to him seems sufficient remove from office any appointed member. Remuneration to members is payable from a special deposits account established in the Treasury (see generally Heritage Act). The information is included only so as to establish that a member of the Heritage Council would qualify as a "public official" within the definition of those words in s.3 of the Act.

Mr Irving was at all relevant times a public official. He is a person substantially and directly interested in the subject-matter of the investigation.

Mr Kringas was not a public official.

There is no doubt that information gathered and opinions formed in relation to the assessment of tenders would be confidential. "We were sworn to secrecy between - naturally - the time when we looked at the models and the thing was made public" (per Mr Irving T3789). As to any disclosure of his views he said: "I was very conscious of the necessity of secrecy and for confidentiality" (T3794).

Disclosure of the rating of tenderers on heritage aspects could, in the circumstances of the situation under review here, certainly constitute corrupt conduct under some and possibly all of the subclauses of s.8(1) of the Act.

There is evidence that Mr Kringas set about winking the information that he wanted about the rating of Ipoh on heritage aspects from Mr Irving, but there is no evidence that he did so for any improper purpose. There was certainly no criminal offence involved. Mr Kringas does not therefore fall within the purview of s.9(1)(a) of the Act.

Seeing that his conduct would not otherwise constitute or involve an offence or expose him to any of the repercussions referred to in s.9 (1) (b) or (c) of the Act, it does not constitute corrupt conduct.

The disclosure of the information by Mr Irving may not have been wise, but it is doubtful if it were in any real way reprehensible. There was no improper motive, and no suggestion that he was in any way aware that it was to be or might be used in any complaint or attack by Ipoh. The Commission is in no position to decide whether his conduct would establish a cause that would have seemed sufficient to the Minister in August 1988 to remove him from office. It must be remembered that he knew Mr Kringas, and Mr Kringas in effect set about getting the information from him. There were circumstances implying that corrupt conduct may have occurred.

Mr Irving is probably a person substantially and directly interested in the subject matter of this investigation. Any statement in this Report pursuant to s.74(5) made necessary by subsection 6, is that there is not sufficient evidence warranting consideration of the doing of any of the things listed in the former subsection.

Chapter 20

POSSIBLE OFFENCES

Introduction

Criminal offences were alleged to have been involved in the conduct of some of the persons substantially and directly interested in the subject-matter of this inquiry and its investigation. Notwithstanding that a conclusion has been reached that there is no substance in any of the allegations, it is considered proper to deal with them as a separate topic.

The offences sought to be relied upon are not specifically referred to in the list of matters set out in s.8(2). However, they could constitute or involve "official misconduct" referred to in s.8(2)(a). They could constitute or involve conduct within any of the categories of corrupt conduct set out in s.8(1), (see Appendix 7 pp 1-2). If the Commission were to reach a conclusion that what has been established by the evidence is conduct which could constitute or involve criminal offences, then it could constitute corrupt conduct.

The conduct alleged to have constituted or involved the two criminal offences in this instance are (i) abuse of public office, and (ii) criminal defamation.

Abuse of Public Office

This is a common law misdemeanour. That means it is not to be found in New South Wales as a criminal offence in the Crimes Act or in any other statute creating criminal offences. This does not mean that it no longer exists. Persons can be prosecuted for, convicted of and punished for a common law misdemeanour, even though the elements of the offence have not been set down in writing in any statute and may be difficult to find or to define. Although it has been an offence under English law "since the memory of man runneth not to be contrary," the fact that it has never found its way into the statute book may be indicative of what the community thinks of it.

The offence that was raised in submissions was called "Abuse of Public Office". The memory of man apparently goes back to the 13th century

(History of English Law, Pollock and Maitland 2nd Edition 1898 Vol 2, p 520). The offence relates to a public official, and involves an element of culpability which is not restricted to corruption or dishonesty but which must be of such a degree that the misconduct impugned is calculated to injure the public interest so as to call for condemnation and punishment (per Lord Widgery giving the judgment of the Court of Appeal in Reg. v Dytham (1979) 1 QB 722.

It seems to be suggested that Mr MacDonald is primarily exposed to the possibility of his conduct constituting or involving this criminal offence, with doubtful application to Miss McIntyre and Mr Nayler, as well as possible complicity by Messrs. Hawker, Baueris and Carr.

The precise way in which any of these persons are caught by this ancient and indictable offence is not explained which is perhaps not surprising. It could be that the last time the thing surfaced in New South Wales was 73 years ago. (Ex p Kearney (1917) 17 SR 578).

A complaint about possible corrupt conduct of the nature involved in this inquiry (ie. of public officials) cannot be an offence if made to the Commission (s.10 of the Act). The fact that it turns out that corrupt conduct did not occur cannot make the complaint an offence, unless perhaps it was activated by a wrongful motive.

The fact that a complaint of possible corrupt conduct is made to the Parliamentary Opposition is not something which, in the circumstances of this affair, I am prepared to label as "misconduct ... calculated to injure the public interest so as to call for condemnation and punishment". Miss McIntyre was disinclined to approach the ICAC for personal reasons (T2459); she was not the holder of a public office; the offence cannot relate to her.

The conduct of Mr MacDonald was conduct by a person who would, under the common law, qualify as the holder of a public office at the time he spoke to Mr Carr. However, to constitute the offence of abuse of public office the impugned conduct must in some way relate to the office held by the person involved, such as wrongfully using the office to obtain some advantage or to avoid some detriment. Wrongful behaviour as such by someone who happens to hold a position called a public office does not constitute "abuse of public office" no matter how much it might be calculated to injure the public interest so as to call for condemnation and punishment. The reprehensible behaviour must include a use of or involve

the public position held by the someone, such as non-performance of a duty that goes with the office; indeed the offence may be confined to the duties attendant upon the holding of a responsible public office.

It was never submitted or suggested that Mr MacDonald's disclosures on the voicing of his opinions about Walsh Bay were in any way related to the office that he held at the time he spoke to Mr Carr.

There is no doubt that Mr Macdonald held concerns about Walsh Bay and what had gone on up to the time he left. I am not prepared to hold that to voice then publicly (which is in effect what he did) in order to try and damage the Government in a political sense was calculated to injure the public interest, or to do so in a way that calls for condemnation and punishment.

His conduct on both grounds does not constitute or involve the criminal offence of abuse of public office.

Criminal Defamation

The criminal offence concerning defamation is now to be found in the Defamation Act, 1974 (NSW) Part 5 headed "Criminal Defamation". The offence is defined in s.50, thus:

50.(1) A person shall not, without lawful excuse, publish matter defamatory of another living person:

- (a) with intent to cause serious harm to any person (whether the person defamed or not); or
- (b) where it is probable that the publication of the defamatory matter will cause serious harm to any person (whether the person defamed or not) with knowledge of that probability.

Penalty: Imprisonment for a term not exceeding three years or a fine of such amount as the court may impose or both.

- (2) In subsection (1), "publish" has the meaning which it has in the law of tort relating to defamation.
- (3) An offence under this section is an indictable misdemeanour.

The remainder of the section deals with the necessary consent of the Attorney General. The Defamation Act goes on, in s.51, to deal with lawful excuse. Part 6 - "Supplemental", deals with various matters concerning the offence.

Criminal Defamation - Persons Said to be Involved

In one fashion or another the following person were said to have been engaged in conduct that could constitute or involve criminal defamation namely: Mr Carr, Mr Hawker, Mr Baueris, Mr MacDonald, Miss McIntyre, Mr Nayler and Mr Morison.

There is simply no evidence at all to support any allegation directed at Mr Baueris, Mr Nayler or Mr Morison. The actions of these three related to the obtaining of copies of the minutes of board meetings of the MSB and the interview by Mr Nayler with Mr Baueris.

Mr Nayler had expressed his general unease and disquiet about Walsh Bay to Mr Morison. When he went to see Mr Baueris, he, Mr Baueris, said he was making some investigations into Walsh Bay (T3643). This was late in 1989 or early 1990. It was a short interview - ten or 15 minutes. There is no suggestion that anyone had any intention at all about anyone; at the most the Walsh Bay matter was being explored at that time. Any suggestion that any of these persons were actively involved with any attack on Mr Murray or knew anything about what was going to be said in Parliament is totally unsupported by anything in the evidence.

Nothing further need be said about them. The others will be dealt with seriatim.

Statements Made by Mr Carr

The criminal defamation accusations that are levelled at Mr Carr concern statements made in Parliament on 28 February 1990 which related to Mr Murray. It is unnecessary to set them out in this Chapter or to give a precis - they can be read in full in Appendix 2. Associated with this there are three other matters.

On the same day, 28 February, and after the proceedings in Parliament, Mr Carr issued a press release (E229).

The next day, 1 March 1990, Mr Carr had a telephone conversation with a radio announcer, and what he said or part of it anyway, was broadcast on a Sydney radio station (E228).

On 14 June 1990 there was a statement by Mr Carr broadcast on a television station in Sydney (E274).

Claims of Criminal Defamation - Mr Carr's Speech

It is sought by those who allege that there has been an offence to rely upon certain matters in relation to Mr Carr's speech to establish or show what is said to be a necessary element of that offence, namely a wrongful state of mind. That element is categorised as malice, claimed to be aimed at Mr Murray, and inferred from three different sources.

Firstly, the argument was that by making his speech when he did, viz on 28 February 1990, Mr Carr demonstrated malice towards Mr Murray, or at least that this was evidence of malice. Mr Murray was absent from the House on that day, and it is said that Mr Carr deliberately "chose" that day to launch an attack upon the Deputy Premier. Not only does this make at least one assumption (that Mr Carr knew that Mr Murray would not be there) which is not established, but there was no evidence to support the proposition, and it was denied by Mr Carr. There is no foundation for any inference of malice from this submission.

Secondly, and of equal stature, is the submission that an inference of malice can be drawn from the terms of motion which Mr Carr moved in Parliament in relation to this matter. It was:

That so much of the standing orders be suspended as would preclude the consideration forthwith of the following motion:

That this House condemns the Deputy Premier for interfering with the proper tendering procedures in respect of the Walsh Bay redevelopment.

The submission is without foundation. No suggestion was made as to how else a motion of this kind could be framed.

The third submission as to the source of an inference of malice is even more tenuous. The words used by Mr Carr in his speech demonstrate malice, it was put.

What is said in Parliament is the subject of absolute privilege. This means that absolute immunity from criminal and civil proceedings is given to it. Numerous authoritative works state this as the law; many are collected in the judgment of Hunt J. in *R v Murphy* (1986) 5 NSWLR 18. That principle means, among other things "that what was said or done in Parliament in the course of proceedings there could not be examined outside Parliament for a purpose of supporting a cause of action, even though the cause of action arose out of something done outside Parliament. The reason for its exclusion is, no doubt, to prevent any inquiry into the motives or intentions of Members of Parliament in anything they said or did in the House" (*Church of Scientology of California v Johnson-Smith* (1972) 1QB 522). The case has been approved and followed. Reference may also be made to s.122 of the Act. There is nothing in the submission.

Claim of Criminal Defamation - Mr Carr's Press Release

On the same day as his speech in Parliament, Mr Carr issued a press release. It was in the following terms:

WALSH BAY REDEVELOPMENT

Opposition Leader, Bob Carr, today raised in Parliament serious questions about the tendering procedures for the \$73.5 million Walsh Bay Redevelopment.

Mr Carr told the House that according to Maritime Services Board files:

- * The company which won the Walsh Bay redevelopment was the lowest of the shortlisted bidders when the tenders closed.
- * After the Deed of Agreement was signed in December 1988, major changes were made to the proposed development without any extra money being sought by the Government from the developer.
- * Yet these changes included:
 - an increase in the development's net floor area from 124,400 square metres to 142,600 square metres,

- an increase in the number of private main births from 30 to 105,
 - the construction of 24 townhouses on the Towns Place site,
 - an increase in the number of residential apartments from 124 to 211,
 - zoning conversions to allow a hotel to be built,
 - the deletion of a backpackers hostel and its replacement with an office block.
- * A firm was appointed to conduct the review of the changes to the Development Application. But it was at the same time employed by C.R.I. to do work on the Walsh Bay project.
- * The Minister for Transport was so embarrassed he wrote to the Deputy Premier requesting that the Department of State Development take over the control of the development and that the MSB be allowed to withdraw.

The first point is that it does not mention Mr Murray or refer to him at all except inferentially in the last paragraph. The second is that, apart possibly from one matter, what Mr Carr said was accurate. The MSB files did disclose all the matters referred to in the statement except that the Minister for Transport took the action that he did (which is correctly recorded) because he was "so embarrassed". I do not know whether any Minister was embarrassed or not. It is not of the slightest consequence.

The third point is that standing alone the statement could not possibly support any claim of defamation. So it is put that by releasing this press statement Mr Carr re-published outside the confines of the House and its protection the speech which he had earlier made. That is, it became necessary to subsume into it the parliamentary speech, assuming, without deciding, that given no privileged occasion, that speech would be slanderous.

The effort fails. If the reader of a speech in Parliament cannot afterwards refer to the important topic that he raised in his speech and point to some of the matters of concern that he dealt with, and do so in a way that is accurate and not critical of any person, without running the risk of being

sued or charged, then I am not going to be the first to say so. And none of the authorities to which reference was made remotely suggest such a proposition.

To the ordinary reader of the press statement, the inference to be drawn from it is in fact quite inaccurate. It would appear to sheet home the whole of the serious questions there raised to the Minister for Transport. On its face it suggests that all the problems arose before the DSD took over and that the Minister up to then involved was so embarrassed about all these things that he sought to withdraw himself and the MSB from the whole process.

If the intention to attack or embarrass members of a different political party can be used as a basis for a charge of criminal defamation, then there will be a lot less heard from politicians outside Parliament.

Claim of Criminal Defamation - Radio Broadcast

The transcript of the interview which Mr Carr had with a radio announcer at 7.10am on 1 March 1990, covers about four pages of typing. It need not be set out in full.

The conversation was, in effect, limited to two matters. They were (i) that significant changes were made to the scheme of the selected developer after the development agreement had been signed, which were apparently calculated to bring in a lot more money to the developer without any additional benefit to the Government, and (ii) the firm chosen by the Government to assess the value of the changes, and hence any potential additional return to the Government, had, at the time, been advising the developer in relation to the very same development. The following passage is taken from the interview.

JONES Why would someone want to give the inside running to one firm as opposed to another. Why would someone coming to you, (A) say, they wanted to change the original proposal. Would it be because it wasn't financially viable as it stood or what?

CARR It don't know, I honestly don't know the answer to that.

JONES What motive would there be for say Mr Murray to do what you're saying he's done?

CARR I don't know Alan. I can't ...

JONES Are you sure of your sources?

CARR Yes we've seen the file, we've seen the file and we had to be sure of that, sure of those procedures before ...

JONES You've seen the file on the Walsh Bay Redevelopment?

CARR Absolutely. I've said that in Parliament. My second sentence in my speech in Parliament yesterday was that what the Opposition is raising in this House is based on the MSB file ...

JONES So that's the official file?

CARR Yes

JONES A copy of it or the file?

CARR A copy of it, copy of it, the photocopy of the file.

JONES Nick Greiner said that you have been fed a line by a disgruntled MSB employee, Maritime Services Board employee?

There is another paragraph that might be quoted, namely:

CARR We're certainly saying at this stage it raises questions that have got to be answered. After that final Deed of Agreement was signed in December 1985, changes conservatively estimated to be worth \$20 million were made to the deal without an additional cent flowing to the taxpayer. Now the Government can say, o.k. these changes were referred to Horwath and Horwath, a firm of accountants which looks at these matters. According to the MSB file, that firm happened to be employed during this process by CRI, the successful company. Now look, on the bottom line anyone's got to say this matter deserves investigation. That is why we raised it in the Parliament. It is why we as in Opposition were duty bound in the interest of good government .

The particular topics of concern were stated. A politician must be able to say that he also raised them in Parliament without thereby losing the immunity that goes with Parliamentary proceedings.

The complaint which seems to be levelled at Mr Carr over this interview, and which somehow, it is said, exposes him to the possibility of a charge of criminal defamation, is his reference to having seen a copy of the official MSB file.

Of course this reference to the file can be elevated to the status of an untruth if you want to take it out of context. Taken in context it is clear that Mr Carr was being pressed about the authenticity of his information - was he merely being "fed a line" by someone who may have had an axe to grind? "No," he said, "the information comes from the file, we've seen it." That is perfectly correct. The source of this material was the MSB file where the information had been documented, and it had been seen - Mr Hawker had seen Miss McIntyre referring to documents throughout the interview with him and had no reason to suppose that what she told him was not all recorded there in some way or another. In addition there were copies of the minutes of board meetings. So that the reference to the official file, taken in context, is no more than a way of indicating, when Mr Carr was asked if he was sure of his sources, that he was, and why he was. How it can be suggested that it supports the presence of an intention to injure remains a mystery.

There is no substance in the submission.

Claim of Criminal Defamation - TV Broadcast

Mr Carr was interviewed on 14 June 1990, after he left the ICAC building, following his appearance to give evidence before the Commission. There was a television broadcast program some time later the same day, in which Mr Carr is shown, and is recorded as having said this:

What we're saying is we stand very much by the serious and substantial matters we raised in Parliament.

A transcript of the whole of what was said in the broadcast is in evidence. Most of it was by the newsreader and reporter.

There is nothing to suggest that Mr Carr knew what else was going to be said, where his small segment was going to be slotted in, nor that he

approved or endorsed anything else in any way. It was not suggested that in those circumstances it can be used in any way to his detriment.

I therefore confine myself to the words spoken in the above passage. It was submitted that this statement subsumes into it the speech made by Mr Carr in Parliament on 28 February 1990, and is therefore a republication of that speech; that speech, if given without the privilege of Parliament it is said, would subject Mr Carr to the possibility of a charge for the offence of criminal defamation; hence this Commission should consider it, so the argument runs, in relation to corrupt conduct and a statement pursuant to s.74(5).

It is simply not necessary to deal with other than the first part of the submission. What had been raised in Parliament had been raised some three and a half months before. The matters raised were serious and substantial enough to cause them to be referred to this Commission. The statement here under review was made contemporaneously with Mr Carr's evidence to the Commission about them. There is no authority to which I have been referred or of which I am aware that gives any support to a proposition that a statement such as this, made when, where and why it was, could amount to a republication. It offends common sense.

Mr Carr was a person substantially and directly interested in the subject-matter of the investigation, pursuant to s.74(5) of the Act. The statement under that subsection is that there is no evidence to warrant consideration of the doing of any of the things there specified.

Claim of Criminal Defamation - Miss McIntyre

It was alleged that by her disclosures to Mr Hawker that Miss McIntyre engaged in conduct that may have constituted corrupt conduct because it amounted to criminal defamation of Mr Murray.

As an alternative, or in addition, it is submitted that Miss McIntyre was engaged in conspiracy to commit criminal defamation of Mr Murray or otherwise wrongly to injure him. The co-conspirators were said to be Mr MacDonald and/or Mr Hawker and/or Mr Carr or perhaps some combination of these.

It will be remembered that:

- (i) Miss McIntyre believed that there had been corruption

or funny business of some kind in relation to the Walsh Bay project;

- (ii) I did not accept her denials in evidence to the Commission that she harboured any such beliefs;
- (iii) she had agreed to talk to Mr Hawker after a phone call from Mr MacDonald;
- (iv) she knew that what she had said to Mr Hawker would be used in Parliament, probably in a speech; and
- (v) it would be so used by the Leader of the Opposition.

To this can be added the inference that she knew that her statement implicated Mr Murray in the possible corruption or funny business - among other things she had been told as much by Mr Kortlang and had passed this on to Mr Hawker.

The matter for decision in respect of this aspect is whether Miss McIntyre had any wrongful intent vis a vis Mr Murray in saying what she did to Mr Hawker, call it malice, intent to injure, what you will. One submission in support of the presence of such a wrongful state of mind can be put out of the way immediately. It was that if I did not accept what Miss McIntyre said about her belief that there was no corruption, this could be used as evidence of malice.

The submission has no substance. The fact that one person, who has to make a decision whether there is evidence to support the existence of all the elements of an offence, including the presence in X at the relevant time of a belief pertaining to certain matters, does not accept, at some other time, X's denial of holding the belief, is of no probative value at all. In other words the non-acceptance of a denial by X that he held a belief goes no way at all towards proving that he did hold it. Even less would it be permissible to suggest to someone else, who may have to consider whether there is evidence to support all the elements of an offence, that your rejection of X's denial that he held the belief is evidence that he did hold it.

There is no evidence of malice or other necessary wrongful state of mind existing in Miss McIntyre at the relevant time. It is quite clear what happened. When Miss McIntyre left the MSB in December 1989 she carried away with her a conviction that things had gone awfully wrong in

relation to Walsh Bay. Whatever may have been her belief as to what lay behind this, she had a sheaf of documents which she believed supported this conviction. She knew that in relation to the project the MSB had been virtually pushed aside by the DSD, and that the latter was responsible for the mess that she believed the thing had got into. In her belief there were a lot of things that smelt very badly. It was never suggested to her, and she never asserted, that she believed Mr Murray was responsible although she had been told and knew that he was involved in some of the matters. It would be only natural to assume that the legacy of the clash of personalities, in respect of which she had seemed to come out on the losing side, was still with her. All these and more were with her when she left.

When the opportunity was given to Miss McIntyre to unburden herself, she took it. The rush of information from her, which is how the interview with Mr Hawker commenced, bears witness to her pent-up feelings. It was probably all, or nearly all, confidential information that she disclosed. Whether Miss McIntyre was justified in disclosing it is not a matter which has to be decided here. For reasons given elsewhere, unless her conduct in divulging it could constitute or involve a criminal offence then I am not prepared further to comment on it.

The criminal aspect has no legs. The evidence discloses nothing except a desire on Miss McIntyre's part to bring it all out into the open, nastiness and all. Probably Miss McIntyre thought Mr Murray was associated with it - she had been told by Mr Kortlang of at least one occasion that might suggest just that. Miss McIntyre was concerned to tell Mr Hawker about the things she saw as mistakes or wrong or suspicious. If Mr Murray's name was involved in any aspect, so be it. So were the names of others. The point is that her disclosures to Mr Hawker were not aimed at Mr Murray; they were aimed at what had happened, supported by the documents. Nothing she said about Mr Murray was not so supported. The intention was not to cause him injury, it was to take the lid off the whole affair. If Mr Carr aimed his shafts at Mr Murray this is no evidence of Miss McIntyre's intentions.

The route taken for disclosures of what Miss McIntyre believed should be disclosed is no evidence of any wrongful intent. She was invited to use the Parliamentary path, and accepted, believing that by doing so her name would not be brought out into the open. It was not because it was a way of getting at Mr Murray.

There is no evidence of malice or wrongful intent vis a vis Mr Murray sufficient to support any criminal offence.

During submissions at the conclusion of the hearing it was claimed that conduct amounting to criminal defamation arose out of references to Mr Kortlang made in Miss McIntyre's disclosures to Mr Hawker.

The evidence would not support any conclusion that Miss McIntyre was motivated by malice, that she had any intent to cause him serious harm, or that she had any knowledge of a probability that her disclosures to Mr Hawker would cause him serious harm. He was one of the participants in the Walsh Bay debacle; she recounted how he was involved and her theories as to why; she had obviously been turning them over in her mind. Her motive was to expose the Walsh Bay affair, not to get at Mr Kortlang. The latter, as a suggested motive for giving her version of his part in the event and how they had been dealt with, was never suggested to her.

It is probable that a defence of qualified privilege would be available to Miss McIntyre if she had to meet any charge of criminal defamation. It is not necessary to decide.

A statement pursuant to s.74(5) has already been made in relation to Miss McIntyre. The allegations of criminal conduct do not require it to be altered in any way.

Claim of Criminal Defamation - Mr MacDonald

How Mr MacDonald came to talk to Mr Carr about Walsh Bay has been described in Chapter 7. What was discussed about Walsh Bay is recorded by Mr Carr in his evidence and in E226. It was really confined to the additional developments that were "squeezed in", the Horwath & Horwath involvement and the Kortlang connection. There was no mention of Mr Murray.

Mr MacDonald certainly unburdened himself about what he saw as deficiencies in Government performance. So far as Walsh Bay was concerned he suggested that Miss McIntyre could do this part better than he could. There is no evidence at all to support any finding of malice or other wrongful intention vis a vis Mr Murray.

There is no need to add to the statement already made pursuant to s.74(5) of the Act by reason of any allegation of criminal behaviour.

Claim of Criminal Defamation - Mr Hawker

Mr Hawker interviewed Miss McIntyre, obtained the material about Walsh Bay from her that he did, and turned it into a draft speech for Mr Carr. This is his job, what he is paid to do. The draft also made some use of material from the minutes of the MSB board meetings obtained via Mr Baueris.

Mr Carr's speech as delivered in Parliament is virtually a reproduction of the last of the three drafts prepared by Mr Hawker (E258(c)). For ease of reference it is hereafter referred to as "the speech".

The speech attacks Mr Murray, there is no doubt about that. It suggests that Mr Murray himself was involved with a number of occurrences during the course of the project that warrant his being called upon to give an explanation. It does not allege corrupt conduct in those words, but it does not seek to disguise that the smell of corruption hangs over the project - to be dispelled by the Deputy Premier if he can. It concluded:

The challenge for the Deputy Premier, Minister for State Development and Minister for Public Works is clear: release the files; explain the whole process, especially the fact that \$20 million worth of changes to the proposal earned the taxpayer nothing; explain the choice of a review firm that was engaged by the tenderer on other aspects of the work; justify yet another loss to the taxpayer under the ground rules that apply in New South Wales Inc. - that is, New South Wales Incompetent. As the Liberal Party jingle says, there are questions that have to be answered. And if the answer is not Liberal, it is National.

There is no doubt that Mr Murray thought that corruption was in the air. On the same day, 28 February 1990, he sent the matter off to the ICAC (see Appendix 1).

Each draft of the speech prepared by Mr Hawker was discussed with Mr Carr, and amendments made. Presumably the publication alleged in relation to any offence of criminal defamation by Mr Hawker is the publication to Mr Carr or by Mr Carr in Parliament.

Leaving on one side some other difficulties, the claims that there was criminal defamation by Mr Hawker fails at the outset because there is no

evidence of malice or other wrongful state of mind. It is said the decision of the Court of Criminal Appeal (NSW) in *R v Grassby* (1988) 15 NSWLR 109 is authority for a proposition that publication of a statement to a member of Parliament with the object of it being made into or incorporated in a speech in the House with the intention of causing serious harm to a person, takes the publication out of the protection of qualified privilege and enables a charge of criminal defamation to be brought. That may be so, but it has little or nothing to do with the submission made here that Mr Hawker, by his construction of the speech for Mr Carr and its subsequent publication, is liable to be the subject of proceedings for criminal defamation.

Miss McIntyre was strongly critical of the DSD and all its works, as well as persons connected or associated with it. She inferred corruption. She had gone to the Opposition instead of the ICAC (T2459). Mr Murray was the Minister concerned; as Minister he had, naturally enough, engaged himself in the activities of his Department in relation to Walsh Bay in various ways; some of the activities were, on the face of them suspicious, and indeed so they have seemed to this Commission, with ample justification for suspicion; he had been involved in one event which, on the face of it, was very questionable, even though, it was discovered months later, the event never occurred; this was his alleged meeting with Mr Wills asserted by Mr Kortlang. He was the person to answer in Parliament.

There is no doubt that the facts given to Mr Hawker and to at least one other person in the service of the Leader of the Opposition, as well as to Mr Carr himself, were turned into a very strong attack upon Mr Murray. That alone could not subject Mr Hawker to anything in the nature of a claim of wrongdoing. There was undoubtedly an intention to attack the Leader of the Opposition; that means nothing; if a speech writer for a Member of Parliament is to be exposed to some serious consequence for displaying an intention to attack some person on the other side of the House upon material that he had obtained, then it is not going to be me who says so. The attack made use of derogatory language. I express no view about what language I might think is appropriate to be used in Parliament. The attack inferred that the Minister was associated, involved, in any corruption that might have gone on. If there was in fact any corruption associated with the various suspicious events that had been uncovered, then the Minister would have been involved. As it turns out the suspicious circumstances were not the result of corrupt conduct, and Mr Murray was not involved.

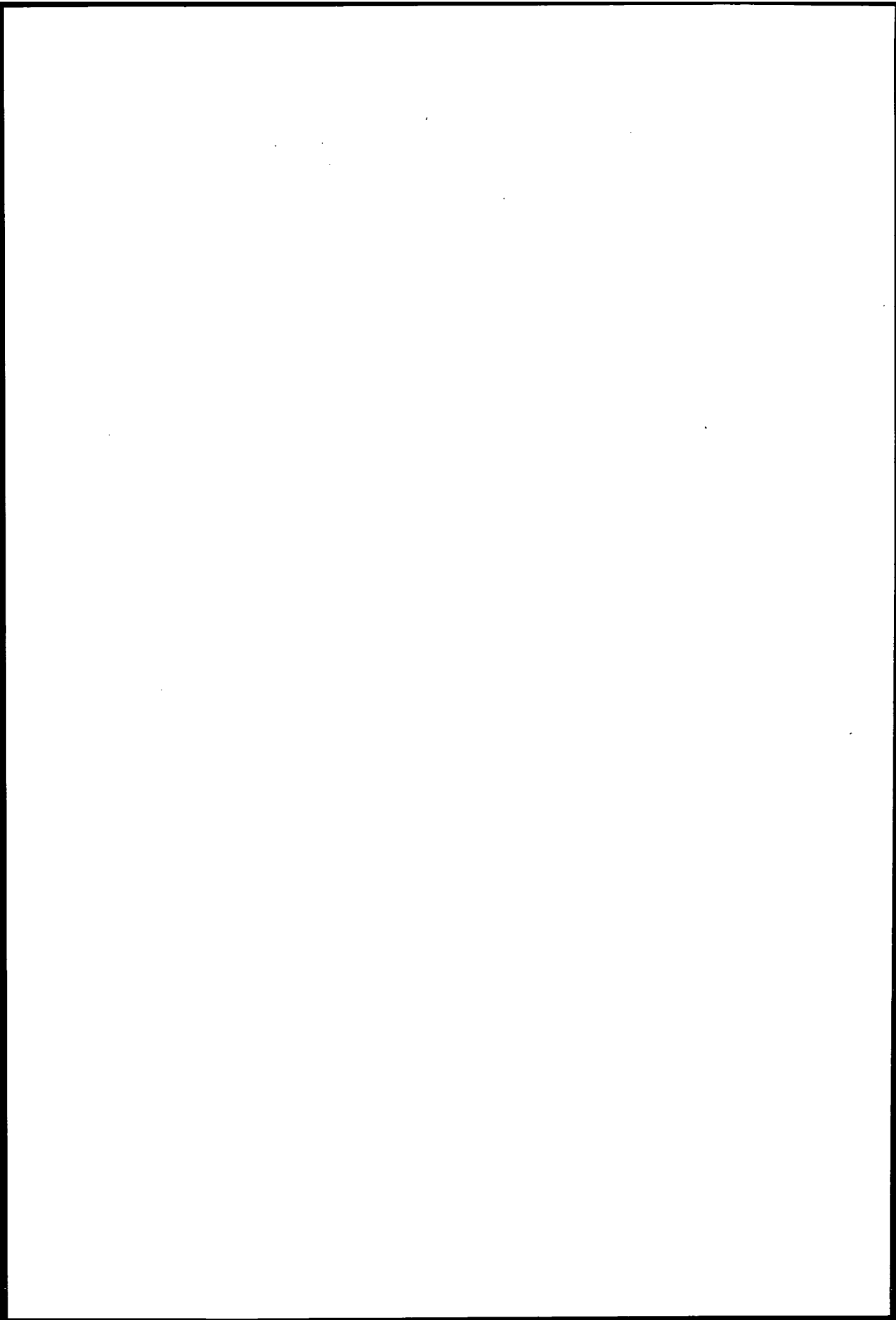
It is probably true to say that the intention of Mr Hawker, as an employee of the Leader of the Opposition, was to cause as much harm in one sense as he could to the Deputy Premier, the more serious the better. But this was in a political sense. Any intention associated with the attack that was mounted was related to a Minister, to exact his explanations as a Minister about things that had gone on in the Department for which he was responsible, matters which had hallmarks of wrongful behaviour and which had come from very responsible and apparently reliable sources.

It can be added that it was not suggested that there was any personal animus on the part of Mr Hawker to cause serious injury to Mr Murray. The circumstances of the preparation of the speech and the matters to which it was intended to draw public attention would make it at least the subject of qualified privilege.

Mr Hawker was an employee of Mr Carr. Mr Carr is a public official by definition in the Act. That in turn makes Mr Hawker a public official - see definition "public official" in sub-clause (m) of the definition in s.3 of the Act.

Mr Hawker was the recipient of what was obviously confidential information. There is nothing to suggest that his conduct constituted or involved a disciplinary offence. There is nothing to suggest that his conduct, constituted or involved reasonable grounds for dismissal, dispensation or termination of his services as a public official.

Mr Hawker was a person substantially and directly interested in the subject-matter of the investigation. The statement pursuant to s.74(5) of the Act is that there is no evidence warranting consideration of the doing of any of the things specified in that subsection.



It is my belief that these files have been "leaked" to the Opposition in order to pursue a personal vendetta, and not in the pursuit, albeit misguided of the public interest.

The fact of the Independent Review Committee's role was well known to the relevant officials in the MSB, yet another reason for concern at the motives of this "leak."

If the source of this "leak" was of the view that there was any impropriety in this matter, then the appropriate course of action was to make a complaint to yourself. I consider it to be significant that, instead of taking this step, he or she chose to "leak" the files to the Opposition.

Given the very serious nature of these allegations and the questionable conduct of some public official, apparently from within the MSB, I believe that the ICAC should also inquire into the circumstances of this "leak."

Yours sincerely,



WAL MURRAY, MP
DEPUTY PREMIER
Minister for State Development
&
Minister for Public Works

Appendix Two

386 ASSEMBLY 28 February, 1990

DEPUTY PREMIER, MINISTER FOR STATE DEVELOPMENT AND MINISTER FOR PUBLIC WORKS

Suspension of Standing Orders

Mr CARR (Maroubra), Leader of the Opposition [2.21]: I move:

That so much of the standing orders be suspended as would preclude the consideration forthwith of the following motion:

That this House condemns the Deputy Premier for interfering with the proper tendering procedures in respect of the Walsh Bay redevelopment.

Suspension of standing orders will allow me to show how the Deputy Premier, Minister for State Development and Minister for Public Works and the Minister for Local Government and Minister for Planning turned upside down the tendering process for the \$73.5 million Walsh Bay redevelopment. The debate will be based on the Maritime Services Board files on this matter. The debate will show that the Deputy Premier spent a great deal of 1988 "sitting at the dock of the bay, watching the tide roll away". But, unlike Otis Redding, the Deputy Premier was not "wasting time". In fact, he was so busy that this deserves another chapter in those long awaited Wal Murray memoirs entitled "Stop stuffing around".

[*Interruption*]

Mr SPEAKER: Order! I call the Minister for Corrective Services to order. I call the honourable member for Ryde to order.

Mr CARR: A debate will show how, according to a senior public servant, the Deputy Premier leaked confidential tender information to the developer CRI Limited, which subsequently won the bid for Walsh Bay; how this developer won the tender despite being the lowest bidder when tenders were closed by the Maritime Services Board; that after the final deed of agreement was signed in December 1988 major changes, conservatively estimated to be worth \$20 million to the company, were implemented without an additional cent going to the public; that the Minister for Transport was so embarrassed by the deal in December 1988 that he wrote to the Deputy Premier requesting no further involvement by the Maritime Services Board; that the firm appointed by the Department of State Development to review these changes to CRI's development application—to give an independent assessment—was at that time employed by CRI to do work on the same development. It was also the same firm that Ian Kortlang used a few months before to launder the books of the notorious Community Polling organisation. A debate will allow the Premier to explain whether he discussed the CRI tender for the Walsh Bay redevelopment when he met CRI chairman, Peter Wills, in November 1988, as revealed in the recent court case involving CRI and Sheraton; and whether, in other words, the Mad Max of Macquarie Street is, in Mr Wills' words, "the man in Macquarie Street".

Standing orders should be suspended so that the House might hear how political interference dogged this development from 18th July, 1988, when the Maritime Services Board assessment group recommended that Ipoh Garden (Australia) Pty Limited be given preferred development status for Walsh Bay. A debate will show that, despite bidding approximately \$25 million less than Ipoh Gardens for the development rights, CRI was eventually granted the

redevelopment. The MSB assessment of the short-listed tenderers recommended Ipoh Garden over three other companies—Com Realty, White Industries and CRI Limited. However, the choice of Ipoh Garden did not suit the Deputy Premier. He immediately ordered a review of the project by a committee. That committee managed to find that CRI and Ipoh had made roughly equivalent bids, despite Ipoh's having bid \$25 million more. The Deputy Premier, with his departmental head, Ian Kortlang, determined that a second so-called independent review should take place. Out of all the consultants, accountants and finance advisers available, the company chosen to undertake this objective assessment was Horwath and Horwath, the same firm which had been selected by Mr Kortlang to audit the notorious Community Polling organisation. Horwath and Horwath were appointed on 8th August, 1988. Their review was to be discussed at a joint meeting of the MSB—

Mr Dowd: On a point of order. Most of the four minutes of diatribe from the Leader of the Opposition has dealt with the content of the motion and material in support of the motion. In the event that the House grants suspension, that is a proper matter to discuss. Debate on suspension of standing orders is much more confined than it was under the previous urgency rules. There is a limit to how much can be said on the subject of the motion during this preliminary debate, which is concerned with the suspension of standing orders.

Mr SPEAKER: Order! I have listened with great care to what the Leader of the Opposition has said. It is my opinion that so far he is within the parameters relating to debate on the suspension of standing orders.

Mr CARR: The Opposition has sighted file notes that show that in the intervening week the Deputy Premier and Ian Kortlang were at a cocktail party with Mr Wills. According to the file note, prepared by a senior public servant, they gave details of the unpublished Horwath and Horwath report to Mr Wills or, at the very least, they told Mr Wills that CRI was very close to winning the tender and that the only other competitor was Ipoh. A debate will allow the Deputy Premier to tell the House exactly what he and Kortlang told Wills. On 11th August officers of the Maritime Services Board complained to the Director-General of the Cabinet Office, Gary Sturgess, about these procedures. His response was to excuse the Deputy Premier and Kortlang and company because they were "just learning". They were learning remarkably quickly. A debate will allow the Premier to tell the House the exact details of Kortlang's confession to Sturgess concerning the leak. Suspension of standing orders will show that changes made to the tender include an increase in the developer's net floor area of 14.5 per cent; an increase in the number of private marina berths from 30 to 105; the construction of 24 town houses on the Towns Place site; an increase in the number of residential apartments from 125 to 211; the conversion of the zoning of wharf 6-7 from office-retail to hotel, in conjunction with wharf 8-9, and an extra floor within the wharf structure; and, finally, the deletion of the 184-bed backpackers hostel and its replacement with an office block.

These changes involved multimillion dollar additions, estimated to be worth up to \$20 million, and not one extra cent demanded of the development company. Suspension of standing orders will allow the Deputy Premier to tell the House whether he or Kortlang ensured before the agreement was signed that these added extras would be included. There has to be an explanation for the sudden jump from about \$30 million to \$73.5 million in the CRI bid. The transcript of Mr Wills' evidence given during cross-examination in the Sheraton case should be debated fully. For example, when asked what he spoke to the Premier about, Mr Wills replied, "The main purpose of the discussion, your Honour, was nothing to do with this project"—that is, the Sheraton project at The Rocks—"it was to do with other subjects". What was the principal topic of discussion? What did the Premier tell the developer?

When these major amendments to the development application were approved the MSB quite correctly raised the issue of further payments with the Department of State Development. Having conservatively estimated the extra value at \$20 million, the MSB met with the acting director of the Department of State Development, Mr Dick Humphry, and with other officers, on 19th June, 1989, and was told that a 14.5 per cent increase in floor space was not substantial. It was told that Horwath and Horwath would undertake a further review. The only problem was that that company was employed by CRI to work for itself on the same project. If that was not a conflict of interest for New South Wales Inc., I do not know what was. The upshot was that Horwath and Horwath, in a second so-called independent review four days later, on 23rd June, concluded that the revenue generating potential of the overall project had not increased significantly.

[Interruption]

Mr SPEAKER: Order! There is too much audible conversation in the Chamber.

Mr CARR: The report also found that, despite all the added extras, the overall value of the project to CRI may have dropped. In that case it is the first instance in history of a developer making to his development application changes that reduced the profit to the developer. The challenge for the Deputy Premier, Minister for State Development and Minister for Public Works is clear: release the files; explain the whole process, especially the fact that \$20 million worth of changes to the proposal earned the taxpayer nothing; explain the choice of a review firm that was engaged by the tenderer on other aspects of the work; justify yet another loss to the taxpayer under the ground rules that apply in New South Wales Inc.—that is, New South Wales Incompetent. As the Liberal Party jingle says, there are questions that have to be answered. And if the answer is not Liberal, it is National.

[Interruption]

Mr SPEAKER: Order! I call the honourable member for Fairfield to order. The House will come to order. I am endeavouring to state the motion so that I can call the Premier. I expect to do that in silence.

Mr GREINER (Ku-ring-gai), Premier, Treasurer and Minister for Ethnic Affairs [2.30]: When the Government assumed office in March 1988 no appropriate tendering guidelines for projects such as Walsh Bay existed in this State. There was absolutely nothing by way of an appropriate public or private set of guidelines to deal with such projects. Honourable members may have noticed how the former Labor Government dealt with them.

[*Interruption*]

Mr SPEAKER: Order! I call the honourable member for Waverley to order.

Mr GREINER: It dealt with the casino stage one and the casino stage two. That is the way in which it dealt with those sorts of proposals, which are large and complicated.

[*Interruption*]

Mr SPEAKER: Order! I call the honourable member for Rockdale to order.

[*Interruption*]

Mr SPEAKER: Order! I call the honourable member for Rockdale to order for the second time.

Mr GREINER: The honourable member for Rockdale managed to make the greatest single hash—

[*Interruption*]

Mr SPEAKER: Order! I call the honourable member for Ryde to order for the second time.

Mr GREINER: —of a public investment project in the State's history.

[*Interruption*]

Mr SPEAKER: Order! I call the honourable member for Rockdale to order for the third time.

Mr GREINER: The honourable member for Rockdale cost the people of New South Wales \$38 million, and potentially as much as \$700 million.

[*Interruption*]

Mr SPEAKER: Order! The Chair will have silence during this debate. The Leader of the Opposition was heard in relative silence. I expect the same courtesy to be extended to the Premier.

Mr GREINER: As I was saying, the honourable member for Rockdale cost the people of New South Wales exactly \$38 million in settlement of the casino site.

Mr Unsworth: On a point of order. The Premier is misleading the House. It was the Premier who gave \$38 million to George Herscu.

Mr SPEAKER: Order! The honourable member for Rockdale has been in this House long enough to know that that is not a point of order.

Mr GREINER: I can understand the honourable member for Rockdale being a little agitated about that, because the real risk to the people of New South Wales in his twice botching—not once, but twice—the casino tender to the order of \$700 million. That puts the honourable member for Rockdale in the same class as John Cain. The honourable member really has something to go on with. I come back to Walsh Bay. That project was initiated by the former Government, which short-listed four development consortiums, made up of Ipoh Garden (Australia) Pty Limited, CRI Limited, Comrealty Limited, and White Industries Limited. The former Government invited those companies to submit to the Maritime Services Board tenders for a scheme that would ensure the redevelopment of the site for residential, commercial and tourist purposes. The costs of the project are, and were, estimated to be in excess of half a billion dollars.

The question of how such projects should be evaluated came to the Government early on, and it was determined explicitly, because of the difficult nature of the project and the difficulty of comparing tenders on an apples and apples basis, that an independent committee of review be commissioned under the chairmanship of Mr Allan Moyes, the chairman of IBM Australia Limited. The Leader of the Opposition is now saying that Mr Moyes is incapable, or dishonest, and that the other two members of the so-called committee of angels—I do not recall the other two members, but I can obtain the names—had totally impeccable credentials, both in their business backgrounds and their reputations for honesty. Thus, for the very first time with any project such as this in New South Wales, there was a totally independent, arm's-length committee. That committee was able to review the entire process from the time this Government came to office until the determination of the tender.

[*Interruption*]

Mr SPEAKER: Order! I call the honourable member for Port Stephens to order.

Mr GREINER: Let it be perfectly clear that it is being asserted that Allan Moyes is either dishonest or a crook. The people of New South Wales know that neither of those assertions is remotely near the truth.

[*Interruption*]

Mr SPEAKER: Order! I call the Deputy Leader of the Opposition to order.

[*Interruption*]

Mr SPEAKER: Order! I call the honourable member for Drummoyne to order.

Mr GREINER: Control of the project was moved, appropriately, from the Maritime Services Board to the Department of State Development. The latter department was responsible for the commissioning of the independent

review committee. It went through each and every stage. It made its own decisions on who provided the expert advice. In the course of the negotiations which that independent—I emphasise the word independent—review committee was involved in, it increased the value of the project to the Government by some \$20 million. The Leader of the Opposition has been fed a lie by some people in the Maritime Services Board. Members in opposition usually say that they have leaked documents. I used to know about that.

[*Interruption*]

Mr SPEAKER: Order! I call the honourable member for Wentworthville to order.

Mr GREINER: It is clear that the matter was dealt with entirely appropriately to maximise the financial return from the project to the people of New South Wales—

[*Interruption*]

Mr SPEAKER: Order! I call the Leader of the Opposition to order.

Mr GREINER: —and in a way that was environmentally suitable. One would have thought that the Leader of the Opposition, with his previous interest in heritage matters, would have recognised that one consideration was clearly the nature of the project in this part of the central business district of Sydney, which was remarkably historic and, in heritage terms, sensitive; an area that was put out to redevelopment by the previous Government.

[*Interruption*]

Mr GREINER: I will come to Horwath and Horwath. The suggestion is that Horwath and Horwath, one of the eight big accounting firms, somehow is crook too.

[*Interruption*]

Mr SPEAKER: Order! I call the Leader of the Opposition to order for the second time.

Mr GREINER: The Leader of the Opposition is trying to impugn the professional integrity of Horwath and Horwath. On any basis, that firm is one of the leading firms engaged in tourism and development.

[*Interruption*]

Mr SPEAKER: Order! I call the honourable member for Ashfield to order.

Mr GREINER: The guts of the case put by the Leader of the Opposition is that Mr Moyes and a series of other captains of industry have been somehow totally delinquent and incapable and have really mucked up all these things. The Leader of the Opposition then suggested that Horwath and Horwath is a firm of no professional integrity or capacity, a firm that has deliberately done the wrong thing.

Mr Carr: I am not saying that at all.

Mr GREINER: Oh, the honourable gentleman is not saying that. I am sure that the firm has done the right thing, as have the committee of angels and the Department of State Development. There is absolutely no question that the matter was dealt with as well as it could be. It was dealt with in a far more independent manner at arm's-length, than was any project in the time that the Labor Party was in office in New South Wales.

[Interruption]

Mr SPEAKER: Order! I call the honourable member for Wentworthville to order for the second time.

Mr GREINER: It was dealt with completely at arm's-length. There is absolutely nothing in the innuendo that has come forward. A course of action is open. Under this Government—it was not available under the previous Government—this matter can be referred to any number of authorities, not least of which is the Independent Commission Against Corruption. If there is any suggestion with any basis that the matter was not properly dealt with it is in the hands of the Leader of the Opposition, or any disgruntled people at the MSB or any other person who has any information, to put that information forward and to have the matter investigated properly. I remind the House that under the previous Labor Government that opportunity did not exist because there was not a single institution to which one could go at arm's-length to say that something was not proper, was sinister or had not been done with integrity and to ask that the matter be investigated to see whether there was a breach of appropriate standards by a Minister or a public servant. I have absolute confidence in the way the matter has been handled. I reject out of hand any suggestion that in any way the people of New South Wales get less than the best possible deal. Suspension of standing orders is denied.

[Interruption]

Mr SPEAKER: Order! I call the honourable member for Drummoyne to order for the second time.

Question—That standing orders be suspended—put.

The House divided.

Ayes, 42

Ms Allan	Mr Irwin	Mr E. T. Page
Mr Amery	Mr Knight	Mr Price
Mr Anderson	Mr Knowles	Mr Primrose
Mr A. S. Aquilina	Mr Langton	Dr Refshauge
Mr J. J. Aquilina	Mr Lovelee	Mr Rogan
Mr Carr	Mr McManus	Mr Rumble
Mr Cleary	Mr Markham	Mr Shedden
Mr Davoren	Mr Martin	Mr Unsworth
Mr Doyle	Mr Mills	Mr Walsh
Mr Face	Mr H. F. Moore	Mr Whelan
Miss Fraser	Ms Moore	
Mr Gibson	Mr J. H. Murray	
Mr Harrison	Mr Nagle	Tellers,
Mr Hatton	Mr Newman	Mr Beckroge
Mr Hunter	Ms Nori	Mr Christie

Appendix 3

COUNSEL

Client	Representatives
Walsh Bay Development	Mr T K Tobin QC Mr P Gray
Department of State Development	Mr P M Hall Mr R J H Darke Mr J B Costigan
Mr I W Kortlang	Mr A Sullivan Mr R A Dalgeish Mr L Gyles
Miss B McIntyre	Mr M Cashion Mr P Clay
Maritime Services Board	Mr M Orlov
Mr L A MacDonald	Mr T Garling Mr G R Rummery
The Hon W T J Murray	Mr R Gyles QC Mr J S Wheelhouse
Mrs R H Howard	Mr N R Carson
Mrs G Kibble	Mr M Wright
Ms S M Holliday	Mr M Wright
Mr J V Barrett	Mr P Elser
The Hon R J Carr	Mr T Robertson
Mr R B Hawker	Mr T Robertson
Mr A T Dix	Mr S Littlemore

Client**Representatives**

Ms S A Dryden

Mr Wright

Miss R Cowan

Mr J K I Rickard

Mr W A McInness

Mr C C Hodgekiss

Mr M C Ramage

Mr P Elser

Mr R N Simmons

Mr P Gray

Mr V Baueris

Mr J Curtis

Mr P Wills

Mr T K Tobin QC

Mr P Gray

Appendix 4

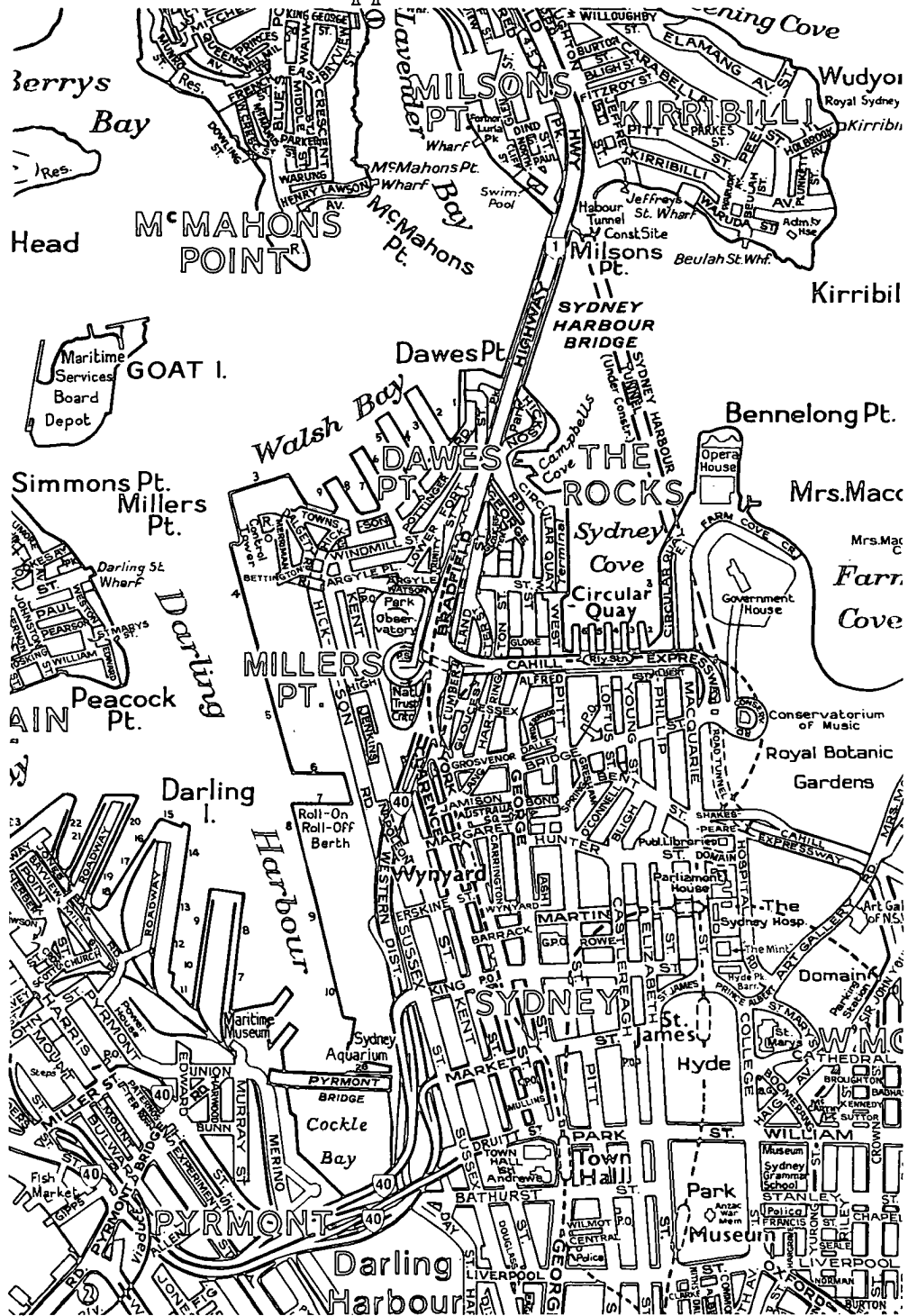
WITNESSES

Name	Date Appeared	Transcript
MacDonald, Les State Owned Corporations Implementations Unit	01/05/90 - 02/05/90 26/06/90 - 27/06/90	35-223 3009-3093
McIntyre, Beth Consultant/Student	02/05/90 - 11/05/90 04/07/90	223-892 3331-3528
Sturday, John Maritime Services Board	14/05/90 - 15/05/90	894-1042
Back, Michael Freehill Hollingdale & Page	15/05/90	1043-1108
Farmer, Brian Turner Consulting Services	16/05/90 - 17/05/90	1110-1323
Jones, Suzanne Department of State Development	18/05/90 - 22/05/90	1325A-1637
Howard, Rosemary Dept of State Development	23/05/90 04/06/90 - 05/06/90	1639-1912
Kibble, Gabrielle Dept of Planning	05/06/90 07/06/90	1913-1974
Holliday, Susan Dept of Planning	07/06/90	1976-2032

Name	Date Appeared	Transcript
Barrett, James	07/06/90	2033-2050
Ipoh Garden (Aust) Ltd	12/06/90	2099-2219
Sturgess, Gary	08/06/90	2053-2095
Cabinet Office		
Wills, Peter	13/06/90	2221-2305
CRI Limited	19/06/90	2647-2766
Carr, The Hon Robert	14/06/90	2309-2429
Leader of Opposition		
Hawker, Bruce	15/06/90	2431-2645
Senior Advisor to	18/06/90	
Leader of Opposition		
Trathen, John	20/06/90	2768-2836
Civil & Civic		
De Lapp, Stephen	25/06/90	2840-2866
Horwath & Horwath		
Bunbury, Greg	25/06/90 - 26/06/90	2869-2965
State Authorities		
Superannuation Board		
Dix, Alex	26/06/90	2966-3008
Independent Committee		
of Review		
Kortlang, Ian	27/06/90 - 28/06/90	3093-3252
Consultant		
Murray, The Hon Wal	03/07/90	3311-3326
Deputy Premier & Minister		
for State Development		
Dryden, Susan	05/07/90	3529-3558
Dept of Planning		

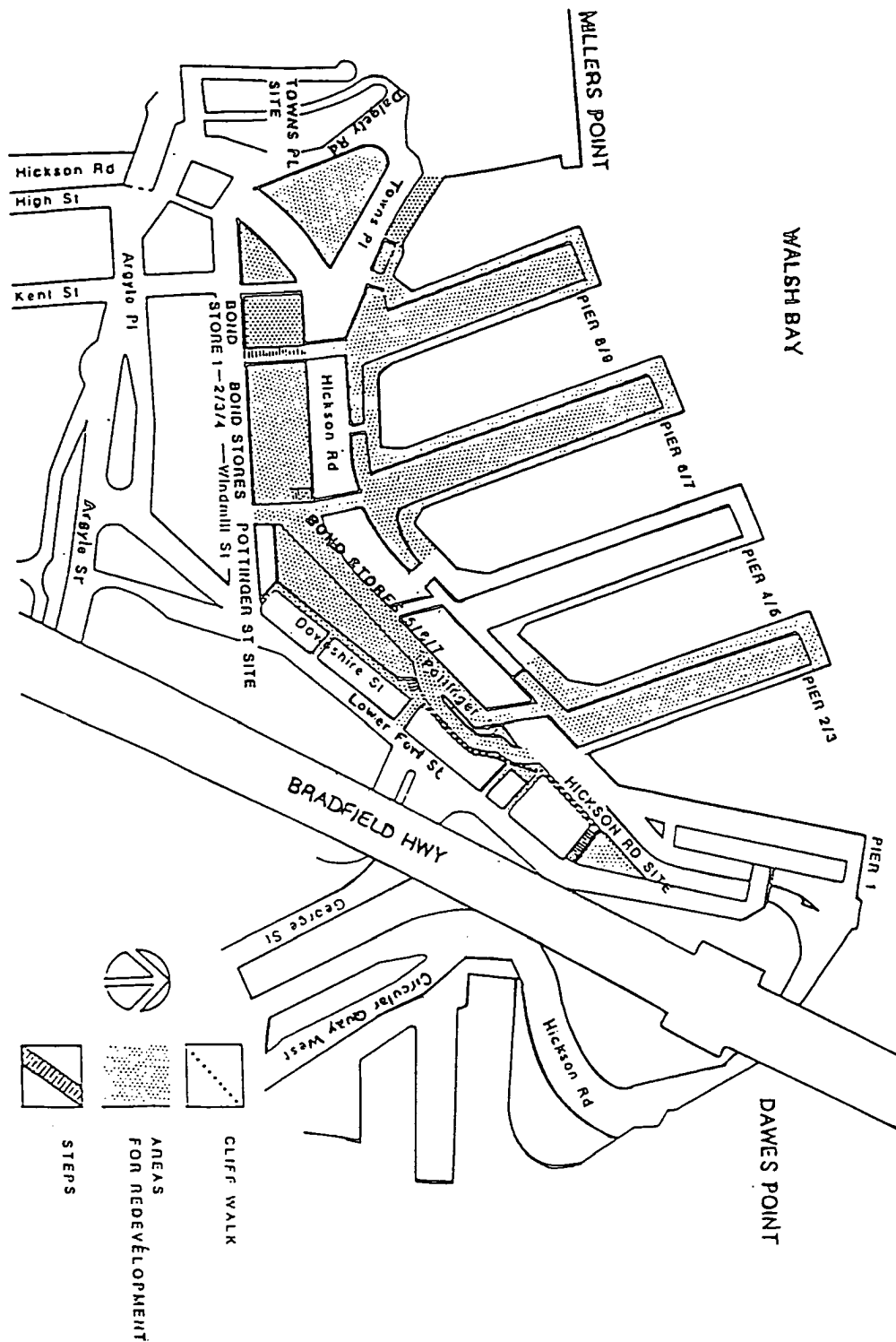
Name	Date Appeared	Transcript
Cleary, Susan Maritime Services Board	05/07/90	3559-3587
Kringas, George Architect	05/07/90	3587-3607
Cowan, Rosemary Ministry of Transport	05/07/90	3608-3617
Nayler, Trevor Municipal Officers' Association	06/07/90	3629-3678
Morison, Anthony Municipal Officers' Association	06/07/90	3680-3716
McInness, Warwick Ipoh Garden (Aust) Ltd	06/07/90	3717-3741
Brooks, Peter Architect	09/07/90	3745-3761
Simmons, Russell Architect	09/07/90	3761-3778
Irving, Robert Architectural Historian	20/07/90	3785-3800
Baueris, Victor Research Officer for State Leader of Opposition	20/07/90	3800-3823
Moyes, Alan Independent Committee of Review	20/07/90	3824-3872

Appendix Five



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Appendix Six



Appendix 7

INTERPRETATION OF ACT

Investigative Power

The relevant investigative powers of the Commission for the purposes of this inquiry are to be found in s.13, a section headed "Principal Functions", in the following words:-

13. (1) The principal functions of the Commission are as follows:-
 - (a) to investigate any circumstances implying, or any allegations, that corrupt conduct may have occurred, may be occurring or may be about to occur;
 - (b) to investigate any conduct which, in the opinion of the Commission, is or was connected with or conducive to corrupt conduct;

"Corrupt conduct" is defined in ss.8 and 9 as follows:-

- 8.(1) Corrupt conduct is:-
 - (a) any conduct of any person (whether or not a public official) that adversely affects, or that could adversely affect, either directly or indirectly, the honest or impartial exercise of official functions by any public official, any group or body of public officials or any public authority; or
 - (b) any conduct of a public official that constitutes or involves the dishonest or partial exercise of any of his or her official functions; or
 - (c) any conduct of a public official or former public official that constitutes or involves a breach of public trust; or
 - (d) any conduct of a public official or former public official that involves the misuse of information or material that he or she has acquired in the course of his or her official functions, whether or not for his or her benefit or for the benefit of any other person.

- (2) Corrupt conduct is also any conduct of any person (whether or not a public official) that adversely affects, or that could adversely affect, either directly or indirectly, the exercise of official functions by any public official, any group or body of public officials or any public authority and which involves any of the following matters:
- (a) official misconduct (including breach of trust, fraud in office, nonfeasance, misfeasance, malfeasance, oppression, extortion or imposition);
 - (b) bribery;
 - (c) blackmail;
 - (d) obtaining or offering secret commissions;
 - (e) fraud;
 - (f) theft;
 - (g) perverting the course of justice;
 - (h) embezzlement;
 - (i) election bribery;
 - (j) election funding offences;
 - (k) election fraud;
 - (l) treating;
 - (m) tax evasion;
 - (n) revenue evasion;
 - (o) currency violations;
 - (p) illegal drug dealings;
 - (q) illegal gambling;
 - (r) obtaining financial benefit by vice engaged in by others;
 - (s) bankruptcy and company violations;
 - (t) harbouring criminals;
 - (u) forgery;
 - (v) treason or other offences against the Sovereign;
 - (w) homicide or violence;
 - (x) matters of the same or a similar nature to any listed above;
 - (y) any conspiracy or attempt in relation to any of the above.

Many of these matters listed above are what could be categorised as crimes or criminal offences. Indeed, the concept of corrupt conduct including criminal offences is picked up in s.9 as follows:

- 9.(1) Despite section 8, conduct does not amount to corrupt conduct unless it could constitute or involve:
- (a) a criminal offence; or

- (b) a disciplinary offence; or
 - (c) reasonable grounds for dismissing, dispensing with the services of or otherwise terminating the services of a public official.
- (3) For the purposes of this section:

‘criminal offence’ means a criminal offence under the law of the State or under any other law relevant to the conduct in question

‘disciplinary offence’ include any misconduct, irregularity, neglect of duty, breach of discipline or other matter that constitutes or may constitute grounds for disciplinary action under any law.

The relevance of subsection (2) of s.9 will be adverted to later.

The draftsman of the Act very carefully framed the powers of the Commission in s.13 in the way he did for obvious reasons. He could not have said that the function of the Commission was to investigate corrupt conduct, as defined; that could have been putting the cart before the horse, as it were. What the Commission had to do was to look into events or claims or conduct that were or was suggestive of corrupt conduct and see if it had occurred.

The provisions of s.13(2) in no way impinge on this or affect it in any way. That subsection will be dealt with later.

Reporting Power

The relevant reporting powers for the purpose of this inquiry are to be found in s.74 as follows:-

- 74.(1) The Commission may prepare reports in relation to any matter that has been or is the subject of an investigation.
- (2) The Commission shall prepare reports in relation to a matter referred to the Commission by both Houses of Parliament, as directed by those Houses.
- (3) The Commission shall prepare reports in relation to

matters as to which the Commission has conducted a public hearing, unless the Houses of Parliament have given different directions under subsection (2).

- (4) The Commission shall furnish reports prepared under this section to the Presiding Officer of each House of Parliament.

The provisions of subsection (5) of that section will be dealt with a little later.

There can be no doubt that a Commission set up to inquire into corrupt conduct, having undertaken to investigate a particular set of circumstances relating to allegations that corrupt conduct may have occurred, can report that corrupt conduct has or has not occurred. To suggest the contrary is nonsense. Indeed the Commission would doubtless be required to report that, pursuant to its investigation, corrupt conduct has or has not occurred, is or is not occurring or as the case may be.

Power to Make Findings

To report whether corrupt conduct has occurred needs a finding as to whether it has or not. If it has, then the report may state what form the corrupt conduct has taken. This means a statement of who has done what and, if applicable, to whom. Subject to what follows this would take the form of stating that the conduct (described) of X in all the circumstances has adversely affected or could adversely affect the honest or impartial exercise of his official functions by Y, a public official, and hence enables a finding of corrupt conduct. This is merely to take one example drawn from s.8(1)(a) of the Act; similar examples of corrupt conduct could be described using the other subparagraphs.

Corrupt conduct may also consist of conduct that adversely affects the exercise of official functions by a public official which involves a criminal offence - see s.8(2) above. Should the Commission reach a conclusion that corrupt conduct of this nature has occurred, then it would have to report this also. The report might say that there is a finding of corrupt conduct because, for example: "X, by offering the money to Y in the circumstances described, attempted to bribe Y, and when Y took the money, was successful in doing so. The circumstances further establish that X forged the cheque that accompanied the offer".

In one sense this requires statements by the Commission that these

criminal offences have occurred. Any finding of corrupt conduct of whatsoever nature may require such statements of fact and law as are necessary to support it.

In layman's language statements that corrupt conduct comprised bribery and forgery such as those mentioned above, or indeed of any reprehensible conduct mentioned in s.8, could be called a finding that X was guilty of bribery or forgery or, for example, guilty of a breach of public trust. But the evidence and material that the Commission is entitled to use to reach such a conclusion, while perfectly proper in an inquiry whose object is to ascertain the truth, may not be such as could be used to reach an adverse finding in a criminal court or other tribunal which can impose penal or other sanctions. It is, therefore, important that, in a report, the Commission should avoid using any such expression, so that its use is confined to the legal meaning of "so found by the appropriate criminal or disciplinary tribunal". The Commission has no function, and no power, to find anyone guilty of anything or to punish, and should avoid any use of that word, even though its use may be appropriate in a colloquial sense.

But bearing that limitation in mind, the Commission must report its conclusions that corrupt conduct has or has not occurred, and if the former, the report may include such statements as are necessary to show why that conclusion was reached.

Section 9 of the Act (see above) in no way cuts into these powers of the Commission. As the section heading indicates, this section places a limitation on the nature of the conduct that can constitute corrupt conduct. It is not sufficient that conduct might be thought to be inappropriate or wrong or quasi-criminal. Conduct to constitute corrupt conduct must fall not only within one of the categories of s.8, but it needs also to be conduct that could constitute or involve a criminal offence, or a disciplinary offence, or reasonable grounds for dismissal etc., at the time the conduct occurred. For example, conduct of a former public official involving a breach of public trust could not amount to or enable a finding of corrupt conduct unless, at the time of its perpetration, it could have constituted or involved a disciplinary offence or reasonable grounds for dismissal of the public official, dispensing with or otherwise terminating his services. "Constitute or involve" when used in s.9 means that the conduct itself may constitute the offence or give reasonable grounds, or that an offence or behaviour that gives reasonable grounds forms part of the total conduct.

The section does no more than limit the nature of corrupt conduct. It does not bear upon what the Commission can do or say except to restrict the ambit of corrupt conduct and hence what the Commission can find to be corrupt conduct. It may require or enable the Commission to state, if that is not elsewhere made apparent in the Report, the reasons why the conduct could constitute or involve a criminal offence or a disciplinary offence or reasonable grounds for dismissal or other removal. The draftsman has very carefully placed it and described it as a limitation upon what may amount to corrupt conduct.

It is convenient here to mention subsection (2) of s.9. It provides:

- (2) It does not matter that proceedings or action for such an offence can no longer be brought or continued, or that action for such dismissal, dispensing or other termination can no longer be taken.

That subsection was no doubt designed to ensure that the statutory power of the Commission to investigate and report on corrupt conduct is not defeated by the accidental or intentional intervention of some event that prevents actual proceedings at the time of the investigation or report to be taken in relation to the conduct being inquired into. Resignation of a public official after the relevant conduct but before there is any report may remove that former public official from liability to be proceeded against for a disciplinary offence or to dismissal etc. This cannot frustrate an investigation into nor a finding of corrupt conduct provided, in the example suggested, the person was a public official at the time he engaged in the behaviour concerned, and provided it then qualified as corrupt conduct as defined in and limited by ss.8 and 9.

Limitation on Power to Make Findings

Some problems seem to have arisen in relation to the reporting power or powers to make findings arising from the words used in s.13(a) and (b) (see above). There need be no difficulties.

The Commission cannot of its own accord investigate anything unless there are before it circumstances implying or allegations that corrupt conduct may have occurred or unless it has formed an opinion that there has been conduct connected with or conducive to corrupt conduct. Those words describe the triggers for any such investigation. There is just no need and no warrant for any report about the circumstances implying that corrupt

conduct may have occurred or the conduct that caused the Commission to form an opinion. The two subparagraphs are simply descriptive of what there must be to get the Commission up and running, to give it jurisdiction, if you like, to conduct an investigation into those circumstances and/or that conduct. It is also empowered to reach a conclusion and to communicate that conclusion to the appropriate authorities. Section 13(1)(c) makes it a function of the Commission:

- (c) to communicate to appropriate authorities the results of its investigations;

The conclusion or result of an investigation is whether there was in fact any corrupt conduct. It is nonsense to suggest that the result of an investigation, sparked off by the Commission forming an opinion that certain conduct was connected with corrupt conduct, should be that there was conduct which, in the opinion of the Commission, was connected with corrupt conduct. The "result" of an investigation, which the Commission may communicate, is of course, whether there was any corrupt conduct.

There is just no need, except perhaps to indicate that it had jurisdiction to investigate, to report the circumstances implying or the allegations that corrupt conduct may have occurred.

Contents of Report

In some cases the Commission may, and in some cases it must, prepare reports. Any report made must be furnished to Parliament (s.74). Some difficulty seems to have arisen out of s.74(5). It need not. The meaning of the subsection, and the role it was intended to play in the overall functioning of the Commission is quite clear. The subsection provides:

- 74.(5) A report may include a statement of the Commission's findings as to whether there is or was any evidence or sufficient evidence warranting consideration of:-
- (a) the prosecution of a specified person for a specified offence; or
 - (b) the taking of action against a specified person for a specified disciplinary offence; or
 - (c) the taking of action against a specified public official on specified grounds, with a view to dismissing, dispensing

with the services of or otherwise terminating the services of the public official.

If the Commission has reported that there has been corrupt conduct, and stated what it consisted of, then, according to s.9 (above, q.v.) the conduct must have constituted or involved, at the time that it occurred, a criminal offence, a disciplinary offence or reasonable grounds for dismissal etc. That would make it appropriate, prima facie at least, for someone to give consideration to the question of whether criminal or other proceedings or action should be brought or taken in respect of it. That consideration should be given and any decision about it made by the authorities charged with the duty of making such a decision. That is not the Commission. The Commission has no duty or power to do so.

On the other hand, where it reports that corrupt conduct has occurred, the Commission has heard all the evidence and received all the material relating to the offence or behaviour, or, if not all, sufficient to enable the requirements of s.9 to be satisfied. It would be in a position to assist the authorities in the performance of the latter's task. But not all the evidence or material before the Commission and on which it may have relied to reach the result that it did, can necessarily be used in any subsequent proceedings or action. Firstly, the Commission is not bound by any rules of evidence, such as might bind other tribunals or bodies; for example hearsay evidence given to the Commission would not ordinarily be available in any criminal proceedings. Secondly, the Act provides certain safeguards for witnesses in its hearings who wish to claim the benefit of the protection given them, and those safeguards state that while evidence has to be given to the Commission, that evidence, if the claim is made, cannot be used in criminal or disciplinary proceedings. But the Commission would be in a position to sort out what evidence would be available for use in any subsequent proceedings, and of that, what evidence would be admissible in any such proceedings. That in turn puts the Commission in a position where it can advise the relevant authorities whether there is any evidence or sufficient evidence to warrant consideration by those authorities of the taking of any action.

That is precisely what, and all, that s.74(5) is about. The Commission may, and on occasions must, give advice by way of a statement included in its report, a statement which is its findings as to whether there is or was any evidence or sufficient evidence warranting consideration of the prosecution for a crime or the taking of other action for a disciplinary offence or with a view to dismissal. Where there are persons substantially and directly

interested in the subject matter of the investigation, or persons named where there has been a reference of a matter to the Commission by Parliament (s.74(6)), then the Commission must include such a statement in relation to those persons in its report. Where this is not the case, the Commission has a discretion as to whether it should take the course of including a statement or not.

Where you get an inquiry that has received evidence covering thousands of pages of transcript (3981 pages in the present inquiry - but that includes addresses, objections and so on) some of it hearsay, some of it admissible, some witnesses giving it under objection (making it inadmissible) and some not, or at least only parts under objection, it is understandable that the legislature would require the Commissioner who heard the matter to state his findings as to whether there is available evidence sufficient to warrant the proper authorities giving consideration to it in order to make a decision.

There may be another factor inherent in this process. Having seen and heard the witnesses, and all the evidence (whether admissible elsewhere or not) of the surrounding circumstances, the Commissioner is in a very strong position to form an opinion that, even though there may be enough admissible evidence to supply all the elements of a specified offence, that evidence does not warrant consideration by the prosecuting authorities of the bringing of proceedings. It is unnecessary to explore this further, or to make any decision about it in the present inquiry. It in no way affects how s.74(5) fits into the scheme of things.

The High Court, in the matters of *Balog v. Independent Commission Against Corruption* and *Stait v. Independent Commission Against Corruption* (unreported 28 June 1990) made the following declaration:-

... declare that the respondent is not entitled in any report pursuant to s.74 of the Independent Commission Against Corruption Act 1988 (N.S.W.) to include a statement of any finding by it that the respective appellants or either of them was or may have been guilty of a criminal offence or corrupt conduct other than a statement made pursuant to s.74(5) of that Act.

That declaration was made in proceedings which had sought clarification of the powers of the Commission in relation to the making of reports. The High Court made quite clear that which s.74(5) makes clear, namely that it is no function of the Commission, nor does the Commission have

any power, to do more in any statement made under that subsection than that which the subsection specifies. The declaration made by the High Court does not touch upon a report of the Commission or the findings that may be made in any such report except insofar as concerns the statement which, in any report, may or must be included.

In the present inquiry the Commission must prepare and furnish a report (see s.74(3) and (4) supra). It must also include a statement made pursuant to s.74(5) in its report because there are persons substantially and directly interested in the subject-matter of the investigation concerned (see s.74(6)). Any doubts about who such persons may be does not present any problem in the present matter.

Reference by both Houses of Parliament

A report must be prepared in relation to a matter referred to the Commission by both Houses of Parliament.

What may be referred is dealt with in s.13(2) of the Act. That subsection provides:-

- 13.(2) The principal functions of the Commission also include the following:
- (a) to investigate any matter referred to the Commission by both Houses of Parliament, with a view to determining:
 - (i) whether any corrupt conduct may have occurred, may be occurring or may be about to occur; or
 - (ii) whether the laws governing, or the practices or procedures of, any public authority or public official need to be changed with a view to reducing the likelihood of the occurrence of corrupt conduct;
 - (b) to develop, arrange, supervise, participate in or conduct such educational or advisory programs as may be described in a reference made to the Commission by both Houses of Parliament.

What the subsection does and was intended to do is clear. It was to enable Parliament to refer two types of matters to the Commission viz (a) something to be investigated and (b) development etc. of programs. Investigation matters that Parliament may direct the Commission to

undertake are (a) matters concerning the possible occurrence of corrupt conduct, or (b) ways of reducing the likelihood of corrupt conduct occurring. The first of these two is no more than a description of what the Parliament may do to activate the Commission to investigate corrupt conduct in the same way as in s.13(1)(a) and (b). The Commission by the latter provisions may be its own activator for exactly the same kind of pursuit.

There would just be no sense at all in a situation where the Commission can, in a matter referred to it by Parliament to investigate corrupt conduct, make a finding of corrupt conduct, and where the Commission cannot, in investigating exactly the same matter under its own powers to do so, make such a finding. The draftsman could not have intended such a result, and did not say so.

Persons Amenable to Findings of Corrupt Conduct

The Act deals with three categories of persons whose conduct may be categorised as corrupt conduct namely (i) anybody (ii) public officials and; (iii) previous public officials. To deal with them separately:

- (i) **Anybody.** Any person whose conduct adversely affects or could adversely affect the honest and impartial exercise of official functions by a public official etc (s.8(1)(a)) or, any person whose conduct involves one or more of the 25 matters specified in s.8(2) and which adversely affects or could adversely affect the exercise of the official functions by a public official etc;
- (ii) **Public official.** Any public official whose conduct constitutes or involves dishonest or impartial exercise of his official functions (s.8(1)(b)) or that constitutes or involves the misuse of information etc (s.8(1)(d)), or whose conduct comes within (i) above; and
- (iii) **Former public official.** Any previous public official whose conduct constitutes or involves a breach of public trust (s.8(1)(c)) or that involves the misuse of information etc (s.8(1)(d)), or whose conduct comes within (i) above.

However, to constitute corrupt conduct it must be something that could expose the person to the possibility of a sanction of the kind specified in s.9, except as hereafter explained.

It is not clear what width was intended to be given to the words "disciplinary offence" as defined in s.9(3). Persons other than what might be called public servants whose conduct may constitute or involve a disciplinary offence include members of the armed forces, now subject to the Uniform Disciplinary Code. They may include Federal public servants and public servants from other States of Australia. There may be others. It is not necessary to decide the matter here. The point can be flagged for future consideration if necessary.

Any public official, as defined in s.3, or former public official whose conduct did not constitute or involve a criminal offence but which fell into one of the categories of conduct described in s.8 may have a finding of corrupt conduct made in respect of it provided he was a public official at the time of the conduct and that, when it occurred, the conduct constituted or involved a disciplinary offence or reasonable grounds for dismissal or other removal (ss.8(3) and 9(2)). This may need to be slightly modified by s.8(4), which catches up conduct where the person involved was not a public official but the effect of it spills over, as it were, after he becomes one.

Disciplinary offence would include the matters dealt with under Part 5 of the Public Sector Management Act 1988, which relates to "Discipline and Conduct of Officers of the Public Service". Conduct that constitutes breaches of discipline are listed and punishments specified. Disciplinary offence as defined in s.9(3) of the Act would include those matters listed in s.66 of the Public Sector Management Act.

In the case of a former public official, s.9(2) makes it clear that the requirement that conduct could constitute or involve a disciplinary offence or reasonable grounds for dismissal etc. before it can qualify as corrupt conduct is not a requirement that needs to exist at the time of any finding. It is a requirement that those matters should have existed while the person concerned was a public official. That means, inter alia, that resignation after the conduct does not prevent a finding of corrupt conduct.

The Commission's Position

The views expressed above about the interpretation of the Act are my own. In some respects they differ from the unanimous opinions of those Justices of the High Court who sat on the two appeals mentioned earlier. In particular they differ about whether the Commission can, in a report, express findings of corrupt conduct.

Because of the nature of the appeal to the High Court and the terms of the order made by it when delivering judgment, the opinions of the Justices about whether this Commission can or cannot express such findings are what lawyers choose to call *obiter dicta*. That means that the opinions are not statements of reasons essential for the making of the order which thereby establish the law and must be followed by other courts. As *obiter dicta* the opinions are of persuasive value, but any other court dealing with the topic is required to reach its own conclusions as to what the law is, and make findings accordingly.

However, built into the court structure is a system of appeals; that enables findings of a court to be tested - up to the High Court if appropriate. By this means the law becomes authoritatively determined and stated.

The Commission is not a court; there is no appeal from its findings. It has been given very wide powers to search out and uncover corruption by public officials. Its findings may have very severe consequences. Common fairness makes it essential that it does not exceed its powers in any way, and it must be astute not to do so. Lest it do so, it is proper until permitted or directed by law to do otherwise, that the Commission should accept and adopt the opinions expressed by the High Court about what it can and cannot do.

This Report has been written on that basis.

The views expressed by me about the true interpretation of the Act, and what the findings the Commission can make, are intended to assist society which, through Parliament, has entrusted the Commission with the task of "protection of the public interest and the prevention of breaches of public trust" (s.12).

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