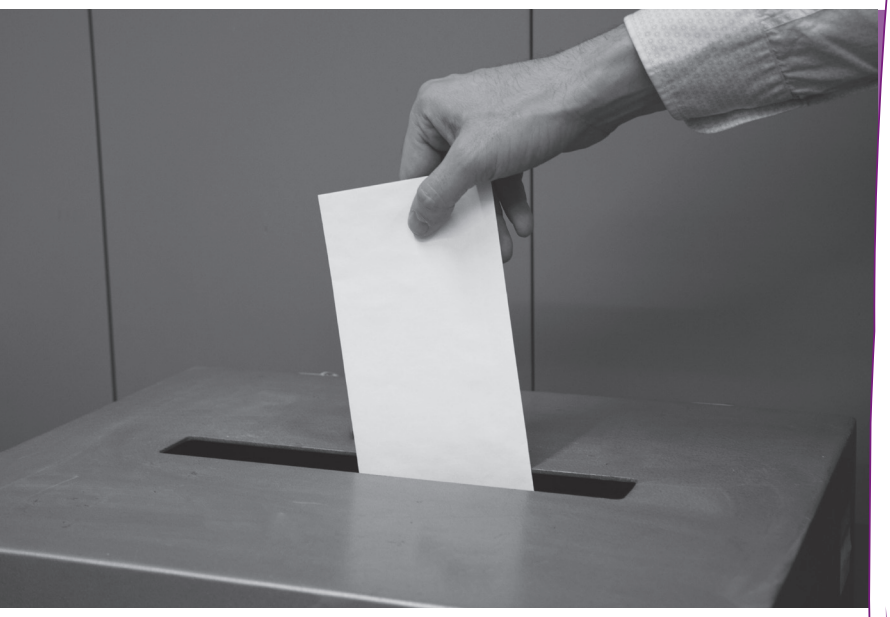

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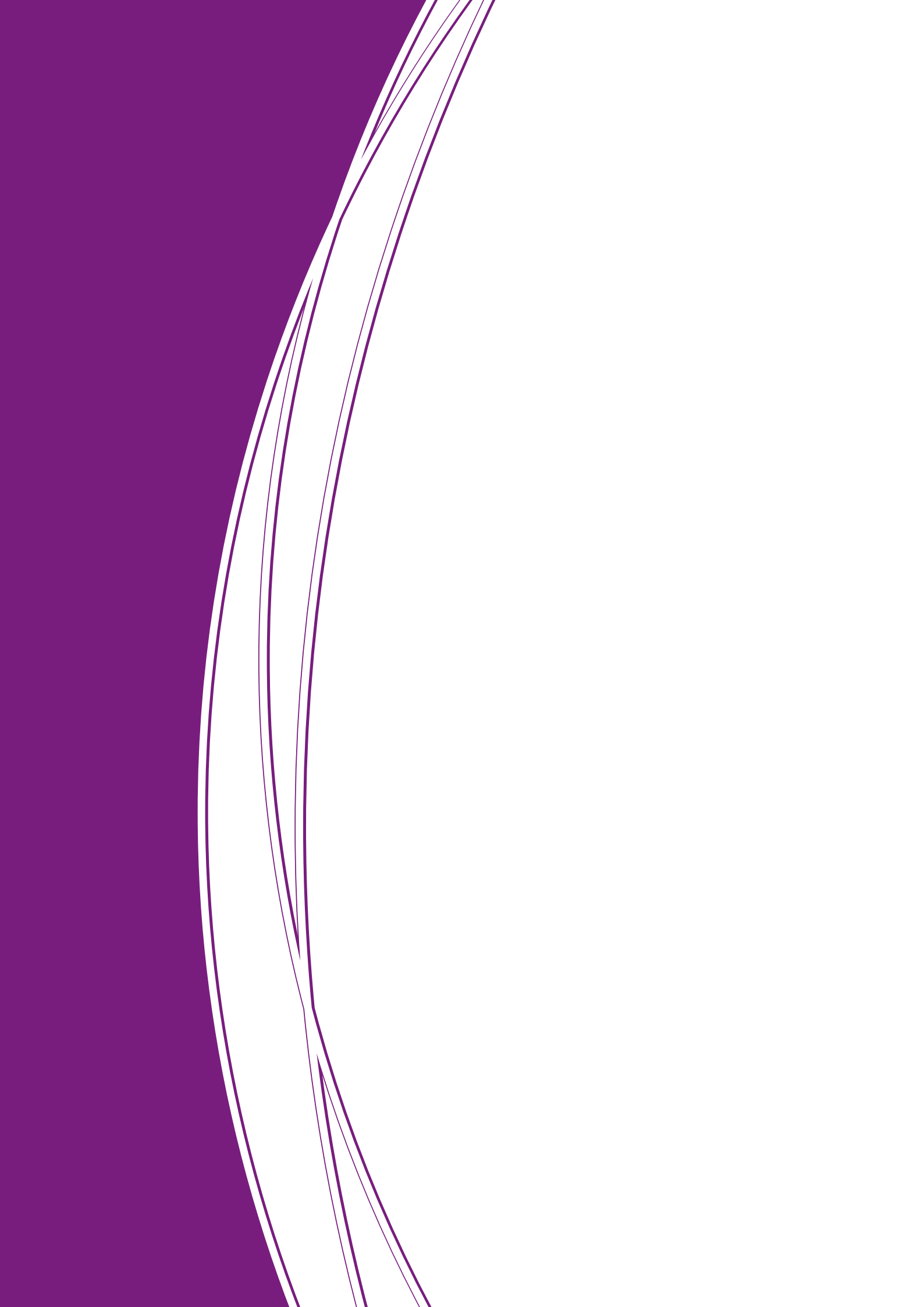
NEW SOUTH WALES

INVESTIGATION INTO NSW LIBERAL PARTY ELECTORAL FUNDING FOR THE 2011 STATE ELECTION CAMPAIGN AND OTHER MATTERS

ICAC REPORT
AUGUST 2016



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ICAC

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The Hon Shelley Hancock MLA
Speaker
Legislative Assembly
Parliament House
Sydney NSW 2000

Mr President
Madam Speaker

In accordance with s 74 of the *Independent Commission Against Corruption Act 1988* I am pleased to present the Commission's report on its investigation into NSW Liberal Party funding for the 2011 state election campaign and other matters.

I presided at the public inquiry held in aid of the investigation.

The Commission's findings and recommendations are contained in the report.

I draw your attention to the recommendation that the report be made public forthwith pursuant to 78(2) of the *Independent Commission Against Corruption Act 1988*.

Yours sincerely

The Hon Megan Latham
Commissioner

Contents

Significant persons in this report

Bandle, Anthony	Trustee, Free Enterprise Foundation
Bassett, Bart	Member of Parliament for Londonderry (26/3/11 – 6/3/15)
Baumann, Craig	Member of Parliament for Port Stephens (24/3/07 – 6/3/15)
Beaven, Robin	Former President and Treasurer, Charlestown Branch, NSW Liberal Party
Brinkmeyer, Lee Jay	Director, Elmslea Land Developments Pty Ltd
Brookes, Samantha	Wife of Andrew Cornwell
Brown, Wayne	Country Representative, NSW Liberal Party State Executive
Burrell, Shane	Director, Mezzanine Media Australia Pty Ltd
Caputo, John	Vice-President, Manly State Electoral Conference, NSW Liberal Party
Carter, Raymond	Senior Electorate Officer, Terrigal Electorate
Christensen, Philip	Former Director, Boardwalk Resources Limited
Cornwell, Andrew	Member of Parliament for Charlestown (26/3/11 – 12/8/14)
Crosby, Samuel	Senior Adviser, Office of the Minister for Ports and Waterways
De With, Rolly	Treasurer of the Newcastle Alliance
Di Girolamo, Nicholas	Former Chief Executive Officer, Australian Water Holdings Pty Ltd
Edwards, Garry	Member of Parliament for Swansea (26/3/11 – 6/3/15)
Ficarra, Marie	Member of the NSW Legislative Council (24/3/07 – 6/3/15)
Fedele, Vincenzo	Proprietor, Meshmedia
Gallacher, Michael, the Hon	Member of the NSW Legislative Council
Gazal, Nabil, Junior	Director, Gazcorp Pty Ltd
Gazal, Nicholas	Director Gazcorp Pty Ltd
Grant, Luke	Broadcaster
Grugeon, Hilton	Principal, Hunter Land Holdings Pty Ltd
Hanson, Eric	Operations Manager, Australian Decal Sales and Manufacturing Co Pty Ltd
Hartcher, Christopher	Member of Parliament for Gosford/Terrigal (19/3/88 – 6/3/15)
Henry, Aaron	Electorate Officer, Terrigal Electorate
Heufel, Vincent	Accountant
Hodges, Joshua	Campaign Assistant, Timothy Owen 2011 election campaign
Koelma, Timothy	Proprietor, Eightbyfive
Lusted, Matthew	Director, LA Commercial Pty Ltd
Maclaren-Jones, Natasha	Former President, NSW Liberal Party

McCloy, Jeffrey	Former Lord Mayor of Newcastle, Chairman of the McCloy Group
McInnes, Simon	Finance Director, NSW Liberal Party
McKay, Jodi	Member of Parliament for Newcastle (24/3/07 – 4/3/11)
McNamara, Ian	Former Adviser, office of the Premier
Merhi, Tony	Builder and property developer
Murphy, Paul	Chairman of the Newcastle Alliance
Neeham, Mark	Former State Director, NSW Liberal Party
Newell, Rex	Artist
Nicolaou, Paul	Former Executive Chairman, Millennium Forum
Owen, Timothy	Member of Parliament for Newcastle (26/3/11 – 12/8/14)
Palmer, Troy	Chief Financial Officer, Tinkler Group Holdings Administration Pty Ltd, Director, Patinack Farm Pty Ltd
Partridge, Lindsay	Managing Director, Brickworks Ltd
Regent, Mark	Contractor/consultant to Buildev Group Pty Ltd
Reid, Sebastian	Solicitor, Hartcher Reid
Roozendaal, Eric, the Hon	Former NSW Minister for Ports and Waterways (6/9/10 – 28/3/11)
Saddington, William	Director, PW Saddington & Sons Pty Ltd
Schuster, Dominic	NSW Treasury, Director of Commercial Assets
Sharpe, David	Former Managing Director, Buildev Group Pty Ltd
Slater, Neil	Member of the Newcastle Alliance
Spence, Christopher	Member of Parliament for The Entrance (26/3/11 – 6/3/15)
Sriwattanaporn, Ekarin	Proprietor, Mickey Tech
Stronach, Keith	Director, Stronach Property Pty Ltd
Thomson, Hugh	Campaign manager, Timothy Owen 2011 election campaign
Tinkler, Nathan	Director, Buildev Group Pty Ltd, Director, Tinkler Group Holdings Administration Pty Ltd
Tripodi, Joseph	Member of Parliament for Fairfield (25/3/95 – 4/3/11)
Trumbull, Timothy	Proprietor, Skilled Accounting Pty Ltd
Webb, Gary	Former CEO, Newcastle Port Corporation
Webber, Darren	Member of Parliament for Wyong (26/3/11 – 6/3/15)
Webster, Robert	Member, Finance Committee, NSW Liberal Party State Executive
Williams, Darren	Director, Buildev Group Pty Ltd
Wills, Ann	Consultant, Buildev Group Pty Ltd

Foreword

The publication of this report and the findings of the NSW Independent Commission Against Corruption ("the Commission") were affected by a number of significant factors that are addressed more fully below.

Report completion time

Preparation of this report was principally delayed by litigation, legislative changes and the need to ensure that parties were afforded procedural fairness.

The last sitting day of the Operation Spicer public inquiry was 12 September 2014. Counsel Assisting the Commission were required to prepare written submissions setting out the findings then available to the Commission. A primary purpose of these submissions was to afford procedural fairness by notifying relevant parties of potential adverse findings. The submissions were provided to affected parties on 10 October 2014. Written submissions in response from relevant parties were received by 7 November 2014, and Counsel Assisting and other parties provided written submissions in reply by 14 November 2014. The Commission then commenced preparation of the report. In the normal course of events and given the complexity of the issues involved in the investigation, the Commission anticipated that the report would be completed in the first half of 2015.

At the time it conducted the Operation Spicer investigation, the Commission was exercising its jurisdiction on the basis that corrupt conduct under s 8(2) of the *Independent Commission Against Corruption Act 1988* ("the ICAC Act") extended to the conduct of persons who were not public officials (or public officials not acting in a public official capacity), where that conduct could affect the "efficacy" as well as the "probity" of the exercise of official functions by a public official. This was particularly important in the context of Operation Spicer where much of the conduct under investigation was not the conduct of public officials, or of public officials acting in a public official capacity, but rather conduct (such as failure to make appropriate and correct disclosure of political donations) that could affect either directly or indirectly the "efficacy" of the exercise of official functions of the then Election Funding Authority of NSW.

On 5 December 2014, the NSW Court of Appeal delivered judgment in *Cunneen v ICAC* [2014] NSWCA 421. The majority (Basten and Ward JJA) held that the Commission's power under s 8(2) of the ICAC Act to investigate conduct that "could adversely affect ... the exercise of official functions by any public official" should be construed as being limited to conduct that "has the capacity to compromise the integrity of public administration" (at [71]) such that the conduct has the potential to lead a public official into dishonest, partial or otherwise corrupt conduct (Basten JA) or conduct that has the potential to cause corruption in the exercise by the public official of his or her functions or that could have an adverse outcome when viewed from a public corruption perspective (Ward JA at [188] to [189]).

This decision impacted on significant aspects of Operation Spicer.

The Commission was granted special leave to appeal the decision to the High Court of Australia.

The case was heard by the High Court (French CJ, Hayne, Kiefel, Nettle, and Gageler JJ) on 4 March 2015 and judgment delivered on 15 April 2015 (*ICAC v Cunneen* [2015] HCA 14).

The majority (French CJ, Hayne, Kiefel and Nettle JJ) held that s 8(2) of the ICAC Act refers to conduct "... having an injurious effect upon or otherwise detracting from the probity of the exercise of the official function in any of the senses defined by s.8(1)(b)-(d)" (at [46]) and that could involve any of the matters in paragraphs (a) to (y) of s 8(2). In the majority's judgment, the definition of corrupt conduct did not extend to conduct that adversely affects or could adversely affect the "efficacy" of the exercise of an official function by a public official in the

sense that the official could exercise a function in a different manner or make a different decision.

Following this decision, the Commission suspended activity in respect of the Operation Spicer and Operation Credo investigations pending a decision by the NSW Government on whether it would amend the ICAC Act in relation to the Commission's jurisdiction.

On 6 May 2015, the NSW Parliament passed the *Independent Commission Against Corruption Amendment (Validation) Act 2015* ("the Validation Act"). The Validation Act validated things done by the Commission before 15 April 2015, which depended on the Commission's previous construction of s 8(2) of the ICAC Act. One effect of this was to validate those actions of the Commission in Operation Spicer which had depended on the interpretation of s 8(2) to include conduct that could adversely affect the "efficacy" of the exercise of official functions.

The validity of the Validation Act was subject to a challenge in the High Court by Travers Duncan. The case was heard on 5 August 2015 and judgment dismissing Mr Duncan's application was delivered on 9 September 2015 (*Duncan v ICAC* [2015] HCA 32).

The issue of whether the Commission would be able to make corrupt conduct findings in Operation Spicer and other investigations, where the relevant conduct affected the "efficacy" as opposed to the "probity" of the exercise of official functions, was not addressed by the Validation Act.

The NSW Government established an independent panel, comprising the Hon Murray Gleeson AC QC and Bruce McClintock SC, to consider, and report to NSW Premier the Hon Mike Baird on, inter alia, the appropriate scope for the Commission's jurisdiction in light of the High Court decision in *Cunneen*.

The Independent Panel provided its report to Premier Baird on 30 July 2015.

The NSW Parliament subsequently passed the *Independent Commission Against Corruption Amendment Act 2015* ("the 2015 Amendment Act"). The 2015 Amendment Act, which came into force on 28 September 2015, amended the ICAC Act in relation to the jurisdiction and functions of the Commission. The relevant amendments are discussed later in this foreword and in chapter 1.

On 8 September 2015, one of the persons involved in the Operation Spicer investigation, Jeffrey McCloy, commenced proceedings in the NSW Supreme Court seeking orders restraining the Commission from preparing or furnishing any report on Operation Spicer. The case was heard on 12 and 13 November 2015. Judgment was delivered on 10 December 2015 (*McCloy v Latham* [2015] NSWSC 1879), dismissing Mr McCloy's summons.

The High Court decision in *Cunneen* and the legislative responses to that decision fundamentally affected significant aspects of Operation Spicer. In these circumstances, it was necessary that Counsel Assisting prepare supplementary written submissions identifying relevant legal developments, how the Commission should interpret and apply the ICAC Act in light of those developments, and specify the alterations that should be made to their 2014 submissions in respect of individual cases.

These supplementary submissions were provided to affected parties on 18 December 2015. Written submissions in response to the supplementary submissions were sought from affected parties by 18 February 2016. Most submissions were received by this date; however, two were not received until 25 February 2016. Counsel Assisting provided written submissions in reply on 25 February 2016.

Only after taking these submissions into account was it possible for the Commission to proceed with this report.

Corrupt conduct findings

Until the December 2014 Court of Appeal decision in *Cunneen*, the Commission proceeded on the basis that corrupt conduct findings were available under s 8(2) of the ICAC Act in circumstances where the relevant conduct could adversely affect the "efficacy" of the exercise of official functions. Thus, it was open to make corrupt conduct findings in circumstances where conduct could affect the exercise of official functions where the public official exercising the relevant official functions was not aware of, or involved in, any wrongdoing.

The 2014 submissions of Counsel Assisting for Operation Spicer were made on this basis. Counsel Assisting submitted that there were a number of instances in Operation Spicer where there had been deliberate failure to comply with the requirements of the *Election Funding, Expenditure and Disclosures Act 1981* ("the Election Funding Act") in circumstances where those failures could adversely affect the exercise of official functions of the then Election Funding Authority of NSW but where officers of that authority were unaware of any wrongdoing.

Following the High Court decision in *Cunneen*, it was clear that, without legislative changes, the Commission could not make corrupt conduct findings on this basis.

Changes to the ICAC Act effected by the 2015 Amendment Act expanded the definition of corrupt conduct by inserting s 8(2A). That section provides:

> *Corrupt conduct is also any conduct of any person (whether or not a public official) that impairs, or that could impair, public confidence in public administration and which could involve any of the following matters:*
>
> *a. collusive tendering,*
>
> *b. fraud in relation to applications for licences, permits or other authorities under legislation designed to protect health and safety or the environment or designed to facilitate the management and commercial exploitation of resources,*
>
> *c. dishonestly obtaining or assisting in obtaining, or dishonestly benefiting from, the payment or application of public funds for private advantage or the disposition of public assets for private advantage,*
>
> *d. defrauding the public revenue,*
>
> *e. fraudulently obtaining or retaining employment or appointment as a public official.*

The 2015 Amendment Act conferred a new function on the Commission to investigate conduct that may involve specified possible criminal offences under the Election Funding Act, the *Parliamentary Electorates and Elections Act 1912* or the *Lobbying of Government Officials Act 2011* that the NSW Electoral Commission refers to the Commission for investigation under s 13A of the ICAC Act. It is not necessary that conduct so referred for investigation involves corrupt conduct. The 2015 Amendment Act amended the ICAC Act to provide that the Electoral Commission is taken to have referred to the Commission under s 13A of the ICAC Act the investigation of conduct that may involve possible criminal offences under the specified Acts that have come to light as a result of the Commission's investigations and proceedings in operations Credo and Spicer.

The 2015 Amendment Act also amended the ICAC Act by inserting s 14(1)(a1), which provides that the Commission has the function of gathering and assembling evidence, during or after the discontinuance or completion of an investigation into conduct under s 13A, that may be admissible in the prosecution of a person for a criminal offence in connection with the conduct and to furnish such evidence to the Electoral Commission and (if considered appropriate) to the NSW Director of Public Prosecutions.

One of the other amendments made by the 2015 Amendment Act was to insert a new s 74BA into the ICAC Act. This section provides that the Commission is not authorised to include in a report a finding or opinion that any conduct of a specified person is corrupt conduct unless the conduct is serious corrupt conduct. The amendment, however, provides that the Commission is not precluded from including in a report a finding or opinion about any conduct of a specified person that may be corrupt conduct within the meaning of the ICAC Act if the statement as to the finding or opinion does not describe the conduct as corrupt conduct.

These amendments do not allow the Commission to make corrupt conduct findings in cases of failure to comply with the requirements of the Election Funding Act where, although those failures could affect the exercise of official functions of the then Election Funding Authority of NSW, officers of that authority were unaware of any wrongdoing.

In these circumstances, the Commission has accepted the submission of Counsel Assisting in their 18 December 2015 submissions that:

> *...a combination of the decision in* ICAC v Cunneen *and the effect of the (2015 Amendment Act) on the matters investigated in Operation Spicer mean that no findings of corrupt conduct can be made where the only breach relied upon was a breach of the (Election Funding Act).*

Accepting this submission does not preclude the Commission from making factual findings. The basis on which the Commission can make factual findings is set out in chapter 1.

PART 1 – INTRODUCTION

Chapter 1: Investigation summary and results

Between 2012 and 2014, the NSW Independent Commission Against Corruption ("the Commission") conducted a composite investigation in two parts: Operation Credo and Operation Spicer. This report concerns the Operation Spicer investigation and public inquiry.

The Operation Spicer investigation was complex and the matters investigated were diverse. The scope and purpose of the investigation was amended and supplemented over time so that, by its conclusion, the Commission was investigating the following:

a. *whether, between April 2009 and April 2012, certain Members of Parliament, including Christopher Hartcher MP, Darren Webber MP, and Christopher Spence MP, and others, including Timothy Koelma and Raymond Carter, corruptly solicited, received and concealed payments from various sources in return for certain Members of Parliament agreeing to favour the interests of those responsible for the payments;*

b. *whether, between December 2010 and November 2011, certain Members of Parliament, including Christopher Hartcher MP, Darren Webber MP, and Christopher Spence MP, and others, including Raymond Carter, solicited, received and failed to disclose political donations from companies, including prohibited donors, contrary to the* Election Funding, Expenditure and Disclosures Act 1981*;*

c. *whether Eightbyfive, a business operated by Timothy Koelma, entered into agreements with each of a series of entities including Australian Water Holdings Pty Ltd, whereby each respective entity made regular payments to Eightbyfive purportedly for the provision of media, public relations and other services and advice, in return for which Christopher Hartcher MP favoured the interests of the respective entity;*

d. *the circumstances in which false allegations of corruption were made against senior executives of Sydney Water Corporation (see also Operation Credo);*

e. *the circumstances in which the 2011 election campaign for the seat of Newcastle was funded by the NSW Liberal Party, and whether funds were solicited and received from prohibited donors, including Buildev Pty Limited, Nathan Tinkler, Jeff McCloy, Hilton Grugeon and other persons and companies associated with them;*

f. *whether Members of Parliament, including Christopher Hartcher MP and Michael Gallacher MLC, solicited and received donations from prohibited donors for use in the NSW Liberal Party 2011 State election campaign, including in the seat of Newcastle;*

g. *whether parties and persons, including Buildev Pty Limited, Nathan Tinkler, Darren Williams, David Sharpe, Jeff McCloy and Hilton Grugeon improperly sought to influence certain Members of Parliament by making donations during the 2011 State election campaign;*

h. *whether Members of Parliament, including Christopher Hartcher MP and Michael Gallacher MLC, used or attempted to use their power and influence improperly to confer, or attempt to confer, benefits upon donors to the NSW Liberal Party in the 2011 State election campaign;*

i. *the circumstances in which two campaigns were conducted against the sitting member of the seat of Newcastle, Jodi McKay MP, including the publication and distribution of misleading information, and whether certain persons were involved in organising, or attempting to organise,*

and/or funding those campaigns, including Joseph Tripodi MP, Ann Wills, Nathan Tinkler, Darren Williams, David Sharpe and members of the Newcastle Alliance;

j. whether Members of Parliament, including Joseph Tripodi MP, used or attempted to use their power and influence either to improperly confer benefits, or attempt to improperly confer benefits, upon certain parties and persons, including Buildev Pty Limited, Nathan Tinkler, Darren Williams and David Sharpe, in respect of a development of a coal terminal proposed at the Port of Newcastle;

k. whether members or associates of the Liberal Party of NSW used or attempted to use the Free Enterprise Foundation as a means of receiving and disguising donations from prohibited donors in the lead up to the 2011 election campaign;

l. whether certain companies and persons, including Buildev Pty Limited, Boardwalk Resources Pty Limited, Nathan Tinkler, Darren Williams, David Sharpe and Troy Palmer used or attempted to use the Free Enterprise Foundation as a means of making donations to the NSW Liberal Party with the intention of attempting to improperly influence certain Members of Parliament;

m. whether certain companies and persons including Buildev Pty Limited, Darren Williams and Mark Regent influenced or sought to influence a public official, namely Bart Bassett, to make planning decisions for their benefit;

n. whether Craig Baumann MP and Vincent Heufel agreed to make false or inaccurate electoral funding disclosures in 2007 and 2011 and whether the disclosures were made for the purpose of concealing benefits already exchanged or to be exchanged with amongst others Jeffrey McCloy and Hilton Grugeon.

Although the two investigations and public inquiries were formally separated, there was an overlap in some of the factual matters examined. It was decided that, in those circumstances, the evidence elicited in one of the public inquiries would also be available for use in the other public inquiry. This report deals with each of the matters set out in (a) to (n) above, with the exception of (d) – the circumstances in which false allegations of corruption were made against senior executives of the Sydney Water Corporation. This matter will be dealt with as part of the Operation Credo report.

Corrupt conduct findings

For the reasons set out in the foreword to this report, the Commission has accepted the submission of Counsel Assisting the Commission that conduct that only relies on a breach of the *Election Funding, Expenditure and Disclosures Act 1981* ("the Election Funding Act") is not capable of constituting corrupt conduct for the purposes of *Independent Commission Against Corruption Act 1988* ("the ICAC Act"). There was, however, other conduct investigated by the Commission that did not rely solely on a breach of the Election Funding Act. In some of these cases, the Commission was not satisfied that the evidence established any person had engaged in corrupt conduct. There was, however, evidence in relation to the conduct of Joseph Tripodi where the Commission was satisfied that his conduct involved corrupt conduct.

In chapter 33 of this report, the Commission has made a finding that Mr Tripodi engaged in serious corrupt conduct by, sometime shortly prior to 16 February 2011, misusing his position as a member of Parliament to improperly provide an advantage to Buildev by providing to Darren Williams of Buildev a copy of the confidential 4 February 2011 NSW Treasury report, *Review of Proposed Uses of Mayfield and Intertrade Lands at Newcastle Port*. Mr Tripodi had obtained this report through his position as a member of Parliament and provided it to Mr Williams to ingratiate himself with the management of Buildev in the hope he could secure future benefit from Buildev.

Other findings

In response to the December 2015 supplementary submissions of Counsel Assisting, it was submitted by some parties that, where the Commission lacks jurisdiction to make corrupt conduct findings, it also necessarily lacks power to make any findings, opinions or recommendations that are adverse to individuals. The Commission rejects these submissions.

While it is clear from the High Court decision in *Cunneen* that the Commission lacked jurisdiction to investigate conduct under s 8(2) of the ICAC Act that affected the "efficacy" as opposed to the "probity" of the exercise of official functions, the matters under investigation in Operation Spicer extended beyond this; so much is readily apparent from the terms of the scope and purpose set out at the beginning of this chapter.

As has been previously noted, on 6 May 2015, the NSW Parliament passed the *Independent Commission Against Corruption Amendment (Validation) Act 2015* ("the Validation Act"). The Validation Act validated things done by the Commission before the date of the High Court judgment (15 April 2015), where those things depended

on corrupt conduct under the ICAC Act where the conduct could affect the "efficacy" of the exercise of official functions. One effect of this was to validate those actions of the Commission in Operation Spicer which had depended on the interpretation of s 8(2) of the ICAC Act as including conduct that could affect the "efficacy" of the exercise of official functions.

To the extent that any of the matters covered by the scope and purpose were beyond the Commission's power to investigate because they only involved possible criminal offences under the Election Funding Act, the *Independent Commission Against Corruption Amendment Act 2015* ("the 2015 Amendment Act") gave the Commission the function of investigating such conduct. Section 13A of the ICAC Act gives the Commission the function of investigating certain matters referred to it by the NSW Electoral Commission, including the conduct of possible criminal offences under the Election Funding Act. By virtue of clause 38 of Schedule 4 to the ICAC Act, the Electoral Commission is taken to have referred to the Commission the investigation of such conduct that may have come to light as a result of the Operation Spicer investigation and the Commission is taken to have determined under s 13A of the ICAC Act to continue that investigation.

Thus, some of the matters the subject of the Commission's investigation relate to possible corrupt conduct and therefore come within the Commission's functions under s 13 of the ICAC Act, while others concern possible criminal offences under the Election Funding Act and therefore come within the Commission's functions in s 13A of the ICAC Act.

Sections 74 and 74A of the ICAC Act are directly relevant to the Commission's powers with respect to its reporting obligations.

Section 74(1) of the ICAC Act gives the Commission power to prepare a report in relation to any matter that has been the subject of an investigation. Section 74(3) goes further and requires the Commission to prepare a report in relation to any matter that has been the subject of a public inquiry. The application of s 74 to matters covered by s 13A is expressly contemplated by s 13A(8) of the ICAC Act.

Section 74A(1) of the ICAC Act provides that:

> *The Commission is authorised to include in a report under section 74:*
>
> *(a) statements as to any of its findings, opinions and recommendations, and*
>
> *(b) statements as to the Commission's reasons for any of its findings, opinions and recommendations.*

Thus, it is clear that the Commission has power to make findings, form and state opinions, and make recommendations, even if the relevant conduct is not corrupt conduct for the purposes of the ICAC Act but is otherwise in respect of a matter within the Commission's functions.

A further argument supporting the conclusion that the Commission has power to make findings was made by Counsel Assisting in submissions responding to the submissions in response to the supplementary submissions. That argument was put in the following terms:

a. s 13 of the ICAC Act prescribes the "principal functions" of the Commission. Those principal functions include the grant of powers and the imposition of duties on the Commission. The Commission must *always* discharge its functions in accordance with the terms of its "principal functions". In that event, those functions include the matters set out in s 13(3) of the ICAC Act (power to make findings and form opinions in respect of conduct with which an investigation is concerned, whether or not the findings relate to corrupt conduct)

b. it would be incorrect to read the insertion of s 13A as generally removing or releasing the Commission from its "principal functions" under s 13 – a better construction is that s 13A only derogates from the principal functions of the Commission where there is an inconsistency between the two sections

c. in short, because there is no inconsistency between s 13A and the "principal functions" imposed by s 13(3), the Commission may also make findings, etc under s 13(3) of the ICAC Act.

The Commission accepts this submission.

It was also suggested in submissions in response to the supplementary submissions of Counsel Assisting that s 74BA(2) of the ICAC Act imposes some limit or restriction on the Commission's ability to make findings. That submission ignores the fact that the obvious purpose behind s 74BA(2) is to preserve the Commission's ability to make findings.

One party submitted that, because the underlying Election Funding Act offences were (arguably) statute-barred, there was no power for the Commission to continue the investigation or to make findings. The Commission rejects this submission. This submission is contrary to the unambiguous words of s 13A(2) of the ICAC Act, which make it clear that the Commission may

investigate conduct involving a possible criminal offence under the Election Funding Act whether or not the time within which proceedings for the possible criminal offence may be instituted has expired.

Set out below are some of the principal factual findings made by the Commission.

- Sometime shortly prior to 16 March 2011, Nathan Tinkler offered to make a political donation to Jodi McKay's election campaign. In making this offer, Mr Tinkler was attempting to induce Ms McKay to accept a donation from a person she knew to be a prohibited donor and which would be falsely disclosed to the Election Funding Authority as coming from private individuals. Mr Tinkler knew at the time he made the offer that he was a prohibited donor and was not able to make a political donation and that Ms McKay was not able to accept a political donation from him (chapter 11).
- Each of Mr Williams, David Sharpe and Ann Wills of Buildev played an active part in the "Stop Jodi's Trucks" mailout campaign, which was designed to damage Ms McKay's prospects of re-election. Given its inherent political nature, the expenditure on the leaflets amounted to "electoral communication expenditure", as defined by the Election Funding Act. This expenditure was incurred in the period between 1 January 2011 and the end of the polling day for the 2011 NSW state election and was therefore incurred within the "capped expenditure period" as defined in s 95H of the Election Funding Act. As the electoral communication expenditure exceeded $2,000 in a capped expenditure period, Buildev was operating as a "third-party campaigner" as defined in s 4 of the Election Funding Act. Buildev failed to register as a third-party campaigner as required by s 96AA of the Election Funding Act and failed to disclose to the Election Funding Authority its electoral communication expenditure as required by s 88(1A)(a) of the Election Funding Act (chapter 11).
- Mr Tripodi played a central role in the Stop Jodi's Trucks campaign by nominating the printer for the mailout pamphlets and involving himself in the drafting and design process for the pamphlets (chapter 11).
- During November and December 2010, the Free Enterprise Foundation was used to channel donations to the NSW Liberal Party for its 2011 NSW state election campaign so that the identity of the true donors was disguised. A substantial portion of the $693,000 provided by the Free Enterprise Foundation and used by the NSW Liberal Party in its 2011 state election campaign originated from donors who were property developers and, therefore, prohibited under the Election Funding Act from making political donations (chapter 15).
- Each of Simon McInnes, Paul Nicolaou and Anthony Bandle knowingly used the Free Enterprise Foundation to channel political donations, including political donations from property developers, to the NSW Liberal Party to fund its 2011 state election campaign so that the identity of the true donors was disguised from the Election Funding Authority (chapter 15).
- Timothy Koelma used his business, Eightbyfive, to receive and channel political donations for the benefit of Christopher Hartcher, Christopher Spence, Darren Webber and the NSW Liberal Party for the 2011 Central Coast election campaign with the intention of evading the election funding laws relating to disclosure of political donations, the ban on donations from property developers, which operated from 14 December 2009, and, in relation to payments made after 1 January 2011, the applicable cap on donations. The funds obtained and channelled in this way were used for the purposes of the NSW Liberal Party 2011 election campaigns in the seats of Terrigal, The Entrance and Wyong. Mr Koelma directly benefited from the donations through Eightbyfive, as he was able to draw from those funds to give himself a salary, thereby, enabling him to work for Mr Hartcher on the 2011 NSW state election campaign. Mr Koelma subsequently obtained full-time employment in Mr Hartcher's ministerial office after the 2011 election (chapter 17).
- Mr Hartcher was involved in the establishment of Eightbyfive and took an active part in using Eightbyfive to channel political donations from Australian Water Holdings Pty Ltd, Gazcorp Pty Ltd and Patinack Farm Pty Ltd for the benefit of the NSW Liberal Party, himself, Mr Spence and Mr Webber with the intention of evading the election funding laws relating to disclosure of political donations, the ban on donations from property developers (in the case of Gazcorp) and, in relation to payments made after 1 January 2011, the applicable cap on donations. Mr Hartcher benefited from this arrangement because part of the funds channelled through Eightbyfive enabled Mr Koelma to work for him on the 2011 NSW state election campaign

at no cost to Mr Hartcher, while other funds channelled through Eightbyfive ensured that Mr Hartcher's likeminded political colleagues were funded to campaign for the Central Coast seats of Wyong and The Entrance (chapter 17).

- Mr Hartcher was a party to an arrangement with Nicholas Di Girolamo and Mr Koelma, whereby Mr Di Girolamo made regular payments through Australian Water Holdings to Eightbyfive. Under this arrangement, between April 2009 and May 2011, Eightbyfive received $183,342.50 from Australian Water Holdings. These payments were ostensibly for the provision of services by Eightbyfive to Australian Water Holdings but were in fact political donations made to assist Mr Hartcher by providing funds to Mr Koelma so that Mr Koelma could work for Mr Hartcher in the lead up to the 2011 NSW state election. Mr Hartcher and the others involved in this arrangement intended to evade the election funding laws relating to the disclosure of political donations. The payments totalling $36,668.50, made after 1 January 2011, exceeded the applicable cap on political donations (chapter 18).
- Mr Hartcher, Nabil Gazal Junior, Nicholas Gazal, Mr Koelma and Mr Spence (the NSW Liberal Party candidate for the seat of The Entrance) were parties to an arrangement whereby, between May 2010 and April 2011, Gazcorp made payments totalling $121,000 to Eightbyfive. These payments were ostensibly for the provision of services by Eightbyfive to Gazcorp but were in fact political donations which were mainly used to help fund Mr Spence so that he could work on the Central Coast election campaign and on his campaign for the seat of The Entrance. Mr Hartcher, Nabil Gazal Jnr, Nicholas Gazal, Mr Koelma and Mr Spence intended by this arrangement to evade the disclosure requirements of the Election Funding Act and the ban on the making and accepting of political donations from property developers. The payments totalling $33,000, made after 1 January 2011, exceeded the applicable cap on political donations (chapter 19).
- Mr Hartcher, Mr Koelma, the Hon Michael Gallacher MLC, Troy Palmer and Mr Williams were parties to an arrangement whereby, between July 2010 and March 2011, Patinack Farm made payments totalling $66,000 to Eightbyfive. These payments were ostensibly for the provision of services by Eightbyfive to Patinack Farm but were in fact political donations to help fund the NSW Liberal Party 2011 Central Coast election campaign. The parties to this arrangement intended to evade the disclosure requirements of the Election Funding Act. The payments made after 1 January 2011, totalling $33,000, exceeded the applicable caps on political donations. Although the payments to Eightbyfive were made by Patinack Farm, the arrangement was organised through Buildev, a property developer (chapter 20).
- Mr Koelma and Mr Webber (the NSW Liberal Party candidate for the seat of Wyong) were parties to an arrangement whereby, between 2010 and 2011, Mr Koelma's business, Eightbyfive, made payments totalling at least $34,650, and up to $49,500, to Mr Webber. These payments were ostensibly for the provision of services by Mr Webber to Eightbyfive but were in fact political donations to help fund Mr Webber's 2011 election campaign for the seat of Wyong. The parties to this arrangement intended to evade the disclosure requirements of the Election Funding Act. The payments made after 1 January 2011 exceeded the applicable caps on political donations (chapter 20).
- Raymond Carter used the Free Enterprise Foundation to channel political donations to the NSW Liberal Party for its 2011 NSW state election campaign so that the identity of the true donor was disguised from the Election Funding Authority. A portion of this money was from property developers (chapter 21).
- Mr Carter and Mr Koelma entered into an arrangement to use Mr Koelma's business, Eightbyfive, to channel political donations to the NSW Liberal Party for the 2011 Central Coast election campaign with the intention of evading the Election Funding Act laws relating to disclosure to the Election Funding Authority of political donations and the ban on accepting political donations from property developers. The political donations obtained by Mr Carter under this scheme included $5,000 from each of LA Commercial Pty Ltd, Yeramba Estates Pty Ltd and Brentwood Village Pty Ltd, and $2,200 from Crown Consortium Pty Ltd (chapter 21).
- In March 2011, Mr Carter used a business, Mickey Tech, with the intention of evading the Election Funding Act laws relating to disclosure of political donations by disguising from the Election Funding Authority political donations of $2,000 from INE Pty Ltd and $2,000 from Maggiotto Building Pty Ltd. In each case, the money was sought and received by Mr Carter as a political donation for the 2011 NSW

state election campaign. Although at the time Mr Carter received the money he intended to apply all the money for the purposes of the election campaign, he eventually only applied $2,400 for this purpose, the balance being applied to private use (chapter 21).

- In March 2011, Mr Hartcher received three bank cheques payable to the NSW Liberal Party totalling $4,000. They were received by Mr Hartcher for the benefit of the NSW Liberal Party for the March 2011 state election campaign. In November 2011, some eight months after the election, Mr Hartcher arranged for the cheques to be paid into the trust account of Hartcher Reid, a legal firm, and for that firm to draw a cheque for $4,000 in favour of Mickey Tech, a business owned by Mr Carter's partner. After the $4,000 was deposited into that account, it was withdrawn in cash by Mr Carter and given to Mr Hartcher. These steps are inconsistent with an intention on the part of Mr Hartcher to apply the $4,000 for the benefit of the NSW Liberal Party (chapter 23).
- In about November 2010, Mr Gallacher sought a political donation from Mr Sharpe of Buildev by inviting him to attend a New Year's Eve political fundraising function for which Mr Sharpe or Buildev would make a payment. Mr Gallacher knew that they were property developers, and he sought the political donation with the intention of evading the election funding laws relating to the ban on property developers making political donations (chapter 25).
- In late 2010, Mr Gallacher, Mr Hartcher and Mr Williams of Buildev were involved in an arrangement whereby two political donations totalling $53,000 were provided to the NSW Liberal Party for use in its 2011 election campaigns for the seats of Newcastle and Londonderry. To facilitate this arrangement, on 13 December 2010, Mr Palmer, a director of Boardwalk Resources Limited, a company of which Mr Tinkler was the major shareholder, drew two cheques totalling $53,000 payable to the Free Enterprise Foundation. These were provided to Mr Hartcher who arranged for them to be sent to Mr Nicolaou. Mr Nicolaou sent the cheques to the Free Enterprise Foundation. The Free Enterprise Foundation subsequently sent money to the NSW Liberal Party, which included the $53,000. Of the $53,000, some $35,000 was used to help fund Timothy Owen's 2011 election campaign in the seat of Newcastle and $18,000 was used towards the purchase of a key seats package for Bart Bassett's 2011 election campaign in the seat of Londonderry. Although the cheques for the donations were drawn on the account of Boardwalk Resources, they were made for Buildev, a property developer. Each of Mr Gallacher, Mr Hartcher and Mr Williams entered into this arrangement with the intention of evading the Election Funding Act laws relating to the accurate disclosure to the Election Funding Authority of political donations (chapter 26).
- In about February 2011, Jeffrey McCloy gave HughThomson $10,000 in cash as a political donation to fund Mr Owen's 2011 election campaign for the seat of Newcastle with the intention of evading the Election Funding Act laws relating to the ban on the making of political donations by property developers and the applicable cap on political donations. By not reporting the donation, he intended to evade the disclosure requirements of the Election Funding Act. In accepting the political donation, Mr Thompson intended to evade the Election Funding Act laws relating to the ban on accepting political donations from property developers and the applicable cap on political donations. By not ensuring the donation was disclosed, he intended to evade the disclosure requirements of the Election Funding Act (chapter 27).
- In early 2011, Mr McCloy gave Mr Owen $10,000 in cash as a political donation to fund Mr Owen's 2011 election campaign. In making the payment, Mr McCloy intended to evade the Election Funding Act laws relating to the ban on the making of political donations by property developers and the applicable cap on political donations. By not reporting the donation, he intended to evade the disclosure requirements of the Election Funding Act. In accepting the political donation, Mr Owen intended to evade the Election Funding Act laws relating to the ban on accepting political donations from property developers and the applicable cap on political donations. By not ensuring the donation was disclosed, he intended to evade the disclosure requirements of the Election Funding Act (chapter 27).
- In early 2011, Hilton Grugeon gave Mr Thomson $10,000 in cash as a political donation to fund Mr Owen's 2011 election campaign. In making the payment, Mr Grugeon intended to evade the Election Funding Act laws relating to the ban on the making of political donations by property developers and the applicable cap on political donations. By not reporting the donation, he

intended to evade the disclosure requirements of the Election Funding Act. In accepting the political donation, Mr Thompson intended to evade the Election Funding Act laws relating to the ban on accepting political donations from property developers and the applicable cap on political donations. By not ensuring the donation was disclosed, he intended to evade the disclosure requirements of the Election Funding Act (chapter 27).

- Services provided by Mezzanine Media Australia Pty Ltd for Mr Owen's 2011 election campaign were paid for, in part, by a political donation of $5,000 made by Keith Stronach, a property developer. The payment evaded the Election Funding Act laws relating to the ban on the making of political donations by property developers. The political donation was not disclosed as required by the Election Funding Act. Mr Owen and Mr Thomson were aware that Mr Stronach was a property developer and were aware that Mr Stronach paid money towards Mr Owen's election campaign (chapter 27).
- Services provided by Mezzanine Media Australia for Mr Owen's 2011 election campaign were paid for, in part, by a political donation of $14,190 organised by Mr Williams on behalf of Buildev, a property developer. In organising the payment, Mr Williams intended to evade the Election Funding Act laws relating to the ban on the making of political donations by property developers and the applicable cap on political donations. By not reporting the donation he intended to evade the disclosure requirements of the Election Funding Act. Mr Owen and Mr Thomson were aware that Buildev was a property developer and that it had paid money towards Mr Owen's election campaign (chapter 27).
- Mr Gallacher was responsible for proposing to Mr McCloy and Mr Grugeon an arrangement whereby each of them would contribute to the payment of Luke Grant for his work on Mr Owen's 2011 election campaign. He did so with the intention that the Election Funding Act laws in relation to the prohibition on political donations from property developers and the requirements for the disclosure of political donations to the Election Funding Authority would be evaded (chapter 27).
- Mr Owen, Mr Thompson, Mr Grugeon and Mr McCloy were parties to an arrangement whereby payments totalling $19,875 made to Mr Grant for his work on Mr Owen's 2011 election campaign were falsely attributed to services allegedly provided to companies operated by Mr McCloy and Mr Grugeon. Those involved in this arrangement intended to evade the Election Funding Act laws in relation to the prohibition on political donations from property developers and the requirements for the disclosure of political donations to the Election Funding Authority. The payments were also in excess of the caps imposed on individual donors (chapter 27).
- Services provided by Joshua Hodges for Mr Owen's 2011 election campaign were paid for, in part, by a political donation of $3,998.50 made by William Saddington of PW Saddington & Sons Pty Ltd. The payment was disguised as being for consultancy services provided to that company. The payment had the effect of evading the disclosure requirements of the Election Funding Act. Mr Owen and Mr Thomson were aware that Mr Saddington was contributing to Mr Owen's election campaign expenses by paying Mr Hodges. They did not ensure that the donation was disclosed as required by the Election Funding Act (chapter 27).
- Services provided by Australian Decal Sales and Manufacturing Co Pty Ltd for Mr Owen's 2011 election campaign were paid for in August 2011 by a political donation of $3,198.80 organised by Mr Williams on behalf of Buildev, a property developer. By organising the payment, Mr Williams intended to evade the Election Funding Act laws relating to the ban on the making of political donations by property developers and the disclosure requirements of the Election Funding Act. Mr Owen and Mr Thomson were aware this political donation had been made by a property developer and participated in this arrangement with the intention of evading the Election Funding Act laws relating to the ban on accepting political donations from property developers. They did not ensure the donation was disclosed as required by the Election Funding Act (chapter 27).
- During the 2011 NSW state election campaign, a third-party campaign known as "FedUp" was conducted by Rolly De With, Neil Slater and Paul Murphy using the name of a local business association, the Newcastle Alliance. The purpose of the campaign was to assist in defeating the sitting member for the seat of Newcastle, Ms McKay, in the 2011 NSW state election. In March 2011, a payment of $50,000 was arranged by Mr Williams of Buildev and

authorised by Mr Tinkler to fund the campaign. The payment was ostensibly made by Serene Lodge Racing Pty Ltd but was in fact money from Mr Tinkler and was made for Buildev, a property developer. The $50,000 payment was a political donation and was in excess of the $2,000 cap on political donations made for the benefit of a third-party campaigner. The political donation was not disclosed to the Election Funding Authority by Buildev, Serene Lodge Racing or Mr Tinkler (chapter 28).

- On 6 October 2010, Mr McCloy paid $10,000 in cash to Andrew Cornwell, the NSW Liberal Party candidate for the seat of Charlestown, as a political donation for Andrew Cornwell's 2011 election campaign. By making the donation, Mr McCloy intended to evade the Election Funding Act laws relating to the ban on property developers making political donations and the requirement for the disclosure of political donations. By accepting the donation Andrew Cornwell intended to evade the Election Funding Act requirement relating to the ban on property developers making political donations and the requirement for the accurate disclosure of political donations (chapter 29).
- Andrew Cornwell, his wife, Samantha Brookes, and Mr Grugeon were parties to an arrangement involving the pretence that a payment of $10,120 made in early 2011 by Mr Grugeon, a property developer, was for a painting. The $10,120 was in fact a political donation made by Mr Grugeon to fund Andrew Cornwell's 2011 NSW state election campaign. In participating in this arrangement, Mr Grugeon intended to evade the Election Funding Act laws relating to the ban on the making of donations by property developers and the requirement for disclosure of political donations. In participating in this arrangement, Andrew Cornwell intended to evade the Election Funding Act laws relating to the ban on accepting political donations from property developers, and the requirement for accurate disclosure of political donations received. The payment exceeded the applicable cap on political donations (chapter 29).
- During the 2011 NSW state election campaign, Garry Edwards, the NSW Liberal Party candidate for the seat of Swansea, received a political donation by way of a cash payment of about $1,500 from Mr McCloy, a property developer. Mr Edwards accepted the donation with the intention of evading the election funding laws relating to the ban on accepting political donations from property developers and the requirements for disclosure of political donations. Mr McCloy knew he was making a political donation and that, as a property developer, he was prohibited from making such a donation (chapter 30).
- In 2007, Craig Baumann, the NSW Liberal Party candidate for the seat of Port Stephens, entered into an arrangement with Mr McCloy and Mr Grugeon to disguise from the Election Funding Authority the fact that companies associated with Mr McCloy and Mr Grugeon had donated $79,684 towards Mr Baumann's 2007 NSW election campaign. As part of this arrangement, a company associated with Mr McCloy made a political donation of $32,604 and a company associated with Mr Grugeon made a political donation of $47,080. These political donations were paid to Mr Baumann's company, Mambare Pty Ltd, which, in turn, paid the money to the Medowie branch of the NSW Liberal Party to be used for Mr Baumann's 2007 election campaign. Mr Baumann caused Mambare to lodge a declaration with the Election Funding Authority that falsely claimed that it had donated the money to the NSW Liberal Party. Mr Baumann did so with the intention of evading the election funding laws relating to the accurate disclosure of political donations (chapter 31).
- In about November 2010, Mr Baumann entered into an arrangement with Vincent Heufel with the intention of evading the Election Funding Act laws relating to the truthful disclosure of political donations. Under this arrangement, Mr Heufel made a donation of $100,000 for Mr Baumann's election campaign and Mr Baumann reduced the amount his company, Mambare, charged for building Mr Heufel's house by that amount. This was done so that Mr Heufel could falsely represent that he was responsible for making the political donation, rather than Mr Baumann's company and so that Mambare could evade disclosing that it had made a political donation for Mr Baumann's 2011 NSW state election campaign (chapter 31).
- In 2010, for the purposes of his 2011 NSW state election campaign, Mr Bassett, the NSW Liberal Party candidate for the seat of Londonderry, solicited a political donation from Buildev, a property developer. This culminated in the drawing of a cheque, dated 13 December 2010, for $18,000 on the account of Boardwalk Resources, which was payable to the Free Enterprise Foundation. The Free Enterprise

Foundation subsequently sent money to the NSW Liberal Party, which included the $18,000. The $18,000 was used towards the purchase of a key seats package for Mr Bassett's 2011 election campaign in the seat of Londonderry. Although the cheque for $18,000 was drawn on the account of Boardwalk Resources, the donation was made for Buildev. Mr Bassett was aware at the time he solicited the political donation that Buildev was a property developer and knew it was not able to make a political donation and he was not able to accept a political donation from a property developer (chapter 32).

Section 74A(2) statements

Chapter 34 of this report contains statements made pursuant to s 74A(2) of the ICAC Act that the Commission is of the opinion that consideration should be given to obtaining the advice of the Director of Public Prosecutions (DPP) with respect to the prosecution of the following persons:

- Samantha Brookes for two offences of giving false or misleading evidence under s 87 of the ICAC Act
- Andrew Cornwell for two offences of giving false or misleading evidence under s 87 of the ICAC Act
- Timothy Gunasinghe for an offence of giving false or misleading evidence under s 87 of the ICAC Act
- Christopher Hartcher for an offence of larceny
- Timothy Koelma for three offences of giving false or misleading evidence under s 87 of the ICAC Act
- William Saddington for an offence of giving false or misleading evidence under s 87 of the ICAC Act
- Joseph Tripodi for the common law offence of misconduct in public office.

Action by the NSW Electoral Commission

Section 16(3) of the ICAC Act provides that the Commission may disseminate intelligence and information to law enforcement agencies and such other persons and bodies as the Commission considers appropriate.

Pursuant to this section, the Commission disseminated to the Electoral Commission information obtained by the Commission in the course of the investigation for the purpose of the Electoral Commission considering what action it should take in relation to the matters disclosed by the investigation.

On 23 March 2016, the chairperson of the Electoral Commission issued a statement advising that, as a result of considering the evidence obtained by the Commission, the Electoral Commission had decided that the Liberal Party of Australia (NSW Division) was not eligible for payment of claims for public funding of $4,389,822.80 because it failed to disclose the identity of all major political donors in its 2011 disclosure declaration. The statement went on to advise that, in addition, the Liberal Party would not receive further funding from the Election Campaigns Fund or the Administration Fund and would remain ineligible to receive such funds until it disclosed all reportable political donations in relation to its 2011 declaration.

The basis for this decision by the Electoral Commission was its conclusion that the Free Enterprise Foundation (evidence relating to which is set out in part 3 of this report) was used by senior officials of the Liberal Party and an employed fundraiser to channel and disguise donations by major political donors, some of whom were prohibited donors. No disclosure of the requisite details of these major political donors was made by the Liberal Party.

Corruption prevention

The Commission's investigation uncovered conduct indicative of significant failures to comply with election funding laws concerning the disclosure of political donations, the prohibition on property developers making political donations and the caps placed on political donations.

At the time of the investigation, NSW had some of the most restrictive political donation and election expenditure rules of any jurisdiction, but those rules by themselves were demonstrated by the investigation as insufficient to make regulation effective. If the framework of enforcement, scrutiny by civil society, incentives and penalties does not support compliance with the rules, then rules alone will be ineffective.

Some of the weaknesses in the system uncovered by the investigation were remedied by the *Election Funding, Expenditure and Disclosures Amendment Act 2014*. This Act amended the Election Funding Act by increasing maximum penalties for summary offences relating to political donations and electoral expenditure. The limitation period for commencing proceedings for summary offences was also increased. Importantly, limits on political donations have meant that third-party campaigners and branches of political parties operating in other jurisdictions are no longer an effective conduit for circumventing NSW donation laws. In addition, a new separate indictable offence was created relating to schemes to circumvent the donation or expenditure

prohibitions or restrictions. For serious matters, a member of Parliament may now, if convicted, lose their seat.

Despite these welcome changes, there remained flaws in the regulatory framework which, in the Commission's opinion, continued to fall short of an effective system.

In December 2014, the Commission published its report, *Election funding, expenditure and disclosure in NSW: Strengthening accountability and transparency*. In that report, the Commission made 22 recommendations affecting electoral funding, disclosure, election expenditure and political party registration operations at both the macro and micro levels in the context of NSW state elections. The report was distributed to NSW Parliament as well as to the Political Donations Panel of Experts, a panel of specialists assembled by the NSW Government to assess potential reforms to election funding laws, led by Dr Kerry Schott.

After the Commission's report was released, the Political Donations Panel of Experts released their final report to the governor and the premier. The report contained a set of 50 recommendations for reform to NSW election laws, traversing a range of issues, including restrictions on political donations and expenditure, public funding, party governance, regulation of third-party campaigners, disclosure requirements and enforcement. The 50 recommendations provided by the expert panel aligned closely with the recommendations submitted in the Commission's December 2014 report.

Recommendation this report be made public

Pursuant to s 78(2) of the ICAC Act, the Commission recommends that this report be made public forthwith. This recommendation allows either Presiding Officer of the Houses of Parliament to make the report public, whether or not Parliament is in session.

Chapter 2: Background

This chapter sets out some background information on how the investigation came about, how the investigation was conducted, why the Commission decided to conduct a public inquiry and the conduct of the public inquiry.

How the investigation came about

In March 2011, Matthew Lusted made a report to the Liberal Party of Australia (NSW Division) in respect of irregularities arising from a $5,000 donation that he believed his private company had made to the NSW Liberal Party, but which had been paid to a business titled Eightbyfive. The circumstances of the donation involved Mr Carter, an electorate officer working for Christopher Hartcher MP. Eightbyfive was a business owned by Mr Koelma, one of Mr Hartcher's staff. The NSW Liberal Party reported Mr Lusted's concerns to the Election Funding Authority of NSW. On 17 May 2012, the Election Funding Authority reported the matter to the Commission.

The Commission recognised that the circumstances appeared to involve a possible breach of electoral funding laws. The Commission then looked at the financial records of Eightbyfive and identified payments made to it by other organisations, some of which were clearly property developers. Those records showed that the payments were not small or minor; there were hundreds of thousands of dollars involved. An examination of those records gave an impression that Eightbyfive may have been used as a vehicle for collecting and distributing political donations in a manner contrary to the Election Funding Act.

On that basis, the Commission embarked on a deeper investigation.

Conduct of the investigation

The Commission's investigation led to additional areas of concern that came under close examination during the public inquiry. Here, it is appropriate only to mention briefly some of those areas that became the subject of investigation.

The Commission uncovered information that would suggest that Eightbyfive was at the centre of a complicated and relatively sophisticated arrangement designed to evade election funding laws. At one level, Eightbyfive appeared to be providing services to substantial companies – Gazcorp, Patinack Farm and Australian Water Holdings – but there was little or no information available as to the nature of those services. Meanwhile, the evidence disclosed that Mr Koelma paid some of the money received by Eightbyfive to two NSW Liberal Party candidates on the Central Coast – Mr Spence, who was the NSW Liberal Party candidate for The Entrance, and Mr Webber, the candidate for Wyong. There was no evidence of services being provided by Mr Spence or Mr Webber in return for those payments. The investigation broadened to determine the relationship between the payments to Eightbyfive and the payments for service ultimately made to Mr Koelma, Mr Spence and Mr Webber.

The involvement of Patinack Farm turned the investigation to the campaign for the seat of Newcastle, where it appeared that a local property developer, Buildev, had provided considerable financial and other assistance to the campaign of the NSW Liberal Party candidate, Timothy Owen. While investigating issues, which arose in relation to the seat of Newcastle, a critical witness was identified – Hugh Thomson. Mr Thomson had acted as Mr Owen's campaign manager. With the assistance of Mr Thomson, the investigation looked more broadly at the involvement of several other property developers in providing assistance to Mr Owen's campaign. From there, the investigation spread to look at some events that occurred in the campaign in the adjacent seats of Charlestown, Swansea, Port Stephens and the Greater Western Sydney seat of Londonderry.

While examining the way in which particular funds had been treated by the NSW Liberal Party, the Commission observed that, in its declaration made in September 2011, the NSW Liberal Party had declared $787,000 in donations from an organisation named the "Free Enterprise Foundation" – an unusually large amount to have been donated by a single donor. As the investigation unfolded, the evidence suggested that money donated to the NSW Liberal Party by the Free Enterprise Foundation included substantial sums that had come from prohibited donors. Other evidence suggested many of these donations were originally provided to the NSW Liberal Party, which forwarded the money on to the Free Enterprise Foundation, which then sent the money back to the NSW Liberal Party as donations from the Free Enterprise Foundation.

It emerged that, from middle or late 2010, the member for Fairfield, Joseph Tripodi MP, had become closely involved in advising Buildev in respect of its proposal to develop and construct a fifth coal terminal in the Port of Newcastle. It became clear that Mr Tripodi had gone to some lengths to assist Buildev, including soliciting support from his parliamentary colleague, the Hon Eric Roozendaal MLC. At the relevant time, Mr Roozendaal was both the state treasurer and minister for ports and waterways. As the investigation unfolded, evidence emerged indicating that decisions made by Mr Roozendaal had favoured Buildev. There was a related investigation into the circumstances in which a NSW Treasury report was leaked and came into the possession of Buildev, which then attempted to use part of the report to its advantage.

To further its investigation into these matters, the Commission:

- obtained documents, including financial records, call charge records and computer databases from a range of sources by issuing 242 notices under s 21 or s 22 of the ICAC Act
- conducted 39 compulsory examinations
- conducted interviews with 16 witnesses, and took 37 statements from witnesses
- executed 14 search warrants.

The public inquiry

The Commission reviewed the information that had been gathered during the investigation and, after taking into account this material and each of the matters set out in s 31(2) of the ICAC Act, determined that it was in the public interest to hold a public inquiry. In making that determination, the Commission had regard to the strong public interest in ensuring politicians and political parties complied with the election funding laws. The Commission also had regard to the seriousness of the conduct, including the highly organised nature of the various arrangements apparently designed to evade the disclosure and other requirements of the Election Funding Act that underpins the democratic process. The Commission considered the corresponding public interest in preserving the privacy of persons who were concerned in the course of events, but concluded that the public interest in identifying the facts, and revealing precisely what had occurred, outweighed that consideration.

As mentioned earlier, the investigation into Operation Spicer was part of a composite investigation that included Operation Credo. The reasons for conducting a public inquiry in respect of Operation Credo will be discussed in the report for that investigation, but the decisions to conduct both public inquiries were related. There were several factual links and some of the witnesses were common to both inquiries. As mentioned earlier, it was decided that the evidence in one public inquiry would, to the extent relevant, be evidence available to be taken into account in the other public inquiry.

The Hon Megan Latham, Commissioner, presided at the public inquiries of both Operation Credo and Operation Spicer. Geoffrey Watson SC and Greg O'Mahoney acted as Counsel Assisting the Commission in both public inquiries.

The Operation Credo segment of the public inquiry commenced on 17 March 2014 and continued over 23 days until 16 April 2014. There was then a short adjournment to allow for preparation in Operation Spicer. The Operation Spicer segment of the public inquiry commenced on 28 April 2014 and continued over 17 days until 20 May 2014, when the public inquiry adjourned to permit further investigation. The public inquiry resumed on 6 August 2014 and continued over 24 days until 12 September 2014.

In all, there were 64 days of hearing during which oral evidence was taken from 162 witnesses. Operation Spicer involved 116 witnesses over 41 hearing days. The combined transcript tally from Operation Credo and Operation Spicer was 7,711 pages, and the portion attributable to Operation Spicer alone was 5,092 pages. During Operation Credo, 123 separate exhibits were received into evidence. During Operation Spicer, 243 separate exhibits were received into evidence – those from the first part of the public inquiry were marked from Exhibit S1 to S108, and those tendered during the second part of the public inquiry were marked from Exhibit Z1 to Z135. Those documentary exhibits comprised several thousands of pages.

Given the sheer volume of the evidence, the diversity of issues that arose for examination and the wide-ranging

nature of the investigation, it was imperative that the public inquiry was conducted efficiently and effectively. The scope of the inquiry and the large number of witnesses required the adoption of a strict approach to the application of the standard directions governing the conduct of the public inquiry. It is not necessary for present purposes to reproduce those standard directions here. They are available on the Commission's website. However, in the light of a number of submissions repeatedly made by some legal representatives throughout the inquiry, that the Commission was not affording procedural fairness or natural justice to persons of interest, it is appropriate to refer to some aspects of those standard directions.

The standard directions on the conduct of public inquiries and the use of documents provide that, subject to the control of the Commission, Counsel Assisting determines which documents are to be tendered and when. It is the Commission's discretion to provide persons who are substantially and directly affected by the inquiry with advance confidential access to documents that are likely to be tendered. A large number of documents were made available to parties through a confidential website. The Commission's practice is not to provide every document or every item of other material in advance of the inquiry. The rationale for this practice is rooted in the nature of a public inquiry; namely, that it is part of an ongoing investigation that has hitherto been conducted in private. The information acquired in the course of the private part of the investigation is subject to the secrecy provisions of the ICAC Act (s 111) and may also be the subject of a suppression order under s 112 of the ICAC Act. The combined effect of these provisions is that none of that information can be communicated to any person, except for the purposes of the ICAC Act (which includes the conduct of a public inquiry) and, in some cases, only if a suppression order is lifted or varied by the Commission.

There were a considerable number of documents that fell into this category to which Commission staff, including the instructing solicitors, and Counsel Assisting had access for the purposes of the public inquiry. The information contained within those documents, which included statements, transcripts of compulsory examinations, financial records, email accounts, telephone records and electronic diaries, provided Commission officers and Counsel Assisting with an appropriate factual basis for the allegations that were ultimately put to a number of witnesses. The allegations may or may not be made out when all of the evidence at the inquiry is examined; however, the material in the possession of the Commission required that the allegations be put, so that the persons affected might know of any potential adverse findings and have the opportunity to meet those findings.

In particular, there is no obligation on Counsel Assisting to disclose all of the material on which an allegation is based before the allegation is put. Provided the material supporting an allegation is admitted into evidence before the close of the inquiry, and the affected parties are provided with the opportunity to address that material, the requirements of procedural fairness and natural justice will have been met.

Despite the Commission's attempts to draw these matters to the attention of counsel, there were repeated complaints from various legal representatives that the conduct of Counsel Assisting was in breach of the Bar Rules and that the Commission was denying procedural fairness by withholding transcripts of evidence and statements from persons of interest at various stages of the inquiry. So persistent were these submissions during the first tranche of the Operation Spicer public inquiry, that it resulted in considerable delay and gave rise to a direction on 6 August 2014, at the beginning of the second tranche of the public inquiry, that no oral applications for access to previously unpublished documents would be entertained. In the course of that direction, the Commissioner said:

> *…The Commission is an investigative body not an adversarial adjudicative one. It is not bound by the rules of evidence and it has no power to determine questions of criminal or civil liability. The extent of its obligation to observe the rules of procedural fairness and natural justice is directly related to its power to make findings that reflect adversely upon some persons. The two pillars of those rules are that the Commission base its findings on the evidence and that the Commission listens fairly to any relevant evidence conflicting with a proposed finding and any rational argument against that finding that a person at the inquiry, whose interests may be adversely affected by it, wishes to advance.*
>
> *Of course the ability to advance argument and conflicting evidence is premised upon the relevant person being made aware of the risk of an adverse finding. That function is performed by the framing of the scope and purpose of the inquiry, the opening by Counsel Assisting … by the nature of the questioning during the inquiry and by the submissions of Counsel Assisting at the end of the evidence. When a person at risk of adverse findings wishes to advance a positive case by adducing relevant evidence that opportunity will be afforded at every stage of the inquiry subject of course to the availability of a witness who may need to be recalled and subject to any document being given in advance of its use or tender to Counsel Assisting. The salient point is that the rules of natural justice and procedural fairness do not require the Commission to treat the inquiry as though it were a trial in a court of law.*

Notwithstanding this direction, a number of counsel

continued to make oral submissions seeking access to material that the Commission did not intend to release at that time. These repeated submissions contributed to the length of the inquiry and caused a degree of frustration in the Commission's attempts to efficiently schedule witnesses.

It was to be expected that counsel representing those persons of interest who were named in the scope and purpose of the inquiry would vigorously defend their clients' reputations against the allegations that were foreshadowed and ultimately put by Counsel Assisting. However, on occasions, the conduct of the inquiry proved challenging. It was necessary in some instances to remind all counsel of their professional obligations to refrain from unwarranted personal attacks and to observe the appropriate formalities of practice and procedure.

It was asserted in a number of submissions, both during and after the public inquiry, that Counsel Assisting were in breach of the then Bar Rules 82, 84 and 85 in so far as those rules purported to apply by virtue of Rule 94. It must be said that, in some respects, they sat uneasily with the Commission's functions. For example, Rule 82 required "a prosecutor" to present "the whole of the relevant evidence ... intelligibly before the court". The Commission is not a prosecuting authority, Counsel Assisting is not a prosecutor and the Commission is not a court. The reference in Rule 85 to a prosecutor's belief on reasonable grounds that a proposition of fact is capable of "contributing to a finding of guilt" cannot be reconciled with the Commission's mandate to investigate corruption and make findings of fact on the balance of probabilities, mindful of the seriousness of the allegation and the gravity of the consequences that might flow from a particular finding (*Briginshaw v Briginshaw* (1938) 60 CLR 336).

The new Legal Profession Uniform Conduct (Barristers) Rules 2015 now recognise the distinct role performed by Counsel Assisting an inquiry or investigation.

As earlier mentioned, the last day of evidence in the public inquiry was 12 September 2014. After this, on 10 October 2014, Counsel Assisting provided extensive written submissions. These were circulated to affected parties. Of these, 62 parties made written submissions in response. Most of these were received by the Commission by 7 November 2014, although some parties were given an extension of time in which to provide their submissions. Brief written submissions in reply were provided by Counsel Assisting on 14 November 2014. Some other parties also provided written submissions in reply. These were generally provided by 14 November 2014, although some parties were given an extension of time. In all, 34 parties made submissions in reply.

As explained in the foreword to this report, throughout most of 2015, the Commission's preparation of this report was delayed by litigation and legislative changes. It was then necessary for the Commission to seek further written submissions in relation to the effect of these changes on the findings that could be made by the Commission. Counsel Assisting provided supplementary written submissions on 18 December 2015, which were circulated to affected parties on that date. Written submissions in response were received from 22 parties. Most of these were received by 18 February 2016, although some parties were given an extension of time to provide their submissions. Counsel Assisting provided brief written supplementary reply submissions on 25 February 2016.

All of these submissions, which comprised many hundreds of pages, have been taken into account in preparing this report.

Chapter 3: The election funding laws

This chapter sets out relevant functions of the Election Funding Authority of NSW which was, at the time of this investigation, the regulator with responsibility for overseeing the operation of the Election Funding Act and examines relevant provisions of the Election Funding Act.

The Election Funding Act imposes three areas of regulation relevant to this investigation: laws requiring political parties and candidates to disclose the sources of their money and how they spend it; laws that prohibit the seeking or receiving of political donations from property developers; and laws that impose a cap on the amounts that can be donated and spent.

The Election Funding Authority

The Election Funding Authority of NSW was abolished on 1 December 2014. The NSW Electoral Commission now administers and regulates the NSW political funding and disclosure regime.

Section 5 of the Election Funding Act created the Election Funding Authority of NSW, which, as a statutory corporation, was a "public authority" for the purposes of the ICAC Act. The Election Funding Authority comprised three members: a chairperson and two appointees, each of whom was a "public official" for the purposes of the ICAC Act. Part 3 of the Election Funding Act dealt with the "Responsibility of the Authority". Under s 22(1), the Election Funding Authority's "General functions" were described so that the Authority "shall have and may exercise the functions conferred or imposed on it by or under this or any other Act".

In general terms, the functions of the Election Funding Authority relevantly extended to monitoring and policing the disclosure rules, the prohibition on donations by property developers, and caps on donations and expenditure. Under s 23(1)(a), the Election Funding Authority had specific responsibility for the registration of political candidates and parties. Under s 23(1)(c), the Election Funding Authority had the specific responsibility for dealing with the disclosure of political donations and electoral expenditure, as well as the caps placed on "political donations" and "electoral expenditure". Under s 23(2), the Election Funding Authority was given powers "For the purpose of ensuring compliance with this Act".

The Election Funding Authority could investigate whether there had been a failure to comply with the requirements of the Election Funding Act. Under s 23(2) of that Act, the Election Funding Authority could apply to the NSW Supreme Court for an injunction, declaration or other order to ensure compliance with the Act. Under s 96J, the Election Funding Authority could recover an unlawful political donation as a debt due to the state. Proceedings for an offence under the Act could be commenced with the Election Funding Authority's consent.

The Election Funding Authority was also required to prepare and forward to the president of the Legislative Council and the speaker of the Legislative Assembly a report of its work and activities for each reporting period. The report was to include accurate information on the amount of political donations made and the recipients of those donations. In addition, the Election Funding Authority, as required by the Election Funding Act, published the disclosures of political donations and electoral expenditure on its website so that members of the public and other interested parties could readily ascertain who made and who received political donations, the amounts involved and the extent of electoral expenditure incurred by political parties, candidates and third-party campaigners.

As will be seen, this investigation uncovered a number of instances where political donations were made and received but actions were taken to ensure that they were not disclosed to the Election Funding Authority or that the true source of the political donations was disguised from the Election Funding Authority. In many cases, the

amount of the political donation exceeded the relevant cap on donations. Political donations were obtained from, and provided by, prohibited donors. Each of these actions impacted on the ability of the Election Funding Authority to fully discharge its functions under the Election Funding Act.

The disclosure rules

In general terms, the Election Funding Act imposes a requirement that parties, elected members and candidates disclose the political donations they have received and the electoral expenditure that they have incurred during a relevant period.

The general provision relevant to disclosure is s 88. It provides:

*(1) **Parties, members, groups and candidates***

Disclosure is required under this Part of political donations received or made, and electoral expenditure incurred, by or on behalf of the following during the relevant disclosure period:

(a) a party (whether or not a registered party),

(b) an elected member,

(c) a group,

(d) a candidate.

(1A) Third-party campaigners

Disclosure is required under this Part of:

(a) electoral communication expenditure incurred by a third-party campaigner in a capped expenditure period during the relevant disclosure period, and

(b) political donations received by the third-party campaigner during the relevant disclosure period for the purposes of incurring that expenditure.

*(2) **Major political donors***

Disclosure is required under this Part of reportable political donations made by a major political donor who has, during the relevant disclosure period, made a reportable political donation of or exceeding $1,000.

The detail that is required in a disclosure is set out in s 92(1) and (2):

*(1) **General***

Political donations are to be disclosed in accordance with this section.

*(2) **Reportable political donations***

Disclosure of reportable political donations is to include disclosure of the following details of each such donation made during the relevant disclosure period:

(a) the party, elected member, group or candidate to or for whose benefit the donation was made (or, if the case requires, the third-party campaigner to whom the donation was made),

(b) the date on which the donation was made,

(c) the name of the donor,

(d) the residential address of the donor (in the case of an individual) or the address of the registered or other official office of the donor (in the case of an entity),

(e) the amount of the donation,

(f) in the case of a donor that is an entity and not an individual—the relevant business number of the entity referred to in section 96D.

Section 89 sets a time limit on providing disclosures:

(1) For the purposes of this Part, the "relevant disclosure period" is each 12-month period ending on 30 June.

(2) In the case of a candidate, the first relevant disclosure period for the candidate registered for an election (the current election) includes the period commencing on:

(a) if the candidate was registered at any time in the Register of Candidates for the previous general election—the 31st day after polling day for that previous general election, or

(b) if the candidate was registered at any time in the Register of Candidates for a by-election (not being the current election) following the previous general election—the 31st day after polling day for that by-election, or

(c) the day that is 12 months before the day on which the candidate was nominated for election at the current election,

whichever first occurs, but not including a period during which he or she was an elected member.

Certain definitions in s 84 explain the relevant scope and impact of the disclosure rules:

- "donor" means "a person who makes a gift"
- "gift" means "any disposition of property made by a person to another person, otherwise

than by will, being a disposition made without consideration in money or money's worth or with inadequate consideration, and includes the provision of a service (other than volunteer labour) for no consideration or for inadequate consideration"

- "major political donor" means "an entity or other person (not being a party, elected member, group or candidate) who makes a reportable political donation of or exceeding $1,000".

Section 85(1) defines "political donation" as:

> *(a) a gift made to or for the benefit of a party, or*
>
> *(b) a gift made to or for the benefit of an elected member, or*
>
> *(c) a gift made to or for the benefit of a candidate or a group of candidates, or*
>
> *(d) a gift made to or for the benefit of an entity or other person (not being a party, elected member, group or candidate), the whole or part of which was used or is intended to be used by the entity or person:*
>
> *(i) to enable the entity or person to make, directly or indirectly, a political donation or to incur electoral expenditure, or*
>
> *(ii) to reimburse the entity or person for making, directly or indirectly, a political donation or incurring electoral expenditure.*
>
> *(2) An amount paid by a person as a contribution, entry fee or other payment to entitle that or any other person to participate in or otherwise obtain any benefit from a fund-raising venture or function (being an amount that forms part of the proceeds of the venture or function) is taken to be a gift for the purposes of this section.*
>
> …
>
> *(4) The following are not political donations:*
>
> *(a) a gift to an individual that was made in a private capacity to the individual for his or her personal use and that the individual has not used, and does not intend to use, solely or substantially for a purpose related to an election or to his or her duties as an elected member,*
>
> …
>
> *(5) However, if any part of a gift referred to in subsection (4) (a) is subsequently used to incur electoral expenditure, that part of the gift becomes a political donation.*

Section 87 defines "electoral expenditure" and "electoral communication expenditure". "Electoral expenditure" is "expenditure for or in connection with promoting or opposing, directly or indirectly, a party or the election of a candidate or candidates or for the purpose of influencing, directly or indirectly, the voting at an election".

The Commission received submissions to the effect that, if money provided during an election campaign was used on "living expenses" (or, in one instance, on an outstanding tax bill), this means that, under s 85(4), the money was not a political donation. This misconstrues the section. A "political donation" is anything covered by s 85(1), which has a broad application. A "gift" can still be a "political donation" even though the recipient used it towards personal expenses if it is used, solely or substantially, for a purpose related to an election or to his or her duties as an elected member. All that s 85(4) does is exclude gifts received in a "private" capacity where the purpose of the gift was purely for "personal use". That is a narrow but necessary exception. As an example, without it, politicians would be required to declare their birthday presents from family.

Section 86 defines "reportable political donation" as:

> *(1) For the purposes of this Act,* a reportable political donation *is:*
>
> *(a) in the case of disclosures under this Part by a party, elected member, group, candidate or third-party campaigner—a political donation of or exceeding $1,000 made to or for the benefit of the party, elected member, group, candidate or third-party campaigner, or*
>
> *(b) in the case of disclosures under this Part by a major political donor— a political donation of or exceeding $1,000 made by the major political donor to or for the benefit of a party, elected member, group, candidate or third-party campaigner.*

A reportable political donation must be disclosed by the donor as well as the recipient in sufficient detail to satisfy the requirements of s 92(2) of the Election Funding Act.

There are other concepts that are relevant to this report. For example, there are persons and organisations that, although not candidates or parties, involve themselves in a political campaign. They are captured by the election funding regime as "third-party campaigners", which is defined in s 4 as "an entity or other person (not being a registered party, elected member, group or candidate) who incurs electoral communication expenditure during a capped expenditure period (as defined in Part 6) that exceeds $2,000 in total".

Some submissions received by the Commission referred to the impact of disclosure on "candidates", which is defined in s 4 as:

> candidate, *in relation to an election, means a person nominated as a candidate at the election in accordance with the* Parliamentary Electorates and Elections Act 1912 *or in accordance with the* Local Government Act 1993 *(as the case requires) and includes a person applying for registration as, or registered as, a candidate in the Register of Candidates for the election.*

A submission was put that, if accepted, would potentially apply to each of those persons who were first-time candidates for NSW Parliament. The argument put in the submission, as the Commission understands it, is that under the *Parliamentary Electorate and Elections Act 1912* these persons could only become "candidates" on or after the writs for an election were issued. The writs were issued on 7 March 2011. Therefore, it was submitted, payments that were made *before* that date could not be regarded as "political donations" so far as these "candidates" were concerned.

This argument overlooks the effect of s 84(2) of the Election Funding Act that provides: "an individual who, or group of individuals which, accepts a gift for use solely or substantially for a purpose related to the proposed candidacy of the individual or individuals at a future election is for the purposes of this Part, taken to be a candidate or group when accepting the gift". This section has applied from 1 January 2011.

Prior to this amendment, s 84(2) provided that, "for the purposes of this Part, a reference to a candidate or group extends to an individual who, or a group of individuals which, accepts gifts for use solely or substantially for a purpose related to the proposed candidacy of the individual or individuals at a future election". This section came in under the *Electoral Funding Amendment (Political Donations and Expenditure) Act 2008*, which commenced on 10 July 2008. Prior to that, relevant provisions of the Act were different but they still had the effect of precluding this argument.

Mr Hartcher submitted to the Commission that, because Mr Spence and Mr Webber only became "candidates" so late, and because Mr Koelma was never a candidate, the payments made to Eightbyfive before 7 March 2011, which are examined in detail later in this report, could not have been a "political donation". That submission misinterprets and artificially restricts the breadth of the operation of the definition of "political donation" in s 85(1).

Another point taken up in submissions received by the Commission is based on the fact that the statutory responsibility for making a disclosure falls on an agent. In the case of a party, there is a single agent known as "the party agent". In the case of elected members, candidates and third-party campaigners it is "the official agent". Section 90 provides:

> *The person who is responsible for making a disclosure required under this Part is as follows:*
>
> *(a) in the case of a party—the party agent,*
>
> *(b) in the case of an elected member—the official agent of the member,*
>
> *(c) in the case of a group or candidate—the official agent of the group or candidate,*
>
> *(d) in the case of a third-party campaigner—the official agent of the third-party campaigner,*
>
> *(e) in the case of a major political donor—the political donor.*

It was submitted to the Commission that because the "agent" had "responsibility" for disclosure, if anything went wrong in the disclosure it would be the responsibility of the "agent". This is not correct, as s 96H(3) of the Election Funding Act provides:

> *(3) An elected member, member of a group, candidate or third-party campaigner who, in relation to a matter required to be disclosed under this Part by the official agent of the elected member, group, candidate or third-party campaigner, gives or withholds information to or from the agent knowing that it will result in the making of a false statement in a disclosure or request under this Part by the agent is guilty of an offence.*
> *Maximum penalty: 400 penalty units or imprisonment for 2 years, or both.*

There are two other provisions that impose obligations on those receiving political donations – s 96A and s 96C. The terms of s 96A(1) and (2) control the circumstances in which such donations may be accepted. The position of politicians making contributions into their own campaign is covered by s 96A(5) and (5A). Section 96A provides:

> *(1) It is unlawful for political donations to an elected member to be accepted unless:*
>
> *(a) the member has an official agent, and*
>
> *(b) the donations are made to that agent.*
>
> *(2) It is unlawful for political donations to a group or candidate to be accepted unless:*
>
> *(a) the group or candidate is registered under this Act, and*
>
> *(b) the group or candidate has an official agent, and*

(c) the donations are made to that agent.

…

(5) It is unlawful for an elected member to make payments for electoral expenditure for their own election or re-election unless the payments are made from their campaign account kept in accordance with section 96B. The guidelines of the Authority may exclude minor payments from the operation of this subsection.

(5A) It is unlawful for a candidate or group to make payments for electoral expenditure for their own election or re-election unless the group or candidate is registered under this Act and the payments are made from their campaign account kept in accordance with section 96B. The guidelines of the Authority may exclude minor payments from the operation of this subsection.

Under s 96C, the record-making and keeping obligations are set out:

(1) It is unlawful for a person to accept a reportable political donation that is required to be disclosed under this Part unless the person:

(a) makes a record of the details required to be disclosed under this Part in relation to the donation, and

(b) provides a receipt for the donation (being a receipt that includes a statement required by the regulation as to the circumstances in which the donor is obliged to disclose the donation under this Part).

Note: Section 96I (2) requires the above record to be kept for at least 3 years.

It is important to note that the disclosures are public documents and, at all relevant times, they were required to be published by the Election Funding Authority and were to be available to be examined by the public. The purpose of publication, no doubt, is to enhance the transparency of the process. It could, in some circumstances, raise issues in the mind of an informed reader, which could lead to the identification of irregularities, and that could lead to an investigation by the Election Funding Authority. At the time relevant to this investigation, s 95 provided:

(1) The Authority is to publish on a website maintained by the Authority the disclosures of reportable political donations and electoral expenditure under this Part (and other information it considers relevant).

(2) The disclosures are to be published on the website as soon as practicable after the due date for the making of the disclosures.

The prohibition on property developers

From 14 December 2009, s 96GA of the Election Funding Act prohibited political donations by property developers. Section 96GA provides:

(1) It is unlawful for a prohibited donor to make a political donation.

(2) It is unlawful for a person to make a political donation on behalf of a prohibited donor.

(3) It is unlawful for a person to accept a political donation that was made (wholly or partly) by a prohibited donor or by a person on behalf of a prohibited donor.

(4) It is unlawful for a prohibited donor to solicit another person to make a political donation.

(5) It is unlawful for a person to solicit another person on behalf of a prohibited donor to make a political donation.

The term "property developer" is defined in s 96GB:

(1) Each of the following persons is a property developer *for the purposes of this Division:*

(a) a corporation engaged in a business that regularly involves the making of relevant planning applications by or on behalf of the corporation in connection with the residential or commercial development of land, with the ultimate purpose of the sale or lease of the land for profit,

(b) a person who is a close associate of a corporation referred to in paragraph (a).

…

(3) In this section:

close associate *of a corporation means each of the following:*

(a) a director or officer of the corporation or the spouse of such a director or officer,

(b) a related body corporate of the corporation,

(c) a person whose voting power in the corporation or a related body corporate of the corporation is greater than 20% or the spouse of such a person…

This portion of the Election Funding Act was amended again with effect from 1 January 2011, but the effect of that amendment did not alter the way in which the prohibition in respect of property developers worked.

During the course of their evidence, several witnesses claimed to be uncertain or confused about the statutory definition of "property developer". There were a number of submissions made to the effect that particular companies whose owners and executives admitted were property developers, were not property developers, according to the terms of the legislation or that some doubt existed in that respect.

Section 96GE provided a mechanism whereby any such uncertainty or dispute could be resolved:

> *(1) A person (*the applicant*) may apply to the Authority for a determination by the Authority that the applicant or another person is not a prohibited donor for the purposes of this Division.*
>
> *(2) The Authority is authorised to make such a determination if the Authority is satisfied that it is more likely than not that the person is not a prohibited donor. The Authority is to make its determination solely on the basis of information provided by the applicant.*
>
> *(3) The Authority's determination remains in force for 12 months after it is made but can be revoked by the Authority at any time by notice in writing to the applicant.*
>
> *(4) The Authority's determination is conclusively presumed to be correct in favour of any person for the purposes of a political donation that the person makes or accepts while the determination is in force (even if the determination is subsequently found to be incorrect).*
>
> *(5) The Authority's determination is not presumed to be correct in favour of any person who makes or accepts a political donation knowing that information provided to the Authority in connection with the making of the determination was false or misleading in a material particular.*

None of the persons who claimed to be uncertain about whether or not a person or entity was a property developer sought such a determination or claimed that they were unaware of being able to do so. Failure to have sought a determination militates against a finding that any uncertainty was genuine. The fact that payments were made secretly and not declared by either the giver or receiver, or that payments were made through arrangements designed to hide the identity of the true donor, gives rise to the inference that those involved well understood the donations were from prohibited donors. When dealing with this issue in the report, the Commission has taken into account the circumstances relating to each of the individual transactions as well as the considerations set out above.

The caps on donations and spending

From 1 January 2011, the NSW Parliament imposed caps on the amount that a donor could give to a party, an elected member or a candidate as a political donation. Section 95A provides:

> *(1) The applicable cap on political donations is as follows:*
>
> *(a) $5,000 for political donations to or for the benefit of a registered party*
>
> …
>
> *(e) $2,000 for political donations to or for the benefit of a candidate,*
>
> *(f) $2,000 for political donations to or for the benefit of a third-party campaigner.*
>
> *(2) **Aggregation of donations during financial year***
>
> *A political donation of or less than an amount specified in subsection (1) made by an entity or other person is to be treated as a donation that exceeds the applicable cap on political donations if that and other separate political donations made by that entity or other person to the same party, elected member, group, candidate or third-party campaigner within the same financial year would, if aggregated, exceed the applicable cap on political donations referred to in subsection (1).*

At the same time, s 95B prohibits receiving an amount in excess of the cap:

> *(1) **General prohibition***
>
> *It is unlawful (subject to this section) for a person to accept a political donation to a party, elected member, group, candidate or third-party campaigner if the donation exceeds the applicable cap on political donations.*

From 1 January 2011, the NSW Parliament placed a cap on the amount that could be spent on a state election campaign. Relevantly, the most that could be spent by or on any candidate in an individual seat is $100,000. The effect of s 95H of the Election Funding Act was that expenditure that occurred before 1 January 2011 was not included in the cap.

Offences under the Election Funding Act

The Election Funding Act creates offences for breaches of the disclosure rules, for breaches of the prohibition on property developers, and for breaches of the caps on donations and spending.

In respect of the disclosure rules, s 96H(1) makes the failure to make a declaration an offence punishable by a fine, s 96H(2) makes it an offence to make a declaration that contains a knowingly false statement, and s 96H(3) extends the disclosure obligation beyond the agent:

> *(1) A person who is required to lodge a declaration under section 91 but who fails to do so within the time required by this Part is guilty of an offence. Maximum penalty: 200 penalty units.*
>
> *(2) A person who makes a statement:*
>
> *(a) in a declaration or other disclosure under this Part, or*
>
> *(b) in a request under this Part for an extension of the due date for making the disclosure,*
>
> *that the person knows is false, or that the person does not reasonably believe is true, is guilty of an offence. Maximum penalty: 400 penalty units or imprisonment for 2 years, or both.*
>
> *(3) An elected member, member of a group, candidate or third-party campaigner who, in relation to a matter required to be disclosed under this Part by the official agent of the elected member, group, candidate or third-party campaigner, gives or withholds information to or from the agent knowing that it will result in the making of a false statement in a disclosure or request under this Part by the agent is guilty of an offence. Maximum penalty: 400 penalty units or imprisonment for 2 years, or both.*

The terms of s 96H(3) are particularly important given arguments (noted earlier) that suggested that responsibility for an accurate disclosure lay solely with the agent. This inquiry was largely concerned with cases where the evidence is that the agent was being provided with only part of the information or information was being withheld entirely.

In respect of property developers, s 96I(1) of the Election Funding Act makes it an offence to breach the prohibition. Before 1 January 2011, s 96I provided as follows:

> *A person who does any act knowing that it is unlawful under Division 3, 4 or 4A is guilty of an offence. Maximum penalty: In the case of a party, 200 penalty units or in any other case, 100 penalty units.*

From 1 January 2011, s 96I(1) provided as follows:

> *(1) A person who does any act that is unlawful under Division 3, 4 or 4A is guilty of an offence if the person was, at the time of the act, aware of the facts that result in the act being unlawful. Maximum penalty: 400 penalty units or imprisonment for 2 years, or both.*

In respect of the caps on political donations and spending, s 96HA makes it an offence to breach those caps:

> *(1) A person who does any act that is unlawful under Division 2A or 2B is guilty of an offence if the person was, at the time of the act, aware of the facts that result in the act being unlawful.*
>
> *(2) A person who makes a donation with the intention of causing the donation to be accepted in contravention of Division 2A is guilty of an offence. Maximum penalty: 400 penalty units or imprisonment for 2 years, or both.*

At the relevant time, s 111(4) imposed a three-year limitation period on the commencement of proceedings in respect of an offence. The effect of s 111(4) is that a prosecution for any offence that is relevant to this investigation is now statute-barred.

PART 2 – THE NEWCASTLE CONTAINER TERMINAL

Chapter 4: The Port of Newcastle

This part of the report deals with a proposal by Buildev to create a fifth coal terminal at the Port of Newcastle and some of the steps taken to pursue this proposal.

The three principal ports in NSW are Port Botany, Port Kembla and the Port of Newcastle. Each of those ports has a different speciality. The Port of Newcastle focuses on coal exports. It is the largest coal exporting port in the world, and its role is significant for the regional, state and national economies.

The day-to-day activities of the Port of Newcastle, as well as its plans for expansion, were at all relevant times controlled by the Newcastle Port Corporation (NPC), a statutory state-owned corporation. Under the *State Owned Corporations Act 1989*, a statutory state-owned corporation has two shareholders: the treasurer and another minister nominated by the premier.

The Hon Eric Roozendaal was treasurer between 8 September 2008 and 28 March 2011 and, therefore, a shareholder in the NPC during that period. As the minister for ports and waterways he was also the relevant portfolio minister from 6 September 2010 to 28 March 2011, with responsibility for day-to-day ministerial oversight of the corporation. As at 2010, the NPC was governed by a board of directors. Its chief executive officer was Gary Webb. Mr Webb gave evidence during the public inquiry of the NSW Independent Commission Against Corruption ("the Commission"). He was an impressive witness and the Commission regards his evidence as reliable on the facts as well as in his area of expertise.

As at 2010, there were three coal terminals within the Port of Newcastle. Two were operated by Port Waratah Coal Services Ltd (PWCS) and one was operated by Newcastle Coal Infrastructure Group Pty Ltd (NCIG). These terminals were designated as T1, T2 and T3. Due to high international demand, the three coal terminals were working at close to full capacity. Apart from its coal loading facilities, there were some non-bulk handling facilities in the Port of Newcastle, but these were relatively small and outdated.

The Capacity Framework Agreement

Coal mined in NSW is principally exported through the Port of Newcastle. Generally speaking, bulk coal for export is delivered by rail to a point where it is stored ready for transfer from shore into the holds of bulk-carrying ships. The point at which this interchange occurs is the coal terminal.

Without access to a coal terminal, a coal mine is denied access to the export market. By 2008, the coal industry had enjoyed several years of high demand. As the coal terminal infrastructure was limited, there was a corresponding high demand for access to the coal terminals. The coal industry wanted fair access to the limited infrastructure.

In his July 2008 report titled, *Final report on industry discussions on the long term framework for the Hunter Valley coal chain*, the Hon Nick Greiner AC, one of the architects of the ultimate arrangement, described the need "to develop the necessary long term framework for the expansion and management of the Hunter Valley Coal Chain". Negotiations commenced in about February 2008. They were complex. Apart from anything else they required cooperation from the rail provider, the Australian Rail Track Corporation (ARTC), which required the approval of the federal government.

In 2009, an agreement titled the "Capacity Framework Agreement" was negotiated between the NPC and PWCS and NCIG (in their capacity as the operators of T1, T2 and T3). The effect of the agreement was to facilitate long-term equitable access to coal terminal facilities. It was given several names during the evidence,

including the "Coal Chain Agreement" and the "ACCC Agreement".

On 31 August 2009, the parties entered a deed reflecting their agreement, which relevantly recited that, "On or about 8 April 2009 the parties agreed to pursue the implementation of a long term solution for access to and expansion of export capacity at the Port of Newcastle". As the agreement involved dividing access to limited infrastructure, it required the approval of the Australian Competition and Consumer Commission (ACCC). On 9 December 2009, the ACCC issued a determination that, in summary, authorised the implementation of the Capacity Framework Agreement "until 31 December 2024 to enable a long term solution to the ongoing capacity constraints in the Hunter Valley coal chain … at the Port of Newcastle". The agreement commenced on 1 January 2010.

One of the features of the Capacity Framework Agreement was that it provided a means for the expansion of the existing coal terminal facilities by providing for the development of a fourth coal terminal. This would commence if and when the demand arose. Crown land on Kooragang Island was set aside for development as a new "common user terminal" – designated as T4. The Capacity Framework Agreement provided for a mechanism to pay for the new infrastructure by way of a levy on each tonne of coal.

Chapter 5: The old BHP site

In 1999, BHP Billiton Limited ("BHP") closed its steel-making facility at Mayfield in Newcastle. The land then became available for redevelopment. Mayfield was well served by road and rail, and part of the land was on the Port of Newcastle waterfront. BHP came to an arrangement under which it transferred the ownership of the whole of the land to the NSW Government.

The Commission's public inquiry focused on two parcels of this land – one known as the Mayfield site and another which became known as the Intertrade site.

The Mayfield site

The Mayfield site comprised approximately 90 hectares and adjoined the waterfront on the Port of Newcastle (Figure 1, page 40). The NSW Government transferred the ownership and control of the Mayfield site to the NPC.

The Mayfield site had immediate access to the main channel of the harbour and, for that reason, held a strategic position in relation to the way in which the Port of Newcastle was to be planned and developed. The NPC developed a plan for the Mayfield site, the detail of which is discussed in the next chapter.

The Intertrade site

The Intertrade site comprised approximately 65 hectares, immediately adjacent to the Mayfield site, but did not have access to the waterfront (Figure 2, page 41). The NSW Government transferred the ownership and control of the Intertrade site to another state-owned corporation – the Regional Land Management Corporation (RLMC), which became the Hunter Development Corporation (HDC).

The HDC developed its own plan in respect of the Intertrade site consistent with the planning approvals applicable to the area. The Intertrade site was divided into two lots. In 2007, the HDC put the whole site out to market through a competitive process calling for expressions of interest or "Request for Proposals" – a process that called for developers to put forward plans to deliver "general industrial and related commercial uses" in respect of one lot, and for "intermodal and port support uses" for the other lot. Thus, in practical terms, the development was for the design and construction of general light industry buildings, including warehouses, distribution centres and offices.

In December 2008, the NSW Government endorsed a local Newcastle company known as Buildev Intertrade Consortium Pty Ltd as the preferred developer of the Intertrade site. That company was related to another company, Buildev Developments (NSW) Pty Ltd. There were several companies within the Buildev group and the companies operated as a unit. Unless it is necessary to distinguish between companies it is convenient hereafter to refer to any company operating within the group simply as "Buildev".

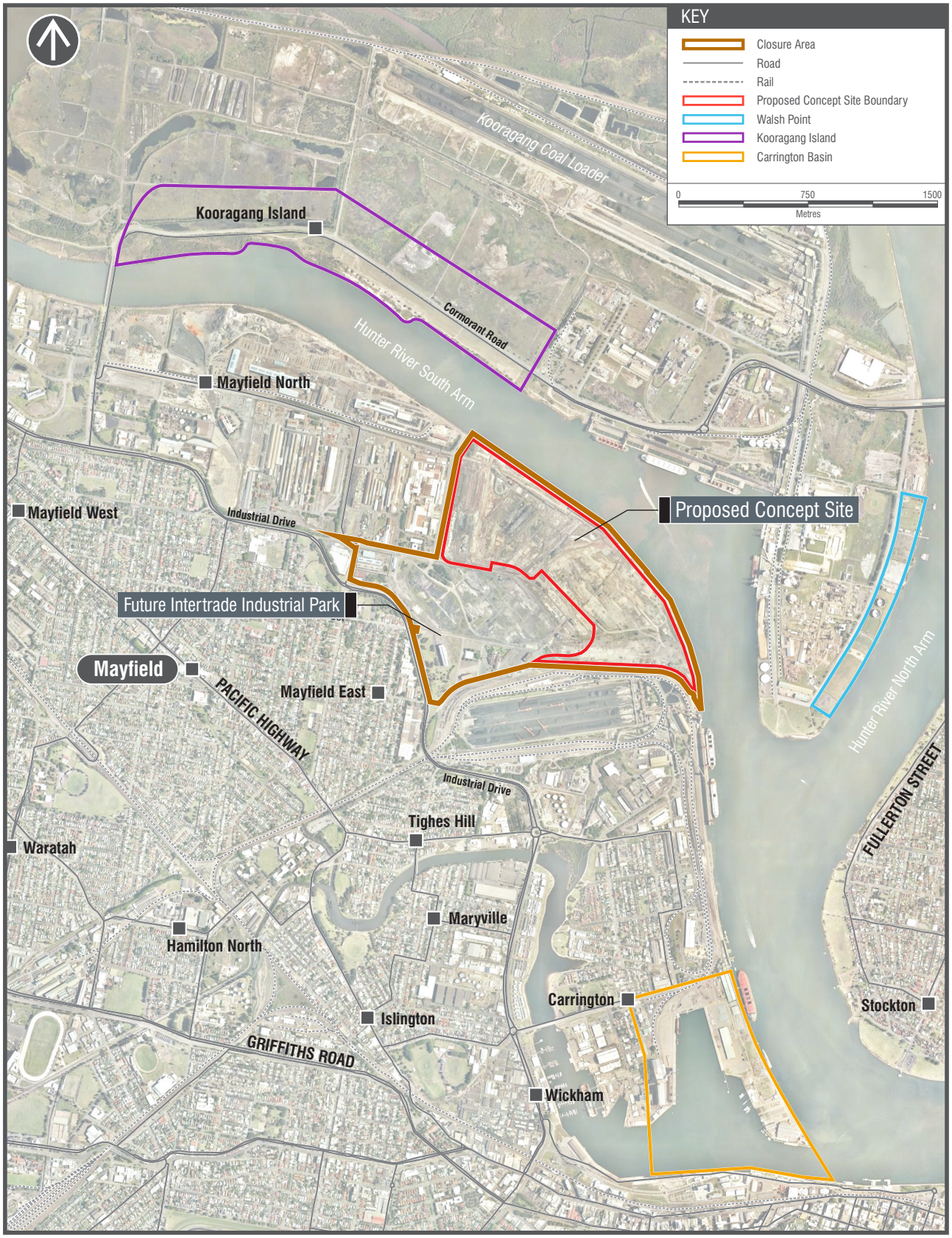

KEY
Closure Area
Road
Rail
Proposed Concept Site Boundary
Walsh Point
Kooragang Island
Carrington Basin
0
750
1500
Metres
Kooragang Coal Loader
Kooragang Island
Cormorant Road
Hunter River South Arm
Mayfield North
Mayfield West
Industrial Drive
Proposed Concept Site
Future Intertrade Industrial Park
Mayfield
Mayfield East
PACIFIC HIGHWAY
Industrial Drive
Tighes Hill
Waratah
Maryville
Hamilton North
Carrington
Islington
GRIFFITHS ROAD
Wickham
Hunter River North Arm
FULLERTON STREET
Stockton
AECOM
ALTERNATIVE PORT OF NEWCASTLE SITES
Environmental Assessment
Mayfield Site Port-Related Activities Concept Plan
Figure 4-2

Figure 1

Figure 2

AECOM

SITE LOCATION
Environmental Assessment
Mayfield Site Port-Related Activities Concept Plan

Figure 1-2

Chapter 6: The Newcastle Port Corporation plan for Mayfield

Over time, the NPC developed a "concept plan" for the Mayfield site. The site was to be divided into five "precincts", each with a different purpose. Only one of the precincts was specifically dedicated as a container terminal; although, as the evidence explained, that was the principal purpose for the whole of the site. For this reason, it is convenient to describe the NPC proposal as one for a container terminal.

The reasons for the NPC's decision were explained by Mr Webb and included general economic considerations, local issues and features pertinent to the particular site. The Port of Newcastle did not have a container terminal. The development of a container terminal was consistent with the 2003 "Ports Growth Plan", which provided for Newcastle to supplement Port Botany as Port Botany approached its capacity. The NPC had actually entered into a statement of corporate intent signed by the NPC and its shareholder ministers that incorporated this proposal. The location of a container terminal in Newcastle was strategic, as there was no container terminal between Sydney and Brisbane, and existing rail and road facilities meant that a Newcastle-based container terminal was in a desirable position for market purposes. The Mayfield site allowed access for container ships up to 280 metres long. A container terminal would permit an upgrade of the outdated bulk handling facilities of the Port of Newcastle and allow for more grain exports, an area in which the Port of Newcastle was lagging.

There was a question as to whether there was sufficient market demand to drive the need for a container terminal at Newcastle. The NPC had tested this and found that private industry was willing to take on the risk of the development of a container terminal. The NPC plan for a container terminal was designed to minimise the financial risk to the NSW Government. The plan was to let private industry take the site under a long-term lease and to meet construction and administration costs. By these means, 90% of any financial risk was passed to private industry.

The NPC had considered whether or not the Mayfield site should be developed as a coal terminal, but had arrived at the decision that it should not. Among the reasons for the decision were the NPC's knowledge of the Capacity Framework Agreement and the inclusion in that agreement of a plan to build T4. The construction of T4 made it unlikely that there would be sufficient market demand for the creation of a fifth coal terminal. Another reason was that the NPC had taken legal advice that suggested that, should the Mayfield site be used for the development of a coal terminal, it could jeopardise the Capacity Framework Agreement. Preservation of the Capacity Framework Agreement was important. The Capacity Framework Agreement was regarded as vital. One witness described it as *the* major achievement of the NSW Labor Government. The legal advice was that, if another coal terminal came on line, it would undermine the rationale behind the Capacity Framework Agreement so that the ACCC would withdraw its support. There was also a concern that, if a fifth coal terminal was approved, other industry players would withdraw from the Capacity Framework Agreement.

To make it clear, when NPC planned a container terminal it was originally allowing for a limited amount of coal to be handled at the Mayfield site. Over time, that altered, so that by mid-2010 it was decided that only "boutique" coal, destined for export to Turkey, would be handled through the site. This amounted to half a million tonnes per annum, which, in the context of the Port of Newcastle, was only a very small amount. Moreover, this coal would not be in bulk, and would be moved in containers.

By late 2010, the NPC had progressed a long way with its proposal for a container terminal on the Mayfield site. The NPC had tested the market by asking for expressions of interest and studying responses. The NPC selected a consortium called the Newcastle Stevedoring Consortium (NSC). The NSC was comprised of Anglo Ports and Grup TCB, large and experienced international groups within the industry, and a local company, Newcastle Stevedores Pty Ltd.

As a statutory state-owned corporation, the NPC was obliged to comply with the NSW Government's "Working with Government Guidelines". Mr Webb explained that, in accordance with the guidelines, the NPC had conducted "direct negotiations" with the NSC. By 2010, the direct negotiations had been completed and the process had moved to the point where the NSC had been identified as the preferred proponent. From this point, the NPC could enter "commercial negotiations" with the NSC with a view to concluding a final contract. This required ministerial approval and the NPC was seeking that permission from Mr Roozendaal.

At the same time that the NPC was seeking to progress its arrangements, Mr Roozendaal was receiving an alternative proposal for the Mayfield site.

Chapter 7: The Buildev proposal

Buildev had won the contractual rights for a light industrial development on the Intertrade site. In about mid-2010, Buildev came up with a radically different proposal that would involve using a combination of the Intertrade site and the Mayfield site to create a fifth coal terminal (involving the construction of a coal loader). The Buildev proposal faced considerable challenges. It required substantial changes to existing arrangements. It required the contract, which Buildev currently held with the HDC, to be terminated or fundamentally altered. It required a re-zoning of the Intertrade site to permit the land to be used for the purposes of a coal terminal. It required a reversal of the plans that the NPC had for the Mayfield site. It also required, if Buildev was to be the proponent, that a very large design, construction and administration project be awarded to a medium-sized, Newcastle-based company.

The circumstances in which Buildev came to make this new proposal are better understood in the context of the background of Buildev and its ownership.

Buildev and its personnel

The history of Buildev was described in the submissions of David Sharpe. The original company, Buildev Equity Pty Ltd, was incorporated in the 1990s as a commercial, residential and industrial property developer. At a later time, Buildev Group Pty Ltd became the flagship entity. It appears that the original ownership was divided between Mr Sharpe, who owned the majority of the shares, and Darren Williams, who owned a minority parcel. Mr Sharpe was the managing director. Although it was commenced and based in Newcastle, Buildev had spread and had interests in a variety of places, including the Hunter Valley, north-west Sydney, Queensland and Victoria.

In November 2008, the coalmining entrepreneur, Nathan Tinkler, bought shares in Buildev Group and was appointed a director. The facts surrounding the purchase of the shares were the subject of some contention. When he gave evidence to the Commission, Mr Tinkler was at pains to claim that he was only "a minority shareholder" and described himself as "an investor", but that was misleading. Although Mr Tinkler (through Oceltip Property Pty Ltd) only held 9% of the share capital, under a collateral arrangement, Mr Tinkler also held convertible notes, which effectively took his interest up to 49%. Philip Christensen was a director of different companies in Mr Tinkler's group of companies ("the Tinkler Group"). He gave evidence that Buildev "was controlled by the Tinkler Group". In his submissions, Mr Tinkler has relied on the evidence of Mr Williams to establish that he had little or no involvement in the commercial operations of Buildev. That may be correct in respect of the general business of Buildev, but it is not correct in relation to the proposal for a fifth coal terminal at Mayfield. In that respect, Mr Tinkler had a direct interest and exercised a degree of control of the way in which the Buildev proposal advanced.

Buildev's objectives altered once Mr Tinkler bought into the company. Mr Tinkler was a major investor in Aston Resources Ltd – the company that owned the rights to the Maule's Creek Coal Mine. The evidence suggested that, once Maule's Creek became fully operational, it would be a large exporter of coal and that access to a dedicated coal terminal would confer a massive economic and financial benefit on Aston Resources. It was abundantly clear from the terms and tone of Mr Tinkler's evidence that he was opposed to the Capacity Framework Agreement, which had been struck among major industry players, including transnational companies. According to Mr Tinkler, there were public advantages of having a fifth coal terminal (in addition to the three existing terminals and further planned terminal) on the Mayfield site. It is not clear whether Mr Tinkler had the idea to alter the Buildev proposal to attempt to facilitate the development of a fifth coal terminal. Whoever

initiated the idea, it is very clear that both Mr Sharpe and Mr Williams became committed to such an option. Each would obtain substantial financial benefit from approval for the fifth coal terminal.

Although this report has so far described the fifth coal terminal as "the Buildev proposal" the actual commercial background is far more complicated. Three companies were involved – Buildev Group, Buildev Intertrade Consortium and Hunter Ports Pty Ltd. Buildev Intertrade Consortium was the company that actually held the benefit of the contract with the HDC over the Intertrade site. Hunter Ports was a company owned by Mr Tinkler. Complex contractual arrangements meant that, in the event that the fifth coal terminal was approved, Hunter Ports agreed to purchase the shares in Buildev Group for $100 million. In that event, Mr Williams and Mr Sharpe would receive a share of that $100 million based on their respective shareholdings. While it is impossible to place a precise figure on the benefits likely to be derived from approval of the fifth coal terminal, each of Mr Tinkler, Mr Williams and Mr Sharpe stood to make many millions of dollars.

While acknowledging the complex contractual and corporate context, this report will continue to refer to the fifth coal terminal project as "the Buildev proposal".

It is appropriate to make some observations on the credibility of the principals of Buildev.

The Commission has concluded that Mr Williams' evidence was generally unreliable in that it was on occasions untruthful or misleading. The balance of this report contains multiple references to support this conclusion.

Mr Tinkler's evidence suffered from two characteristics that undermined his reliability. The first was that, whenever he could, Mr Tinkler attempted to play down his role, his knowledge, and his level of engagement in the conduct under investigation. This report details several instances where he attempted to do so. One example is Mr Tinkler's reliance on his general "ignorance of the election funding laws", which was demonstrated to be untrue at least in respect of the introduction of the prohibition on property developers making political donations. The second characteristic was that he was so dismissive of the Commission and the inquiry that it was difficult to accept that he was giving genuine and considered responses to questions.

The position in respect of Mr Sharpe is more complex. As the founder of Buildev, Mr Sharpe gave an appearance that he was disappointed or even disturbed about what emerged about his company. As he has submitted, it is true that Mr Sharpe did provide considerable assistance to the investigation. Yet, the Commission is left with the impression that Mr Sharpe was not completely forthcoming and may have attempted to downplay his role. In the end, the value of Mr Sharpe's evidence has to be assessed carefully and instance-by-instance. Mr Sharpe's evidence is considered more reliable than the evidence of Mr Williams.

Buildev's political dealings

Buildev was actively involved in pursuing and attempting to influence political issues and outcomes and, in this respect, engaged in a number of questionable transactions. Each of Mr Tinkler, Mr Sharpe and Mr Williams had, to some greater or lesser degree, an involvement in these matters. An examination of the activities of Buildev demonstrates that those who owned and controlled it were willing to pay money in an attempt to obtain political support, generally, and specifically for the fifth coal terminal proposal.

Of the relevant Buildev officers, Mr Williams was the most involved in politics. Over the years, he had curried favour with politicians from the Australian Labor Party (ALP) and the NSW Liberal Party through donations and subscriptions. The evidence is that Mr Williams "had

vast connections with political parties". Mr Williams had acquired political connections with dozens of politicians, including the Hon Michael Gallacher MLC, Christopher Hartcher, Craig Baumann, Bart Bassett and Timothy Owen. He agreed, for example, that the motive to sponsor the NSW Liberal Party in the lead up to the 2011 election was to build relationships with the politicians who could make the decisions affecting Mayfield. When Mr Williams recognised that the ministry that affected Mayfield was likely to be held by a National Party politician, he directed Troy Palmer, the chief financial officer of the Tinkler Group, to organise a donation of $20,000 to the National Party because the "Nats will be running ports".

Mr Tinkler was politically active too. In particular, Mr Tinkler became angry because of his perception that the National Party had failed to respond adequately to his donation of $45,000, which he thought was a waste of money because he did not get a "hearing" on the subject of the fifth coal terminal. This is one of those areas where Mr Tinkler tried to play down his role – in his submissions he describes himself as "[a]n unwitting participant in the plans of others" – nominating Mr Williams and Mr Sharpe as the organisers. The Commission does not accept that evidence. Mr Williams and Mr Sharpe reported to Mr Tinkler and acted on his instructions.

The whole of the evidence would tend to suggest that Mr Sharpe was less politically active than Mr Williams or Mr Tinkler, but he, too, was astute on political matters. For example, in relation to a fundraiser organised for Mr Gallacher (the detail of which is discussed later in this report), Mr Sharpe was aware why the money was being paid – it was being paid in respect of "lobbying" in relation to the fifth coal terminal.

The breadth and quantum of the political donations of Buildev are considerable. They crossed party lines. While the ALP was in power in NSW, Buildev sought to influence, and did influence, two powerful ALP politicians. At that time, it was a top-level subscriber to the ALP, paying the ALP about $100,000 a year. Sensing a likely change of state government, Buildev involved itself in the 2011 NSW election campaign in many different ways in support of the NSW Liberal Party. The detail is set out later in this report, but in summary this included organising for a payment of $66,000 into a scheme designed to fund NSW Liberal Party candidates on the Central Coast, $35,000 directly into Mr Owen's campaign fund for the seat of Newcastle, $18,000 for Mr Bassett's campaign in the seat of Londonderry, $50,000 for the anti-ALP FedUp campaign, and about $10,000 for an anonymous mailout campaign designed to unseat the ALP member for Newcastle, Jodi McKay MP.

Chapter 8: Mr Tripodi and Mr Roozendaal become involved

As at mid-2010, Buildev was still in its contract with the HDC in respect of the Intertrade site. The Buildev proposal for a fifth coal terminal would critically affect the NPC as, in order to give effect to that proposal, it would be necessary to at least create an easement on, and over, the NPC's land at Mayfield. It might be expected that Buildev would have approached each of the HDC and the NPC to submit its new proposal. This is particularly the case having regard to the impact its proposal was likely to have on the HDC's administration of the Intertrade site, the NPCs plans for the Mayfield site, and the efficacy of the crucial Capacity Framework Agreement. It did not do so, and instead went straight to speak to NSW politicians – government and the opposition.

The Commission's investigation principally examined the contact between Buildev and two ALP politicians – Joseph Tripodi and Mr Roozendaal. It is not clear how or when anyone at Buildev first met Mr Tripodi, but there is evidence that Mr Williams had a pre-existing relationship with Mr Roozendaal from the days when Mr Roozendaal was general secretary of the NSW branch of the ALP.

Mr Tripodi seemed to suggest that he knew very little or nothing about Buildev until after 19 November 2010. That evidence is not consistent with the objective facts. Mr Roozendaal recalled that Mr Tripodi spoke to him about Buildev's proposal sometime between September and October 2010. Other evidence outlined below supports the finding that Mr Tripodi dealt with Buildev before 19 November 2010.

The Commission is satisfied, for the reasons discussed below, that by 19 November 2010, when Mr Tripodi travelled by helicopter to Newcastle at Buildev's expense to meet with Mr Sharpe and Mr Williams at Buildev's offices, he was well aware of the Buildev proposal and had already taken substantial measures toward assisting Buildev. Other evidence, set out below, demonstrates that Mr Tripodi was closely and continuously involved with a number of aspects of Buildev's proposal for a fifth coal terminal.

Mr Tripodi's involvement raises two important questions.

The first question relates to Mr Tripodi's motives: why would Mr Tripodi assist Buildev in relation to its proposal for a fifth coal terminal? Mr Tripodi told the Commission he spoke to Buildev because, "I've always had an interest in public policy", and in particular policy about ports. He had been minister for ports and waterways between February 2006 and November 2009. He said he was interested in remaining informed about what was happening after he ceased being minister for ports and waterways. If Buildev benefited from his involvement and, "if they can make a contribution through their activity to the benefit of New South Wales, then I'm happy to help".

The Commission does not accept this evidence represents the entirety of his interest in the proposal. Mr Tripodi made no attempt to inform himself about ports policy from a myriad of other sources open to him, including the HDC, the NPC, Samuel Crosby (ports adviser in Mr Roozendaal's office) or NSW Treasury officials. He was only interested in Buildev's position and was advocating for its proposal from the commencement of his involvement. The Commission finds that Mr Tripodi was also hoping to secure some kind of future benefit from Buildev in relation to the development of the fifth coal terminal. This emerges from the totality of the evidence.

Mr Williams thought that Mr Tripodi's motives were to build a relationship with Buildev. Mr Tripodi had been moved to the backbench in late 2009, and made up his mind not to seek re-election in 2011. It would have been necessary for him to consider some kind of life post-Parliament. In about late 2010, Mr Tripodi had "mused" to his friend and colleague, Ian McNamara, that he was "interested in the port sector ... given his experience in that area". More specifically, Mr McNamara recalled a conversation he had with Mr Tripodi in late 2010 in which Mr Tripodi said that, "it would be interesting to be involved in building something new like … the new coal terminal". In the context in which this conversation took

place, Mr McNamara said he "imagined" Mr Tripodi was talking about the Mayfield proposal; the Commission finds that it was the likely subject of the conversation.

Ann Wills, a Buildev consultant, worked closely with Mr Tripodi on the Buildev proposal, and she said that she thought, "he was doing it because he was looking for something post politics". In April 2011, Mr Tripodi had put his name forward on a "pitch" to Buildev to act as a "senior advisor" on the fifth coal terminal proposal. The pitch was put together by Ross Cadell, who was campaign manager for the NSW National Party's campaign for Cessnock in 2011, after Ms Wills had introduced Mr Tripodi "as potentially coming on board as a senior advisor". Mr Tripodi assisted in putting the pitch together during one or two conversations with Mr Cadell.

There is other evidence of Mr Tripodi supplying real estate leads and advice to Buildev, which tends to confirm he was trying to build some kind of commercial relationship with Buildev.

The second question is whether Mr Tripodi's involvement in assisting Buildev was improper. As at late 2010, Mr Tripodi was the state member of Parliament for the western Sydney seat of Fairfield and required to undertake the ordinary and usual duties of a parliamentarian. According to Mr Tripodi, he was only doing for Buildev as much as an ordinary parliamentarian should do.

The Commission rejects that evidence. Mr Tripodi's conduct demonstrated a desire to advance Buildev's interests, whether or not that coincided with his role as a public official. The full reasons for the Commission arriving at this view are explained below, but it is appropriate for the Commission to record that, apart from the objective evidence, it has also taken into account the reliability of Mr Tripodi's evidence. The Commission has arrived at the view that Mr Tripodi's evidence was evasive and incorrect in respect of essential issues. The Commission finds Mr Tripodi's evidence untrustworthy.

Before going further, it is necessary to understand what it was that Buildev sought to achieve in the short, middle and long term. In the short term, Buildev wanted to prevent an announcement by the NPC that it was heading toward a contract with the NSC, its preferred proponent, because that had certain legal consequences that could have damaged Buildev's prospects of having its coal terminal proposal approved. So, in the short term, Buildev needed to prevent Mr Roozendaal from granting permission to the NPC to enter commercial negotiations with the NSC, as such negotiations could lead to a final contract for a container terminal on the Mayfield site. In the middle term, Buildev wanted the viability of its proposal to be preserved. The best means of preserving the position was by the creation of an easement in favour of the Intertrade site, across the Mayfield site and connecting the Intertrade site with the harbour front. In the long term, Buildev wanted to become the preferred proponent itself in relation to the development of the Mayfield site and to enter negotiations with the government for the construction of the fifth coal terminal.

The earliest reported involvement by Mr Tripodi with Buildev and the coal-loader proposal emerges from the evidence of Mr Roozendaal. Mr Roozendaal told the Commission that "sometime between September and October 2010", Mr Tripodi told him that he had been meeting with Buildev. He spoke about the coal-loader proposal. Mr Roozendaal told the Commission that he spoke with Mr Tripodi about the project on a number of occasions and thought that Mr Tripodi was communicating to people at Buildev what he was told by Mr Roozendaal. Mr Roozendaal regarded Mr Tripodi as "advocating for the Buildev proposal".

The second record of an involvement by Mr Tripodi is in Mr Sharpe's note written on 31 October 2010. Under the heading "Strategy", Mr Sharpe noted "Need to brief Joe and Eric so they can take charge of the situation". That note suggests that, as at 31 October 2010, Mr Tripodi and Mr Roozendaal were not only involved, but – at least in the perception of Mr Sharpe – inclined to assist Buildev and its proposal.

It is evident that soon after he became involved, Mr Tripodi obtained the assistance of his friend and former political officer, Mr McNamara. In his submission to the Commission, Mr Tripodi denies it was he who brought in Mr McNamara to assist in the Buildev proposal. The Commission does not accept that submission. Mr McNamara, whose evidence was generally reliable, recounted how he barely knew anyone at Buildev until 2 November 2010 when Mr Tripodi contacted him and asked him to come to his office. When he went to the office, Mr Williams and Mr Sharpe were present. There was a discussion about the fifth coal terminal proposal. Emails exchanged at the time show that Mr McNamara was providing some general advice to Buildev on how to advance its proposal. Among the matters raised by Mr McNamara were "probity issues" because, as Mr McNamara put it, "PWCS and NCIG were never given the opportunity to bid for the [Intertrade] site for the purpose of a coal terminal". A feature of that meeting, on the evidence of Mr McNamara, was that Mr Tripodi and others already knew that Mr McNamara had an appointment to see Mr Roozendaal and Mr Webb on 8 November 2010 – information they were likely to have obtained from Mr Roozendaal.

The meeting on 8 November 2010 took place at Mr Roozendaal's office. As well as Mr Roozendaal, Mr Webb and Mr McNamara, Lisa Carver, a lawyer

from the law firm Gilbert + Tobin, and Mr Crosby (Mr Roozendaal's ports adviser) were present. Gilbert + Tobin was the law firm that had acted for the NPC on the Capacity Framework Agreement. During that meeting, Ms Carver provided oral legal advice on the consequences of the Buildev proposal on the Capacity Framework Agreement. The advice was that the Buildev proposal jeopardised the Capacity Framework Agreement. The substance of Ms Carver's advice was, on the instruction of Mr Roozendaal, immediately communicated by Mr McNamara to Mr Tripodi.

The next contact of which there is evidence was on 19 November 2010, when Mr Tripodi flew on the Buildev helicopter to meet Mr Sharpe and Mr Williams in Newcastle. There are notes made by Mr Sharpe of that meeting, titled "Joe notes – 19.11.10" (Figure 3, page 50). Although Mr Sharpe was very evasive as to the nature of the notes, the Commission finds that they can be relied on and used as a reasonably accurate record of the actual exchanges that day.

Several points can be made about the notes and what they disclose about Mr Tripodi's involvement. Mr Sharpe recorded "Gary Webb provided legal opinion from Tobins that argues that ACCC agreement would be compromised" and followed by "Both Joe [Tripodi] / Ian [McNamara] say argument put forward are unfounded and believe ACCC agreement allows what we are planning". The reference to "legal opinion from Tobins" is undoubtedly a reference to the oral advice provided by Ms Carver of Gilbert + Tobin and the reference to the "ACCC agreement" is a reference to the Capacity Framework Agreement. It is plain that Mr Tripodi was disclosing to Mr Sharpe and Mr Williams the content of what Ms Carver had advised. That was NPC's legal advice, and it had been provided to a minister. The advice was protected by client legal privilege.

The notes also make it plain that Mr Tripodi had been discussing the issues with Mr Roozendaal, and that Mr Roozendaal was onside with Buildev's proposal. For example, Mr Sharpe made a further note: "Eric [Roozendaal] fear is Gary [Webb] may go public with a smear campaign on labour [sic] government that is why we will need libs onside to hose down and say government right on this occasion".

As described above, Buildev's short-term ambition was to prevent the NPC from entering into commercial negotiations with the NSC. The last of Mr Sharpe's notes is "[w]hilst progressing our bid / negotiations we need to slow or derail Anglo". The reference to "Anglo" is a reference to the NSC (Anglo Ports being a key member of the consortium), and the reference to slowing or derailing Anglo is a reference to Buildev's short-term objective. In this respect, the fifth note made by Mr Sharpe is particularly important "Joe – going to get Eric to stop Anglo deal going to board this Thursday". The reference to the "Anglo deal" is a reference to the NSC proposal and the reference to the "board" is a reference to the NPC board, which had a meeting scheduled for the following Thursday, 25 November 2010. In other words, Mr Tripodi had agreed with Mr Sharpe and Mr Williams that he would arrange it with Mr Roozendaal so that Buildev's short-term objective was advanced.

Mr Tripodi told the Commission that he could not "specifically" recall that part of the meeting. Mr Tripodi said, "to the best of my recollection", he did not speak to Mr Roozendaal about this issue. However, there was extensive telephone contact between the mobile telephone services of Mr Tripodi and Mr Roozendaal between the time of Mr Tripodi's meeting with Mr Sharpe and Mr Williams on Friday, 19 November 2010, and the following Monday, 22 November 2010. When Mr Roozendaal was asked whether Mr Tripodi urged him to stop the Anglo deal going to the NPC board, he said "I think so, yes". He told the Commission that Mr Tripodi "raised concerns that it would be inappropriate for the NPC to progress the container terminal proposal while the Buildev proposal was being considered". The Commission is satisfied that Mr Tripodi used his position as a member of Parliament to influence Mr Roozendaal to prevent the deal between the NPC and the NSC for construction of a container terminal from progressing by stopping the NPC from entering into commercial negotiations with the NSC.

On Monday, 22 November 2010, Mr Roozendaal acted consistently with the "Joe" undertaking. He requested Mr Webb to provide him with a copy of the NPC board agenda for the meeting on Thursday, 25 November 2010. The Commission finds that Mr Roozendaal did this to ascertain whether the NPC proposed dealing with the NSC arrangements was going before the NPC board at that meeting (it was). There is then evidence that Mr Roozendaal called Mr Webb into his office for a meeting on Wednesday, 24 November 2010, and instructed him that he did not wish the NPC to deal with the NSC proposal "until Treasury had reviewed the process". The minutes of the meeting of the NPC on 25 November 2010 show that, in accordance with the ministerial direction, the issue was deferred. In that respect, Buildev's short-term objective had been secured.

Mr Roozendaal told the Commission that he felt "it would be premature for NPC to move forward on the issue of the container terminal until I'd had proper time to gather further advice from Treasury on both the container terminal proposal and the Intertrade land proposal".

On 8 December 2010, Dominic Schuster of NSW Treasury attended a meeting with Mr Roozendaal. Mr Roozendaal instructed him to undertake a review and

Joe notes - 19.11.10.doc

From: Kellie Lowe <kellielowe@buildev.com.au>

To: David Sharpe <davidsharpe@buildev.com.au>

Date: Mon, 22 Nov 2010 10:24:35 +1100

Attachments: Joe notes - 19.11.10.doc (36.35 kB)

- Gary Webb provided legal opinion from Tobins that argues that ACCC agreement would be comprised.
- Both Joe / Ian say argument put forward are unfounded and believe ACCC agreement allows what we are planning.
- Gary Webb proving to be stubborn.
- DS – will try and get Libs/Nats to call him and tell him they support our proposal as well.
- Joe – going to get Eric to stop Anglo deal going to board this Thursday.
- DS – getting ARTC to say in writing there is capacity in Rail Network.
- Still trying to get outcome signed AFL based on CP's
  - Planning Approval
  - ACCC Approval
- We have plans of site and areas along with rough commercial terms.
- We should at some stage speak with shareholders PWCS as we think they will be supportive of our facility as they don't want to build new infrastructure for competitors.
- Jodie is not supporting us.
- Buildev – will contact Tony Kelly and make sure he is still on side.
- Buildev – shall do the same with Warwick Watkins.
- Mark Sargent – should be briefed and he should if supportive speak up to Gary and other board members.
- Buildev getting legal opinion on NPC conduct to date, we are trying to prove they have acted inappropriately.
- Need EOI doc's from Anglo.
- Joe – we try and make any recommendations go through budget committee.
- Anglo meeting
  - Dump Spanish
  - Fight 500k mtpz coal restriction
  - Equity 90/10
  - Buy out NSC

  Not going to get up without us
- Meeting Eric / Gary – 2 options
  - Gary rolls over
  - Gary does not roll over, Eric takes land control off NPC gives it to HDC with instructions to do the deal with Buildev.
- At this rate we are 50/50 to get AFL deal done prior to Christmas.
- Eric fear is Gary may go public with a smear campaign on labour government that is why we will need libs on side to hose down and say government right on this occasion.
- Whilst progressing our bid / negotiations we need to slow or derail Anglo.

Figure 3 (the original exhibit appears as two separate pages)

prepare a report on that review. To do so, Mr Roozendaal provided Mr Schuster with materials that had come from Buildev. Mr Schuster was also put in contact with Mr Williams and Mr Sharpe. Given that Christmas was approaching and the Treasury report would take some time to produce, Mr Roozendaal had, in effect, made certain that the NPC could not make an agreement with the NSC in the ongoing short term.

Meanwhile, Mr Roozendaal did something that had the effect of securing Buildev's middle-term objective – preservation of the viability of its coal terminal proposal. Sometime before 7 February 2011, Mr Schuster was asked to prepare a draft letter for Mr Roozendaal granting approval for the NPC to commence formal commercial negotiations with the NSC but subject to a condition. The letter read:

> *In its negotiations, Newcastle Port Corporation should make provision for an easement across the Mayfield site for a coal conveyor. This will provide the option for the development of a coal loading terminal in the event that the Government made such a decision in the future.*

The minutes of the NPC board meeting, held on 8 February 2011, recorded the approval for commencing formal commercial negotiations but noted that:

> *…in those negotiations, Newcastle Port Corporation should make provision for an easement across the Mayfield site for a coal conveyor. It was understood that the Minister was to make announcement to this effect but would not refer to the easement.*

There are three points to be made about the proposal to create an easement. The first point is that it is precisely what Buildev wanted and the Commission finds that, in this respect, Mr Roozendaal was aware that he was doing just as Buildev wanted. The proposal to create such an easement should not be brushed aside as merely a precaution to keep options open; the proposed creation of the easement created a burden on the Mayfield site that could have the effect of restricting its use and its attractiveness for use as a container terminal. It is not clear whether the NSC would have been willing to engage in further commercial negotiations once it became aware that the subject land was to be burdened with such an easement.

The second point to be made arising out of Mr Roozendaal's action is that, in effect, the only party who could take a benefit from the creation of such an easement was Buildev. In substance, the proposed easement created access from the Intertrade site to the waterfront. The only beneficiary of this would be the owner or controller of the Intertrade site – that is, Buildev. Buildev already had the contract with the HDC, which the HDC could not escape without paying Buildev damages. If Buildev wanted to on-sell the project on the Intertrade site, it could do so knowing that the value of the site had been enhanced by the creation of the easement.

The third point that arises from the proposal to create an easement comes from the note made in the NPC minutes that indicated the Minister "would not refer to the easement" when making his announcement. In light of all of the other evidence, the Commission infers that Mr Roozendaal did not wish his actions to come to light lest they identify the benefit that he was conferring on Buildev.

In any event, Mr Roozendaal's permission for the NPC to commence commercial negotiations with the NSC was quickly withdrawn. Sometime before 15 February 2011, Mr Roozendaal instructed that a further letter be sent to the NPC directing it not to commence commercial negotiations. The ostensible reason for this was an announcement made on 8 February 2011 by the minister for planning, Tony Kelly, that the public consultation period in respect of the concept plan for the Mayfield site would be extended. Although Mr Roozendaal was advised that the extension of the consultation period did not affect the commencement of commercial negotiations, he directed Mr Schuster to draft a letter for his signature issuing a further instruction to the NPC, directing it not to commence commercial negotiations. Mr Schuster prepared a draft, which, at the request of Mr Roozendaal, had to be re-done to incorporate the following words: "I am advised by NSW Treasury it is not appropriate for Newcastle Port Corporation to progress commercial discussions until the outcome of this consultation process has been considered by Cabinet". This effectively killed off any chance of advancing the container terminal before the NSW state election on 26 March 2011.

Chapter 9: The relative merits of a container terminal and the Buildev proposal

Both Mr Tripodi and Mr Roozendaal were in a position to make judgments regarding the Port of Newcastle. Each had served previously as minister for ports and waterways – Mr Tripodi from February 2006 to November 2009, and Mr Roozendaal twice from August 2005 to February 2006 and again from September 2010 to March 2011. It was during Mr Tripodi's period as minister for ports and waterways that the negotiations that led to the Capacity Framework Agreement were initiated.

It is difficult to determine whether Mr Tripodi or Mr Roozendaal ever genuinely believed that the Buildev proposal was viable or one which would be for the benefit of the state of NSW.

Some of the flaws in the Buildev proposal were self-evident. Earlier mention was made of the problems arising from the existing contract Buildev held with the HDC, the need for re-zoning. In addition, it would have been self-evident that Buildev was an inappropriate candidate as a potential contractor. Buildev was a medium-sized building company with no experience in large-scale construction, no experience in the design or construction of coal terminals, and with insufficient financial backing to get the project off the ground. It did not have the capacity to execute a project of this scale and complexity. Even the principals of Buildev recognised that it was not a vehicle that could be responsible for a major project such as a coal terminal. Mr Tinkler recognised that it did not have the financial backing, and both Mr Sharpe and Mr Williams recognised that Buildev was out of its depth. Even Mr Tripodi eventually conceded that it was not feasible for Buildev to carry off the project. In his submissions, he acknowledges that Buildev was "clearly out of its depth". If the NSW Government was truly attracted to the idea that the Mayfield site be opened for the construction of a coal terminal, this could have led to proposals that focused on the Mayfield site and did not involve the Intertrade site.

Apart from these flaws in the Buildev proposal, Mr Roozendaal had access to high-level advice that indicated that the Buildev proposal was not viable. The content of this advice would have been available to Mr Tripodi. When Mr Roozendaal re-assumed the ministry for ports and waterways, he inherited staff including a principal adviser, Mr Crosby. In his submissions, Mr Roozendaal has questioned Mr Crosby's expertise; however, the Commission found Mr Crosby to be an impressive witness. His evidence was intelligent, detailed and accurate. The Commission accepts his evidence. Mr Crosby advised Mr Roozendaal against the Buildev proposal. In Mr Crosby's assessment, the Buildev proposal created insurmountable planning difficulties and could destroy the Capacity Framework Agreement. This advice was justified, but Mr Roozendaal's reaction was not only to reject the advice, but to sideline Mr Crosby.

Before going further, it is appropriate to refer to the matter raised by several witnesses that the Buildev proposal could undo the Capacity Framework Agreement. The Capacity Framework Agreement required the ACCC's continuing approval and, should the surrounding circumstances change, that approval could be withdrawn. Mr Webb, Mr Crosby and Mr Schuster were all conscious that the Buildev proposal placed the Capacity Framework Agreement at risk.

Submissions made by Mr Tripodi and Mr Roozendaal contest this. They point to the terms of the ACCC approval, which contemplated that another coal terminal could be developed. They also point to a legal advice Buildev received, which said a fifth coal terminal was not inconsistent with existing agreements or approvals. These submissions do not deal with the real issue. The issue is not whether (as Mr Roozendaal put it) the Buildev proposal would "have necessarily fractured" the Capacity Framework Agreement. The real issue was whether the Buildev proposal placed the Capacity Framework Agreement at *risk*.

The Commission accepts Mr Crosby's evidence that the Buildev proposal did place the Capacity Framework Agreement at risk.

Mr Roozendaal could also draw on the advice of Mr Webb, the chief executive officer of the NPC. Mr Webb's advice was similar to that of Mr Crosby. The NPC had a genuine and direct interest in the maintenance of the Capacity Framework Agreement – the significance of the Capacity Framework Agreement to the Port of Newcastle would have outweighed any plans in respect of the development of the Mayfield site. It was when Mr Roozendaal appeared to be supporting the Buildev proposal that Mr Webb organised for Ms Carver of Gilbert + Tobin to explain the risk the Buildev proposal created for the maintenance of the Capacity Framework Agreement. Mr Roozendaal's ongoing support for the Buildev proposal after that meeting, at the very least, demonstrates a risk of undermining the Capacity Framework Agreement.

Mr Roozendaal also received advice from the HDC. Obviously, the HDC had a deep and direct interest in the impact that the Buildev proposal would have upon the Intertrade site. On 7 December 2010, the chairman of the HDC, Paul Broad, wrote to Mr Roozendaal about the Buildev proposal. The letter sets out the grounds for rejecting the Buildev proposal. Among other things, Mr Broad pointed out that the Buildev proposal was contrary to the contractual arrangement it had with Buildev. He also identified specific planning issues, and the fact that the Buildev proposal was not consistent with the land use planned for the site. Mr Broad pointed out that, because of the particular purpose for which the Intertrade site had been placed on the market, the expressions of interest (including that received from Buildev) reflected that use, not some other potentially more lucrative use. For this reason, as Mr Broad explained, in the context of the changes proposed by Buildev, the expression of interest process had not been conducted fairly, nor had the real value of the land been extracted. Mr Broad attached an advice indicating that, if the Buildev proposal went ahead, it "would be grossly unfair" to the other participants in the original expression of interest process.

It is clear that Mr Roozendaal rejected the advice he was getting from Mr Crosby, Mr Webb and Mr Broad. As mentioned earlier, on 8 December 2010, Mr Schuster from Treasury attended a meeting in Mr Roozendaal's office, during which he was asked to undertake a review and prepare a report. The resultant report on the review is dated 4 February 2011, and was presented to Mr Roozendaal on that day. The terms of the Treasury report were strongly adverse to the Buildev proposal. Many of the points made by Mr Schuster had already been made by Mr Crosby, Mr Webb and Mr Broad, and they were repeated with just as much force. Mr Schuster independently identified the probity questions, the failure of the original expression of interest process for the Intertrade site to have obtained the true potential value for the site should the coal terminal proposal proceed, the zoning problems and the adverse impact on the Capacity Framework Agreement.

There were other specific matters identified by Mr Schuster that created insurmountable problems for the Buildev proposal. Mr Schuster identified that the Buildev proposal's berthing arrangements were "unworkable", due to the width of the river and interaction with other vessels in the port. Mr Schuster advised that there was no compelling competition or capacity-driven case for a fifth coal terminal and that the proposal may even be "detrimental" to industry. Buildev's proposal was "surprisingly superficial" and contained "unrealistic" forecasts. In his oral evidence, Mr Schuster doubted the "motives" of Buildev. He told the Commission that he thought, "It wasn't apparent they genuinely sought to develop a coal terminal on the facility. It was equally possible that they wanted to demonstrate that they could build one on the facility which would enable Aston Resources to increase the value of its coal mine because it was purchased without any coal loading rights so it seemed to me feasible that merely having accessed the right to build one there was value accretive to Aston and Buildev".

Certain submissions, especially those of Mr Roozendaal, have pointed to other evidence that suggests that there

were reasons favouring the development of a coal terminal at Mayfield. Mr Roozendaal places reliance on estimates made by Buildev itself and the opinions of Mr Tinkler, Mr Williams and Mr Sharpe, who each stood to make a large amount of money from the fifth coal terminal project. Mr Roozendaal also relied on the contents of a letter sent to Mr Webb by Mark Vaile of Aston Resources. Aston Resources also stood to gain. According to Mr Schuster, if the proposal went through it "would enable Aston Resources to increase the value of its coal mine". Mr Roozendaal also relied on David Simmons; however, this reliance needs to be placed in the context that Mr Simmons received his information from Buildev only, and in his capacity as its paid lobbyist retained to support the proposal.

In his report, Mr Schuster had identified what he saw as some problems in the NPC plan. These would have been a basis for pausing before a decision was made. It should also have been a basis on which Mr Roozendaal would consult Mr Webb and seek his answer to these suggested problems. During the course of the public inquiry, Mr Webb was asked to answer the problems identified by Mr Schuster. His answers were authoritative and compelling. In other words, had Mr Roozendaal taken the proper step by asking for Mr Webb's opinion on those problems, the apparent concerns about the NPC proposal would have been resolved.

While Mr Roozendaal's support for the Buildev proposal was contrary to the weight of the advice he received, the Commission is not satisfied on the available evidence that he was motivated by any improper purpose.

Chapter 10: The NSW Treasury report is leaked

Each page of Mr Schuster's 4 February 2011 NSW Treasury report, *Review of Proposed Uses of Mayfield and Intertrade Lands at Newcastle Port*, clearly indicates that it is a report of the NSW Treasury. Each page is marked "confidential", leaving no doubt that it is a confidential NSW Government document.

On 16 February 2011 a journalist at the *Newcastle Herald*, Matthew Kelly, was called to a meeting at a cafe with Mr Williams and Ms Wills during which he was provided with two of the 22 pages from the Treasury report – the cover page and page 10. The cover page sets out the title of the report, thereby clearly indicating it was concerned with the Mayfield and Intertrade sites. Page 10 contained information that was critical of the NPC container terminal plan. Later that same day, at Mr Kelly's insistence, Ms Wills attended the offices of the *Newcastle Herald* with the whole of the 22 pages of the Treasury report. Ms Wills allowed Mr Kelly to read it, although she would not let him keep it or copy it.

The contents of page 10 of the Treasury report were critical of the NPC plan for a container terminal (Figure 4, page 56). That part of the Treasury report was of considerable benefit to Buildev. For the following reasons, the Commission finds that, sometime shortly before 16 February 2011, Mr Tripodi provided Mr Williams with the Treasury report, which he had obtained through his position as a member of Parliament, and did so in order to benefit Buildev. Very few people would have had access to the Treasury report who also had a connection with Buildev or Mr Williams – in reality, only Mr Roozendaal or Mr Tripodi. Mr Tripodi was asked on four occasions whether he denied providing the document to Mr Williams, and he evaded answering that question each time. Mr Williams said that he received the Treasury report when at a meeting with Mr Tripodi and Ms Wills. He thought it had been given to him by one of them, but also said that, in light of all of the evidence, it was more likely that it was Mr Tripodi who had provided it to him. The Commission accepts his evidence on this point, which is supported by other evidence.

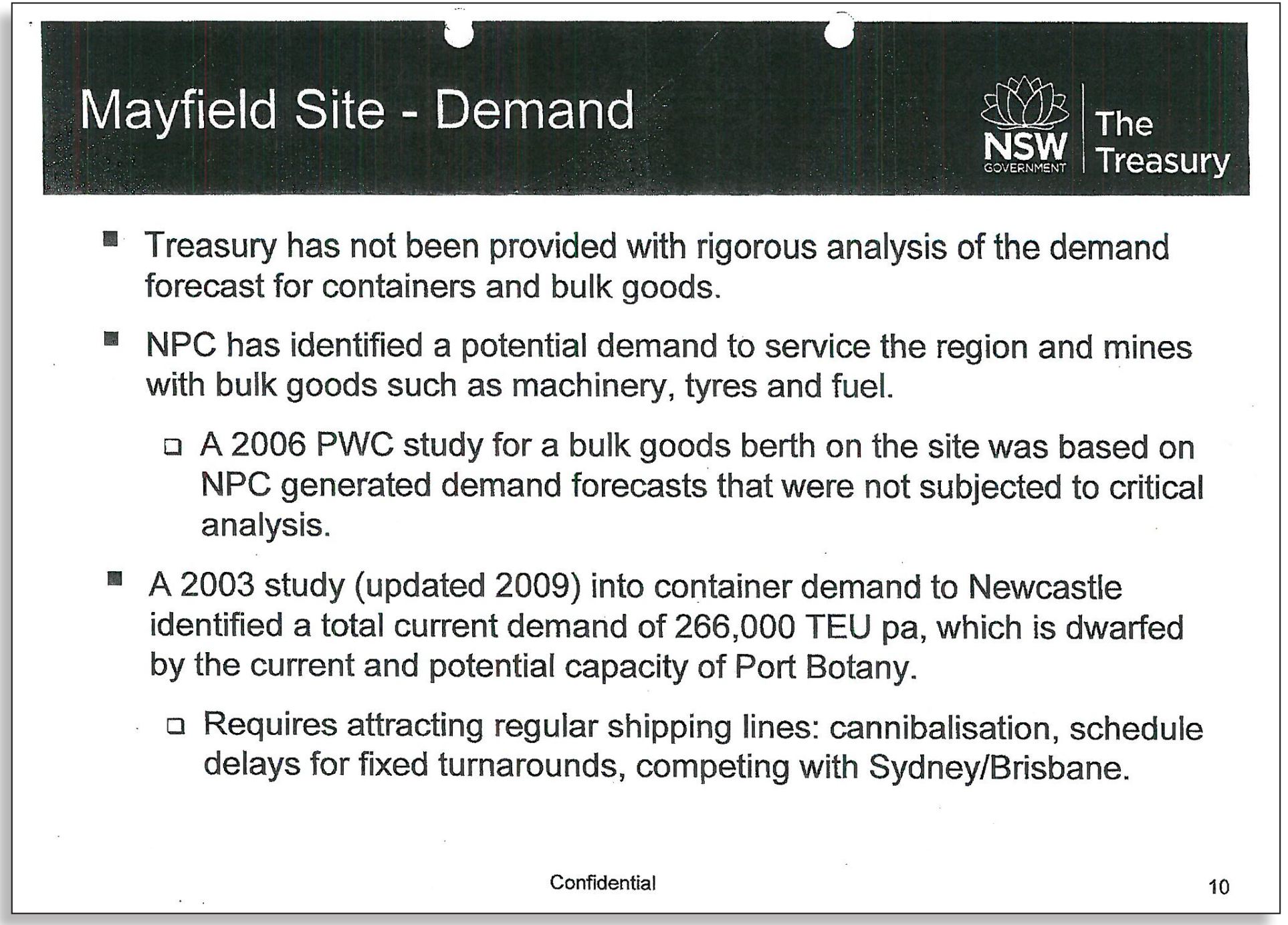
That other evidence includes the following. At 4.07 pm on 16 February 2011 – the same day the document was provided to Mr Kelly, the journalist – Mr Williams sent a text message to Ms Wills: "Call me Joe is panicking to [sic] document has been leaked!". He followed that up with a second text message: "ring mat and tell him not to give anyone a copy asap". Mr Williams told the Commission that Mr Tripodi was "panicking" about the *Newcastle Herald* getting the Treasury report. He agreed with the proposition that Mr Tripodi was "panicking" because the leaking of a confidential document might be brought home to him (Mr Tripodi), in which case the consequences to him would be serious. That led Mr Williams to get Ms Wills to stop Mr Kelly from disseminating copies of the Treasury report. Ms Wills understood she was asked to do this because there was concern the source of the leak might be identified if others saw the Treasury report. In light of the evidence as a whole, the Commission finds that Mr Tripodi was panicking because it was he who was the source of the leak.

The other evidence also includes Ms Wills' evidence that she received the Treasury report from Mr Williams.

The Commission notes a submission made by Mr Tripodi that the leaking of the Treasury report could not assist Buildev because its contents were negative toward Buildev's proposal. The submission is rejected. The information contained in the Treasury report was valuable to Buildev. To the extent that some of the conclusions were critical of Buildev's proposal, knowledge of the report's contents forewarned Buildev of that criticism. In any event, the content of page 10 was sufficiently helpful to Buildev that it was provided to a journalist with a view to damaging the prospects of the container terminal and thereby promoting the Buildev agenda.

Mr Roozendaal denied that he provided the Treasury report to Mr Tripodi. He also submitted that this finding is not open, and that before such a finding can be made it

Figure 4


Mayfield Site - Demand
NSW GOVERNMENT
The Treasury
Treasury has not been provided with rigorous analysis of the demand forecast for containers and bulk goods.
NPC has identified a potential demand to service the region and mines with bulk goods such as machinery, tyres and fuel.
A 2006 PWC study for a bulk goods berth on the site was based on NPC generated demand forecasts that were not subjected to critical analysis.
A 2003 study (updated 2009) into container demand to Newcastle identified a total current demand of 266,000 TEU pa, which is dwarfed by the current and potential capacity of Port Botany.
Requires attracting regular shipping lines: cannibalisation, schedule delays for fixed turnarounds, competing with Sydney/Brisbane.
Confidential
10

was necessary that all persons who might have had access to the Treasury report had to be called to deny they leaked the report. This submission assumes the Commission is bound to exclude every available hypothesis consistent with exculpating Mr Roozendaal in this respect. There is no such obligation. The Commission is able to make a finding on the balance of probabilities to the *Briginshaw* standard.

Realistically, there were only two persons who could have provided it to Mr Tripodi – Mr Roozendaal or Mr McNamara and, even if it was Mr McNamara who supplied a copy of the Treasury report to Mr Tripodi, it is likely he would have done so on the instruction of Mr Roozendaal. Other evidence points to it being Mr Roozendaal. Mr Roozendaal accepted that he was supplying other information to Mr Tripodi about the arrangements on the Mayfield site. As mentioned earlier, once Ms Carver had completed providing her (confidential) legal advice, Mr Roozendaal directed that Mr McNamara provide Mr Tripodi with a briefing on the meeting. It is inherently likely that Mr Roozendaal would have been willing to share the Treasury report with Mr Tripodi.

The Commission is satisfied that Mr Roozendaal, either directly or indirectly through another, passed the Treasury report to Mr Tripodi. This may not, of itself, amount to an improper disclosure of the document. Mr Tripodi was a government colleague with substantial experience in ports. Mr Roozendaal may have been able to properly pass the document to him, to seek his input as he developed government policy in the light of this advice from Treasury. The key breach was the passing of the document on to Buildev, which occurred shortly prior to 16 February 2011. In the end, the Commission is not satisfied that Mr Roozendaal was complicit in the passing of the Treasury report to Buildev. While the Commission finds that Mr Roozendaal passed, or caused the document to be passed to Mr Tripodi, it is not satisfied that Mr Roozendaal did so knowing or intending that it would be provided to Buildev. In making this finding, the Commission has reflected on the seriousness of the allegation and the Commission's obligations regarding the *Briginshaw* standard.

The Commission is satisfied that Mr Tripodi could have been in no doubt of the confidential nature of the report. Each page of the report is marked confidential. Its contents were obviously confidential. The contents dealt with a substantial infrastructure project worth hundreds of millions of dollars. The Commission finds that, when Mr Tripodi provided the Treasury report to be provided to Mr Williams, Mr Tripodi was improperly motivated to provide an advantage to Buildev, thereby ingratiating himself with the management of Buildev in the hope he could secure future benefit from Buildev.

Chapter 11: Other matters

This chapter examines the evidence in relation to two other matters that were closely related to Buildev's desire for a fifth coal terminal. The first involved a discussion between Mr Tinkler and Jodi McKay, the member for Newcastle, concerning a possible political donation. The second concerns a campaign known as "Stop Jodi's Trucks", which was directed against Ms McKay in the 2011 NSW election campaign for the seat of Newcastle.

Mr Tinkler and Ms McKay

In late 2010 or early 2011, there was an exchange between Mr Tinkler and Ms McKay. The participants give very different versions of the exchange. The exchange indicates that Buildev and Mr Tinkler were prepared to go to some lengths in an attempt to advance the proposal for a fifth coal terminal.

Ms McKay's continuing role as the member for Newcastle and the minister for the Hunter presented two problems for Buildev. Sometime after she had been elected in 2007, Ms McKay discovered that part of her election campaign had been funded by a donation made by Buildev. As soon as she found this out, Ms McKay decided she did not want to meet with Buildev executives in relation to Buildev's commercial interests because she did not wish to be seen as having been prejudiced in Buildev's favour by the fact of the donation. In other words, Buildev was unable to deal directly with the local member or the minister for the Hunter in respect of the Buildev proposal. The second problem for Buildev was that Ms McKay was a strong supporter of the container terminal. In Ms McKay's view, the container terminal presented advantages for Newcastle and the region.

During late 2010, Ms McKay was obliged to meet with Mr Tinkler on a couple of occasions to discuss his control and funding of local sporting teams. During one of these meetings, Ms McKay said that Mr Tinkler attempted to raise the subject of the Buildev proposal at Mayfield, but she cut Mr Tinkler short, explaining her policy of not speaking to Buildev or persons associated with it on that issue. The matter was taken no further. The Commission accepts Ms McKay's evidence on this matter.

The controversial exchange occurred at a later meeting. There is no direct evidence of the date of the meeting, but other evidence suggests it was shortly before 16 March 2011. On this occasion, Ms McKay said that Mr Tinkler turned the conversation to the subject of her prospects of succeeding in the 2011 election. The actual words said to have been used by Mr Tinkler are important, so it is preferable to set out some of Ms McKay's evidence. Ms McKay gave a statement to Commission investigators in which she recounted the episode:

> *At the last meeting I had with Tinkler he offered to support my campaign for re-election. His offer came at the end of a general conversation about the Newcastle Knights. I don't recall word for word what he said but he said words to the effect of how it was going to be a hard election (NSW 2011 State Election) for the ALP. He mentioned the Newcastle Lord Mayor John Tate, who was a candidate in the 2011 NSW State Election for the Electorate of Newcastle, would make it difficult for me to hold the seat. At the time of Tinkler's offer of support, the law forbade developers from financially supporting Members of Parliament. I told Tinkler that as a developer, he could not support my campaign, Tinkler's response to me was that he had hundreds of employees and that he can get around the rules that way. I took his comment to mean that he could use his money but get his employees to donate to my campaign. Only Tinkler and I were present when he made those comments and it made me feel very uncomfortable. Tinkler was standing up when he made the comments but his demeanour was not aggressive. I refused his offer of support.*

In her oral evidence she recounted the exchange as follows:

[Counsel Assisting]:'m sorry I interrupted you but Mr Tinkler said it's going to be hard for you to win, Mr Tate was running against you.

[Ms McKay]: Yes, so um, John Tate's running against you and then there was an offer to donate to my campaign. And I said to him, you can't you're a developer and quite obviously at that point developers were prohibited from donating to campaigns and I said that to him and his immediate reply was, I have hundreds of employees and I can get around the rules that way.

[Q]: And what did you understand him to mean by that?

[A]: I understood him to mean that he would use his money to give to his employees to donate to my campaign so that he, as a developer, wasn't donating to my campaign. It was pretty clear what he was saying.

[Q]: And did he give you an indication of the amount of money he was prepared to…?

[A]: No, no, I shut it down, I felt very uncomfortable about it. I was also intrigued because at that point he knew I know he knew that developers weren't allowed to donate because he went straight into, this is how I can get around it. And I was intrigued because I'd never thought about it, I had never considered that you could actually get around the rules that way. So I felt very uncomfortable about that conversation.

[Q]: Did you also feel that this, in the context of what you said earlier, about him wanting your support for his plans with the Mayfield site and how much money he stood to gain from that, it does sound to me like a bribe, an attempt to bribe you?

[A]: It certainly, it certainly felt like that he wanted my support and he was prepared to buy that.

[Q]: Another word for that would be bribe?

[A]: Yes.

[Q]: Now in response to that, you said you felt very uncomfortable.

[A]: Yes.

[Q]: I think I can say this, we at ICAC, you I think you made a complaint to ICAC, is that right?

[A]: The events that occurred over that period I reported to the ICAC in 2011, I reported to Police, I reported to the Electoral Commission and I reported to the Electoral [sic] *Funding Authority.*

There is a conflict between Ms McKay and Mr Tinkler as to what occurred. Mr Tinkler denies Ms McKay's account and says it is a "fabrication", which included "deliberate, calculated, false allegations of corruption against him". He said Ms McKay "was motivated by revenge".
Mr Tinkler went further and claimed that Ms McKay had sought funding from him. A critical portion of Mr Tinkler's evidence included the following:

[Counsel Assisting]: During a meeting with Jodi McKay and while she was the Member for Newcastle, you offered to donate to her re-election campaign, didn't you?

[Mr Tinkler]: Sorry, no.

[Q]: You deny that, do you?

[A]: I do, yes.

[Q]: See, what you said to Jodi McKay was that her seat, Newcastle, could be hard for her to hold. You made that point to her, didn't you?

[A]: Yeah, I certainly did 'cause I thought she was ah, thought she was dead in the water, I wasn't even sure she was going to ah, get pre-selection.

[Q]: Well you then offered to donate to her campaign

to assist her, didn't you?

[A]: No, I did not.

[Q]: You deny that, do you?

[A]: Yeah, I certainly do deny that.

[Q]: Let's make it clear?

[A]: Yeah, no, I wanted her gone, I was on the other side.

[Q]: And Jodí McKay said, "You can't do that, you're a prohibited donor." Didn't she?

[A]: No.

[Q]: And you would have realised that a place where that political support could be acquired was through the local State MP?

[A]: Um, there would have come a time where ah, that had to happen, yes.

Another portion of Mr Tinkler's evidence went as follows:

[Counsel Assisting]: Well you, no, you better tell us what you say your side of that story is, Mr …?

[Mr Tinkler]: Oh, she come to see me to see if she had my support. And I said she didn't.

THE COMMISSIONER: Sorry, you said she …?

[A]: Come to see me to see if she had my support.

[Q]: Yes. And you said?

[A]: No.

[Q]: And when was that conversation?

[A]: Um, it was sort of leading up the election. I'm not even sure if ah, Tim Owen was even a candidate back then.

[Q]: This is more specific than that. It was suggested to Ms McKay that she had actually sought money from you. Is that, is that what you're saying?

[A]: Well by support I took that to mean money, yes.

There is an obvious conflict that must be resolved. For the following reasons, the Commission accepts the evidence of Ms McKay and rejects the evidence of Mr Tinkler.

Ms McKay impressed the Commission as an honest and open witness. The stance she had taken in cutting contact with Buildev after the 2007 election was principled and inconsistent with her seeking further funding from Mr Tinkler. In addition, Ms McKay made reports of her exchange with Mr Tinkler to relevant authorities. Mr Tinkler was an unimpressive witness. The Commission also takes into account other evidence that shows Mr Tinkler was willing to fund politicians and political campaigns, and use fronts to disguise the true source of the funding. It would not have been out of character for Mr Tinkler to make the offer alleged by Ms McKay.

The Commission has considered Mr Tinkler's submission that it was "illogical in the extreme" that he would offer Ms McKay money because he "was keen to see Ms McKay lose her seat". There is some superficial force to that submission, but the fact is that Mr Tinkler spoke freely of his willingness to donate to "just about all, all political parties ... Because, because that's the that's – you share it around, everybody needs funding to be able to tell their story and, and go forward that's the process". At the time of the conversation, Ms McKay was still in the running for the seat of Newcastle (and the closeness of the result proves that). The Commission is satisfied that Mr Tinkler's views on donations suggest that he would have been more than willing to make such an offer to a politician, even if he did not like the politician or their politics, in order to hedge his bets.

The Commission concludes that Mr Tinkler was attempting to get Ms McKay to accept a political donation in circumstances that would have evaded the effect of the election funding laws. If accepted, the donation would have been made contrary to the disclosure rules and the prohibition on donations by property developers. As a director of Buildev, Mr Tinkler was aware of the prohibition on property developers and that a significant part of Buildev's business was property development. The Commission is aware of Mr Tinkler's evidence that he did not consider himself a property developer, but notes that evidence was given in the same context of his claim not to have any "managerial control" over Buildev – a statement that was quite misleading. Further, Ms McKay told Mr Tinkler he was a prohibited donor and he then proposed a strategy to circumvent the prohibition.

The Commission is satisfied that, sometime shortly prior to 16 March 2011, Mr Tinkler offered to make a political donation to Ms McKay's election campaign. In making this offer, Mr Tinkler was attempting to induce Ms McKay to accept a donation from a person she knew to be a prohibited donor and that would be falsely disclosed to the Election Funding Authority as coming from private individuals. Mr Tinkler knew at the time he made the offer that he was a prohibited donor and was not able to make a political donation and that Ms McKay was not able to accept a political donation from him.

Counsel Assisting the Commission have also suggested that Mr Tinkler's offer could properly be considered to be corrupt conduct on the basis that Mr Tinkler was

seeking to bribe Ms McKay. An inference is available that the offer of the payment was made in order to influence Ms McKay's conduct in her public office. It does not matter that the offer was not accepted or that it was never likely that it would be accepted. The Commission declines to make such a finding. The whole of the evidence surrounding Mr Tinkler clearly establishes some general attitude that, wherever possible, he wanted the gratitude of politicians. The evidence falls short of satisfying the Commission that Mr Tinkler was intending to induce Ms McKay to act contrary to her public duty.

The "Stop Jodi's Trucks" campaign

The political activities of Buildev included devising and funding a mailout campaign titled "Stop Jodi's Trucks". The Commission finds that the campaign was designed to damage Ms McKay's prospects of re-election as the member of Parliament for Newcastle.

There is relatively little dispute as to the relevant facts. Buildev had planned a letterbox drop for some time. On 13 February 2011, Mr Sharpe sent an email as a "general up date" to Mr Tinkler that referred to the NPC master plan and said "Jodie [sic] has supported it so we are going to use that against her, letter box drop going out". On 16 February 2011, Mr Williams sent Ms Wills a telephone text message "Need resident letter out Friday asap Jodi is pushing Eric to announce container terminal". On 17 February 2011, Ms Wills responded by sending Mr Williams and Mr Sharpe a draft letter to be sent to residents that could be signed and forwarded to Ms McKay. The draft letter asked Ms McKay "to delay the current application for a container terminal" on the basis of damage to the amenity of the local area. That mailout was superseded by the Stop Jodi's Trucks campaign – a more elaborate plan to send colourful pamphlets to the households in the suburbs around the Mayfield site.

In the end, 8,000 A4-sized pamphlets were printed and mailed to the residents in six suburbs surrounding the Mayfield site. The cover of the pamphlet was colourful and striking (Figure 5, page 62). The cover referred to "Jodi's Trucks", as though Ms McKay had entire responsibility for the proposal. It referred to 1,000 trucks travelling through the suburbs each day of the year, although the NPC's "1,000 trucks per day" estimate was based on a figure that might be applicable in 2034, and then only if the container terminal achieved its greatest potential.

The pamphlet included a draft letter addressed to Ms McKay that a resident could sign and send as a means of voicing their disapproval of the container terminal (Figure 6, page 63). The draft letter referred to problems arising from "1,000 trucks in our neighbourhood every single day of the year" and "increased air and noise pollution" as well as "pedestrian danger for children and the elderly". There is also a suggestion that "For more information" the reader could "visit: www.cpcfm.org", the website of a local pressure group known as the "Correct Planning and Consultation for Mayfield Group" (CPCMG). The CPCMG opposed the NPC plans. There was no evidence (or suggestion) that Buildev had obtained permission to refer to the CPCMG.

Mr Sharpe was involved in the campaign. He was the managing director of Buildev and there is evidence that he was informed of, and complicit in, Buildev's involvement. He was privy to the covert nature of the activity. On 6 March 2011, after the leaflets had been distributed, Mr Sharpe sent a text to Ms Wills pointing out that a journalist had been making enquiries about who was responsible. Mr Sharpe concluded "do we have a problem?". Ms Wills responded facetiously "No we know nothing about it. haven't seen or heard anything about a mail out". Mr Sharpe responded: "Me either poor Jodie [sic]".

It is clear that Mr Tinkler was informed that there was going to be a pamphlet distribution. Mr Tinkler told the Commission that he did not know anything about the content of the pamphlet and had no involvement in the process. Mr Sharpe confirmed that the content of the pamphlet, and therefore the nature of the activity, changed over time. In all the circumstances, the Commission is not satisfied that Mr Tinkler had a significant role.

Mr Williams admitted he was involved in the Stop Jodi's Trucks campaign from its inception. Ms Wills described Mr Williams, along with Mr Tripodi, as being involved in the original idea. There is an inference that Mr Williams initiated it with his text message to Ms Wills on 16 February 2011, referred to above. Mr Williams was involved (along with Ms Wills and Mr Tripodi) in selecting a printer outside the Newcastle area. Ms Wills told the printer to invoice "Darren" and the bill was paid from Buildev's account.

Ms Wills admits she "was a participant in the Stop Jodi's Trucks campaign" but denies she was a major participant. The Commission finds that Ms Wills was involved throughout and made some of the decisions that were critical to the campaign. Ms Wills was the one who travelled to Wetherill Park to meet the printer, and she was the one who paid a cash deposit of $1,000 on behalf of Buildev. Ms Wills provided the printer with the information that went into the pamphlet.

Mr Tripodi's involvement was central, as well. Mr Tripodi tried to play down his involvement. He said, for example,

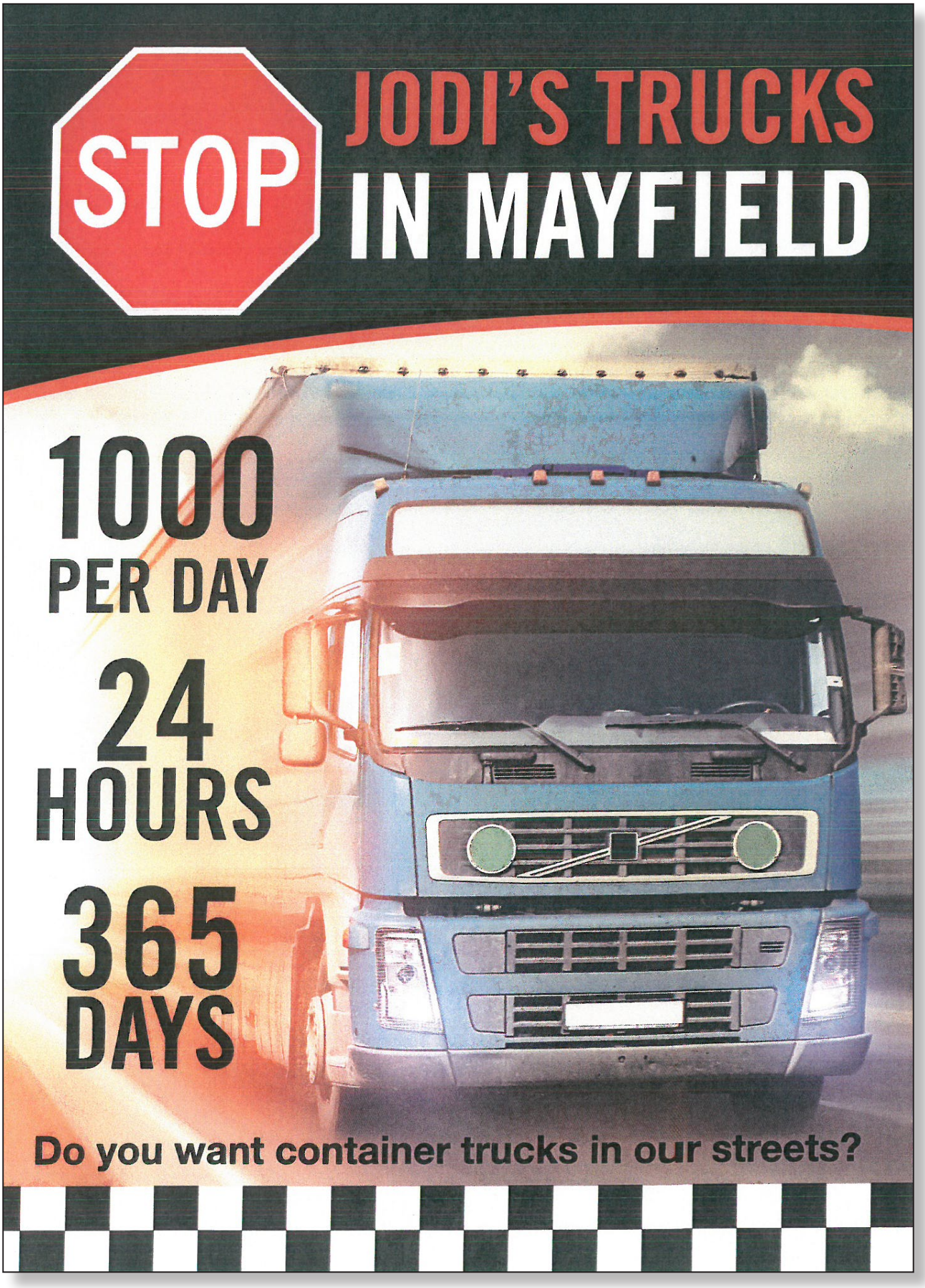

STOP
JODI'S TRUCKS
IN MAYFIELD
1000
PER DAY
24
HOURS
365
DAYS
Do you want container trucks in our streets?

Figure 5

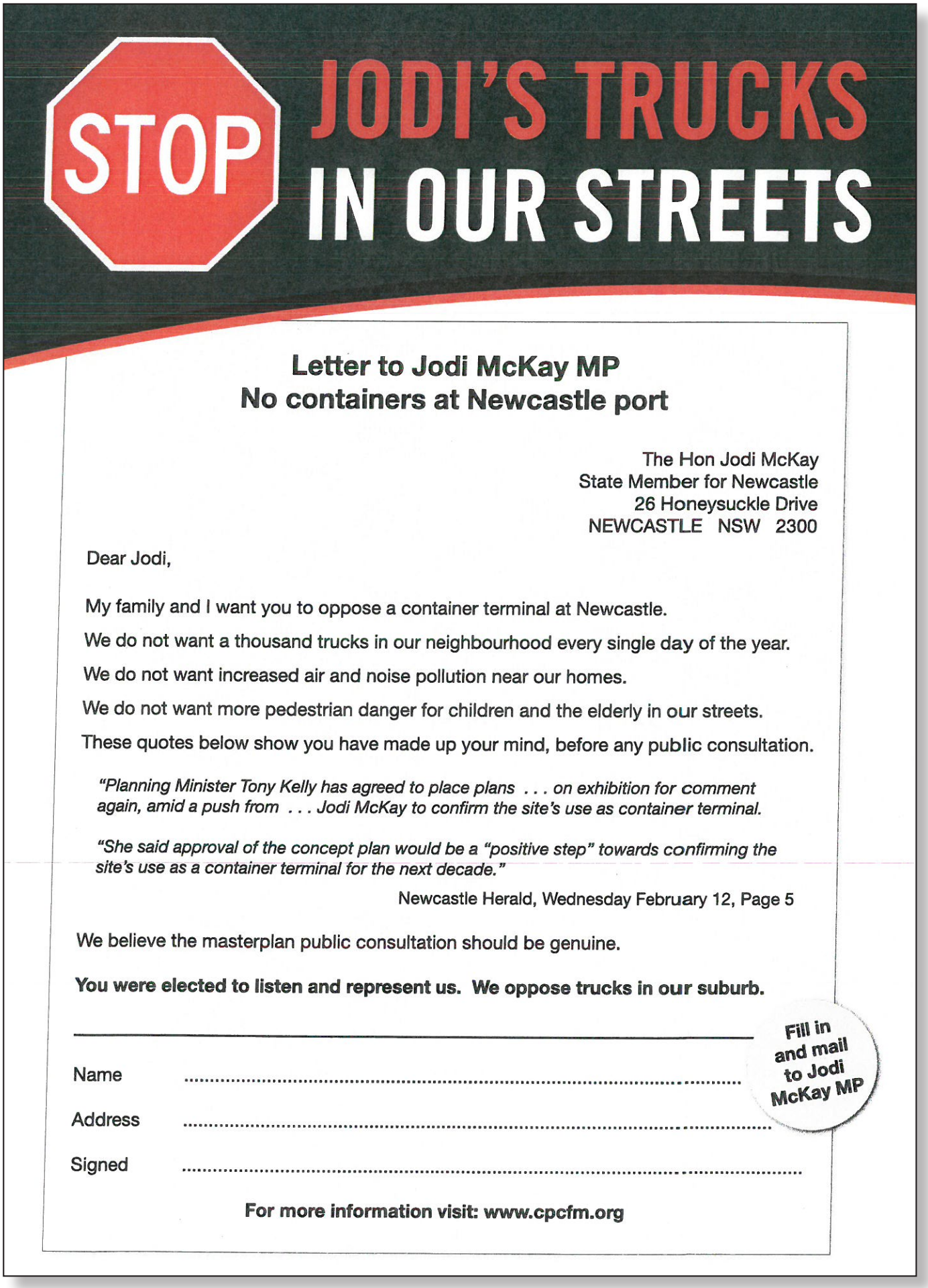

STOP
JODI'S TRUCKS
IN OUR STREETS
Letter to Jodi McKay MP
No containers at Newcastle port
The Hon Jodi McKay
State Member for Newcastle
26 Honeysuckle Drive
NEWCASTLE NSW 2300
Dear Jodi,
My family and I want you to oppose a container terminal at Newcastle.
We do not want a thousand trucks in our neighbourhood every single day of the year.
We do not want increased air and noise pollution near our homes.
We do not want more pedestrian danger for children and the elderly in our streets.
These quotes below show you have made up your mind, before any public consultation.
"Planning Minister Tony Kelly has agreed to place plans . . . on exhibition for comment again, amid a push from . . . Jodi McKay to confirm the site's use as container terminal.
"She said approval of the concept plan would be a "positive step" towards confirming the site's use as a container terminal for the next decade."
Newcastle Herald, Wednesday February 12, Page 5
We believe the masterplan public consultation should be genuine.
You were elected to listen and represent us. We oppose trucks in our suburb.
Fill in and mail to Jodi McKay MP
Name .....
Address .....
Signed .....
For more information visit: www.cpcfm.org

Figure 6

that he "became involved because Mr Fedele had asked me to help him with his pamphlet that he was working on". The Commission rejects that evidence as untruthful. It was Mr Tripodi who nominated Vincenzo Fedele as the printer. Mr Fedele said he was told by Mr Tripodi that Ms Wills was coming. He described how Mr Tripodi involved himself by making changes to the pamphlet and was partly involved in the design process. Mr Tripodi eventually admitted that he assisted Mr Fedele with the pamphlet, knowing that it would damage Ms McKay's re-election campaign.

It is not clear how much Buildev spent on the Stop Jodi's Trucks campaign. It is clear that Buildev paid the printer's invoice of $8,977 in addition to the $1,000 cash deposit paid by Ms Wills.

The mailout was politically driven. Ms McKay presented an impediment to Buildev's prospects of success for a fifth coal terminal. Ms Wills gave evidence that the pamphlet campaign was designed to unseat Ms McKay and her evidence in this respect was strongly corroborated by all the circumstances. The pamphlets were published anonymously and failed to bear an authorisation. Mr Williams was explicit as to why the pamphlet was published anonymously. He said he was concerned that if a reader recognised that the pamphlet had come from Buildev it was unlikely to have had its desired effect. In fact, Mr Williams suspected that, if the reader knew that Buildev was the source of the pamphlet, they would "throw it in the bin".

The Commission is satisfied that each of Mr Williams, Mr Sharpe and Ms Wills played an active part in the Stop Jodi's Trucks mailout campaign, which was designed to damage Ms McKay's prospects of re-election. Given its inherent political nature, the expenditure on the leaflets amounted to "electoral communication expenditure", as defined by Election Funding, Expenditure and Disclosures Act 1981 ("the Election Funding Act"). This expenditure was incurred in the period between 1 January 2011 and the end of the polling day for the 2011 NSW state election and was, therefore, incurred within the "capped expenditure period" as defined in s 95H of the Election Funding Act. As the electoral communication expenditure exceeded $2,000 in a capped expenditure period, Buildev was operating as a "third-party campaigner", as defined in s 4 of the Election Funding Act. Buildev failed to register as a third-party campaigner, as required by s 96AA of the Election Funding Act, and failed to disclose to the Election Funding Authority its electoral communication expenditure, as required by s 88(1A)(a) of the Election Funding Act.

The Commission finds that Mr Tripodi played a central role in the campaign by nominating the printer for the mailout pamphlets and involving himself in the drafting and design process for the pamphlets.

During the conduct of the public inquiry, reference was made to the fact that the actions of Mr Tripodi were detrimental to his political colleague Ms McKay. It does seem to conflict with commonly understood principles of personal, political and party loyalty, but the Commission makes no further judgment in relation to that, except to say that it does reinforce the Commission's finding that Mr Tripodi acted throughout in support of Buildev's interests, in the hope or expectation that he would derive a personal benefit.

PART 3 – THE NSW LIBERAL PARTY AND THE FREE ENTERPRISE FOUNDATION

Chapter 12: Structure of the NSW Liberal Party

This part of the report examines the circumstances in which the Free Enterprise Foundation, a trust based in the Australian Capital Territory, came to make significant donations to the NSW Liberal Party just prior to the 2011 NSW state election. During this part of the investigation, the Commission was concerned to ascertain whether the Free Enterprise Foundation was used to channel political donations to the NSW Liberal Party from property developers and to evade the requirements of the *Election Funding, Expenditure and Disclosures Act 1981* ("the Election Funding Act") for accurate disclosure of political donations.

Before examining the role played by the Free Enterprise Foundation, it is relevant to consider the structure of the NSW Liberal Party.

The NSW Liberal Party is divided into a parliamentary wing and an organisational wing. The investigation was primarily interested in the conduct of the organisational wing, although some of the actions of members of the parliamentary wing are relevant.

The NSW Liberal Party is governed by a State Council, and its affairs are managed by the State Executive. At the relevant time, Natasha Maclaren-Jones was the party president.

Specific tasks and functions of the NSW Liberal Party are delegated to committees, one of which is the state Finance Committee. The Finance Committee was described by one of its members, Robert Webster, as being "there for good governance of the Party" and he said it managed the party's finances, set and scrutinised its budget, reported to auditors, and reported to the State Executive on the party's finances. Mr Webster accepted that this included ensuring money used by the party was raised and deployed in accordance with law. Under the party constitution, the Finance Committee has responsibility for the management of income and expenditure of the State Party.

The membership of the Finance Committee changed from time-to-time, and the precise makeup of the committee throughout the whole of the relevant time is not clear. During the relevant time, the chair was Arthur Sinodinos and members included Mr Webster, Michael Photios, John Pegg and Peter McGauran. Ms Maclaren-Jones was, as party president, an ex officio member of the Finance Committee.

According to its submissions to the Commission, the NSW Liberal Party has approximately 20 paid employees. During the relevant time, Mark Neeham was the state director of the party. The deputy director of the party was Richard Shields. Simon McInnes was the finance director, and he was also registered with the Election Funding Authority as the party agent. Mr McInnes reported to the Finance Committee. Christopher Stone was employed as the campaign director for the 2011 election campaign.

Since 1999, the NSW Liberal Party has had a separate fundraising arm known as the Millennium Forum. Its principal purpose was to raise money for use by the NSW Liberal Party in its general activities and election campaigns. The Millennium Forum raised money in at least three ways: through subscriptions paid by different classes of "sponsors", through fundraising events and through soliciting donations.

The executive chairman of the Millennium Forum was Paul Nicolaou. Mr Nicolaou provided his services to the Millennium Forum through his business, Solutions R Us. In accordance with that contract, Solutions R Us was paid an annual retainer, but there was also an incentive scheme so that, if the funds raised exceeded certain thresholds, Solutions R Us would become entitled to 6% of the additional funds raised. Mr Nicolaou was based at the head office of the NSW Liberal Party and appears to have shared offices with other members of the party executive.

There is also evidence that some members of the Finance Committee were actively involved in soliciting donations

for the party. It is not clear whether this was carried out as an official function of the Finance Committee, itself, but it is clear that committee members, including Mr Sinodinos, Mr Webster and others, were given the task of approaching potential donors. One example is a Finance Committee document created for the purpose of fundraising for the 2010 federal election campaign, which identified target donors and a particular party person – described as the "solicitor" – who was designated to approach a target donor. Those "solicitors" included Mr Nicolaou and most, if not all, of the members of the Finance Committee.

Each member of the Liberal Party is a member of a local branch – a geographical grouping. The local branches belong to a State Electoral Conference, which was referred to in the evidence as "SEC". An SEC comprises all the branches that are located within the geographic boundaries of a particular state electorate.

Chapter 13: The Nicolaou proposal

This chapter examines how a proposal came about to use the Free Enterprise Foundation to channel political donations from property developers to the NSW Liberal Party.

Key personnel in the NSW Liberal Party recognised that the prohibition on seeking and receiving donations from property developers, which commenced on 14 December 2009, could have a serious negative impact on its budget and the amount that it would be able to spend on the 2011 NSW state election campaign. Several witnesses described how it was estimated that the prohibition could take away $500,000 in anticipated donations, thereby reducing the budget from $1.5 million to $1 million. On 1 December 2009, a letter was sent by the NSW Liberal Party addressed to "all MPs and Senators" dealing with the impact of the prohibition. The letter was signed by Mr Sinodinos as "Finance Director" and Mr Neeham as state director. The letter set out a portion of the Election Funding and Disclosures Amendment (Property Developers Prohibition) Bill 2009 (the legislation had not then been passed) and then went on as follows:

> *While this is a Bill to ban political donations from property developers, it goes much further than that and affects many of our traditional supporters. We acknowledge the substantial financial impact this will have on all of our fundraising targets and efforts moving forward.*
>
> *This Bill is designed to cause maximum damage to our party and our efforts to fund an effective campaign against Labor at the next election.*

One solution to the potential shortfall in the campaign budget was advanced by Mr Nicolaou. Mr Nicolaou suggested that donations could be made by prohibited donors through a body known as the Free Enterprise Foundation and come back from the Free Enterprise Foundation to the NSW Liberal Party. Mr Nicolaou said, "I put the idea forward to the Finance Committee in relation to the Free Enterprise Foundation". Mr Nicolaou also said, "I advised the Committee of the Free Enterprise Foundation and what it does. I assumed that the Finance Committee would then have taken legal advice to ensure that what we would do with the Free Enterprise Foundation was above board". Mr Neeham said that Mr Nicolaou raised the use of the Free Enterprise Foundation at a Finance Committee meeting in the context of a discussion of how the NSW Liberal Party would deal with the ban on property developers. During that discussion, Mr Neeham said that Mr Nicolaou suggested that the Free Enterprise Foundation "could receive donations from prohibited donors in New South Wales". The Commission also accepts the evidence of Mr Nicolaou that he raised the matter specifically with each of Mr Sinodinos, Mr Webster, Mr Photios and others. Mr Photios recalled the suggestion being made and remembered a discussion around it.

Mr Neeham said that either Mr Webster or Mr Sinodinos raised the question of whether the proposal was legal. According to both Mr Nicolaou and Mr Photios, the need for legal advice was raised. There is no evidence that relevant legal advice was obtained.

Chapter 14: The Free Enterprise Foundation

During 2010, the Free Enterprise Foundation, was one of the largest donors to the NSW Liberal Party. On 20 October 2011, the NSW Liberal Party submitted a "Political Party Disclosure Return" to the Australian Electoral Commission. That return disclosed five donations from the Free Enterprise Foundation during the period from 1 July 2010 to 30 June 2012 – $94,000, $64,000, $171,000, $358,000 and $100,000 – a total of $787,000. Of that, $693,000 was donated in a 19-day period between 6 and 24 December 2010. Of the $693,000, some $629,000 was donated in a three-day period between 22 and 24 December 2010. According to Mr McInnes, the finance director of the NSW Liberal Party, $693,000 was used by the NSW Liberal Party in its 2011 state election campaign. According to party records, the total amount raised for the NSW Liberal Party election campaign through donations, fundraising events and appeals was $2,160,252.

The Commission was interested in donations that passed to the Free Enterprise Foundation through the hands of the head office of the NSW Liberal Party. In a number of instances, the original donation, although made out to the Free Enterprise Foundation, was actually originally received by the NSW Liberal Party. Generally these donations were sought and collected by Mr Nicolaou, the NSW Liberal Party's chief fundraiser. The donation was then sent to the Free Enterprise Foundation. Soon after, lump sums were "re-donated" back by the Free Enterprise Foundation to the NSW Liberal Party.

What is the Free Enterprise Foundation?

The Free Enterprise Foundation purports to be a trust created by a trust deed made on 20 August 1981. The trust deed recites that the "settlor" of the trust was Denis Davis, that Mr Davis was "desirous of settling a fund to be known as 'The Free Enterprise Foundation'" and that the trust would apply the fund for described purposes. Two trustees were appointed, Anthony Bandle and Charles Fox. Mr Bandle and Mr Fox collectively comprised what the trust deed described as the "Council". Mr Fox was replaced as a trustee in 1986.

The Free Enterprise Foundation was set up by persons closely associated with the NSW Liberal Party. Mr Bandle said that he was approached to become a trustee by the treasurer of the NSW Liberal Party, Sir Robert Crichton-Brown. Mr Bandle, Mr Fox and the settlor, Mr Davis, were all accountants practising from the firm that provided accounting services to the NSW Liberal Party.

Under clauses 5(a) and 5(b) of the trust deed, the Council held the capital and income of the trust fund "to pay or apply" income or capital to "such persons companies firms associations groups societies and organisations whatsoever for the achievement of the Prescribed Purposes and in such manner as the Council shall in their absolute and uncontrolled discretion at any time from time to time determine".

Under clause 5(c), the Council is given the same discretion to hold the fund and income "upon trust for such charitable institution or institutions and for such charitable purposes generally".

The "Prescribed Purposes" are defined in clause 1(d) of the trust deed:

> *"the Prescribed Purposes" means:*
>
> *(i) to promote the principle of free enterprise;*
>
> *(ii) to promote a society in which the individual has maximum equality of opportunity and maximum freedom of choice in pursuing his own way of life;*
>
> *(iii) to promote the economic system of free enterprise within which system individuals have the opportunity to experience achievements by the exercise of choice and initiative;*

(iv) to promote the principle of freedom of enquiry choice association and trade;

(v) to promote or in any way advance in the opinion of the Council the above objects by:

(aa) publishing, advertising or otherwise making known the principles and advantages of the above objects;

(bb) fostering in the advancement of education relating to the above objects by the provision of prizes, grants, scholarships and other assistance whether to persons or to schools, universities or other educational institutions or otherwise;

(cc) assisting by donations grants of money or otherwise persons companies societies associations groups of people parties institutions or any group or body whose philosophy or objects are in accordance with the above objects;

(dd) generally to do any such things and make any grant donation contribution of money or otherwise provide assistance as the Council shall in its absolute and unfettered discretion deem necessary or be desirable to promote or advance in any way whatsoever the above objects.

The trustees' "discretion"

Under the terms of the trust deed, the trustees of the Free Enterprise Foundation were given an "absolute and uncontrolled" discretion. In his evidence, Mr Bandle, who managed these transactions for the Free Enterprise Foundation, repeatedly claimed that whenever he sent money on to the NSW Liberal Party he was exercising that discretion. The Commission does not accept that part of Mr Bandle's evidence. There may have been occasions when Mr Bandle did exercise a discretion in accordance with the trust deed but, at least for a couple of months in 2010, Mr Bandle was not exercising a discretion when he made a series of particular donations – at that time, he was acting to process payments at the request of persons associated with the NSW Liberal Party.

The detail of the way in which particular payments were made is elaborated on later in this report. For present purposes, it is sufficient to note that Mr Bandle agreed with persons associated with the NSW Liberal Party to allow the Free Enterprise Foundation to be used in the following way. Persons associated with the NSW Liberal Party solicited donations (including donations from property developers) and requested those donations be made out to the Free Enterprise Foundation. The donations would then be sent to, or collected by, Mr Nicolaou and then delivered to Mr Bandle at the Free Enterprise Foundation. The cheques were usually accompanied by a covering letter from Mr Nicolaou in his capacity as the executive chairman of the Millennium Forum. The letter was in a standard form and informed Mr Bandle that the donor "would like the Trustees to consider donating their contribution to the Liberal Party of Australia NSW Division" (Figure 7, page 71).

The money would then accumulate in the Free Enterprise Foundation bank account and eventually be sent back in lump sums to the NSW Liberal Party. The advantage of this arrangement was to disguise the true source of the donation; all that the NSW Liberal Party would declare was a large lump sum donation from the Free Enterprise Foundation. Meanwhile, the Free Enterprise Foundation, under federal disclosure rules, was not required to, and did not disclose, the identities of donors who had made donations of less than $11,500. By these means, it was only the large donors whose identity would ever become publicly known, and those donors would appear on the public record as having made their donations to the Free Enterprise Foundation, not to the NSW Liberal Party.

This arrangement was most prevalent during November and December 2010. The size and frequency of the donations passing through the Free Enterprise Foundation to the NSW Liberal Party suggests that the Free Enterprise Foundation was not operating as an independent trust at all. The Commission does not accept that Mr Bandle was exercising a discretion during this period. There are numerous instances where Mr Bandle was acting at the bidding of persons from the NSW Liberal Party. Every time the NSW Liberal Party made a request that a donation be remade to it, Mr Bandle acceded.

In his submissions, Mr Bandle conceded that he had "never met or corresponded with" the actual donors; it appears he simply accepted Mr Nicolaou's say so as to the donors' intentions, and sent the money back to the NSW Liberal Party. Mr McInnes, the finance director of the NSW Liberal Party, said there "was definitely an expectation that money that went down there would come back" to the NSW Liberal Party. On 16 December 2010, Mr Nicolaou sent two cheques totalling $53,000 (one for $35,000 and one for $18,000) from Boardwalk Resources Limited, a company within the Tinkler Group, to Mr Bandle saying the donors "would like the Trustees to consider donating their contributions to the Liberal Party of Australia, NSW Division". On the same day, Mr McInnes sent an email to Mr Neeham, state director of the Liberal Party, which already factored these funds in as available campaign funds. He reported to Mr Neeham on contributions that candidates had made towards the "Target Seat Package" requirement of

Millennium Forum
Liberal Party of Australia New South Wales

13 December 2010

Mr Tony Bandle
Chairman
Free Enterprise Foundation
PO Box 292
CANBERRA ACT 2601

Dear Tony,

How are you? I hope all is well?

Please find attached cheques totalling $14,990 from a number of donors.

They would like the Trustees to consider donating their contributions to the Liberal Party of Australia NSW Division.

Finally if approved and accepted, can you please receipt their monies as appropriate. I have provided names and addresses for that purpose. Please see attached.

Should you have any questions in relation to this matter please feel free to call me on 02 8356 0330.

Thank you for your assistance, it is greatly appreciated.

I look forward to your reply.

With warm regards,

PAUL NICOLAOU
EXECUTIVE CHAIRMAN

Tel: (02) 8356 0313 Fax: (02) 9360 3097 Web: www.milleniumforum.org.au
Address: Level 9, 140 William Street, East Sydney 2011 Mail: Locked Bag 2, Kings Cross NSW 1340

Figure 7

$35,000 (the Target Seat Package cost was a required contribution for NSW Liberal Party candidates to access the benefits of the Target Seat Package program). In this email, he had already included $18,000 for the seat of Londonderry and $35,000 for the seat of Newcastle from the $53,000 that Mr Nicolaou was sending to the Free Enterprise Foundation. This indicates that, before the Free Enterprise Foundation had received the money, Mr McInnes knew the money would come to the NSW Liberal Party and that he had already allocated the money.

The money sent to the Free Enterprise Foundation by the NSW Liberal Party was under NSW Liberal Party control. A "reconciliation" or "running account" was kept by Mr McInnes that recorded the date and the amount of the "donations" paid into the Free Enterprise Foundation, and set off against those the lump sums that were repaid to the NSW Liberal Party. On 24 January 2011, Mr McInnes emailed this reconciliation document, as it was at that date, to Mr Bandle. This depicts 78 donor payments totalling $793,214 into the Free Enterprise Foundation, and five corresponding lump sum payments totalling $787,000 out of the Free Enterprise Foundation to the NSW Liberal Party. At the end, a balance of $6,214 remained with the Free Enterprise Foundation. All payments were made between 28 July and 24 December 2010. Mr McInnes accepted that the arrangement operated in a manner similar to a bank account. The email enclosing these details shows that Mr McInnes and Mr Nicolaou exercised influence over the allocation of money to fund the expenses of the Free Enterprise Foundation. Mr McInnes concluded the email with the following comment:

> *If this* [reconciliation] *does agree with your records then Paul and I would request that the balance of $6,214 be retained by your organisation in recognition of the fabulous donations you have given us.*

At this point, it is convenient to deal with a particular submission made by Mr Bandle. He submitted that the Commission could not make adverse findings against him because each donation would be mixed with other funds in the trust bank account, and it was therefore impossible to say what money came from where. There are two bases for rejecting that submission. The first comes from the evidence of Mr Bandle himself, who said that for 33 years re-donations were invariably made in accordance with the request of the donor. The second is contained within Mr McInnes' "reconciliation", which shows exactly where the money came from, where it went, and how it was treated.

Was the trust a sham?

Counsel Assisting have submitted that the Commission should find that the Free Enterprise Foundation trust was a sham or, at least, "emerged as a sham" from mid-2010. Although the Commission has misgivings about the way in which the trust was conducted, it declines to make such a finding.

There was some evidence to support a finding that the trust was a sham. Raymond Carter (an experienced NSW Liberal Party member and office bearer) said his understanding of the Free Enterprise Foundation "was that it was set up so that money could go to Canberra and come back, and that illegal donors can be lost … on the way through". While there is no evidence that this was the purpose from the outset, it is the case that, at least in late 2010, the trust came to be used that way. During the course of his evidence, Mr Bandle admitted that in the 33 years of the trust's existence he had never read the platforms of any political parties (including the NSW Liberal Party) to determine whether a particular party's policies conformed with the "Prescribed Purposes" of the trust.

While the evidence is insufficient to convince the Commission that the trust is a sham, it does, however, support a finding that the trust was used during 2010 to channel political donations to the NSW Liberal Party. The Commission finds that, during November and December 2010, Mr Bandle worked in conjunction with Mr Nicolaou and Mr McInnes pursuant to an arrangement under which money was simply paid into the trust so that it could come back out to the NSW Liberal Party. The Commission finds that, at least in November and December 2010, Mr Bandle was not exercising his power as a trustee for the purpose for which it was granted.

In a statement issued on 23 March 2016, the NSW Electoral Commission concluded that the Free Enterprise Foundation "was never a validly constituted charitable trust because the purposes to which money it controlled could be paid were not exclusively charitable in the eyes of the law". The issue as to whether or not the Free Enterprise Foundation was a validly constituted charitable trust was not addressed in Counsel Assistings' submissions. Consequently, the relevant parties have not been given an opportunity to address the legal or practical consequences of such a conclusion. In these circumstances, the Commission has not dealt with this issue in this report.

From at least November 2010, the NSW Liberal Party began to use the Free Enterprise Foundation as suggested by Mr Nicolaou. In January 2011, Mr McInnes prepared a record listing the dates on which donations had been forwarded to the Free Enterprise Foundation and the dates on which the Free Enterprise Foundation had returned that money. Mr McInnes described it as a "reconciliation", and accepted that it reflected an arrangement that operated as a kind of running account. A copy of the reconciliation was sent to Mr Bandle so he could check whether it agreed with his records. The first entry in Mr McInnes' reconciliation is 28 July 2010 and the last entry is 24 December 2010. During that period, the Free Enterprise Foundation donated $787,000 to the NSW Liberal Party. As mentioned earlier, Mr McInnes said that, of this, $693,000 would have been used on the NSW 2011 state election campaign.

Mr McInnes' reconciliation confirms the Commission's finding that, during at least November and December 2010, Mr Bandle and the Free Enterprise Foundation operated in accordance with the wishes of the NSW Liberal Party, and no independent discretion was being exercised.

The reconciliation also enables the identification of some of those donors who passed their money through the Free Enterprise Foundation before the money was channelled back to the NSW Liberal Party. While not every donor has been investigated, there is sufficient evidence to show that several did come within the statutory definition of a prohibited donor (property developer). It will be recalled that Mr Nicolaou's "suggestion" was that the Free Enterprise Foundation could be used to deal with the problem created by the prohibition on donations from property developers. The Commission finds that Mr Nicolaou's suggestion was, in terms, implemented.

Chapter 15: Channelling donations through the Free Enterprise Foundation

Some specific donations

In order to clarify the way in which this arrangement was operating, it is appropriate to recount the circumstances of some donations that were used by the NSW Liberal Party in its 2011 state election campaign.

Brickworks Ltd

On 8 December 2010, Lindsay Partridge, the managing director of Brickworks Ltd, sent a letter to the Free Enterprise Foundation. He enclosed a cheque for $125,000 stating that it was "a donation to the Foundation to further the cause of the free enterprise system". The letter went on in similar terms to the standard form letter usually sent by the Millennium Forum to the Free Enterprise Foundation, to suggest that, "The trustees may care to consider making a donation of a similar amount to such a cause and in doing so, exercise their discretion in favour of the Liberal Party of Australia – New South Wales division". Mr Partridge's letter went on to say, "We trust this donation will provide assistance with the 2011 NSW sate election campaign". Mr McInnes' reconciliation records a donation made by Brickworks Ltd for $125,000.

Part of the business of Brickworks Ltd is property development; it has three divisions, one of which is designated as "land and development" and conducts property development activities. For this reason, Brickworks Ltd met the statutory definition of a property developer. According to Mr McInnes' reconciliation, the $125,000 from Brickworks Ltd was used by the NSW Liberal Party in its 2011 state election campaign.

The following evidence establishes that someone in the NSW Liberal Party knew about the Brickworks Ltd's donation and the way it was made. Robert Milner is the chair of Brickworks Ltd. He had a recollection that "someone from the party came and spoke to me, I can't recollect who it was" and "just asked could we give part of the donation to the Free Enterprise Foundation". Mr Milner said that he agreed to do so, took the matter to the Brickworks board and it was "ratified". When asked whether he understood that a donation to the Free Enterprise Foundation would go to the NSW Liberal Party, Mr Milner said "yes, yes, otherwise we wouldn't have given it".

Mr Partridge explained that Brickworks Ltd had previously donated through the Free Enterprise Foundation, which he had described as a "diversionary organisation". He said historically their use of the Free Enterprise Foundation was a way of keeping donations "away from the eyes of the press".

Mr Webster was concurrently a director of Brickworks Ltd and a member of the NSW Liberal Party's Finance Committee. He told the Commission that he recalled the Brickworks board making the decision to give the donation. He appreciated at the time of the decision that it was a donation to the NSW Liberal Party. As a director of Brickworks Ltd, he would have appreciated its business involved property development.

Walker Group Holdings Pty Ltd

On 22 December 2010, Walker Group Holdings Pty Ltd drew a cheque for $100,000 in favour of the Free Enterprise Foundation. The cheque was signed by Lang Walker. Victor Yee, the financial controller for the Walker Corporation, gave evidence that Walker Group Holdings is a property developer. Based on Mr McInnes' reconciliation, that donation to the Free Enterprise Foundation was sent back to the NSW Liberal Party on 23 or 24 December 2010. The Commission finds that this was a donation that was directly affected by the agreement reached with Mr Bandle that he would clear money through the account of the Free Enterprise Foundation and send it back to the NSW Liberal Party.

Westfield Ltd

Westfield is a property developer. On 21 December 2010, Westfield drew a cheque for $150,000 in favour of the Free Enterprise Foundation. On the same day, Mr Nicolaou sent a letter to Mr Bandle at the Free Enterprise Foundation, attaching the cheque, and advising Mr Bandle that Westfield "would like the Trustees to consider donating their contributions to the Liberal Party of Australia NSW Division". On 22 December 2010, the cheque was deposited into the bank account of the Free Enterprise Foundation.

The Commission finds that, pursuant to the agreement reached with Mr Bandle, the money paid by Westfield was cleared through the account of the Free Enterprise Foundation and channelled to the NSW Liberal Party. It was then used in the 2011 state election campaign.

Mark Ryan is a group director at Westfield and his role includes media management and public affairs. He has authority to make substantial political donations. Mr Ryan said that he was aware of the Free Enterprise Foundation as "quite a well-known fundraising body that's linked to the Liberal Party". Mr Ryan said he recalled speaking to Mr Nicolaou and Mr Webster around the time of making the donation and, "I can only assume that one or both of those gentlemen advised me to make the donation to the Free Enterprise Foundation". Whatever be the case, Mr Ryan went on to say that he "was very confident that the money would end up with the Liberal Party".

The Commission accepts the evidence of Mr Ryan as generally reliable. Westfield was quite clearly a property developer, and Mr Ryan was aware of the prohibition, but he said he understood the Free Enterprise Foundation was a federal entity, and the amount was intended to be donated to the federal party. The Commission accepts this evidence.

Although there appears to have been a misunderstanding on the part of Mr Ryan as to the ultimate recipient of the donation, the Commission is satisfied that it was always Mr Nicolaou's intention that the donation would be channelled to the NSW Liberal Party.

Elmslea Land Developments Pty Ltd

Elmslea Land Developments Pty Ltd, a property development company, is owned by Lee Jay Brinkmeyer and his family. On 15 December 2010, Elmslea Land Developments drew a cheque for $20,000 in favour of the Free Enterprise Foundation.

Mr Brinkmeyer gave evidence to the Commission in a compulsory examination that he had heard of the Free Enterprise Foundation "over many years" from "different people" and wanted to make a donation to it because he supported a free enterprise and free markets ideology. His evidence at the public inquiry was different. At the public inquiry, he told the Commission that the first time he heard of the Free Enterprise Foundation was when he spoke with Wayne Brown, a long-term NSW Liberal Party member and friend, and asked him "who would be a good ... organisation to be able to support?". According to Mr Brinkmeyer, Mr Brown told him the Free Enterprise Foundation would be good because it supported the Liberal Party.

Mr Brown, a witness whose evidence the Commission accepts, told the Commission that during a casual meeting, a few weeks before 15 December 2010, Mr Brinkmeyer asked him how he could make a donation because "I'd like to donate to the campaign". Mr Brown said that he told Mr Brinkmeyer that he could not donate because Mr Brinkmeyer was a property developer and therefore prohibited from making a donation.

The matter was left there until Mr Brown had second thoughts and contacted the "Liberal Secretariat" at the head office of the NSW Liberal Party in Sydney. Mr Brown asked to be put through to "fundraising". Mr Brown then spoke to a male and told him that

he "had a person interested in donating who was a developer". The male responded, "developers have to donate to the Free Enterprise Foundation". As a consequence, Mr Brown recontacted Mr Brinkmeyer and told him that a donation could be made through the Free Enterprise Foundation.

The Commission is satisfied that Mr Brinkmeyer made out a cheque to the Free Enterprise Foundation and provided it to Mr Brown on the understanding that the money would find its way to the NSW Liberal Party. In accordance with instructions he received from someone at head office of the NSW Liberal Party, Mr Brown took the cheque personally from Queanbeyan, where he lived, to the NSW Liberal Party head office in Sydney and passed it to Mr McInnes (Mr Brown had known Mr McInnes from previous dealings). Mr McInnes took the cheque and passed it to a person who Mr Brown was able to identify as Mr Nicolaou.

The Commission accepts Mr Brown's evidence, and does not accept the evidence of Mr Brinkmeyer. Mr Brinkmeyer's evidence was not credible, particularly as it changed markedly between the evidence he gave in his compulsory examination and the evidence he gave at the public inquiry.

Boardwalk Resources Limited

The Commission looked specifically at a $53,000 donation made on 13 December 2010 by Boardwalk Resources to the Free Enterprise Foundation. The detail of the matter is dealt with in chapter 26 of this report. The circumstances of that donation are another reason why the Commission concludes that the Free Enterprise Foundation was used to channel political donations to the NSW Liberal Party.

The Central Coast

The Free Enterprise Foundation was used specifically to receive and return donations made by a group of donors located on the Central Coast. These donations are among the matters relied on by the Commission in arriving at the view that persons in the NSW Liberal Party were using the Free Enterprise Foundation to channel donations to the NSW Liberal Party. This is dealt with in part 4 of this report.

Were the donations "political donations"?

A preliminary issue, in determining whether the channelling of donations through the Free Enterprise Foundation was permitted under the Election Funding Act, is whether the donations by the true donors amounted to "political donations". If they did not, then s 96GA, s 88 and s 92 of the Election Funding Act would not apply to those payments.

Section 96GA of the Election Funding Act relevantly states, "It is unlawful for a person to accept a political donation that was made … by a person on behalf of a prohibited donor".

Section 88 of the Election Funding Act requires disclosure of political donations received on behalf of a party, elected member or candidate. Section 92(2) of the Election Funding Act outlines the details that must be included in the disclosure of reportable political donations (political donations exceeding $1,000). These include "the name of the donor" and "the residential address of the donor (in the case of an individual) or the address of the registered or other official office of the donor (in the case of an entity)". Failing to comply with the requirements of s 88 and s 92(2) is unlawful.

This issue was addressed by the Crown Solicitor in an advice dated 16 July 2013 to the Election Funding Authority. The central consideration, as averted to by the Crown Solicitor, is whether payments by property developers ceased to be "political donations" as they passed through the Free Enterprise Foundation. Section 85(1)(d) of the Election Funding Act relevantly provides, that a gift is a "political donation" if it is "a gift made to or for the benefit of an entity or other person (not being a party, elected member, group or candidate), the whole or part of which was used or intended to be used by the entity or person to enable that entity or person to make directly or indirectly a political donation".

In this respect, the Crown Solicitor was concerned with whether it could be said that the payments to the Free Enterprise Foundation were made by the source entity with the intention that they be used by the Free Enterprise Foundation to contribute the same funds to the NSW Liberal Party. The Crown Solicitor arrived at the conclusion that it would be difficult to establish that it was the intention of the donors that their gifts be used in whole or in part to enable a political donation to the NSW Liberal Party as required by s 85(1)(d) of the Election Funding Act. This conclusion drew on the assumption that the trustees of the Free Enterprise Foundation were exercising a discretion and so there was no certainty to sustain an expectation and intention that the funds would pass to the NSW Liberal Party.

The Crown Solicitor did not have access to the same evidence that the Commission obtained. This evidence disclosed that, at least during November and December 2010, there was no genuine discretion being exercised by the trustees of the Free Enterprise Foundation. The donors (with the exception of Westfield), the Free Enterprise

Foundation and the relevant party officials all intended and expected the funds going to the Free Enterprise Foundation would pass to the NSW Liberal Party. Relevant donations to the Free Enterprise Foundation were accompanied by a "request" from the donor, or from Mr Nicolaou, that the funds be passed to the NSW Liberal Party. The Crown Solicitor did not have access to Mr Bandle's evidence that, in 33 years, all donations were made in accordance with the request of the donor. He did not have access to Mr McInnes' candid acknowledgement that there was "definitely an expectation that money that went down there would come back". He did not have access to the NSW Liberal Party's reconciliation document that demonstrated that, in the months leading up to the end of 2010, the NSW Liberal Party had been using the Free Enterprise Foundation like a bank with donor funds being deposited into the Free Enterprise Foundation only to be returned in bulk as donations to the party.

The Crown Solicitor referred to the letters that Mr Nicolaou sent with each donation he channelled to the Free Enterprise Foundation. These letters provide suggestions as to how the Free Enterprise Foundation may apply the donations. The letters generally use terms such as the trustee "may care to consider" and he would "like the Trustees to consider" passing the funds to the NSW Liberal Party. The Crown Solicitor commented that "the letters could be said to be consistent with the companies intending to leave it open to the Trustee to consider, as one of a number of options, using the gift to enable a Liberal Party donation". On the evidence before the Commission, Mr Nicolaou's language was disingenuous. He did not need to ask the trustee or trustees to consider passing the money to the NSW Liberal Party. He knew that the money would be passed on to the NSW Liberal Party.

The Commission is satisfied on the evidence before it that the relevant payments made to the Free Enterprise Foundation, and passed on to the NSW Liberal Party, each constituted a "gift made to or for the benefit of an entity … the whole or part of which was … intended to be used by the entity to enable the entity to make a political donation" to the NSW Liberal Party. Each payment was a "political donation" for the purposes of the Election Funding Act.

Were the donations made on behalf of prohibited donors?

The next issue is whether each payment from a prohibited donor passed on by the Free Enterprise Foundation was "made by a person [the Free Enterprise Foundation] on behalf of a prohibited donor", as set out in s 96GA of the Election Funding Act. Here, the issue of discretion is again important. If the Free Enterprise Foundation was exercising a true discretion, this would interrupt the passage of funds to the NSW Liberal Party. The source of the payments to the party would cease to be the prohibited donor. It would become the Free Enterprise Foundation that was drawing on funds it had access to to make its own donations to the party. But the Commission has found that the Free Enterprise Foundation was not exercising an independent discretion. It was just mechanically passing funds through to the NSW Liberal Party. Rather than being a source of its own payments, it was a conduit to political donations made by donors who were not lawfully able to make these donations directly to the NSW Liberal Party. Accordingly, when payments from prohibited donors were passed on by the Free Enterprise Foundation to the NSW Liberal Party, each payment was "a political donation made by a person on behalf of a prohibited donor".

Who in the NSW Liberal Party was involved?

The Commission finds that, from the NSW Liberal Party, each of Mr Nicolaou and Mr McInnes were knowingly involved in implementing the channelling of donations through the Free Enterprise Foundation to the NSW Liberal Party and, thereby, concealing the true source of those funds.

Mr Nicolaou was centrally involved in promoting and implementing the arrangement for the channelling of funds through the Free Enterprise Foundation. It was Mr Nicolaou's suggestion in the first place that the Free Enterprise Foundation be used to deal with donations from property developers. There is other evidence that demonstrates that he was well aware the arrangements had been implemented. For example, Mr McInnes said Mr Nicolaou told him some of the donors whose donations were channelled through the Free Enterprise Foundation were prohibited donors. There was a discussion between Christopher Hartcher and Mr Nicolaou on this subject – the content of that discussion is set out later in this report. There were other discussions with one of Mr Hartcher's staffers, Mr Carter, along similar lines. Mr Nicolaou said that "where there was some doubt, Simon and I decided that the Free Enterprise Foundation was the mechanism to deal with the Ray Carter donations". It was Mr Nicolaou who wrote and signed the letters addressed to the Free Enterprise Foundation asking for the money to be re-donated to the NSW Liberal Party.

Mr McInnes knew that donations had been channelled through the Free Enterprise Foundation to the NSW Liberal Party. In his compulsory examination, Mr McInnes agreed that he understood "in December 2010 and subsequently that some of those donors may have

been prohibited donors". Mr McInnes said he got the information that some of the donors may have been prohibited donors "probably in general discussions with Paul Nicolaou and other members of the organisation". Mr McInnes claimed that he "believed" that, if the donations were made to the Free Enterprise Foundation, it was "completely legal" if they found their way back to the NSW Liberal Party because of the asserted exercise of discretion on the part of the trustees of the Free Enterprise Foundation.

However, Mr McInnes had described his "discomfort" about the practice and said that he "was also concerned that there may have been donations that could have come from prohibited donors who would have been prohibited from directly donating to the party". There is also an email about donations, which was sent on 23 December 2010 from Mr McInnes to Mr Carter at Mr Hartcher's office, in which he wrote: "This does not include that last lot of cheques received today that were to be conducted through the Free Enterprise Foundation. Unfortunately these have been received too late and have been sent back to your office for alternative processing".

The statement that cheques were being "conducted" through the Free Enterprise Foundation is evidence that confirms Mr McInnes' involvement in the arrangement and his understanding that the money passed through the Free Enterprise Foundation as a matter of process rather than discretion. The reference to the "last lot of cheques" being "too late" is a reference to the fact that they could not be processed before the 31 December 2010 deadline after which the introduction of caps on donations would necessarily defeat the ongoing operation of the Free Enterprise Foundation arrangement. From 1 January 2011, the Free Enterprise Foundation, like every other donor, was confined to a $5,000 donation cap.

Mr Neeham was experienced in political affairs and the administration of political parties. At the relevant time, he was the state director of the NSW Liberal Party. Mr Neeham knew that the NSW Liberal Party was receiving donations from the Free Enterprise Foundation, but he said he was unaware that the money had come from property developers. He was, however, obviously aware and concerned about the possibility. Mr Neeham recounted one occasion when he spoke to Mr Nicolaou "just to clarify in terms of donations to the Free Enterprise Foundation that we were not directing donations to the Free Enterprise Foundation, ie, if a property developer said they wanted to support the party … we had to say we couldn't, but we couldn't then say please … send your cheque to the Free Enterprise Foundation". Mr Neeham says that he "got an agreement from Paul Nicolaou that that was the case". Mr Neeham was a straightforward and honest witness and the Commission is not satisfied that he was aware the Free Enterprise Foundation was being used to channel funds from property developers to the NSW Liberal Party.

The question arises as to whether anyone else in the NSW Liberal Party was aware that donations were being channelled through the Free Enterprise Foundation.

The course of events demonstrated that the expected shortfall in funding from $1.5 million to $1 million, as a result of the introduction of the prohibited donor provisions, was a matter of serious concern to the NSW Liberal Party Finance Committee and state executive. It was accepted by Mr Sinodinos that he and the Finance Committee wanted to know from Mr Nicolaou how the party was "tracking" against budget. The NSW Liberal Party was actually receiving donations at a rate exceeding the old budget. This should have raised questions as to the source of the unexpected funds, but the evidence before the Commission is that no member of the Finance Committee asked that question. The party received $629,000 in three days from one donor, but no one on the Finance Committee admitted to knowing anything about it in their evidence. The records would have shown that, in the year before the prohibition on donations from property developers, the Free Enterprise Foundation donated only $50,000 to the NSW Liberal Party.

Some Finance Committee members repeatedly denied being aware that the Free Enterprise Foundation had become a major donor. Mr Nicolaou said the Finance Committee wanted him to tell them who the "major donors" were. Under compulsory examination, Mr Nicolaou said that the Finance Committee asked him the identity of the major donors "on many occasions" and he said he "presumably" told them about the Free Enterprise Foundation. The evidence given by the following persons on this issue is difficult to accept.

Ms Maclaren-Jones was not only party president and an ex officio member of the Finance Committee, she was a candidate for election in 2011. She had a real and practical interest in monitoring fundraising and in identifying major donors. Mr Sinodinos was the chair of the Finance Committee. He was actively involved in fundraising and, in this regard, had a fundraising role second only to Mr Nicolaou. Yet, both Ms Maclaren-Jones and Mr Sinodinos denied knowing that the Free Enterprise Foundation was a major donor. Mr Neeham said he remembered that Ms Maclaren-Jones made a request "for a list of donors" toward the end of 2010. Mr Neeham understood she wanted this because "she wanted to thank them". Mr Webster was another member of the Finance Committee and also a director of Brickworks Ltd, a company that made a donation to the NSW Liberal Party through the Free Enterprise Foundation. Although Mr Webster told the Commission he had heard of the Free Enterprise

Foundation, he said that he had no recollection of any suggestion it be used to channel donations to the NSW liberal Party and he could not recall being told that the NSW Liberal Party was receiving donations from the Free Enterprise Foundation.

There is insufficient evidence to conclude that others in the hierarchy of the NSW Liberal Party, apart from Mr Nicolaou and Mr McInnes, were knowingly involved in the channelling of donations to the NSW Liberal Party through the Free Enterprise Foundation.

The NSW Liberal Party disclosure

Not all donors who channelled funds through the Free Enterprise Foundation were prohibited donors. Sometimes, Mr Nicolaou and others passed payments through the Free Enterprise Foundation out of concern to preserve the anonymity of the source. However, these were "political donations received [by the Free Enterprise Foundation] … on behalf of a party (the NSW Liberal Party)" and were required by s 88 of the Election Funding Act to be disclosed by that party, together with the details required by s 92 of the Election Funding Act. There was a failure to make such a disclosure and provide the required details.

Section 90 of the Election Funding Act provides that the person responsible for making disclosures for a party is the "party agent" registered under the Election Funding Act. Mr McInnes was the party agent for the NSW Liberal Party. Section 91 of the Election Funding Act provides that disclosures are to be made in a "declaration" lodged with the NSW Electoral Commission. Mr McInnes did lodge a declaration document with the Electoral Commission, disclosing political donations made to the NSW Liberal Party over the relevant period. This declaration made reference to receiving payments from the Free Enterprise Foundation and provided the details of the Free Enterprise Foundation in purported compliance with s 88 and s 92(2) of the Election Funding Act, requiring disclosure of political donations received and details of each donor as required by s 92(2).

The payments that should have been disclosed were the payments by the true donors, as the Free Enterprise Foundation was not acting as a discretionary trust. It was acting as a conduit for political donations to the NSW Liberal Party. Accordingly, for the purposes of s 88 and s 92 of the Election Funding Act it was receiving political donations from donors on behalf of the NSW Liberal Party. The political donations from the true donors were not included in Mr McInnes' declaration. Section 91(4) of the Election Funding Act provides that a declaration lodged with the Electoral Commission must contain a statement to the effect that all disclosures required to be made have been made. Mr McInnes made a statement to this effect in the declaration he lodged on behalf of the NSW Liberal Party. The contents of this statement were not objectively true because the true identity of the relevant donors had not been disclosed.

The Commission is satisfied that, during November and December 2010, the Free Enterprise Foundation was used to channel donations to the NSW Liberal Party for its 2011 NSW state election campaign so that the identity of the true donors was disguised. A substantial portion of the $693,000 provided by the Free Enterprise Foundation and used by the NSW Liberal Party in its 2011 state election campaign originated from donors who were property developers and, therefore, prohibited under the Election Funding Act from making political donations.

The Commission finds that each of Mr McInnes, Mr Nicolaou and Mr Bandle knowingly used the Free Enterprise Foundation to channel political donations, including political donations from property developers, to the NSW Liberal Party to fund its 2011 state election campaign so that the identity of the true donors was disguised from the Election Funding Authority.

PART 4 – THE CENTRAL COAST CAMPAIGN

Chapter 16: The Central Coast

This part of the report examines irregularities in the funding activities of three seats on the Central Coast of NSW (Terrigal, The Entrance and Wyong) for the NSW Liberal Party's 2011 NSW state election campaign. The Commission did not uncover any irregularities in Gosford, another Central Coast seat. The irregularities primarily involved failure to disclose political donations, but, from 14 December 2009, also involved evading the prohibition on donations from property developers and, from 1 January 2011, evading the caps on political donations.

The principal persons involved in these irregularities were Christopher Hartcher, Timothy Koelma, Christopher Spence, Darren Webber and Raymond Carter.

Mr Hartcher's role

Mr Hartcher is a lawyer by training. He worked for a period in private practice on the Central Coast before entering the Legislative Assembly in 1988 as the member for the seat of Gosford. He continued as a member of Parliament until March 2015. In 1992, he was appointed minister for the environment and, between 1995 and 2011, held several different shadow ministries. In 2002 and 2003, he was deputy leader of the opposition. Following a re-distribution, in 2007, Mr Hartcher contested, and won, the seat of Terrigal. After the Coalition success in the March 2011 election, Mr Hartcher was appointed concurrently to three ministries – special minister of state, resources and energy, and the Central Coast. He held these ministries until December 2013.

The Commission is satisfied that, at all relevant times, Mr Hartcher was aware of the requirements of the *Election Funding, Expenditure and Disclosures Act 1981* ("the Election Funding Act") relating to the need for accurate disclosure of political donations, the ban on accepting political donations from property developers, and the applicable caps on political donations.

By 2011, Mr Hartcher was a significant and influential member of the NSW Liberal Party. He had given long service and he was a key member of the leadership group within the NSW Liberal Party. Simon McInnes recounted a discussion when Paul Nicolaou said, "what Hartcher wants Hartcher gets". This influence was more evident on the Central Coast. In his submissions to the Commission, Mr Hartcher claimed that the names "Chris", "Hartcher" and "Chris Hartcher" were all used "interchangeably" with the "Terrigal SEC [State Electorate Conference]".

There were four seats identified as Central Coast seats – Terrigal, Gosford, Wyong and The Entrance. Before the 2011 election, Mr Hartcher held Terrigal, and the other three seats were held by the NSW Labor Party. The Liberal candidates for the 2011 election were Chris Holstein for Gosford, Mr Spence for The Entrance, and Mr Webber for Wyong. To some extent, these candidates campaigned as a group. As a shadow minister and an experienced and successful campaigner, Mr Hartcher was regarded as the NSW Liberal Party leader on the Central Coast.

Mr Hartcher and his Terrigal SEC were heavily involved in fundraising for the Central Coast seats generally. In September 2011, the NSW Liberal Party disclosed to the Election Funding Authority that the Terrigal SEC had raised $123,600 over the previous financial year, essentially for the March 2011 election. This was a comparatively large sum. The Gosford SEC had raised $995. The Entrance SEC had raised $27,880. The Wyong SEC had raised $9,488. There is other evidence, which the Commission accepts, indicating that Mr Hartcher had a strong personal role in raising funds for the Central Coast. For example, Mr Hartcher sought to obtain funds through John Caputo, the vice-president of the NSW Liberal Party Manly SEC, and Mr Nicolaou gave evidence about specific discussions he had with Mr Hartcher about raising funds.

The Commission finds that funds raised by Mr Hartcher and through his SEC partially funded the campaigns conducted in The Entrance and Wyong. As Mr McInnes said, "my understanding was that … both Spence and Webber were … Chris Hartcher's men, so to speak, he was helping them get elected".

The Commission infers from the evidence that Mr Hartcher desired to secure funding for the conduct of the 2011 election campaign on the Central Coast independent of the NSW Liberal Party in order to support the prospects of his re-election and the election of likeminded political colleagues. Requirements to disclose the receipt of donations had been imposed by the Election Funding Act. The NSW Liberal Party also had in place a "Finance Code of Practice", which, if obeyed, imposed fairly stringent requirements on sitting members and candidates as to how they could raise funds, and how those funds should be banked and accounted for. Obtaining independent funding, which was not subject to disclosure and not subject to head office scrutiny, could make the funding of a campaign relatively autonomous, as well as increase the amount of money available to be spent. It could also enable Mr Hartcher to ensure the funds were directed where they could best benefit himself and likeminded candidates on the Central Coast.

Following a careful consideration of Mr Hartcher's evidence, the Commission is of the view that it is unreliable. His evidence on various matters was inconsistent with the objective facts. His roles in dealing with three bank cheques payable to the NSW Liberal Party and the Boardwalk Resources donation, which are dealt with later in this report, are examples of that inconsistency.

The others involved

Mr Carter had been a member of the NSW Liberal Party since 1972. He held a variety of offices, including presidency of the Liberal Party Green Point Branch. Since 1988, he had been an electorate officer working for Mr Hartcher. Mr Carter was also a very successful fundraiser, with extensive connections on the Central Coast. The Commission is satisfied that, at all relevant times, he was aware of the requirements of the Election Funding Act relating to the need for accurate disclosure of political donations, the ban on accepting political donations from prohibited donors and the caps on political donations.

Mr Koelma left school in 2001 and, about that time, joined the Liberal Party and commenced voluntary work for Mr Hartcher. He received no formal qualifications after school. In 2003, Mr Koelma commenced paid work in Mr Hartcher's office as a research officer. He worked as a policy officer for Mr Hartcher between 2005 and 2007. In March 2007, he went to work as a member of the staff of the federal politician, Jim Lloyd. From December that year, he was employed as a senior communications officer by the Australian Fisheries Management Authority (AFMA) until he commenced self-employment with his business Eightbyfive in 2009. Mr Koelma continued to work for Mr Hartcher on a voluntary basis between 2009 and the NSW state election in March 2011. The Commission is satisfied that, at all relevant times, he was aware of the requirements of the Election Funding Act relating to the need for accurate disclosure of political donations, the ban on accepting political donations from property developers and the applicable caps on political donations.

Mr Spence worked in a number of odd jobs before 1999, when he commenced employment on the staff of David Oldfield MLC. He remained in that position, with one hiatus, until 2007. At one time, Mr Spence was active in the One Nation political party. In 2005, he joined the NSW Liberal Party and, at some time in or after 2007, commenced work in Mr Hartcher's electorate office. He remained there until May 2010, when he told the Commission that he took up self-employment as a "government relations consultant". Mr Spence was preselected as the NSW Liberal Party candidate for

The Entrance in late 2009. He was elected to Parliament in the 2011 election and remained a member of Parliament until March 2015. The Commission is satisfied that, at all relevant times, he was aware of the requirements of the Election Funding Act relating to the need for accurate disclosure of political donations, the ban on accepting property developers from prohibited donors and the applicable caps on political donations.

Mr Webber left school in 1999. He commenced but did not finish two apprenticeships, and had no formal qualifications. He joined the NSW Liberal Party in 2002. From 2008, he had intermittent work in a call centre and occasional work in different electorate offices. In his submissions to the Commission, he sets out a political history that includes an involvement "in the political scene of the Central Coast since 2002", the presidency of the Wyong SEC in 2009, and endorsement twice as a Liberal candidate for Wyong Shire Council. He was a member of the right-wing faction of the NSW Liberal Party. Between about mid-2009 and August 2010, he was employed from time-to-time by members of the NSW Parliament, including Mr Hartcher and the Hon Michael Gallacher MLC. In late 2009, he was preselected as the NSW Liberal Party candidate for the seat of Wyong. He was elected to Parliament in the 2011 election and remained a member of Parliament until March 2015. The Commission is satisfied that, at all relevant times, he was aware of the requirements of the Election Funding Act relating to the need for accurate disclosure of political donations, the ban on accepting political donations from property developers and the applicable caps on political donations.

Chapter 17: Eightbyfive

On 5 March 2009, Mr Koelma registered the business name "EIGHTBYFIVE". Sometime after the business was registered, a website was created that described a wide variety of services that would be offered by Eightbyfive. Some of the claims made on that website are of questionable accuracy, including the references to "Our experienced staff" and the nature of the services that could be provided.

For the reasons set out below, the Commission finds that Eightbyfive was never a successful business from which Mr Koelma expected to derive an income as a consultant. Mr Koelma used Eightbyfive to receive and channel political donations for the benefit of Mr Hartcher, Mr Spence, Mr Webber and the NSW Liberal Party for the 2011 Central Coast election campaign with the intention of evading the election funding laws relating to disclosure of political donations, the ban on donations from property developers, which operated from 14 December 2009, and, in relation to payments made after 1 January 2011, the applicable cap on donations. The funds obtained and channelled in this way were used for the purposes of the NSW Liberal Party 2011 state election campaigns in the seats of Terrigal, The Entrance and Wyong. Mr Koelma directly benefited from the donations through Eightbyfive, as he was able to draw from those funds to give himself a salary, thereby enabling him to work for Mr Hartcher on the 2011 state election campaign. Mr Koelma subsequently obtained full-time employment in Mr Hartcher's ministerial office after the 2011 election.

Mr Hartcher was involved in the establishment of Eightbyfive and took an active part in using Eightbyfive to channel political donations from Australian Water Holdings Pty Ltd, Gazcorp Pty Ltd and Patinack Farm Pty Ltd for the benefit of the NSW Liberal Party, himself, Mr Spence and Mr Webber, with the intention of evading the election funding laws relating to disclosure of political donations, the ban on donations from property developers (in the case of Gazcorp) and, in relation to payments made after 1 January 2011, the applicable cap on donations. Mr Hartcher benefited from this arrangement because part of the funds channelled through Eightbyfive enabled Mr Koelma to work for him on the 2011 NSW state election campaign at no cost to Mr Hartcher, while other funds channelled through Eightbyfive ensured that Mr Hartcher's likeminded political colleagues were funded to campaign for the Central Coast seats of Wyong and The Entrance.

As at early 2009, Mr Koelma was still working for the AFMA, but he and his wife planned a return to the Central Coast for family reasons. Mr Hartcher was aware that Mr Koelma was leaving his job. As at 2009, Mr Hartcher already had a close working relationship with Nicholas Di Girolamo. Mr Di Girolamo was the chief executive officer of Australian Water Holdings. Mr Hartcher accepted that, as shadow minister for water utilities, he had a working relationship with Mr Di Girolamo. From about 2007, Australian Water Holdings was eager to enter into a public private partnership (PPP) with the NSW Government or Sydney Water Corporation to provide water and sewerage services in the Sydney North West Growth Corridor. Mr Hartcher told the Commission that, when leaving the shadow ministry for water and utilities, he had advised Mr Di Girolamo that, "if you're going to have a continuing relationship with the Opposition as to where you're going with the public private partnership … you should either engage someone as an employee to work on it … or … you should contract out for someone to give you public relationships … consultancy advice".

Mr Hartcher told the Commission that following this advice, "I suggested to him that he might like to meet Mr Koelma and see if Mr Koelma was a suitable person to work with him on Government relations". Mr Koelma met with Mr Di Girolamo and, soon after that meeting, Mr Koelma registered the business name Eightbyfive.

Mr Hartcher was regularly updated by Mr Koelma on the activities of Eightbyfive; for example, the state of its arrangement with Australian Water Holdings, the written

terms of the retainer, and even on money matters. It has been submitted to the Commission that there is nothing especially unusual about this, given the closeness of the relationship between Mr Hartcher and Mr Koelma. The Commission does not accept that submission about the nature of the relationship. The contact was unusually close. Mr Hartcher was also responsible for introductions that led to Eightbyfive gaining its two other principal clients – Gazcorp and Patinack Farm. Mr Hartcher was kept informed by Mr Koelma of the negotiations with those clients.

Contrary to what was suggested in submissions, the Commission is of the view that Mr Hartcher's involvement constituted more than a mentor's interest in a younger associate. On 9 June 2010, Mr Hartcher asked his staff officer, Aaron Henry, to follow up with Mr Koelma on his behalf – an SMS text message was sent to Mr Koelma "CPH wants confirmation the invoice has been sent to Patinackfarm P/L". The initials "CPH" are Mr Hartcher's. Mr Hartcher also received "updates" from Mr Koelma, and he and Mr Koelma referred to Eightbyfive's clients as "friends". For example, on 4 June 2010, when Mr Koelma was updating Mr Hartcher on general office and political matters, he also updated him on the activities of the "friends" (Figure 8, page 86) . In this context, the "friends" were given a geographical title – "Sydney" was a reference to Gazcorp; "West" was a reference to Australian Water Holdings, and "North" was a reference to Patinack Farm. For some years after 2009, Mr Hartcher assumed the role of contacting Eightbyfive's clients and chasing up Eightbyfive's outstanding accounts. Directions concerning the operations of the business emanated from Mr Hartcher.

The Commission finds that Mr Hartcher had a significant role in the genesis and operations of Eightbyfive and that Mr Koelma's role was largely in the nature of managing operations and reporting to Mr Hartcher.

Mr Hartcher submitted to the Commission that various agreements that Eightbyfive entered into occurred so early in time (as early as March 2009, in the case of Australian Water Holdings) that it could not be connected with the 2011 NSW state election. Moreover, it was submitted that Australia Water Holdings' payments to Eightbyfive in 2009 could not have been motivated by a prospective benefit that may or may not have eventuated after the 2011 election. These submissions are rejected. They overlook the reality of the political cycle; namely, that candidates, and those seeking to secure influence with those candidates, in the hope of electoral success, begin planning for state elections well in advance. This is borne out by evidence, set out later in this chapter, that, from April 2009, Mr Koelma was working in Mr Hartcher's office on NSW Liberal Party issues.

In assessing the purpose of Eightbyfive, the Commission takes into account that Eightbyfive had no genuine business. Services were either not provided at all or were not provided to the extent indicated by the amount of the retainer.

Mr Koelma submitted to the Commission that he had the necessary skills and experience to offer and provide services of the type he claimed to have provided to Eightbyfive's clients. He pointed to years of practical experience in and around politics. However, some of the fields in which Mr Koelma held himself out – for example, public relations and marketing – require specific levels of expertise. Public relations and marketing are themselves divided into specialities. Media engagement is another speciality area. Mr Koelma's ability to provide assistance in the area of "political relations" is also questionable. Mr Koelma's connections were only with the NSW Liberal Party and (except for his friendship with Mr Hartcher) only at a low level. The Commission finds that Mr Koelma lacked the requisite skills and experience necessary to offer or provide services that could be of any value to his "clients" or which would be likely to attract genuine customers.

In assessing whether Eightbyfive was a genuine business,

Update

From: Tim Koelma <tim@eightbyfive.com.au>

To: Chris Hartcher <chris.hartcher@parliament.nsw.gov.au>

Date: Fri, 04 Jun 2010 15:24:14 +1000

Hi Chris,

Updates for a few things you asked me to do this week -

Hugo Halliday

Meeting went well. They have some good ideas for the campaign and post-March. They understand OP Sunday and had hoped we were planning something along these lines. Assured me that any work they undertake will be done in light of OP Sunday. Because of the nature of the OP, this is something we have not been able to discuss with other potential partners. Does present us with some interesting options. Still have concerns about size and capacity which they hope to address as discussed.

Humpherson's 50th

Have not been able to find details for his father. What is his name? (so I can search in Groupwise) Otherwise I will hold it here until Monday and we can send once I have discussed with you.

Media

Two press releases went out. Have been talking to Aston Heath about a story regarding Lynch and Liverpool Council. Have had a chance to go through some of the documents we got from out Kirk High Court / WorkCover FOI. There is a potential story there but will have to discuss with you given there is now a meeting organised with them.

OP Sunday

Had further discussions with contacts and have added extensively to various lists in the past week. Plan to brief Robbo when he is next visiting.

Friends

Sydney - steady; meeting them next week.
West - steady; discussing correspondence on Monday
North - nothing yet.

Discussed furniture / computers with RLC. They are in the pipeline. Room is wired, powered and painted. Increased internet capacity to cope. Have applied for phone. All under control.

Figure 8

it is also relevant to have regard to the evidence of Mr Carter. Mr Carter admitted that he was collecting money from property developers and channelling that money through the Free Enterprise Foundation. This arrangement was no longer viable from 1 January 2011, after caps were imposed on donors. Mr Carter said when that happened "I had to have another way of looking at collecting some more money and Tim [Koelma] introduced me, told me that he had a company that … I could use to put some funds through". The Commission accepts that evidence. It is completely consistent with the totality of the evidence about the operations of Eightbyfive.

The Commission has also taken into account that no records of any work of any real value were ever produced to the Commission. The Commission's attention was drawn to a few papers, notes and emails produced by Australian Water Holdings and Gazcorp, but these revealed nothing of substance concerning any services provided by Eightbyfive, despite Mr Koelma's claim that he was doing a significant amount of work for a number of clients.

The Commission has also taken into account that Eightbyfive had none of the indicia of a genuine business. The Commission appreciates that many small businesses operate from home with a laptop, but those businesses also need to implement a strategy to attract customers. Eightbyfive did not advertise beyond the claims made on its website. Almost no records were kept by Eightbyfive. Its banking arrangements were unusual; business and private spending were mixed and there was no cheque account. Many payments were made in cash. Eightbyfive did not keep the necessary records that would have allowed it to file a tax return on time. No records were able to be produced to the Commission that suggested it had any of the ordinary expenses (or deductions) of a business; for example, stationery, electrical power, computers, printers and insurance.

The Commission has considered the submissions made to it by Mr Koelma and Mr Di Girolamo in an attempt to explain away the absence of records. One argument was that the very nature of the work did not require the production of much paperwork. However, even if accepted, those submissions do not explain why the business kept almost no records at all. Other explanations provided for the lack of records lack credibility, such as the following examples: there was a "flood" in Mr Koelma's garage; Mr Koelma's, Mr Spence's and Mr Webber's computer systems all suffered breakdowns, making the relevant material effectively irretrievable; the Gazals claimed they "threw away" or deliberately destroyed copies of the relevant documents; and Patinack Farm kept no Eightbyfive documents except invoices. The value of the few records that remain, including the "reconstructed" invoices of Mr Spence and Mr Webber, is negligible.

There is no objective basis on which the Commission can be satisfied that Eightbyfive was actually providing services.

Finally, the Commission received evidence from a number of witnesses, who were invoiced by Eightbyfive, who told the Commission that they understood they were making a donation to the NSW Liberal Party and never received services from Eightbyfive. Their evidence is set out below. When their evidence is taken together with other evidence, the Commission has no hesitation in concluding that Eightbyfive was not conducting the business it was purporting to conduct.

Who benefited from the Eightbyfive arrangement?

The NSW Liberal Party's campaign on the Central Coast benefited from the payments made to Eightbyfive because the money was used to improve the prospects of success of each of Mr Hartcher, Mr Spence and Mr Webber.

The payments made through Eightbyfive also presented a significant benefit to Mr Hartcher. Under ordinary conditions, Mr Hartcher was only entitled to a limited number of electorate staff and, at the relevant time, those positions were filled by Mr Carter and Laurie Alexander. Because Mr Koelma was able to draw money from Eightbyfive, he was freed up to work for Mr Hartcher to prepare for the 2011 election campaign.

Mr Hartcher also potentially benefited in another, more indirect, way. By using Eightbyfive to channel payments to Mr Spence and Mr Webber, he was able to assist politically likeminded candidates and improve their chances of winning their seats. Mr Hartcher was prominent in the right wing or conservative faction of the NSW Liberal Party, and, if not the leader, then among the leadership group of that faction. The election of other likeminded persons on the Central Coast would strengthen Mr Hartcher's power base within his faction and also strengthen the faction's position within the NSW Liberal Parliamentary party. The election of either or both of Mr Spence or Mr Webber would have had this effect.

It is clear that Mr Koelma was mainly engaged on work for Mr Hartcher or for other NSW Liberal Party candidates. On 26 March 2009, the date of the signed agreement between Australian Water Holdings and Eightbyfive, Mr Koelma advised Mr Hartcher by email that he "…got the signed agreement returned today; just thought you'd like to know it's all confirmed". Later that day, Mr Hartcher replied, "When do you start?". Mr Koelma responded, seeking Mr Hartcher's permission for a delayed commencement, "Is sometime in the week after Easter okay?" From that time, Mr Hartcher

commenced sending emails to Mr Koelma regarding NSW Liberal Party issues or work he wanted him to research, including issues such as government agency restructure, privatisation, super ministries, the electoral system, planned prison privatisation, oversight of public appointments, and the NSW Liberal Party policy on heritage issues. Mr Hartcher commenced referring to Mr Koelma as a member of his staff in correspondence with others.

On 30 March 2009, four days after the Australian Water Holdings agreement was signed, opposition leader Barry O'Farrell's chief of staff emailed Mr Hartcher regarding how they would utilise the services of "Peta". Mr Hartcher replied "…Sorry, still trying to think of how to use her, bearing in mind Tim is starting soon…". On 16 April 2009, in an email from Mr Hartcher to a friend he wrote, "…[w]e are doing really well – just counting now the days until the next State election, due on 26 March 2011 … On the news front, Tim Koelma is coming back to work in the office as from next Monday 21 April".

On 23 April 2009, Mr Koelma sent an email to Mr Hartcher containing a draft document informing colleagues (members of Parliament) that, when Parliament resumes in May, Mr O'Farrell's regional coordinator and Mr Koelma from Mr Hartcher's office would be making an appointment to see them about some of their programs and processes. Other witnesses spoke of Mr Koelma's attendance or presence in Mr Hartcher's electorate office. Even Mr Di Girolamo said he understood Mr Koelma "was also working part-time for Mr Hartcher".

Mr Koelma also benefited from the payments he received through Eightbyfive. He drew sufficiently from the money raised by Eightbyfive to give himself a salary while he was involved, more or less full-time, on the 2011 election campaign. This culminated in Mr Koelma obtaining full-time employment within Mr Hartcher's ministerial office after the 2011 election.

Mr Spence and Mr Webber benefited from the payments made to Eightbyfive, as they were able to leave their employment commitments behind and focus on their own election campaigns. During the latter part of their campaigns, especially during 2011, they were involved in making door-to-door approaches to potential voters – "doorknocking", as it was described. The money paid out by Eightbyfive to each of Mr Spence and Mr Webber provided them with the freedom to prepare for, and undertake work on, the 2011 NSW state election campaign.

The evidence relating to the payments made to Eightbyfive by Australian Water Holdings, Gazcorp and Patinack Farm is set out in the following chapters.

Chapter 18: Eightbyfive and Australian Water Holdings

This chapter examines an arrangement under which, between April 2009 and May 2011, Eightbyfive received over $183,000 from Australian Water Holdings. The Commission investigated whether this arrangement was a means for disguising the making and receipt of political donations.

The arrangement between Eightbyfive and Australian Water Holdings came about as the result of Mr Hartcher introducing Mr Koelma to Mr Di Girolamo. Mr Hartcher claimed he introduced Mr Koelma to Mr Di Girolamo on the basis that Mr Koelma could enhance Australian Water Holdings' "government relations". Mr Di Girolamo explained to Bruce Chadban, the chief financial officer at Australian Water Holdings, that Mr Koelma was being retained as a "PR consultant". On 26 March 2009, Eightbyfive and Australian Water Holdings entered into a short written agreement under which Eightbyfive agreed to provide:

- *Media relations material, draft press releases and media reports, and*
- *Public relations advice, market research and public relations products, and*
- *Government relations advice and lobbying services.*

Under the agreement, Australian Water Holdings agreed to pay Eightbyfive a "service retainer" of $7,333.70 (including GST) per month with the first payment to be made on 13 April 2009.

Most, if not all, of the services Eightbyfive agreed to provide were well beyond Mr Koelma's skills and experience. The reference to "lobbying" is especially difficult to understand given neither Mr Koelma or Eightbyfive were ever registered as lobbyists.

Another reason for finding that this was never a genuine arrangement is that Australian Water Holdings had no need for any of the services that were to be provided by Eightbyfive. Australian Water Holdings already retained a number of highly qualified, experienced and expensive advisers and lobbyists in the field of government relations. It is doubtful that there was an opening for Mr Koelma – no one else was interviewed for the job. A space seems to have been created for him. Australian Water Holdings could not afford to take on another adviser, especially one it did not need. At the time that Mr Di Girolamo retained Eightbyfive, Australian Water Holdings was struggling to pay wages to its staff or meet its tax obligations. In his evidence to the Commission, Mr Di Girolamo tried to play this down. When he was asked about the Australian Water Holdings' financial problems, he would only agree that "it had some issues". By the time of the last payment, Australian Water Holdings had paid Eightbyfive just over $183,000. No one associated with Eightbyfive, including Mr Di Girolamo, was able to produce a record of any valuable work provided by Eightbyfive to Australian Water Holdings. In fact, the services, if any, purported to have been provided by Eightbyfive were of so little consequence that one of the directors of Australian Water Holdings, Bill McGregor-Fraser, had not heard of Mr Koelma or Eightbyfive.

The Commission does not accept that Mr Di Girolamo entered into a genuine commercial relationship with Mr Koelma and Eightbyfive. There is no evidence that before engaging an *additional* consultant that any proper enquiry was made to ascertain what *additional* skills or experience the consultant could bring. Mr Di Girolamo failed to ask any relevant questions that could establish whether that was so. For example, he did not ask where Eightbyfive was based or whether it had any employees. He did not ask about Mr Koelma's experience in the private sector. Mr Di Girolamo could not even recall whether he saw a curriculum vitae. He did not ask anything about Mr Koelma's practical experience or expertise or for the identity of other clients who had been serviced by Eightbyfive. It was submitted that the value to Australian Water Holdings in engaging Mr Koelma was his NSW Liberal Party connections.

Mr Koelma's "connections", however, were essentially limited to Mr Hartcher. Mr Di Girolamo already had a relationship with Mr Hartcher, and the evidence disclosed that Mr Di Girolamo had more NSW Liberal Party connections, at a much higher level, than Mr Koelma. If Australian Water Holdings needed political connections to be made with the NSW Liberal Party, there were contacts of a much higher calibre, including Australian Water Holdings' chairman, Arthur Sinodinos, or its consultant, Mr Nicolaou, who, over time, was paid in the order of $225,000 to make "business connections for Australian Water Holdings".

The payments that Mr Di Girolamo agreed to make to Eightbyfive were not related to the alleged commercial purpose of the arrangement. Australian Water Holdings agreed to pay Eightbyfive $6,667 (plus GST) per month – a figure that reflects an annual retainer of $80,004. Mr Koelma said that the amount agreed to be paid under the retainer reflected the amount that had previously been paid to him by the AFMA as his annual salary.

Finally, there is an absence of evidence of anything that Mr Koelma did in the context of the written agreement that was of any value to Australian Water Holdings. There is no evidence that Australian Water Holdings received any written advice or reports. This was sought to be explained by suggesting the advice was oral; however, no one in either organisation kept a note of the advice or a note of when the advice was provided. Apart from the oral evidence of Mr Koelma and Mr Di Girolamo, there is no evidence to show that any work was actually done. The evidence of both these witnesses lacked credibility and, in the absence of any supporting evidence from other witnesses or documentation in circumstances where some such evidence should exist, the Commission rejects their accounts.

The arrangement with Mr Koelma was of value to Australian Water Holdings, but not because Mr Koelma was providing any of the services set out in the agreement. The real value came from Mr Koelma's relationship with Mr Hartcher and the strengthening of ties between Mr Hartcher and Australian Water Holdings. The agreement also paved the way for practical benefits for Mr Di Girolamo and Australian Water Holdings through the connection generated with Mr Hartcher's parliamentary office. In February 2010, Mr Koelma submitted applications under the *Freedom of Information Act 1989* through the office of Liberal member of the Legislative Council, Charlie Lynn. These applications had been prepared by Australian Water Holdings officers. They were submitted through Mr Lynn's office to the Sydney Water Corporation and the Audit Office of NSW. The applications sought documents in relation to an audit of Sydney Water. Mr Di Girolamo told the Commission that submitting such applications through a politician's office enhanced their prospects of success. Mr Koelma confirmed this belief in his evidence. Mr Lynn, for his part, believed that he was merely assisting a NSW Liberal Party colleague. The documents that were received as a result of the applications were passed to journalist Heath Aston of the *Sun-Herald* , together with remarks from Mr Hartcher supporting Australian Water Holdings' strategy to discredit Sydney Water. This is a matter that will be dealt with in the Operation Credo report. On 22 May 2010, Mr Hartcher sent Mr Koelma an SMS text message: "Sun Herald tomorrow has your water story. I gave some quotes". Mr Koelma responded: "Excellent. He is a good journo. If it comes out well we should keep him in mind for other stories".

In May 2010, Mr Koelma prepared and submitted questions it was proposed would be asked in Parliament by Mr Hartcher. These questions again promoted the Australian Water Holdings agenda, calling into question the conduct of the general manager of Sydney Water. Mr Koelma told the Commission that he prepared the questions based on information he received from Mr Di Girolamo and that he told Mr Di Girolamo about the questions he wrote for Mr Hartcher. Mr Di Girolamo was consulted and kept abreast of developments by Mr Koelma.

In June and July 2010, Mr Koelma agreed with Mr Di Girolamo to pass on information to Mr Aston again in an effort to undermine the authority of Sydney Water management. This culminated in an article in the *Sydney Morning Herald* on 11 July 2010 with the headline, "Thai venture goes to water". This also appears to have been managed through Mr Hartcher's office, with Mr Hartcher providing comments to Mr Aston and subsequently, on the day of publication, sending the following SMS text message to Mr Koelma: "Sun Herald gave us a good run...".

Later in July 2010, Mr Koelma prepared a press release for distribution by the NSW Liberal Party. The press release was on the subject of government land releases in the North West Growth Sector, a subject of commercial importance to Australian Water Holdings. In anticipation of this, on 19 July 2010, Mr Di Girolamo sent an SMS text message to Mr Koelma, as follows: "Tim – I really appreciate your help on this one mate. if possible something along the lines of: Land release is currently being stalled in the NWGC [North West Growth Centre] despite the Govt's land release announcements because of its inability to deliver critical infrastructure and negotiate PPPs with the private sector…".

Mr Koelma responded as follows: "Will try an [sic] put something together. Just have to find a way to "officially" fit it into re portfolio to avoid others who might claim the

issue as theirs. Can't step on toes. But can side-step. Will talk tomorrow".

Mr Koelma prepared the press release, secured approval from others within the NSW Liberal Party and sent the draft release through to Mr Hartcher on 20 July 2010. He provided updates to Mr Di Girolamo on its progress through the NSW Liberal Party approval process. On 21 July 2010, he sent the following SMS text message to Mr Di Girolamo: "Still waiting on BOF's [Barry O'Farrell's] office. Slow process. Sorry will let you know asap". Later that day, the press release was circulated with the heading, "Green seats win while Green Field sites suffer", with Mr Hartcher listed as the "Media Contact" person.

In all the circumstances (including the facts and circumstances that will be discussed shortly in respect of Eightbyfive's arrangements with Gazcorp and Patinack Farm), the Commission finds that the arrangement between Australian Water Holdings and Eightbyfive, as represented in the written agreement, and as presented in the evidence of Mr Koelma, Mr Di Girolamo and Mr Hartcher, was not genuine. The arrangement between Eightbyfive and Australian Water Holdings facilitated the engagement of Mr Koelma to work for Mr Hartcher in the lead up to the 2011 state election.

Before leaving this issue, it is necessary to deal with a specific submission made by Mr Di Girolamo and others. The submission pointed to the fact that Australian Water Holdings was not prohibited from donating and, with no caps in place before 1 January 2011, was free to donate to Mr Hartcher or the NSW Liberal Party. This, it was submitted, made it inherently unlikely that Mr Di Girolamo would have engaged in any subterfuge. The submission fails to appreciate that the arrangement between Eightbyfive and Australian Water Holdings was to provide a source of funding independent from the control of the NSW Liberal Party to fund Mr Koelma so that he could work for Mr Hartcher in relation to the 2011 election campaign.

The Commission is satisfied that the payments made by Australian Water Holdings to Eightbyfive were political donations within the meaning of s 85(1) of the Election Funding Act. This is because they were in fact a gift made to, or for the benefit of, an elected member, Mr Hartcher. They were not disclosed to the Election Funding Authority. Those political donations made by Australian Water Holdings after 1 January 2011, which totalled $36,668.50, exceeded the applicable cap on political donations.

The Commission finds that Mr Hartcher was a party to an arrangement with Mr Di Girolamo and Mr Koelma, whereby Mr Di Girolamo made regular payments through Australian Water Holdings to Eightbyfive. Under this arrangement, between April 2009 and May 2011, Eightbyfive received $183,342.50 from Australian Water Holdings. These payments were ostensibly for the provision of services by Eightbyfive to Australian Water Holdings but were in fact political donations made to assist Mr Hartcher by providing funds to Mr Koelma so that Mr Koelma could work for Mr Hartcher in the lead up to the 2011 NSW state election. Mr Hartcher and the others involved in this arrangement intended to evade the election funding laws relating to the disclosure of political donations. The payments totalling $36,668.50, made after 1 January 2011, exceeded the applicable cap on political donations.

Chapter 19: Eightbyfive and Gazcorp

This chapter examines an arrangement under which, between May 2010 and April 2011, Eightbyfive received payments totalling $121,000 from Gazcorp and whether this arrangement was a means for disguising the receipt of political donations from a property developer. This chapter also examines the arrangement between Eightbyfive and Mr Spence, the NSW Liberal Party candidate for the seat of The Entrance, under which Mr Spence received payments totalling $104,000 from Eightbyfive between May 2010 and March 2011.

The Eightbyfive and Gazcorp arrangement

In late April 2010, Gazcorp entered into a written retainer agreement with Eightbyfive under which it agreed to pay Eightbyfive $11,000 (including GST) per month.

The Gazal family own Gazcorp. Mr Hartcher accepts that he introduced Nabil Gazal Senior ("Nabil Gazal Sr") to the idea of retaining Mr Koelma. There was a close personal relationship between Mr Hartcher and the head of the Gazal family, Nabil Gazal Sr. Mr Hartcher also had a continuing relationship with the sons of Nabil Gazal Sr – Nabil Gazal Junior ("Nabil Gazal Jr") and Nicholas Gazal.

In their evidence to the Commission, the principals to the arrangement between Gazcorp and Eightbyfive disagreed as to how the arrangement came about. Mr Hartcher claimed that he had been told by Nabil Gazal Sr that he (Nabil Gazal Sr) "wanted … his sons to have a closer relationship with the Opposition". Mr Hartcher said he suggested to Nabil Gazal Sr that Gazcorp retain Mr Koelma as "a Government Relations person". Mr Koelma's account is quite different. He says "there had been a discussion about … Mr Spence potentially working for Gazcorp on the same basis that … I was working for AWH". That arrangement did not proceed because Mr Spence was going to become a candidate in the 2011 state election. Mr Koelma said, "the arrangement was that Mr Spence would then work for me as opposed to working for [Gazcorp]" and "I saw it as a labour hire arrangement or something along those lines". On this basis, Mr Koelma agreed that, after allowing for some administration costs, he paid Mr Spence all the money he received from Gazcorp.

The Commission was unable to take evidence from Nabil Gazal Sr about how the arrangement came about because he died in October 2010.

Mr Spence told the Commission that he did not know who Mr Koelma's clients were until after 2 July 2010, more than two months after the commencement of the agreement between Eightbyfive and Gazcorp. On his account, he could not have been involved in any negotiations between the Gazals and Mr Koelma leading up to the finalisation of the agreement.

The Commission finds that the agreement between Eightbyfive and Gazcorp was made in four steps. The first step was a loose agreement struck between Mr Hartcher and Nabil Gazal Sr, as described above.

The second step occurred on 13 April 2010, and involved Mr Hartcher taking up the matter with Nabil Gazal Jr and Nicholas Gazal. An entry in Mr Hartcher's electronic diary records a meeting between Mr Hartcher, Nabil Gazal Jr and Nicholas Gazal at 4 pm on 13 April 2010 at Parliament House, which states "Proposal & Quantum agreed from 1/5/10. – CPH to arrange Tim visit". The initials "CPH" are Mr Hartcher's. The entry indicates that an agreement was reached for Gazcorp to pay Eightbyfive from 1 May 2010. Mr Hartcher told the Commission that it was at this meeting the Gazal brothers were told about the agreement he had reached with Nabil Gazal Sr to engage Mr Koelma but "they didn't get the opportunity to reject or agree" with the arrangement because their father had already made the decision. At 8.14 am on 14 April 2010, Mr Hartcher sent Mr Koelma an SMS text message "All went well on that

new plan we discussed – will need you to come to Sydney to finalise next week". The Commission finds that this SMS text message was sent by Mr Hartcher as a result of his meeting with the Gazal brothers and was his advice to Mr Koelma that the arrangement with Gazcorp had been confirmed.

The third step was a meeting in which it is likely that each of Mr Hartcher, Nabil Gazal Jr, Nicholas Gazal and Mr Koelma were involved, although Mr Koelma denies being present. There are SMS text messages between Mr Hartcher and Mr Koelma regarding Mr Koelma getting access to Parliament House on Monday, 19 April 2010, and records that show both Nabil Gazal Jr and Nicholas Gazal were expected at Parliament House on that same day. This evidence suggests that Mr Hartcher physically introduced Mr Koelma to the Gazals at Parliament House on 19 April 2010.

As for the fourth step, each of Nabil Gazal Jr and Mr Koelma told the Commission that there was a meeting between them at Gazcorp's office in Gladesville, where Mr Koelma provided a draft retainer agreement. Although there is no objective corroboration of such a meeting, there is no evidence to suggest it did not occur. On 29 April 2010, Mr Koelma sent Nabil Gazal Jr the first invoice for $11,000 (including GST) for services that were to commence (just as recorded in Mr Hartcher's diary entry on 13 April 2010) on 1 May 2010.

Mr Spence's involvement

The Commission finds that the purpose of the arrangement established between Eightbyfive and Gazcorp was to fund Mr Spence. Mr Koelma acknowledged this in his evidence to the Commission. While there was no written agreement between Eightbyfive and Mr Spence, the amount of payments to Mr Spence were in evidence through bank records. They show that for 11 months between 3 May 2010 and 2 March 2011, Gazcorp paid Eightbyfive $11,000 (including GST) each month. On each occasion, shortly after receiving this payment, Mr Koelma paid Mr Spence. On 10 occasions between 4 June 2010 and 7 March 2011, $9,450 was electronically transferred to Mr Spence's account. The only occasion when this did not happen was the first occasion when, following receipt of the Gazcorp payment, Mr Koelma withdrew $6,000 and then $3,500 in May 2010. Both Mr Koelma and Mr Spence agreed that at least the bulk of the funds from Gazcorp were passed on to Mr Spence. Mr Spence knew that Eightbyfive relied on the Gazcorp payments to make payments to him.

Mr Koelma and Mr Spence referred to the Gazcorp funds in their telephone text conversations in a manner that indicated the funds belonged to Mr Spence. On 3 August 2010, Mr Spence sent the following SMS text message to Mr Koelma: "…Have my guys shown some love? I'm hoping they do before Friday as I'll be in Hue An [Mr Spence was travelling in Vietnam at the time] which is a suit place". In his evidence to the Commission, Mr Spence confirmed that "my guys" was a reference to the Gazals and that "love" was a reference to money. Mr Koelma responded to Mr Spence's SMS text message as follows: "No love yet but will transfer when it arrives. Cheers".

On 5 August 2010, Mr Spence sent an SMS text to Mr Koelma: "…I know you're busy but could u chase up my friends. I need it by Saturday if possible". Mr Koelma responded the same day: "Rang him (he's in Houston, TX) – said it was being processed today. Apologised for the delay. Couldn't forward emails while in Texas. All okay. Will transfer tomorrow hopefully. Cheers, Tim". Nabil Gazal Jr was in the United States at this time. In his evidence to the Commission, Mr Koelma confirmed that he was referring to conversations with Nabil Gazal Jr in this text. Gazcorp paid the $11,000 on 5 August 2010, in accordance with Nabil Gazal Jr's undertaking to Mr Koelma. Mr Koelma, in keeping with his undertaking to Mr Spence, deposited $9,450 into Mr Spence's account

on 6 August 2010. On that same day, Mr Koelma sent an SMS text to Mr Spence as follows: "Friends came through. Has been sent to you. Should have it overnight. Cheers". Mr Spence responded "Luvs u".

The purpose of the arrangements

A disparity emerged in the evidence about the services Eightbyfive was supposed to be providing. The agreement between Eightbyfive and Gazcorp referred to Eightbyfive supplying "media relations material", "draft press releases", "media reports" and "public relations products" – none of which, according to Nabil Gazal Jr, Gazcorp wanted. Each month Eightbyfive invoiced Gazcorp for exactly the same thing – "Public relations advice, general governance and politics consulting, media relations and media monitoring" – but, even on Mr Koelma's account to the Commission, at least three of these five services were never provided.

Neither Nabil Gazal Jr nor Nicholas Gazal were impressive witnesses. Neither was able to give a clear account of what Eightbyfive was doing for Gazcorp or even what they would have liked it to have done. When presented with anomalies, they could not provide a sensible answer. Nabil Gazal Jr, Nicholas Gazal and Gazcorp had motives for making the payments.

In the first place, there was a longstanding family connection with Mr Hartcher and it is clear that Mr Spence was close to the Gazal family as well. Mr Spence told the Commission that he had been friends with the Gazals since the parliamentary enquiry into the approval process relating to the Gazal's designer outlet centre at Orange Grove, when he had worked with them and their legal team on the presentation to that enquiry. That enquiry was conducted in 2004. In this sense, the Gazal family was helping old friends. The Gazal family and Gazcorp stood to gain from having an influential relationship with politicians.

The evidence showed that Gazcorp was a property developer, and its longstanding controversial Orange Grove project in the Liverpool area had been through multiple planning and political problems in attempts to gain development approval. Gazcorp and the Gazal family stood to gain if approval was finally given for their Orange Grove project. It was quite clear that there would be a new government from March 2011. Nabil Gazal Jr said that, "there was no chance that while the Labor Party was in Government that we would get Orange Grove back". It is true, as submitted by Mr Hartcher, that the re-opening of Orange Grove had been favoured by the NSW Liberal Party, but, by making the payments to Eightbyfive, Nabil Gazal Jr and Nicholas Gazal, solidified their pre-existing relationship with Mr Hartcher.

Nabil Gazal Jr submitted to the Commission that no finding could be made that he "knowingly funnelled money to Spence" through Eightbyfive and referred to his "trust" in Mr Koelma being "misplaced". Nicholas Gazal adopted this submission. A heavy emphasis was laid on the idea that each of the sons was making the payments because their deceased father would have wished them to do so. It was submitted on behalf of both that they had been over-trusting of everyone, due to their "naivety". The Commission does not accept these submissions. It is one thing for the Gazal sons to be honouring an agreement initially arranged by their father, but it is another for them to continue to pay Eightbyfive when nothing was received of any real value in return. Their conduct was not entirely consistent with adherence to their father's wishes; they were capable of making their own choices. The Commission finds that each of Nabil Gazal Jr and Nicholas Gazal were aware that Gazcorp was not receiving any value for its money. The Commission is satisfied that Nabil Gazal Jr and Nicholas Gazal were willing and knowing participants in an agreement made for a collateral and ulterior purpose. That purpose was to provide political donations for the NSW Liberal Party's Central Coast election campaign.

Another basis for finding the agreement between Eightbyfive and Gazcorp was not genuine is that Mr Koelma was unable to produce any documentation to support his contention that Eightbyfive provided services to Gazcorp. Gazcorp produced all of the records it had retained in respect of Eightbyfive. Those records disclosed that there were only three meetings with Mr Koelma in a period of a year – 9 June 2010, 29 October 2010 and 9 February 2011. Nicholas Gazal made some handwritten notes of these meetings, which he called "action points". The notes demonstrate that any advice rendered by Mr Koelma was so trivial in substance, and the matters raised and discussed were so obvious, that the advice lacked any objective value. Some emails were exchanged between Gazcorp and Mr Koelma, but none of these disclose that Eightbyfive was actually doing anything, and certainly do not show that Eightbyfive was providing anything of value to Gazcorp.

The evidence of Mr Koelma and the Gazal brothers differed as to who was actually dealing with Gazcorp. Mr Koelma claimed that the Gazals and Gazcorp were dealing directly with Mr Spence. In his submissions to the Commission, Mr Koelma described how Mr Spence was "attending meetings or having conversations directly with Nabil Gazal Jr and Nicholas Gazal which did not involve the attendance or presence of Koelma". The Gazals, however, claimed they were dealing directly with Mr Koelma. Mr Spence gave conflicting accounts. In a compulsory examination, Mr Spence said that he dealt only with Mr Koelma, that he did not know the identity of Mr Koelma's clients, except "he mentioned that some were developers and some were I think mining or

something like that". Mr Spence assured the Commission that such secrecy was "commonplace", "otherwise I can go straight to his clients and, and work directly for them". In the public inquiry, Mr Spence changed that evidence. He said he was addressing "public relations matters" and providing "political media engagement strategy advice" for Gazcorp. He said "Tim had asked me to speak to" the Gazals and he believed he did so. It is not credible that Mr Spence failed to recall this at his earlier compulsory examination. Each of the Gazals say that they had no idea that Mr Spence was involved in providing any services to Gazcorp or received any money from Eightbyfive. In the end, the Commission finds the evidence of each of Mr Koelma, Mr Spence, Nabil Gazal Jr and Nicholas Gazal on this issue lacks credibility.

When Eightbyfive received a payment from Gazcorp, nearly all the money was transferred to Mr Spence. A number of reconstructed invoices were produced to the Commission by Mr Spence covering the relevant period. It was claimed by both Mr Koelma and Mr Spence that they had lost the original invoices and any electronic means to regain access to the original invoices. The Commission does not accept that there were any original invoices. Nor does the Commission accept that the reconstructed invoices are accurate. The amounts claimed on the reconstructed invoices issued by Mr Spence do not match with the payments made to him by Mr Koelma. The Commission does not consider that either of Mr Koelma or Mr Spence could have provided services that were of any real value to Gazcorp.

Mr Spence told the Commission that, during the time he was retained by Eightbyfive, he was a self-employed "government relations consultant", but this is inconsistent with other evidence where he claimed to have been providing advice on "public relations" to Gazcorp. Mr Spence's reconstructed invoices refer to his services as "review and advise – Public Relations, Political and media engagement strategy".

There is no objective evidence that Mr Spence had the capacity, experience or qualifications to provide these services. Although Mr Spence had previously worked as a member of staff for a politician, his immediate employment before the Eightbyfive retainer was in a low-level job – an electorate officer based in Erina, earning $60,000 a year. Mr Spence was unable to produce to the Commission anything that would support his assertion that he was genuinely engaged in self-employment. He had no business name or business card, he did not advertise, he had no website, and he did not appear to be actively seeking any clients. He did not have an accountant or a business plan. He did not have any written agreement with Eightbyfive. Mr Spence was unable to produce any record that he had actually carried out any valuable work. The overwhelming effect of all the evidence taken together leads the Commission to the conclusion that Mr Spence did not have a genuine business, nor did he have a genuine arrangement with Eightbyfive.

Mr Spence was pre-selected as the NSW Liberal Party candidate for The Entrance in November 2009. At that time, he was working full-time for Mr Hartcher. He continued to work for Mr Hartcher until about mid-May 2010. After he ceased this work, he had no other source of income except for the money he received through Eightbyfive. That money gave him the financial security to allow him to concentrate on the election campaign without having to spend time engaging in full-time employment. The money he received each month through Eightbyfive was almost double his monthly income from his full-time employment with Mr Hartcher. The importance of having time available to work on the election campaign is demonstrated by the example of the entries in his calendar for the week of 11–17 October 2010, which show his time was largely consumed with campaign work, including attending meetings and candidate briefings and attending to electioneering duties such as doorknocking.

In his submissions to the Commission, Mr Spence claimed there was a period between June and August 2010 during which state campaigns were suspended due to the federal election campaign. He argued that, in these circumstances, it could not be said that the purpose of the money he received from Eightbyfive was to provide him with an income while he campaigned for election. The Commission does not accept this submission. The period during which state campaigns were suspended was relatively short. While there may have been periods in which Mr Spence did not actively campaign by doorknocking or other public activity, he, nevertheless, had the opportunity in those periods to undertake other work in preparation for the Central Coast election campaign and and his campaign for the seat of The Entrance.

The Commission finds that there was no real agreement between Eightbyfive and Gazcorp for Eightbyfive to provide any services to Gazcorp, and there was no agreement between Eightbyfive and Mr Spence for Mr Spence to provide services to Eightbyfive or Gazcorp.

The Commission is satisfied that Mr Spence knowingly participated in the arrangement whereby Eightbyfive was used as a vehicle to collect funds from Gazcorp and distribute them to him so that he had sufficient funds to enable him to concentrate on the election campaigns for the Central Coast and for the seat of The Entrance.

Before proceeding, it is appropriate to deal with a submission made by Mr Spence that "it cannot be said

that Gazcorp was a property developer" and that "it was never put to either of the Gazal brothers that … Gazcorp was a property developer". The Commission rejects that submission. It overlooks the evidence of Nabil Gazal Jr when he said in respect of Gazcorp "we are a property developer" and his agreement that "the business of Gazcorp is property development". While being re-examined by his own counsel, Nabil Gazal Jr agreed that there was "no question" that Gazcorp is, and has been involved in, property development. The Commission is satisfied that Gazcorp was a property developer.

There was some evidence that Mr Hartcher was unhappy about Mr Spence leaving his employment in 2010. It was submitted by Mr Hartcher that this evidence was not consistent with him being involved in any arrangement that would result in Mr Spence leaving his employment. The Commission does not accept this evidence or the submission. While it is true that the arrangement resulted in Mr Hartcher losing Mr Spence's services in his office, this was offset by an advantage to Mr Hartcher. The agreement between Gazcorp and Eightbyfive, which Mr Hartcher arranged, allowed him to control the channelling of funds for the benefit of the Central Coast campaign and, in particular, to his colleague and political ally Mr Spence. The election of Mr Spence would, for the reasons given in chapter 16 of this report, politically benefit Mr Hartcher. The arrangement gave Mr Spence time to prepare for, and work on, the election campaign and thereby enhance his prospects of being elected.

The Commission is satisfied that the payments made by Gazcorp to Eightbyfive were political donations within the meaning of s 85(1) of the Election Funding Act. This is because they were in fact a gift made to, or for the benefit of, the NSW Liberal Party and a candidate for election, Mr Spence. They were not disclosed to the Election Funding Authority. As Gazcorp was a property developer, and the payments were made after the ban came into effect in December 2009 on property developers making political donations, the payments also avoided the ban on political donations from property developers. Those political donations made by Gazcorp after 1 January 2011 totalled $33,000 and therefore exceeded the applicable cap on political donations.

Finally, it is appropriate to deal with a submission made by Nabil Gazal Jr concerning a second retainer agreement entered into between Gazcorp and Eightbyfive towards the end of 2011. It was submitted that the fact a second retainer agreement was entered into after the 2011 election shows that the original retainer was genuine and not entered into for the purpose of providing money to fund Mr Spence's campaign. This submission is not logically persuasive. There was a second retainer agreement but it was not a carry-over from the first agreement. The circumstances surrounding the entering into of the second agreement were much different to those for the first agreement.

After the election, Mr Koelma went to work for Mr Hartcher. According to Nabil Gazal Jr and Nicholas Gazal, they were told that Eightbyfive had a new management team and structure and that Mr Koelma's wife, Tennille Koelma, would undertake work for Gazcorp. Mrs Koelma was, on the evidence before the Commission, clearly unqualified to provide assistance of any real value to Gazcorp. Gazcorp entered into a verbal agreement with Eightbyfive under which, between September 2011 and April 2012, Gazcorp paid Eightbyfive $16,000, at the rate of $2,000 a month. The monthly retainer was much less than that paid under the first agreement. According to the Eightbyfive invoices the services provided were "public relations advice, general governance and politics consulting, media relations and media monitoring". No services were provided by Eightbyfive. It is not clear from the evidence what purpose the second agreement was meant to serve. There is no suggestion that Mr Spence received any money from Eightbyfive with respect to this second agreement. Whatever its purpose, the existence of the second agreement does not preclude the Commission from dealing with the first agreement separately and from drawing from the evidence the conclusions it has reached with respect to the first agreement.

The Commission finds that Mr Hartcher, Nabil Gazal Jr, Nicholas Gazal, Mr Koelma and Mr Spence were parties to an arrangement whereby, between May 2010 and April 2011, Gazcorp made payments totalling $121,000 to Eightbyfive. These payments were ostensibly for the provision of services by Eightbyfive to Gazcorp but were in fact political donations that were mainly used to help fund Mr Spence so that he could work on the Central Coast election campaign and on his campaign for the seat of The Entrance. Mr Hartcher, Nabil Gazal Jr, Nicholas Gazal, Mr Koelma and Mr Spence intended by this arrangement to evade the disclosure requirements of the Election Funding Act and the ban on the making and accepting of political donations from property developers. The payments totalling $33,000, made after 1 January 2011, exceeded the applicable cap on political donations.

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Chapter 20: Eightbyfive and Patinack Farm

This chapter examines two connected arrangements. The first was an arrangement under which, between July 2010 and March 2011, Patinack Farm, a thoroughbred horseracing and breeding business owned by Nathan Tinkler, paid Eightbyfive $66,000. The second arrangement involved Eightbyfive paying money to a business owned by Mr Webber, the NSW Liberal Party candidate for the seat of Wyong.

The Eightbyfive and Patinack Farm arrangement

The evidence before the Commission establishes that Mr Hartcher arranged for Mr Koelma to meet Darren Williams of Buildev in Newcastle on 17 May 2010. Mr Hartcher was probably present at this meeting as well. According to the evidence of those involved, Mr Koelma made a "pitch" for Eightbyfive to supply services to Buildev. The Commission does not accept that evidence and, in light of the whole of the evidence, finds that this meeting was the first step that ultimately led to an agreement whereby Patinack Farm came to make payments to Eightbyfive. On 18 May 2010, Mr Koelma followed up on his meeting with Mr Williams by sending him an email in which he said he "Would appreciate the name of the business entity we discussed". In light of the other evidence below, the Commission finds that this is a reference to a discussion in which it was agreed that an "entity" other than Buildev would be involved in the arrangement with Eightbyfive.

Mr Gallacher was also involved in this arrangement. Mr Gallacher has been a member of the Legislative Council since 1996 and had been given particular responsibility for the Central Coast and Hunter regions. He had known Mr Williams and David Sharpe of Buildev since the late 1990s. On 28 May 2010, there was a breakfast meeting between Mr Gallacher, Mr Hartcher, Mr Sharpe and Mr Williams at a cafe near Newcastle known as Talulah. Mr Gallacher told the Commission that the meeting had been arranged by Buildev "to talk to myself and Chris Hartcher about the intermodal at Mayfield". Mr Gallacher said, that during this meeting, he spoke to Mr Sharpe about Mr Koelma. He said this arose because Buildev was thinking of retaining Mr Koelma. Mr Gallacher explained this as an ordinary business discussion. The assertion that Mr Gallacher spoke to Mr Sharpe about Mr Koelma was not put to Mr Sharpe and is inconsistent with Mr Sharpe's evidence that he was not aware of Mr Koelma's existence until he was contacted by the Commission for the purposes of this investigation.

Mr Sharpe explained that sometime in May 2010:

> *Darren* [Williams] *come* [sic] *and see me I guess some time in May … he mentioned that the Liberal Party were looking for assistance with their campaign … they wanted to know whether Buildev or Nathan Tinkler could contribute, I told Darren that Buildev couldn't contribute we're a prohibited donor but if he wanted to talk to Nathan and see whether there was any other businesses within Nathan's network that could donate.*

The arrangement between Eightbyfive and Patinack Farm was entered into soon after the meeting at Talulah. There is a record that, at 4.29 pm on 2 June 2010, Mr Gallacher called Mr Williams twice. Their contact was short. At 4.57 pm on 2 June 2010, Mr Williams sent Mr Sharpe an email and asked, "Which entity will I give mike Gallagher [sic]?" (Figure 9, page 100). Mr Sharpe explained that he "understood that [Mr Williams' email message] to mean" that Mr Williams was asking for "an entity for political donations". The Commission infers from this evidence that Mr Gallacher was asking Mr Williams for the name of the "entity" that would be used to channel funding through Eightbyfive for the NSW Liberal Party 2011 state election campaign.

At 5.17 pm on 2 June 2010, Mr Sharpe responded, suggesting that Mr Williams "ask Nathan as I think it's

best to come through patnack [sic] get right away from property minning [sic] infristructure [sic]". In his evidence to the Commission, Mr Sharpe explained "I was guessing that Patinack was, you know, a suitable entity". He said he knew that Buildev was not "suitable" because it was a property developer and acknowledged that his email was an attempt to select an entity that would not be prohibited from donating to a political party. He explained: "we're a prohibited donor so we couldn't donate" and "I thought Patinack wasn't prohibited from donating, I mean they're not a property related entity".

At 10.47 am on 3 June 2010, Mr Williams sent another email to Mr Sharpe, asking: "Do I ring Nathan or troy [sic] [Palmer, the chief financial officer of the Tinkler Group]?". At 10.48 am on 3 June 2010, Mr Sharpe sent an email suggesting that Mr Williams should contact Mr Tinkler. Four minutes later – just enough time to read and digest the email, and dial a telephone number – Mr Williams telephoned Mr Tinkler. The Commission infers that Mr Williams telephoned Mr Tinkler and requested permission to use Patinack Farm as the entity that would be used to channel funding through Eightbyfive for the NSW Liberal Party 2011 state election campaign.

At 5.27 pm on 3 June 2010, Mr Williams telephoned Mr Gallacher. Mr Gallacher and Mr Hartcher were both at Parliament House at this time. Although it is not known what Mr Williams said to Mr Gallacher, it is known that, at 5.38 pm, Mr Hartcher sent Mr Koelma an SMS text message stating, "Our Newcastle friends say they r ringing u tomorrow. All fixed". Mr Hartcher also made an electronic note in his parliamentary computer system at that time, as follows: "Paknac – Nathan". The Commission finds that Mr Hartcher's SMS text message and his diary entry were a result of information given to him by Mr Gallacher. The Commission finds that Mr Williams provided Mr Gallacher with the name of the entity to be used in the agreement with Eightbyfive and that Mr Gallacher immediately passed the name of the entity on to Mr Hartcher so that Mr Hartcher could, in turn, pass it on to Mr Koelma.

From that time, Mr Hartcher was centrally involved in the arrangement. On 4 June 2010, Mr Koelma sent an email to Mr Hartcher advising that he had heard or received "nothing yet" from the "friends" from the "North". The reference to "friends" from the "North" is a reference to Buildev. The Commission is satisfied that Mr Koelma was advising Mr Hartcher that he had not received any further advice from anyone at Buildev to progress the arrangement under which Eightbyfive was to receive money. On 9 June 2010, Mr Henry, a member of Mr Hartcher's staff, sent Mr Koelma an SMS text message asking whether "the invoice has been sent to Patinackfarm [sic] P/L". Mr Koelma confirmed it had.

For the reasons provided earlier in this report, the Commission is satisfied that Mr Hartcher wanted to secure independent sources of funding for the conduct of the 2011 NSW election campaign on the Central Coast so that he could direct those funds to where they could best benefit himself and likeminded candidates for election, such as Mr Spence and Mr Webber. Patinack Farm making a political donation directly to the NSW Liberal Party would not have allowed Mr Hartcher to control the ultimate use of the money. By arranging for the money to be paid to Eightbyfive, Mr Hartcher would be able, through Mr Koelma, to ensure that the money was used for the Central Coast election campaign. As shown below, a large part of the money was in fact used to assist Mr Webber in his election campaign for the seat of Wyong.

Mr Williams denied that he had any real role in organising the arrangement, and claimed that he simply introduced Mr Koelma to Patinack Farm. Mr Williams was adamant that Buildev was not involved. He said that, after his meeting on 17 May 2010, he had "very little" contact with Mr Koelma. The Commission, however, finds that Mr Williams continued to be involved with the arrangement after its inception. All of the invoices issued by Eightbyfive to Patinack Farm were sent by Mr Koelma

Figure 9 (the original exhibit appears as two separate pages)

/o=Newcastle/ou=First Administrative Group/cn=Recipients/cn=dsharpe

From: David Sharpe
Sent: Thursday, 3 June 2010 10:48 AM
To: Darren Williams
Subject: RE: Which entity will I give mike gallagher ?

Follow Up Flag: Follow up
Flag Status: Blue

nt

Regards

David Sharpe

Managing Director

Buildev Group

Ph: (02) 4929 3299

Fax: (02) 4926 2766

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-----Original Message-----
From: Darren Williams
Sent: Thursday, 3 June 2010 10:47 AM
To: David Sharpe
Subject: RE: Which entity will I give mike gallagher ?

Do I ring Nathan or troy?

Darren Williams
Development Manager
Buildev Development (NSW) Pty Ltd

Phone: 02 4929 3299
Fax: 02 4926 2766
Email: darrenwilliams@buildev.com.au

1

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-----Original Message-----
From: David Sharpe
Sent: Wednesday, 2 June 2010 5:17 PM
To: Darren Williams
Subject: Re: Which entity will I give mike gallagher ?

Ask Nathan as I think it's best to come through patnack get right away from property minning infristructure

David Sharpe
Managing Director
Buildev Group
P: 02 4929 3299
F: 02 4926 2766
E: davidsharpe@buildev.com.au

Sent from my iPhone

On 02/06/2010, at 4:57 PM, "Darren Williams" <DarrenWilliams@buildev.com.au > wrote:

>
>
> Sent from my iPhone

to Mr Williams, who worked for Buildev. They were not sent directly to anyone at Patinack Farm. Mr Williams assumed the responsibility for chasing up Eightbyfive's invoices when they were left unpaid. In March 2011, Mr Williams made arrangements for Patinack Farm to pay Eightbyfive $16,500 (including GST) – a final payment reflecting three months' fees, even though (according to Mr Palmer) no work was provided for these fees.

In April 2013, when Mr Palmer and Mr Williams were alerted to the Commission's investigation and its interest in Eightbyfive, Mr Palmer deferred to Mr Williams to manage the situation rather than anyone at Patinack Farm. On 19 April 2013, Mr Palmer sent an SMS text message to Mr Williams asking, "Have u got eightbyfive under control. We can't have patinack involved in an ICAC hearing". Mr Williams responded: "When r u back ill [sic] run u thru it. We have done everytrhing [sic] above board". This demonstrates that Mr Williams was directly involved in the arrangement.

Mr Koelma attempted to maintain that Eightbyfive was providing genuine services to Patinack Farm. He said the main person he dealt with was Mr Williams, who "was representing Patinack, Buildev and whichever other entities were in that organisation". At first, while giving evidence to the Commission during his compulsory examination, Mr Koelma suggested that the services being provided were specific to Patinack Farm. He described how Patinack Farm's needs were "Hunter focused", involved "political wranglings around Maitland", and how it was "important [for Patinack Farm] to know about those processes". Mr Koelma described how "the horse studs in that area were in the process of trying to convince the former Government that they wanted exclusion zones from certain other industries". Mr Koelma said that he was giving this advice to Mr Williams – even though Mr Williams had nothing to do with horse studs. His evidence during the Commission's public inquiry had a different emphasis. Mr Koelma then claimed his retainer was with "The Tinkler Group in general". The Commission finds that Mr Koelma was readjusting his evidence as he attempted to accommodate the evidence that his invoices and associated communications were delivered to Mr Williams at Buildev, not to anyone at Patinack Farm.

The Commission finds that Eightbyfive did not provide any services under its arrangement with Patinack Farm. Mr Koelma was unable to produce any record that could prove that any work of value was ever provided. His skills and abilities could not sensibly have made any contribution to the business of Patinack Farm. In his evidence to the Commission, he was not sure of the business in which Patinack Farm was involved. He could not even spell its name – all of the invoices referred to "Patinak".

Mr Palmer, who made the payments to Eightbyfive on behalf of Patinack Farm, accepted that no services were ever provided to Patinack Farm.

In his submission to the Commission, Mr Hartcher took issue with Counsel Assistings' assertion that the use of Patinack Farm as the contracting party was a deception to conceal Buildev's involvement. It is, however, clear on the evidence that Mr Hartcher saw the contract as being with Mr Williams and Buildev. When Mr Hartcher pursued payment on behalf of Eightbyfive he did so by contacting Mr Williams. Mr Hartcher's intervention was successful. At 12.39 pm on 10 November 2010, Mr Hartcher telephoned Mr Williams. At 1.05 pm, some 26 minutes later, Mr Williams sent Mr Palmer an email "Mate can you get the payments to Tim the Liberal party please mate as there [sic] 2 months behind". This email is further evidence that the payments were meant to benefit the NSW Liberal Party. In his evidence to the Commission, Mr Williams agreed that Mr Hartcher had been chasing up unpaid Eightbyfive invoices. The invoice was paid that day and Mr Williams and Mr Hartcher exchanged SMS text messages on the progress of the payment.

Although Mr Palmer accepted that Eightbyfive did not provide any services to Patinack Farm, he claimed that the agreement with Eightbyfive was genuine. The Commission rejects Mr Palmer's evidence that the agreement was genuine. Mr Palmer explained how he engaged Mr Koelma with a view to controlling the money that Patinack Farm was spending on marketing. He said, "I needed a marketing guy" and that meant he needed someone to provide an "overall strategy to make sure we were spending in the right areas and we were getting bang for our buck". Although he never met Mr Koelma and did nothing to ascertain Mr Koelma's training or experience, he engaged Mr Koelma on a retainer at $5,500 (including GST) per month. In the end, Mr Palmer paid out $66,000 on invoices addressed to "Patinak", including $16,500 in March 2011. Mr Palmer continued to make payments despite Eightbyfive never providing any work or even a follow up telephone call.

There is other evidence contradicting Mr Palmer's assertion that Eightbyfive was retained to provide services to Patinack Farm. In November 2011, the corporate counsel for the Tinkler Group sent an email to Mr Palmer seeking information to allow a proper disclosure to the Election Funding Authority. Among materials sent back to the corporate counsel by Mr Palmer was one of Eightbyfive's invoices. In his covering email, Mr Palmer said, "We paid a number of these. Not exactly sure who they are but obviously Darren [Williams] knows". Mr Palmer's email demonstrates that Mr Palmer did not engage Mr Koelma to provide services to Patinack Farm. It also demonstrates that he had no contact with

Mr Koelma or Eightbyfive and that the real contact, the person who would know about Eightbyfive, was Mr Williams at Buildev.

There is other evidence from which it can be inferred that Buildev, rather than Patinack Farm, was responsible for instigating the arrangement. For the reasons explained earlier in this report, the management of Buildev was eager to exploit any political advantage, and providing funds for the benefit of the NSW Liberal Party through Eightbyfive was another means of ingratiating Buildev with politicians, such as Mr Hartcher and Mr Gallacher, who might consider or have influence on the Buildev proposal for Mayfield. There is evidence, which the Commission accepts, that Mr Williams had these potential advantages in mind when entering the arrangement, and in following up to make certain that the payments were made.

Mr Williams told the Commission that he wanted to build a relationship with Mr Hartcher because Mr Hartcher "could be handy" if the Coalition won power. Mr Williams saw this as a potential advantage to Buildev and agreed that by paying Mr Koelma he thought he could secure Buildev's interests through Mr Hartcher. He described this in different ways in his evidence. He said it was to keep Mr Hartcher "onside" or to get access to Mr Hartcher to promote Buildev's interests. He explained that he took an active role in pursuing payments on behalf of Eightbyfive "because if Tim wasn't paid our relationship with Mr Hartcher could have soured" and "Because if I was helping [Mr Koelma] I thought it would benefit with my relationship with Mr Hartcher". He also agreed that he thought that he was getting, or would get, access to other politicians through his relationship with Mr Hartcher. Mr Williams told the Commission he also believed the payments to Eightbyfive would benefit Mr Hartcher, although he claimed not to know how. Mr Palmer also acknowledged the political dimension to the payments and described how "helping out Mr Koelma" would build a relationship with the NSW Liberal Party.

The Commission is satisfied that Mr Palmer was aware that the payments were made to support the NSW Liberal Party and that the agreement between Patinack Farm and Eightbyfive was directed at concealing these payments.

By the time the payments were made to Eightbyfive, the people at Buildev had received the benefit of open lines of communication to Mr Hartcher and Mr Gallacher. For example, on 29 July 2010, Mr Williams was chasing Mr Palmer in an email to pay Eightbyfive's outstanding invoice because Mr Koelma "is getting some meetings sorted this week for us re the port". An arrangement was made for Buildev to meet members of the Shadow Cabinet on 24 August 2010 (Mr Koelma admitted he arranged this meeting). Mr Sharpe made a note to himself on 31 October 2010, reminding him to "arrange another meeting with Andrew Stoner [shadow minister for ports and waterways] and Mike Gallegah [sic] and other LIBS". On 19 November 2010, Mr Sharpe made another note to himself that he "will try to get Libs/Nats to call" Gary Webb, chief executive officer of the Newcastle Port Corporation, to "tell him they support our proposal as well". On 13 February 2011, Mr Sharpe advised Mr Tinkler that, "I am meeting Mike Gallagher [sic] this week to go through timing, steps, to achieve AFL [agreement for lease] form [sic] new Gov". Mr Hartcher and Mr Gallacher organised for a private dinner for Mr Williams and Mr Sharpe with Mr Stoner on 10 March 2011. After the election, when Gary Webb was still pressing for the container terminal, Mr Williams sent SMS text messages to Mr Hartcher and Mr Gallacher looking for some kind of help.

There is direct evidence of Mr Hartcher interceding on behalf of Buildev. The member for Swansea, Garry Edwards, gave evidence that Mr Hartcher had contacted him in respect of a controversial marina proposal Buildev had near the Swansea bridge. Mr Edwards had been involved in local government in that area and was strongly opposed to Buildev's proposal. The development was located on Crown land and the NSW Land and Property Management Authority had entered into an agreement with Buildev to allow the development. The contract expired and the department decided not to renew it. Mr Edwards said he received a telephone call in which Mr Hartcher asked him "how would I feel about … an extension for Buildev for the proposal of the marina at Swansea". Mr Edwards said he rejected the request in robust terms and the conversation terminated. Mr Hartcher denies this conversation occurred. The Commission regards Mr Edwards' evidence on this matter as reliable.

In his submissions, Mr Hartcher attacked the "reliability" of Mr Edwards, and pointed to discrepancies between Mr Edwards' evidence in his compulsory examination and his oral evidence at the public inquiry. The Commission regards the differences as immaterial; the substance of Mr Edwards' evidence remained consistent. There is also the fact that Mr Edwards told a fellow parliamentarian, Andrew Cornwell, about the discussion soon after it occurred. Mr Hartcher's answer to that is that both Mr Edwards and Andrew Cornwell were lying. The Commission rejects that submission. There is no satisfactory reason why Mr Edwards and Andrew Cornwell would invent such a story.

Mr Webber's involvement

The political nature of the payments is clearly demonstrated by how they were used. Under its agreement with Eightbyfive, Patinack Farm agreed to pay Eightbyfive $5,500 a month. Under an agreement between Mr Webber and Eightbyfive, Mr Webber was to

receive $4,950 (including GST) per month. This income enabled Mr Webber to work on the 2011 NSW election campaign. Just as a substantial part of the funds obtained from Gazcorp were passed on to Mr Spence, a substantial part of the funds Eightbyfive received from Patinack Farm were passed on to Mr Webber. There is evidence that this was always the intention.

The meeting involving Mr Koelma and Mr Hartcher at Buildev that marked the first step in setting up the arrangement took place on 17 May 2010. The following day, Mr Webber emailed his first invoice for $4,950 to Eightbyfive. There is no evidence that this was paid.

The first payment from Patinack Farm to Eightbyfive was made on Friday, 2 July 2010. On Monday, 5 July 2010, Mr Koelma withdrew $5,000 in cash from the Eightbyfive account and Mr Webber made two cash deposits, each of $1,500, into separate bank accounts. When asked at the public inquiry whether he had given Mr Webber at least $3,000 on that day, Mr Koelma responded that he "probably gave him $4,950". The $3,000 was the first significant payment received into Mr Webber's known bank accounts that year apart from his wage for his intermittent parliamentary staff work.

The second payment from Patinack Farm was made on 29 July 2010. On 30 July 2010, Mr Koelma withdrew $5,000 in cash and Mr Webber deposited $2,100 in cash into one bank account and $2,000 in cash into another of his bank accounts.

No payment was made by Patinack Farm to Eightbyfive in August 2010 but a payment of $11,000 was made on 7 September 2010. Mr Koelma transferred $4,950 to Mr Webber's account on 9 September 2010. Mr Koelma withdrew $5,000 the next day and on that day Mr Webber deposited $1,900 into one of his bank accounts and $3,000 into another of his bank accounts.

No payment was made by Patinack Farm to Eightbyfive in October 2010 but a payment of $11,000 was made on 10 November 2010. The following day Mr Koelma transferred $9,900 to Mr Webber's bank account.

The transfer of funds from Patinack Farm to Eightbyfive and the transfer of funds from Eightbyfive to Mr Webber were thereafter more erratic but the pattern remained of Mr Webber receiving money from Eightbyfive each time Eightbyfive was paid by Patinack Farm. No payment was made by Patinack Farm to Eightbyfive in December 2010 but a payment of $11,000 was made on 20 January 2011. On 21 January 2011, Mr Koelma withdrew $8,000 and Mr Webber banked $4,000 in cash. Patinack Farm next paid Eightbyfive $5,500 on 7 February 2011 and on 10 February 2011 Mr Koelma transferred $4,950 into Mr Webber's bank account. The final payment of $16,500 from Patinack Farm was not received by Eightbyfive until 24 March 2011, two days before the state election. On 25 March 2011, Mr Koelma withdrew $11,000 from the Eightbyfive account and Mr Webber deposited $2,000 into one of his bank accounts.

How much did Mr Webber receive?

It is difficult to establish precisely how much money Mr Webber obtained through Eightbyfive. The deposits referred to above, which were made into Mr Webber's accounts, total $37,800; however, the Commission is not satisfied that, even if these are all attributable to the payments made by Mr Koelma, they represent the total amount paid to Mr Webber by Mr Koelma.

The evidence before the Commission includes six invoices issued to Eightbyfive by Mr Webber's business. Each invoice is for $4,950. The invoices are dated from 17 May 2010, the day of the meeting involving Mr Koelma and Mr Hartcher at Buildev, to 1 October 2010. These represent claims for payments totalling $29,700 (including GST). The Commission, however, is not satisfied that these represent the totality of the payments that Mr Webber actually received from Eightbyfive. Only one of the invoices is original. The others were reconstructed by Mr Webber because he was unable to access copies of the originals due to what he claimed was a computer malfunction. Mr Webber told the Commission that the arrangement with Eightbyfive was for a six-month period but also told the Commission that it commenced in May 2010 and continued up to November or December 2010. He agreed that, in these circumstances, the agreement potentially went on for seven or eight months.

Tax returns submitted by Mr Webber's company, Webbbson Pty Ltd, for the 2010 and 2011 tax periods show income of $4,950 in 2010 and $29,700 in 2011. The latter figure is equivalent to six payments of $4,950 each. The amount of $4,950 is the same as Mr Webber was seeking from Eightbyfive in his invoices. The Commission is satisfied that the income declared in these tax returns represents at least some of the income derived from the arrangement with Eightbyfive.

Another of the documents in evidence before the Commission was a document typed up by Mr Webber and headed "Webbbson P/L income". It comprises two columns. The first column lists the months from June 2010 to March 2011. In the second column, beside each month, is the amount of $4,950. The entries represent a total amount of $49,500. Mr Webber claimed that the first six entries, which are in bold type, were amounts that had either been received or were projected and that the remaining entries, which are not in bold type, were potential amounts if the agreement with Eightbyfive

was extended. The Commission does not consider that Mr Webber's evidence was reliable and does not accept his evidence with respect to this document.

The banking records for Eightbyfive and Mr Webber show three electronic transfers, totalling $19,800, from Eightbyfive to the Webbbson account but also show other occasions when money was withdrawn from the Eightbyfive account shortly followed by one or more cash deposits made by Mr Webber. Mr Webber told the Commission that he saw Mr Koelma virtually every day. In these circumstances, it would have been easy for Mr Koelma to give Mr Webber cash. The cash deposits that correspond with withdrawals from the Eightbyfive account total $18,000. Mr Webber, however, told the Commission that some of these deposits could be cash he received from his father or money he borrowed from others.

The fact that Mr Koelma made cash payments to Mr Webber makes it difficult to establish how much Mr Webber received in total.

While the Commission cannot be sure of the exact amount received by Mr Webber, the Commission is satisfied, based on the Webbbson tax returns, that at least $34,650 was received, but, taking into account the "Webbbson P/L income" document, the amount could have been as much as $49,500.

Was the agreement between Eightbyfive and Mr Webber genuine?

For reasons set out above, the Commission has found that Eightbyfive was never a genuine business. The Commission also finds that there was never a genuine commercial arrangement between Mr Webber and Eightbyfive. Mr Webber claimed that "Mr Koelma approached me unsolicited and … offered a position in relation to Government relations and local knowledge advice on a retainer basis". He said that Mr Koelma wanted his "knowledge as a candidate and access to Government and then Opposition information was what he was seeking" and he "was to source Government and then Opposition media releases". The difficulty with this explanation is that Mr Webber admitted that the information he was providing to Mr Koelma was readily and freely available. Mr Webber could only explain Mr Koelma's desire to engage his services was to "presumably save himself time and … give my background knowledge on particularly the Shadow Ministerial information, some of which would have only been available to myself and my campaign". When he was asked how these could be of value to Mr Koelma, he said, "that's a question for Mr Koelma, I never questioned the advice I was giving him".

Mr Webber submitted to the Commission that he "had detailed knowledge and a strong understanding of the local Wyong electorate". As at May 2010, Eightbyfive's only clients were Australian Water Holdings, Gazcorp and Patinack Farm. It is unclear (and it was never credibly explained in the evidence to the Commission) why Eightbyfive or any of its clients would have been interested in the local politics of Wyong.

Mr Webber was not able to identify anything that he provided to Mr Koelma that was not publicly available. In his evidence to the Commission, he described providing some material, but it was material that he was freely sharing with NSW Liberal Party branch members in his electorate. In other words, it is difficult to see that services he claimed to have provided would have any value at all. It is also difficult to accept that Mr Webber had the qualifications or experience that would enable him to provide services of value. Mr Webber's background does not indicate that there was anything of value that he could bring to the arrangement. When Mr Koelma was asked how he and Mr Webber had agreed to a fee of $4,950 per month he said, "I can't recall the specific negotiations that we, that we would have had to come to that agreement, it was probably based on an annual total, so I would have to work out what that amount is". Mr Koelma accepted that he was making some of the payments to Mr Webber in cash, and said this was done because "that was just what was convenient".

There is little evidence to corroborate the existence of a genuine arrangement between Mr Webber and Eightbyfive. The agreement between them was never reduced to writing. Mr Webber did not seem to have a genuine business, he did not solicit any business from potential clients, and did not have any clients apart from Eightbyfive. His registered business name was taken from a failed business venture that had remained dormant for some years. He did not have a business card or a website or a telephone directory entry. He did not have any system to retain records of the business, including tax and banking records. He was unable to produce any business documents (except for one contemporaneous invoice and some further invoices that Mr Webber had reconstructed and produced to the Commission) capable of showing that any work of value had been provided by him. Although Mr Webber kept a diary, which contained detailed references of his activities, the only entry that related to Mr Koelma was that, at 10 am on 18 May 2010, he was going to engage in "storage shed sorting with Tim".

A brief mention was made above of reconstructed invoices. The entries in the reconstructed invoices suggest that the work purportedly carried out for Eightbyfive had nothing to do with government relations, but was for "IT consulting and electrotechnology advice". When shown

a group of invoices in these terms, Mr Webber told the Commission, "I believe it's a replacement invoice" and said the reference to IT and electrotechnology was "clearly a mistake". Mr Webber went on to explain that it was probably just the repetition from a template invoice that had been set up long ago and had not been changed by him. The Commission does not accept that evidence. There was one original invoice addressed to Eightbyfive that was produced to the Commission. The difference between this and the reconstructed invoices shows that Mr Webber had gone to some lengths in altering and updating the details on the original template invoice, but that he had retained the original reference to "IT consulting and electrotechnology advice".

The Commission accepts that a business may be poorly organised and inexperienced people may keep irregular records. However, the Commission is satisfied that the accumulation of facts, such as Mr Webber's lack of relevant skills and experience, the absence of records, and the entries on the reconstructed records support the conclusion that there was no genuine agreement between Mr Webber, Mr Koelma and Eightbyfive for the provision of any services by Mr Webber.

The real purpose of the payments

Mr Webber told the Commission that he was preselected in December 2009 to run as the NSW Liberal Party candidate in Wyong. In the period between 5 July 2010 and the time of the NSW election, he received at least $34,650 from Eightbyfive. The payments made by Eightbyfive to Mr Webber may not have been large, but they were larger than any other source of income he seemed to be able to generate. In the period before the commencement of the Eightbyfive payments, Mr Webber had irregular employment, meagre earnings and had fallen into debt. The payments made through Eightbyfive enabled Mr Webber to attain some kind of financial independence, which was especially helpful when he was working on the Central Coast election campaign and, in particular, his own campaign in Wyong. The money from Eightbyfive also meant that Mr Webber did not have to engage in paid full-time employment. Having a full-time job would have placed constraints on the time he could dedicate to preparing for, and working on, the election campaign.

In his submissions to the Commission, Mr Webber claimed that the level of campaigning he did during the period of his retainer with Eightbyfive was limited and only became full-time after he re-signed the retainer in about December 2010. He claimed that the work he did for the election prior to Australia Day 2011 was mainly confined to doorknocking on evenings and going to community events "predominantly" at night time. He argued that, in these circumstances, it could not be said that the purpose of the money he received from Eightbyfive was to provide him with an income to free him up to campaign for the election. The Commission does not accept this submission. Although there may have been periods while he was being paid by Eightbyfive in which Mr Webber did not campaign particularly extensively, he nevertheless had the opportunity in those periods to undertake other work in preparation for the Central Coast and Wyong election campaigns. His submission also overlooks the fact that he continued to receive payments from Eightbyfive after December 2010. The last electronic funds transfer from Eightbyfive to Webbbson is for $4,950 and was made on 10 February 2011. On 25 March 2011, there was an $11,000 cash withdrawal from the Eightbyfive account and a $2,000 cash payment made by Mr Webber on his Visa credit card account.

Mr Webber has also submitted that he was not aware of the agreement between Eightbyfive and Patinack Farm. On 23 June 2010, Mr Webber sent a text message to Mr Koelma, as follows, "Hey Mr T. Anything from our friends yet?", to which Mr Koelma responded, "Sorry mate, sorry for the delay. Nothing yet: they were going to follow up today/yesterday". Despite this, the Commission is not satisfied that there is sufficient evidence to conclude that he was aware of the arrangement between Eightbyfive and Patinack Farm. This, however, does not affect the fact that he received money from Eightbyfive, without providing any services in return, which helped fund him to work on the 2011 election campaign. The use of Eightbyfive in this way was simply a device to provide him with income while he worked on that campaign. In that sense, the money from Eightbyfive constituted a political donation.

The Commission is satisfied that the payments made by Patinack Farm to Eightbyfive were political donations within the meaning of s 85(1) of the Election Funding Act. This is because they were in fact a gift made to, or for the benefit of, the NSW Liberal Party. They were not disclosed to the Election Funding Authority. Those political donations made by Patinack Farm after 1 January 2011, which totalled $33,000, exceeded the applicable cap on political donations.

The Commission is satisfied that the payments made by Eightbyfive to Mr Webber were political donations within the meaning of s 85(1) of the Election Funding Act. This is because they were in fact a gift made to, or for the benefit of, a candidate. They were not disclosed to the Election Funding Authority. While the Commission cannot be certain as to the precise amount paid to Mr Webber after 1 January 2011, it is satisfied that the amount exceeded the $2,000 cap on political donations for the benefit of a candidate.

The Commission finds that Mr Hartcher, Mr Koelma,

Mr Gallacher, Mr Palmer and Mr Williams were parties to an arrangement whereby, between July 2010 and March 2011, Patinack Farm made payments totalling $66,000 to Eightbyfive. These payments were ostensibly for the provision of services by Eightbyfive to Patinack Farm but were in fact political donations to help fund the NSW Liberal Party's 2011 Central Coast election campaign. The parties to this arrangement intended to evade the disclosure requirements of the Election Funding Act. The payments made after 1 January 2011, totalling $33,000, exceeded the applicable caps on political donations. Although the payments to Eightbyfive were made by Patinack Farm, the arrangement was organised through Buildev, a property developer.

The Commission finds that Mr Koelma and Mr Webber were parties to an arrangement whereby, between 2010 and 2011, Mr Koelma's business, Eightbyfive, made payments totalling at least $34,650, and up to $49,500, to Mr Webber. These payments were ostensibly for the provision of services by Mr Webber to Eightbyfive but were in fact political donations to help fund Mr Webber's 2011 election campaign for the seat of Wyong. The parties to this arrangement intended to evade the disclosure requirements of the Election Funding Act. The payments made after 1 January 2011 exceeded the applicable caps on political donations.

Chapter 21: Mr Carter

Reference was made earlier in this report to Mr Carter, an electorate officer who worked in Mr Hartcher's Erina office. Mr Carter had been a long-term member and branch office holder in the NSW Liberal Party, and had worked for Mr Hartcher in Mr Hartcher's electorate office since 1988. Mr Carter admitted that he participated in potentially unlawful fundraising activity on the Central Coast 2011 election campaign.

Mr Carter initially used the Free Enterprise Foundation to channel donations from property developers to the NSW Liberal Party. The introduction of the cap on donations made the Free Enterprise Foundation scheme unsuitable for this purpose from 31 December 2010. Mr Carter was still raising funds and needed a vehicle to disguise the source of those funds in the event they were drawn from property developers, and so he began to use Eightbyfive for this purpose. In addition, Mr Carter used a company, Mickey Tech, in a manner similar to Eightbyfive.

Generally, the Commission accepts Mr Carter's oral evidence at the public inquiry. That evidence was, as submitted by Mr Hartcher, different from evidence Mr Carter gave in his compulsory examination, where he claimed a total lack of knowledge of relevant events. The claim of lack of recollection was inherently incredible. Much of the evidence he gave at the public inquiry constituted admissions that he had engaged in arguably illicit practices. Some of his evidence was corroborated by other reliable witnesses or by documentary material. Mr Hartcher described Mr Carter as "disingenuous" and "inherently unreliable". Although it has some reservation as to whether Mr Carter was completely forthcoming, the Commission does not agree with Mr Hartcher's description. There was a long connection between Mr Carter and Mr Hartcher, and it was quite apparent that Mr Carter felt a deep sense of loyalty toward Mr Hartcher. In the end, the Commission believes that Mr Carter's evidence at the public inquiry was honest and reasonably accurate.

The "Donation list 2011" and other documents

Commission officers found a number of documents during the course of executing a search warrant on Mr Hartcher's electorate office. These included a printout of an email sent by Mr Carter to Mr Hartcher's Terrigal electorate office on 4 April 2011. The email refers to an attached "Donation list 2011". This attachment contains a list of the names of potential political donors, some of whom were property developers. The significance of the "Donation list 2011" is that it contains names of persons who did in fact contribute to the Terrigal election campaign, either through the Free Enterprise Foundation or Eightbyfive. The information on the "Donation list 2011" was typed out by Mr Koelma on Mr Carter's instruction.

Commission officers also found a blue folder containing a number of documents, including a typed document headed, "Funding forecast up to the 1 January 2011". This contained a list of eight names next to which are amounts of money. Mr Hartcher recognised his handwriting on some of the documents in the blue folder. The "funding forecast" document does not have any handwriting on it and Mr Hartcher told the Commission that he had not seen the document prior to it being shown to him during the public inquiry.

Another document found by Commission officers in the blue folder is a typed document headed, "Cash on hand". Mr Hartcher told the Commission that this document had been prepared some stage prior to September 2010 and represented plans for fundraising for the 2011 NSW state election. There is some handwriting on this document that Mr Hartcher identified as his.

Mr Carter and the Free Enterprise Foundation

As described earlier in this report, persons involved in the NSW Liberal Party were using the Free Enterprise Foundation as a means of channelling donations from property developers. The Commission has earlier in this report made findings in respect of the way in which Mr Nicolaou suggested that the Free Enterprise Foundation might be used for this purpose.

The Commission finds that Mr Carter used the Free Enterprise Foundation to channel political donations to the NSW Liberal Party for its 2011 NSW state election campaign so that the identity of the true donor was disguised from the Election Funding Authority. A portion of this money was from property developers.

In his evidence to the Commission, Mr Carter described a conversation he had with Mr Nicolaou in which he was told by Mr Nicolaou that "the best way to raise money was through the … Free Enterprise Foundation". Mr Carter said he asked Mr Nicolaou about the legality of channelling donations from property developers through the Free Enterprise Foundation and was told that "it was legal … because it went to Canberra" and "that's what the FEF [Free Enterprise Foundation] is for". The Commission accepts Mr Carter's evidence about this conversation. Mr Nicolaou did not deny it; he said he recalled a conversation with Mr Carter and, when asked whether Mr Carter referred to money from property developers, he said, "I don't know, but in hindsight when I look at the cheques that came through … yes there were a number of cheques that presumably were [from] developers".

Following these discussions, Mr Carter sent money, through Mr Hartcher's electorate office, to Mr Nicolaou for channelling to the NSW Liberal Party through the Free Enterprise Foundation. Under the arrangement, when Mr Nicolaou received the money back from the Free Enterprise Foundation, he would send it back to Mr Carter. On 22 October 2010, Mr Carter sent Mr Nicolaou an email (Figure 10, page 109), which outlined how this would work. It is not exactly clear how much money was sent by Mr Carter to the NSW Liberal Party's head office and from there to the Free Enterprise Foundation. It was, at least, a sum in excess of $100,000. The cheques were sent, in batches, by post. According to the reconciliation account kept by Mr McInnes, it would appear that one batch was sent by Mr Carter on 5 November 2010 (approximately $40,900), and more followed on 6 December 2010 (approximately $11,400), 9 December 2010 (approximately $7,500), 13 December 2010 ($14,990), 14 December 2010 ($14,000), 16 December 2010 (unclear, but several thousand), 17 December 2010 ($10,000) and 20 December 2010 ($10,000). Mr McInnes also received cheques that were "too late" and returned them to Mr Carter for "alternative processing".

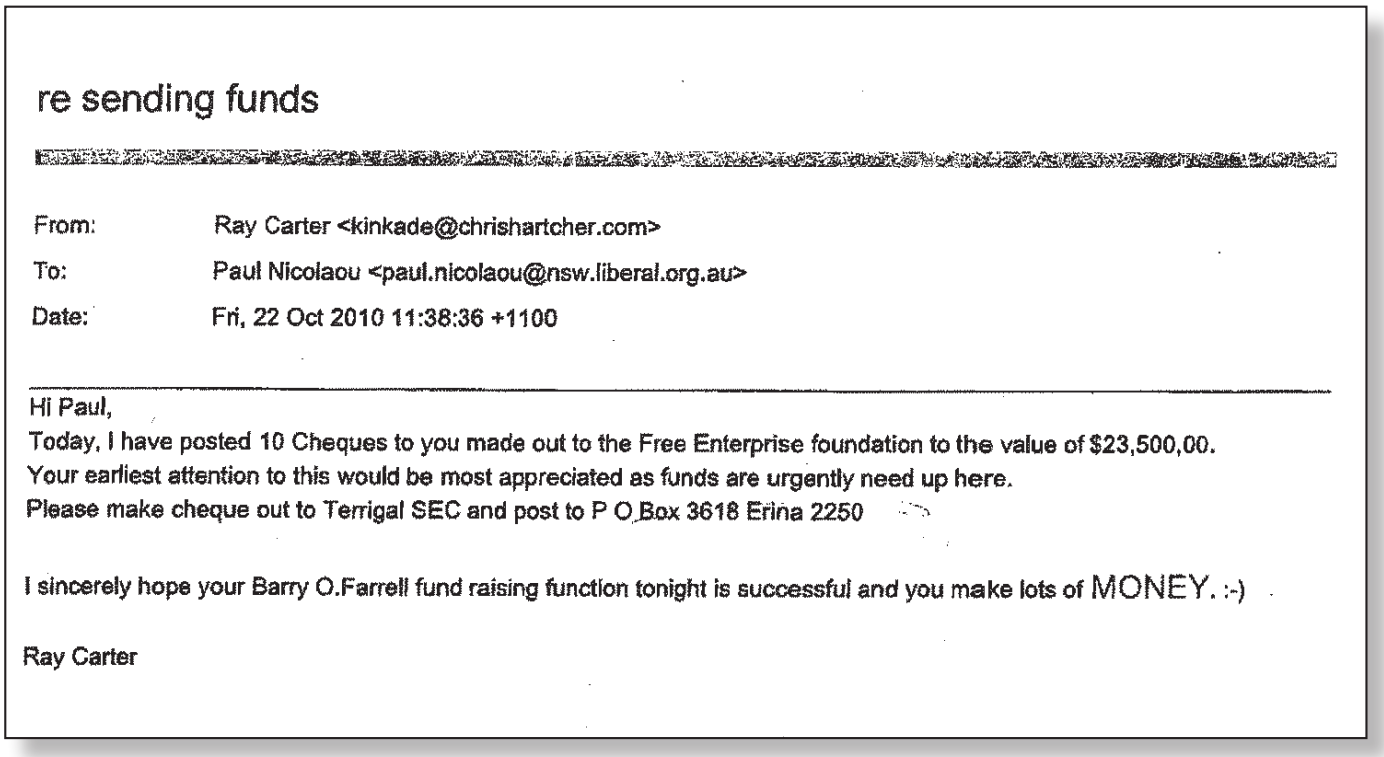
The evidence demonstrates that the Free Enterprise Foundation was routinely used to channel donations to the NSW Liberal Party. A couple of examples will suffice to make the point. The Commission heard evidence from Gary Bonaccorso, the proprietor of a small business, Renlyn Bell Investments Pty Ltd, which donated $9,900 to the Free Enterprise Foundation. Mr Bonaccorso was an impressive witness who described how he was approached by Mr Carter and asked for a donation to the NSW Liberal Party and, when Mr Bonaccorso agreed, Mr Carter asked that the cheque be made out to the Free Enterprise Foundation. Mr Bonaccorso's name is one of those on the "Donation list 2011" document.

Mr Carter also described how he asked Jorge Fernandez, a property developer with control of the Tesrol Group of companies, for money. Mr Fernandez's name also appears on the "Donation list 2011" document. The group accountant, Grahame Young, explained how Mr Fernandez directed him to make "donations". The Tesrol Group donated $14,990 – made up of 10 cheques, each for $1,499 – from 10 different companies in the group. All the cheques were made out to the Free Enterprise Foundation.

Mr Carter told the Commission he also approached Peter Hesky, who had been at school with Mr Hartcher and had previously donated to Mr Hartcher's campaigns. Mr Hesky's name appears on the "Donation list 2011" document. It also appears on the "Funding forecast" document next to the entry "10k" and on the "Cash on hand" document next to the amount of $10,000. Mr Carter asked Mr Hesky to donate and "to write [the cheque] out to the Free Enterprise Foundation for the Liberal Party". Mr Hesky drew a cheque to the Free Enterprise Foundation for $9,900 on the account of his company, Big Country Developments Pty Ltd.

Some donors denied that they had intended to make donations to the NSW Liberal Party. For example, Mr Carter described how he asked a local town planner, Doug Sneddon, for a donation to the NSW Liberal Party and said that Mr Sneddon obliged by drawing a $500 cheque in favour of the Free Enterprise Foundation. Mr Sneddon's name also appears on the "Donation list 2011" document. Mr Sneddon told the Commission that he thought he was actually donating to the Free Enterprise Foundation, which he thought was "a nationally based business lobby group which was based in Western Australia".

Mr Carter gave evidence, which the Commission accepts, of seeking donations from John Stevens and



re sending funds

From: Ray Carter <kinkade@chrishartcher.com>

To: Paul Nicolaou <paul.nicolaou@nsw.liberal.org.au>

Date: Fri, 22 Oct 2010 11:38:36 +1100

Hi Paul,
Today, I have posted 10 Cheques to you made out to the Free Enterprise foundation to the value of $23,500,00.
Your earliest attention to this would be most appreciated as funds are urgently need up here.
Please make cheque out to Terrigal SEC and post to P O Box 3618 Erina 2250

I sincerely hope your Barry O.Farrell fund raising function tonight is successful and you make lots of MONEY. :-)

Ray Carter

Figure 10

Timothy Gunasinghe (who were property developers) and asking them to make the donation to the Free Enterprise Foundation. Mr Carter said he spoke to them both together and he asked for a donation "for the Liberal Party" and "to make out the cheque to the Free Enterprise Foundation". Mr Gunasinghe and Mr Stevens then arranged for a $10,000 donation through their company, Printban Pty Ltd. Their names appear on the "Donation list 2011" document. Mr Stevens' name also appears on the "Funding forecast" document next to the entry "10k".

Each of Mr Stevens and Mr Gunasinghe were interviewed by Commission officers prior to giving evidence at the public inquiry. The evidence they gave at the public inquiry differed in significant respects to the accounts they gave in their interviews. At his interview, Mr Gunasinghe said that, "Tim [Koelma] approached us in regards to this Free Enterprise Foundation in Canberra, which obviously – and we looked at it and we said OK well [sic] support you". At the public inquiry, he said it was Mr Sneddon, not Mr Koelma, who told him of the Free Enterprise Foundation. He said he thought he was giving money to "a lobby group for business", which was based in Canberra, but supporting "local business". During his interview, Mr Stevens said that Mr Hartcher or Mr Carter would have been the people who asked him to make a payment to the Free Enterprise Foundation. At the public inquiry, he told the Commission he did not speak to Mr Hartcher or Mr Carter about making a payment to the Free Enterprise Foundation and he just signed a cheque placed before him by Mr Gunasinghe, although "I didn't really know what the Free Enterprise Group did". The Commission accepts Mr Carter's account.

Mr Hartcher denied any knowledge of the Free Enterprise Foundation being used in this way by Mr Carter. As described in chapter 26, Mr Hartcher was part of an arrangement to use the Free Enterprise Foundation to disguise the true source of a political donation made by Boardwalk Resources Limited. He was therefore aware that the Free Enterprise Foundation could be used to disguise the true source of donations; however, the evidence is less clear on whether he had specific knowledge of the way in which Mr Carter used the Free Enterprise Foundation. Although some of the documents found in his office include the names of people Mr Carter approached to make donations through the Free Enterprise Foundation, there is insufficient evidence to conclude from these that Mr Hartcher was directly involved in seeking to have these people make donations through the Free Enterprise Foundation.

Mr Nicolaou gave evidence to the Commission during a compulsory examination that he believed he had some discussion with Mr Hartcher about the use of the Free Enterprise Foundation in the context of fundraising for the 2011 state election during which Mr Hartcher said, "Paul,

I have some donors who, who don't want to receive media attention, do we have an entity where we can offer these donors so they don't get exposed in the media". Mr Hartcher denies that such a conversation occurred, but the Commission accepts that it did.

Mr Nicolaou also told the Commission that it was after this conversation with Mr Hartcher that money commenced to come to the NSW Liberal Party from the Central Coast and he began dealing with Mr Carter.

There was evidence from a junior member of Mr Hartcher's staff, Mr Henry, that he may have had conversations with Mr Hartcher that are consistent with Mr Hartcher knowing of the arrangement having been put in place. Mr Henry recalled sending cheques addressed to the Free Enterprise Foundation to Mr Nicolaou in Sydney. When asked if he ever discussed this with Mr Hartcher, Mr Henry said, "Ah, I can't remember but it's likely that I would have".

Mr Carter agreed that "nearly all" of the donors who made donations through the Free Enterprise Foundation were prohibited donors. There was evidence from Mr Carter that was equivocal. He told the Commission that he told Mr Hartcher about the people from whom he was seeking money and said, "he would know some of those names". Mr Carter said that he told Mr Hartcher "only that what I collected and where … they were going". He went on to say that he "may", "probably", or "would have" told Mr Hartcher about money coming from Deano Seraylio, Mr Gunasinghe, Mr Stevens and Paul Levick. He "definitely" told Mr Hartcher about money from Mr Fernandez. Mr Hartcher denied being informed that these people had made donations. The Commission is not satisfied that Mr Hartcher was aware that Mr Carter was seeking donations from property developers that were channelled through the Free Enterprise Foundation.

Mr Carter and Eightbyfive

From 1 January 2011, the continued use of the Free Enterprise Foundation to channel political donations to the NSW Liberal Party became problematic due to the introduction of caps on political donations. This meant that the Free Enterprise Foundation could not donate more than $5,000. It was as a result of this that Mr Carter was informed by Mr Koelma about Eightbyfive. Mr Carter told the Commission how Mr Koelma had said he had a company "that I could use to put some funds through". Shortly after that, Mr Carter began to solicit donations for the NSW Liberal Party for use on the Central Coast campaign, and began asking that the payments be made out to Eightbyfive. Mr Carter said that he did this so the money he had solicited and received would "come back to the Liberal Party". He admitted that some of the money was coming from property developers.

Mr Carter's evidence conflicted with Mr Koelma's evidence. Mr Koelma denied that Eightbyfive was being used as a vehicle for channelling donations to the NSW Liberal Party. Mr Koelma claimed that all the payments facilitated by Mr Carter arose from genuine commercial transactions. According to Mr Koelma, Mr Carter identified potential clients for Eightbyfive, and Mr Koelma then provided services to these clients for which services Eightbyfive was then paid. As the public inquiry proceeded, Mr Koelma's account became more and more untenable.

There is evidence that demonstrates that Eightbyfive was being used to channel political donations to the NSW Liberal Party. Mr Koelma's evidence, to the effect that he was providing genuine services to certain entities, was objectively false.

Matthew Lusted was the proprietor of a building company, LA Commercial Pty Ltd. Mr Lusted, whose evidence the Commission accepts entirely, told the Commission that, on 21 January 2011, he was approached by Mr Carter. He said Mr Carter asked him to donate "for the boys who are standing on the Coast" and that "a special account was being created so that funds raised can be shared with some of those candidates and their election expenses". Those "boys" were later identified to be Mr Hartcher, Mr Spence and Mr Webber. Mr Lusted agreed to donate $5,000 and put Mr Carter into contact with his financial manager. Contact was made. The financial manager wanted an invoice. Mr Carter said that he then asked Mr Koelma to prepare an invoice from Eightbyfive. According to Mr Carter, he told Mr Koelma "that it was a, a donation". The evidence shows that Mr Koelma did prepare an invoice for Eightbyfive addressed to LA Commercial for $5,000 for "Products and services as agreed". The invoice was false; LA Commercial had never received any services from Eightbyfive or Mr Koelma. LA Commercial paid the $5,000, treating it in its accounts as a donation. Mr Lusted only became aware of the deceit when he attempted to meet his political donation disclosure obligations.

Despite this, Mr Koelma claimed that Eightbyfive *did* provide valuable services to LA Commercial and that both Mr Lusted and Mr Carter were lying. He submitted that, "Lusted was motivated to lie in an attempt to damage Hartcher". There was no evidentiary basis for this claim. There is no evidence that Mr Lusted had any desire or reason to lie about this matter and the Commission rejects Mr Koelma's claim.

Bruce Johnson is the owner of Yeramba Estates Pty Ltd, a Central Coast property development company. Bruce Johnson's name also appears on the "Donation list 2011". Although Mr Carter knew Yeramba Estates

was a property developer, he approached Bruce Johnson for a donation for the NSW Liberal Party and offered to organise an invoice. Mr Carter described how he asked Bruce Johnson for money "for the Terrigal campaign". Bruce Johnson confirmed that evidence. He gave a statement that Mr Carter called him to ask for a $5,000 donation to the NSW Liberal Party. Yeramba Estates sought an invoice. Mr Carter told the Commission that he asked Mr Koelma to draw up an invoice to cover for a donation to the NSW Liberal Party. On 22 March 2011, Mr Koelma drew an invoice for Eightbyfive charging Yeramba Estates $5,000 for "Products and services as agreed". Mr Koelma asserted to the Commission that Eightbyfive was a genuine business providing services to Yeramba Estates and, in particular, Eric Stammer and Scott Johnson of that company. The invoice was false. Yeramba Estates had never received any services from Eightbyfive or Mr Koelma. Mr Stammer confirmed that Eightbyfive did not provide any services to Yeramba Estates. Mr Koelma's evidence on this issue is rejected by the Commission.

There was evidence along similar lines from other witnesses that clearly showed that Eightbyfive was being used as a means to present false invoices to disguise donations to the NSW Liberal Party from property developers. For example, the invoice that Mr Koelma issued on behalf of Eightbyfive to Brentwood Village Pty Ltd for $5,000 for "Products and services as agreed" falls into that category. Mr Carter understood that Brentwood Village was a property developer. He acknowledged that he would have approached the firm's owner, John Klumper, for a donation, and subsequently told Mr Koelma to issue the invoice. The Commission accepts that evidence. Brentwood Village is owned by Mr Klumper and there is evidence that Mr Klumper was seeking development approval from Wyong Shire Council for a $350–million project at Tuggerah Lake.

In another instance, the invoice Eightbyfive sent to the property developer, Crown Consortium Pty Ltd, for $2,200 for "Market and commercial research" was also false. Mr Koelma claimed he "provided verbal advice to Sunito". Iwan Sunito was a director of Crown Consortium. In his evidence, Mr Sunito said he did not even know Mr Koelma and could find no records to suggest that Eightbyfive ever did any work for Crown Consortium.

Based on the evidence set out in this chapter, the Commission finds that Mr Carter and Mr Koelma entered into an arrangement to use Mr Koelma's business, Eightbyfive, to channel political donations to the NSW Liberal Party for the 2011 Central Coast election campaign with the intention of evading the Election Funding Act laws relating to disclosure to the Election Funding Authority of political donations and the ban on accepting political donations from property developers. The political donations obtained by Mr Carter under this scheme included $5,000 from each of LA Commercial, Yeramba Estates and Brentwood Village, and $2,200 from Crown Consortium.

A key question is the extent to which Mr Hartcher had knowledge of this particular use of Eightbyfive. Mr Carter's evidence on this issue was inconsistent. He said that he did not speak to Mr Hartcher about using Eightbyfive. Mr Hartcher denied knowing Eightbyfive was being used in this way.

The "Donation list 2011", which Mr Carter had prepared, made reference to donors whose donations were passed through Eightbyfive. Mr Carter told the Commission that Mr Hartcher "would know some of those names". Mr Carter was emphatic – "yes, yes, yes" – that he would have told Mr Hartcher that the names on the list were the people from whom he was seeking money. There is no evidence that Mr Hartcher saw the list. The "Cash on hand" document refers to Mr Klumper. Typed next to his name are the words "waiting for delivery of $20,000 which has been promised". An asterisk, acknowledged by Mr Hartcher to be his, appears next to Mr Klumper's name. Mr Hartcher's evidence was that he was concerned to ensure that no person on this list was a property developer. In all the circumstances, the Commission is not satisfied to the required standard that Mr Hartcher was involved in soliciting and accepting donations using Eightbyfive.

Mr Carter and Mickey Tech

In March 2011, Mr Carter approached Pasquale Sergi with a view to raising further money for the upcoming election. Pasquale Sergi appears not to have been in a position to donate himself, but organised a meeting so that Mr Carter could speak to two other potential donors – Roy Sergi and Angelo Maggiotto. There is no real dispute about what followed.

On 16 March 2011, Mr Carter met Pasquale Sergi, Roy Sergi and Mr Maggiotto and asked them whether they would donate money "for the Liberal Party for Chris Hartcher". Each of Roy Sergi and Mr Maggiotto agreed to do so, but the money did not go directly to the NSW Liberal Party. On 16 March 2011, Roy Sergi drew a cheque on the account of his company, INE Pty Ltd, in favour of Mickey Tech Computers for $2,000. On 17 March 2011, Maggiotto Building Pty Ltd paid $2,000 on an invoice issued by Mickey Tech for "Information technology consulting (Single session)". Neither Roy Sergi nor Mr Maggiotto or their businesses had ever been provided with services by Mickey Tech.

Mickey Tech was set up by Mr Carter's partner, Ekarin

Sriwattanaporn. According to Mr Sriwattanaporn, the intention was that Mickey Tech would provide IT services, but the business never got off the ground and Mickey Tech never traded. Mr Carter accepted in his evidence that it was his idea to use Mickey Tech to collect the donations, and he explained how he sought the assistance of Mr Koelma in preparing the fake invoice that was issued to Maggiotto Building. Mr Carter explained to the Commission that he was seeking to raise the additional funds to meet expenses on election day and to reward those volunteers manning polling booths.

The banking records show that, on 25 March 2011, the day before the election on 26 March 2011, $2,400 was withdrawn from the bank account of Mickey Tech. Mr Carter gave evidence that this was probably spent on buying food and drinks for election day volunteers. The balance of $1,600 appears to have been used by Mr Carter and Mr Sriwattanaporn as though it was their own money.

Each payment was a reportable political donation but there is no evidence that Mr Carter, Roy Sergi or Mr Maggiotto intended to declare the donation. The principal author of this arrangement was Mr Carter – the involvement of others was limited. It is not clear whether or not Mr Sriwattanaporn knew that Mickey Tech was being used in this way and, although it would appear that Mr Koelma was involved in the sense of drawing up a false invoice for services, the evidence falls short of implicating him as a knowing participant in the arrangement. It seems as though Mr Carter undertook this part of the fundraising himself. There is insufficient evidence to show that Mr Hartcher participated in this arrangement.

Maggiotto Building is a building firm. Another company belonging to Mr Maggiotto is a property development firm. In relation to this donation, Mr Carter told the Commission that, "at the time I, I didn't realise, one was a builder and I didn't particularly take any notice. I've found out since that one of them was a prohibited donor".

The Commission accepts this evidence having regard to the manner in which it was given and the broader context of his evidence to the Commission. Accordingly, the Commission is not satisfied that at the time Mr Carter accepted this political donation he understood it was from a prohibited donor.

The Commission finds that, in March 2011, Mr Carter used a business, Mickey Tech, with the intention of evading the Election Funding Act laws relating to disclosure of political donations by disguising from the Election Funding Authority political donations of $2,000 from INE and $2,000 from Maggiotto Building. In each case, the money was sought and received by Mr Carter as a political donation for the 2011 NSW state election campaign. Although at the time Mr Carter received the money he intended to apply all the money for the purposes of the election campaign, he eventually only applied $2,400 for this purpose, the balance being applied to private use.

Chapter 22: Ms Ficarra

On 17 March 2011, Marie Ficarra MLC met with Tony Merhi. The meeting resulted in ATM & CPA Projects Pty Ltd, a property development company operated by Mr Merhi, making a payment of $5,000 to Eightbyfive. The evidence as to what occurred that day is unclear and the Commission is unable to make any findings in relation to the purpose of the payment and the understanding of those involved.

Mr Merhi is a property developer. One of his property development companies is ATM & CPA Projects. On 17 March 2011, ATM & CPA Projects transferred $5,000 into the account of Eightbyfive. The payment was directed by Mr Merhi himself. Mr Merhi told the Commission that he made this payment after he had spoken to a young man, who by inference must have been Mr Koelma. He also said that the $5,000 was a deposit in respect of "consultancy services", which would be provided by Eightbyfive. Further, it was accepted by Mr Merhi that no consultancy services were ever provided.

It was accepted by Ms Ficarra and Mr Merhi that Mr Merhi had known Ms Ficarra personally and for some time. It was also accepted that Mr Merhi and Ms Ficarra agreed to meet at a cafe on the edge of the Cumberland State Forest, known as Cafe Saligna, on 17 March 2011. It was also accepted that Mr Merhi made the $5,000 payment to Eightbyfive as a direct result of that meeting. From there, the accounts of Ms Ficarra and Mr Merhi diverge, markedly.

According to Mr Merhi, he was meeting with Ms Ficarra to attempt to ascertain what the Coalition policy might be in respect of several significant property development proposals that he had in the pipeline. Mr Merhi told the Commission he had several development proposals which were to be dealt with under Part 3A of the *Environmental Planning and Assessment Act 1979* . Part 3A granted the state minister for planning broad discretion to approve major projects of state significance, thereby bypassing the normal procedures in relation to such developments. The operation of Part 3A had been politically controversial, and there was some suggestion that, if it formed government, the Coalition might dispense with Part 3A altogether. Mr Merhi was concerned to find out whether, if a project was already within the Part 3A process, it would remain to be assessed in that fashion, or whether all unassessed projects would be remitted back to local planning authorities.

Mr Merhi said that he raised these matters directly with Ms Ficarra, who told him that Part 3A would be repealed by a Coalition government, but those proposals already in the system would be preserved. Mr Merhi said that, in this context, "her advice was I needed a lobbyist and she mentioned Eightbyfive". According to Mr Merhi, Ms Ficarra said that someone from Eightbyfive would call him and that, later that day, he did receive a call from a "young male person" (whose name he had since forgotten) and there was an agreement made that Eightbyfive would provide lobbying services in respect of the Part 3A projects. According to Mr Merhi, it was agreed that he would pay a $5,000 deposit to retain Eightbyfive to provide those services. Although his recall was imperfect, Mr Merhi said that he got account details from the young male person and organised the transfer of $5,000. Ultimately, he received no value for this payment and he took no steps to recover the $5,000.

Mr Merhi was adamant that he would not have proposed making a political donation because he knew, as a property developer, that he was prohibited from doing so.

Ms Ficarra's account varied, but whichever version is relied on, it was quite different from Mr Merhi's account. According to Ms Ficarra, she had agreed to a "catch-up" with Mr Merhi and she selected Cafe Saligna, on the edge of the Cumberland State Forest, because she wished to buy some plants at the nearby nursery. Ms Ficarra said that Mr Merhi said, "my friends and my supporters really want the Coalition to win, is there anything we can do?" – an offer she declined, telling him

that he was a prohibited donor. Ms Ficarra mentioned that the "Young Liberal Flying Squad" needed support. After she told him about the work of the flying squad, he told her he thought its work was admirable and said that "he had someone in his community that would be willing to support it". Ms Ficarra then wrote the name "Charles Perrottet" and his mobile telephone number on the back of her own business card and gave it to Mr Merhi to pass on to whomever it was who would make the donation. She said that Mr Merhi "recognised the name because he's very close friends with Charles' older brother, Dominic Perrottet". They then left Cafe Saligna and Ms Ficarra says she rang Charles Perrottet from her car to give him Mr Merhi's telephone number. Here, Ms Ficarra's narrative became very confused but, it appears, reassembling the events in their most likely order, that when Ms Ficarra spoke to Charles Perrottet she told him that Mr Merhi had a friend who was not a prohibited donor and who wanted to make a donation. She provided him with Mr Merhi's telephone number and told Charles Perrottet he had to get a bank account that was "associated with the Liberal Party and associated with the Young Liberals" and that the account had to be approved by the executive of the NSW Liberal Party and the finance manager. In any event, Ms Ficarra said that Charles Perrottet telephoned her back and provided her with the "numbers" of a bank account. According to Ms Ficarra, she then telephoned Mr Merhi and passed on these details.

Ms Ficarra told the Commission that, later that afternoon, Mr Merhi rang her and told her about "a strange account name" – the Commission infers this must have been "Eightbyfive" – which Mr Merhi told her had been given to him by his bank or financial manager. Ms Ficarra told the Commission that she immediately rang Charles Perrottet and said "Tony Merhi has mentioned a very weird account name to me, I want you to sort this out, is it a legitimate Liberal Party account" and "I want you to contact Tony Merhi or his associate direct and sort this out". According to Ms Ficarra she made about four calls to Charles Perrottet that afternoon becoming "progressively angry". During the last conversation, she told Charles Perrottet that she "didn't want money to be transferred to an incorrect account", but that she was reassured by Charles Perrottet who told her that it was a legitimate NSW Liberal Party account.

Mr Merhi denied that he discussed with Ms Ficarra the possibility of someone he knew making a donation.

Charles Perrottet told the Commission that he had never spoken with Mr Merhi and, while he agreed he may have spoken with Ms Ficarra about the Young Liberal Flying Squad needing money, he could not recall the specifics of such a conversation. He could not recall speaking with Ms Ficarra about Mr Merhi.

Mr Koelma gave evidence suggesting there was contact between himself and Mr Merhi about providing services on Part 3A planning issues. For reasons given earlier, the Commission regards Mr Koelma's evidence as unreliable.

The Commission is left with irreconcilable accounts between Ms Ficarra and Mr Merhi as to what actually occurred. The evidence of Charles Perrottet and Mr Koelma does not assist in determining which account to accept. What actually happened on 17 March 2011 remains unclear. In these circumstances, the Commission is not able to make any findings as to what was said at the meeting of 17 March 2011 or the purpose of the $5,000 payment.

Chapter 23: Mr Hartcher and the $4,000

This chapter examines the circumstances in which, in March 2011, Mr Hartcher came to receive three bank cheques payable to the NSW Liberal Party totalling $4,000 and what was done with that money.

Timothy Trumbull is an accountant practising in Bondi with a business titled Taxback Australia. In early 2011, Mr Trumbull was a strong Liberal Party supporter with a desire to donate to the NSW Liberal Party campaign. The problem was that Mr Trumbull had already donated the maximum amount he could legally donate. He then devised a scheme to avoid the impact of the caps on donors. On 15 March 2011, he paid money into the bank account of three of his employees. The sums deposited were $1,255, $1,397 and $1,397. He then directed each of those employees to withdraw the amount from their bank account and to purchase a bank cheque made out to the Liberal Party of NSW. On 16 March 2011, three bank cheques were drawn for $1,240, $1,380 and $1,380 (a total of $4,000) – the small difference reflecting the cost of purchasing the bank cheques. Mr Trumbull then collected the three bank cheques from his employees.

Mr Trumbull knew Mr Caputo, the vice-president of the NSW Liberal Party Manly SEC. Mr Caputo ran a real estate agency in Dee Why. Mr Trumbull provided the three bank cheques to Mr Caputo personally or by leaving them at Mr Caputo's office. Mr Trumbull provided the cheques to Mr Caputo to be used by the NSW Liberal Party in its campaign in the March 2011 election.

Mr Caputo told the Commission that, "Mr Hartcher … did ring me at some stage and … he said he needed funding for the Central Coast and three cheques from Mr Trumbull went to Mr Hartcher's office". He later said that Mr Hartcher said "the Central Coast needed funds" and this was "for the campaigns". Mr Caputo also described an instance where, following a fundraiser, he sent "something like" $5,000 or $6,000 to the Central Coast. Mr Caputo said that some cheques were sent by post and, he thought, they were addressed to Mr Hartcher. He also recalled that there were some other cheques that he handed straight to Mr Hartcher. The Commission finds that the three bank cheques were among the cheques provided by Mr Caputo to Mr Hartcher. There is other evidence to support this finding. Mr Trumbull said that he spoke to Mr Caputo. Following this discussion, he made a handwritten note "Chris Hartcher" below which he recorded, against the names of each of his three employees, "1240, 1380 1380". Mr Trumbull did not have a recollection of what he was told by Mr Caputo, but that handwritten note clearly connects "Chris Hartcher" to the three bank cheques. Mr Hartcher accepted that he had made contact with Mr Caputo and asked him for assistance for the campaign on the Central Coast. Mr Hartcher accepted that cheques may have arrived at his electorate office, although he denied ever dealing with the cheques himself.

In November 2011, Mr Hartcher arranged for the three bank cheques to be "cleared" through two bank accounts, and $4,000 in cash returned to him.

There is evidence that Mr Hartcher provided instructions to Hartcher Reid, a legal firm, to deal with the three bank cheques. As a lawyer, Mr Hartcher had worked in that firm but left the practice at the time he entered politics. He remained a client of the firm. As at November 2011, Sebastian Reid was working as a solicitor at Hartcher Reid. Mr Reid is Mr Hartcher's nephew.

There is a record that shows Mr Hartcher telephoned Hartcher Reid on 16 November 2011. Marie Neader was the receptionist at Hartcher Reid. Among the records produced to the Commission by Hartcher Reid was a handwritten note made by Ms Neader, the relevant part of which reads: "Chris Hartcher three bank chqs Liberal Party into our a/c & then we to draw cheques". The other side of the note contains records that date between 11 and 21 November 2011, and it seems probable that Ms Neader's note was made in that period. Ms Neader had no independent recollection of making

the note, but said it would have been created in one of two circumstances. One was a note made based on an outsider's instructions, and the other was an internal instruction from someone in the office. Ms Neader's note connects Mr Hartcher to the three bank cheques and to the events that unfolded.

On 17 November 2011, the three Liberal Party bank cheques were deposited at the Martin Place branch of Westpac bank to the credit of the Hartcher Reid trust account. The deposit slip is filled out in handwriting, but the signature is unable to be deciphered. A contact telephone number is inserted, but evidence established that this was a number associated with Sekisui House, a business with no connection to these events. Mr Hartcher denied that the handwriting on the deposit slip is his. Mr Hartcher pointed to some diary entries that suggest that he was in Canberra and could not have deposited the cheques. However, all of the surrounding facts associate Mr Hartcher with the deposit. While there is insufficient evidence to find that Mr Hartcher deposited the three bank cheques personally, the Commission is satisfied that they were deposited at Mr Hartcher's direction.

At the relevant time, Annette Poole was a conveyancing paralegal at Hartcher Reid. Ms Poole said that she opened a file numbered "12055" and gave it the title "Liberal Party Central Coast Miscellaneous". She said she did so on Mr Reid's instruction. Mr Reid explained that, despite the title given to the file, the client was not the Liberal Party Central Coast and said, "I would say we've been given that direction to set that up, by Chris". Ms Poole reviewed documents contained in the file. Reading those documents led her to recall that the file was created because it was necessary to draw cheques on the firm's trust account, something that could not be done without a file, a file number, a client name and an address.

Ms Poole made some handwritten file notes (Figure 11, page 117). The first is headed "Chris Hartcher". Ms Poole said she would have made the note as the result of contact with Mr Hartcher. Beneath the title are some indecipherable words. Beneath that, are two Erina-based telephone numbers. Under those telephone numbers appears "Westpac 17/11 4000", which is a reference to the deposit of the bank cheques. Beneath that appears "Liberal Party Central Coast", which Ms Poole said was a reference to the name of the file. To the left hand side, there is a note "Ring Secr Sandra 9230 2111". That telephone number is the general switch at Parliament House. Mr Hartcher had a Sydney-based secretary named Sandra Calabro.

Another page within the file bears the simple note "From Westpac IT Services". Ms Poole said she believed she made this note after asking Mr Reid about the reference that was to be put on the trust account receipt. On 17 November 2011, a trust account receipt was issued and it referred to "IT Services". Mr Reid said the instruction to describe it as "IT Services" came from Mr Hartcher.

The evidence before the Commission includes a record showing that, at 2.11 pm on 22 November 2011, a telephone call was made from Mr Hartcher's parliamentary office in Sydney to Hartcher Reid. There is other evidence that suggests that Mr Hartcher was in his Sydney parliamentary office on that day. At 2.22 pm on 22 November 2011, Mr Reid sent an email to Ms Poole on the subject "not for now just when we get this cheque". The body of the email instructed Ms Poole to "Please draw a cheque payable to 'Micky [sic] Tech' send with compliments slip Ray Carter PO Box 3618 Erina NSW 2250". Mr Reid said of the contents of his note to Ms Poole "That's come from a conversation with Chris Hartcher". Mr Reid said Mr Hartcher gave him the instructions to draw the cheque in favour of Mickey Tech and to send the cheque to that particular address.

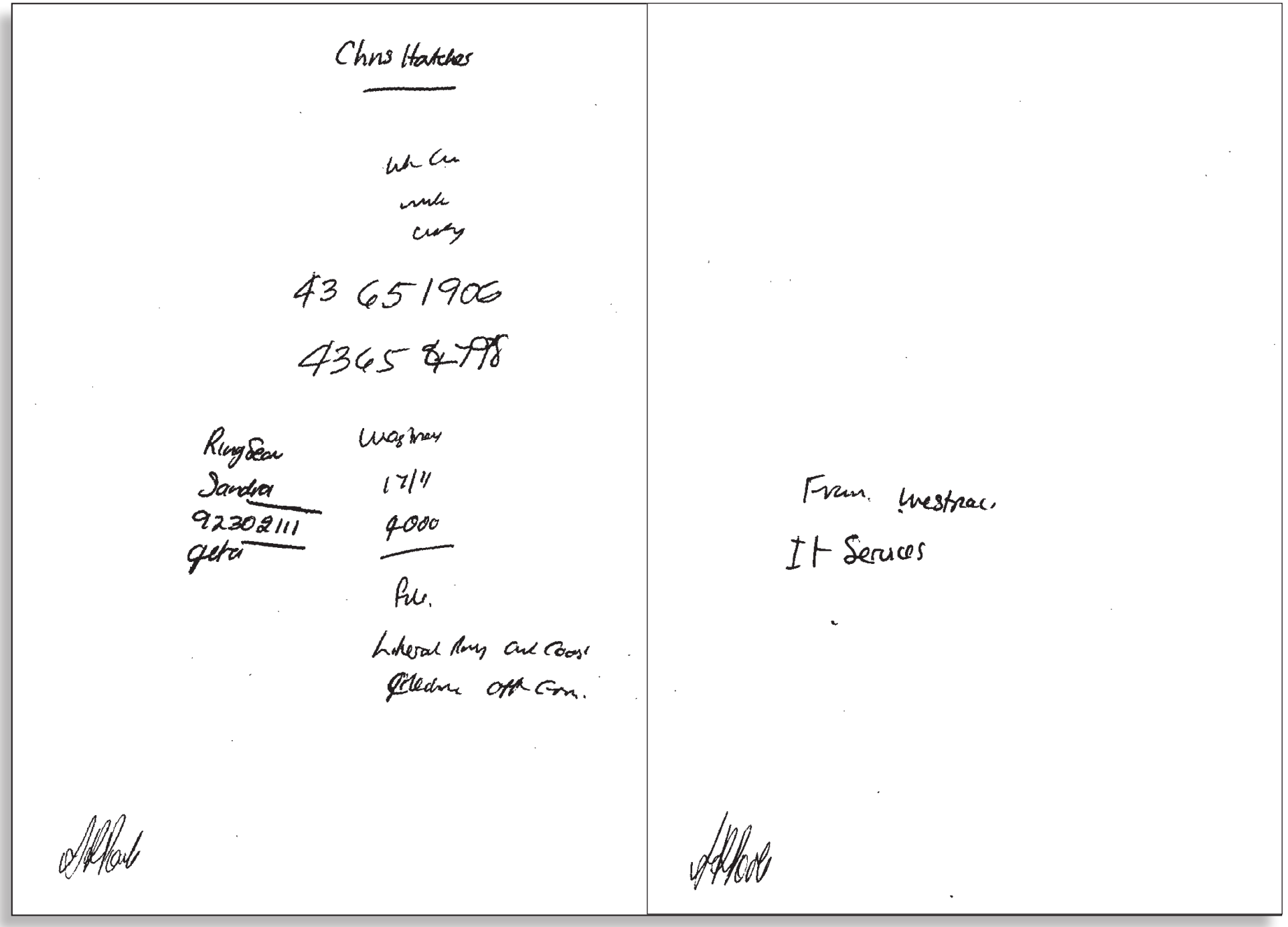
Mr Reid's evidence, that Mr Hartcher had instructed him to draw the cheque in favour of Mickey Tech, was put to Mr Hartcher. Mr Hartcher told the Commission that he did not recall the transaction although he believed Mr Reid was "a truthful person".

The Commission accepts Mr Reid's evidence as to the instructions he was given by Mr Hartcher. His evidence is supported by the handwritten notes and the evidence of Ms Neader and Ms Poole.

On 24 November 2011, Ms Poole drew a trust account cheque in favour of "Micky Tech" in the sum of $4,000. The Hartcher Reid trust account records show the reason for the payment as being for "IT Services". Mr Reid signed the cheque. Although she had no independent recollection of doing so, Ms Poole said she believes that she would have acted in accordance with the instructions she received and sent the cheque to Mr Carter at the address specified.

Mr Carter gave evidence to the Commission that he had told Mr Hartcher about Mickey Tech in the context of explaining his fundraising activities.

Mr Carter was asked what he knew about Mr Hartcher using the account and said, "He told me there was $4,000 coming … from Hartcher Reid" and "I'd be receiving a cheque, that he wanted me to … deposit it and then give it back to him, which I did". On 28 November 2011, the $4,000 was deposited into Mickey Tech's account. On 1 December 2011, the whole of the $4,000 was withdrawn from the Mickey Tech account in cash. Mr Carter gave evidence, which the Commission accepts, that he took the $4,000 cash out of Mickey Tech and gave it straight to Mr Hartcher.


Chris Hatcher

43 65 1906

4365 8798

Ring Sean
Sandra
92302111
Geta

Wednesday
17/11
4000

File.

Liberal Party and Coast
Electorate Office Com.

From Westpac.
IT Services

Figure 11 (the original exhibit appears as two separate pages)

Mr Hartcher expressly denied receiving the money from Mr Carter.

The Commission accepts Mr Carter's evidence on this issue. The objective facts support the finding that Mr Hartcher ultimately received $4,000. The Commission accepts Mr Reid's evidence that Mr Hartcher instructed him to make out the cheque to Mickey Tech and to send it to Mr Carter. In the absence of any explanation from Mr Hartcher as to why he would be directing Liberal Party property to be deposited into the Mickey Tech account, the Commission is satisfied that he used this arrangement as a means of clearing the cheques so that they could come back to him.

The Commission is fortified in this finding by further evidence that emerged during the cross-examination of Mr Carter. Counsel for Mr Hartcher suggested to Mr Carter that he took the $4,000 and that he used it for "personal expenses". Mr Carter became quite animated, even angry, and gave the following evidence:

> *[Counsel for Mr Hartcher]: Yeah?*
>
> *[Mr Carter]: Be a little bit more clear. The $4,000 from Mr Hartcher Reid. Mr Hartcher asked me originally to accept that I took it. I refused that. Right. Mr Hartcher knows very well about that cheque that he, he organised it to come into Mickey Tech, he asked me to put it in. I took it out and I gave it straight to him. Now I can't be more clearer than that.*
>
> *[Q]: All right. Well … ?*
>
> *[A]: So whatever you're assuming or trying to make out, I can see where you're coming from, right. I've been with Chris for 40-odd years. I don't like doing this. Right. But I will protect myself.*
>
> *[Q]: Yeah?*
>
> *[A]: You asked the question, I'll tell you, I'll be explicit- - -*
>
> *[Q]: All right, well- - -?*
>
> *[A]:- - -as to what happened.*
>
> *[Q]: All right, well- - -?*
>
> *[A]: Right. Now, that cheque, and I'll say it (not transcribable), I gave it back to Chris Hartcher. What he did with it I have no idea.*
>
> *[Q]: Well I suggest to you that that evidence that you've given is false isn't it?*
>
> *[A]: It is 100 per cent true.*

In re-examination, Counsel Assisting the Commission took up this issue:

> *[Counsel Assisting]: I–well, I understood those questions from one of the barristers were to suggest on behalf of Mr Hartcher that you'd taken the $4,000 out- - -?*
>
> *[Mr Carter]: Yes, yes.*
>
> *[Q]:- - -and used it for your own purpose?*
>
> *[A]: That's correct.*
>
> *[Q]: And I take it you'd deny that?*
>
> *[A]: I deny that emphatically.*
>
> *[Q]: But when you were giving that answer you said something about Chris asking you to do something about your evidence?*
>
> *[A]: Oh, no, he asked me, he asked me to um, he told me about the money and to give it back to him.*
>
> *[Q]: Right. Did he ask you to accept responsibility for- - -?*
>
> *[A]: Oh, yes, yes, he did ask me that.*
>
> *[Q]: When did he ask you that?*
>
> *[A]: Oh, this was um, oh, probably six months ago.*
>
> *[Q]: And face to face or by phone?*
>
> *[A]: No, face to face.*
>
> *[Q]: And what did he say to you?*
>
> *[A]: He just asked me would I, would I accept the responsibility.*
>
> *[Q]: And did he tell you why?*
>
> *[A]: And I told him I wouldn't because I knew it was Liberal Party funds and I'd raised a lot of money for the Liberal Party and the last thing I did want is to ever be accused of ah, of misleading any of those funds.*

Mr Hartcher denies these exchanges, but the Commission accepts Mr Carter's evidence on this issue. Mr Carter's evidence in his compulsory examination about the way he dealt with the $4,000 was different from his evidence at the public inquiry but the Commission is satisfied that, when giving evidence at his compulsory examination, Mr Carter was trying to assist Mr Hartcher. The Commission is satisfied that the evidence Mr Carter gave at the public inquiry was credible in the face of an allegation made by Mr Hartcher that Mr Carter had taken the money, which Mr Carter denied and deeply resented.

The Commission finds that, in March 2011, Mr Hartcher received three bank cheques payable to the NSW Liberal Party totalling $4,000. They were received by

Mr Hartcher for the benefit of the NSW Liberal Party for the March 2011 state election campaign. In November 2011, some eight months after the election, Mr Hartcher arranged for the cheques to be paid into the trust account of Hartcher Reid, a legal firm, and for that firm to draw a cheque for $4,000 in favour of Mickey Tech, a business owned by Mr Sriwattanaporn, Mr Carter's partner. After the $4,000 was deposited into that account, it was withdrawn in cash by Mr Carter and given to Mr Hartcher. These steps are inconsistent with an intention on the part of Mr Hartcher to apply the $4,000 for the benefit of the NSW Liberal Party.

PART 5 – THE HUNTER VALLEY CAMPAIGN

Chapter 24: Mr Thomson and Mr Gallacher

This part of the report examines irregularities in funding activities for the NSW Liberal Party 2011 election campaign in the Hunter Valley seats of Newcastle, Charlestown, Swansea and Port Stephens. The irregularities involved failure to disclose political donations, evading the prohibition on donations from property developers and, from 1 January 2011, evading the applicable caps on political donations.

Hugh Thomson and the Hon Michael Gallacher MLC were involved in some of the irregularities investigated by the Commission. This chapter provides some background information about them and sets out the Commission's assessment of their credibility as witnesses.

Mr Thomson

On 11 December 2010, Timothy Owen was preselected as the NSW Liberal Party candidate for Newcastle. Mr Thomson, a local corporate lawyer, was Mr Owen's campaign director. The Commission is satisfied that, at all relevant times, Mr Thomson was aware of the requirements of the *Election Funding, Expenditure and Disclosures Act 1981* ("the Election Funding Act") relating to the need for accurate disclosure of political donations, the ban on accepting donations from property developers and the applicable caps on political donations.

Mr Thomson gave significant evidence that demonstrated that the NSW Liberal Party election campaign in Newcastle was funded by a number of persons (including property developers) participating in arrangements that were designed to disguise the source of the payments and overcome the applicable caps on donations. Mr Thomson's evidence implicates himself and others in these arrangements.

Mr Thomson's credibility was questioned during the public inquiry. For that reason, it is an important preliminary issue for the Commission to make an assessment of Mr Thomson's credibility as a witness. Significant among these are considerations of self-protection and the prospect that Mr Thomson was attempting to obtain favourable treatment from the Commission.

The Commission finds that the evidence of Mr Thomson was credible. Mr Thomson impressed as a witness who recognised his own wrongdoing and was determined to tell the truth. In arriving at the conclusion that Mr Thomson's evidence was credible, the Commission has taken into account his demeanour in the course of a lengthy cross-examination, his acceptance of the seriousness of his own role, the corroboration of his evidence on certain critical matters by other witnesses, and the measured terms of his responses to questions so as not to overstate the involvement of third parties in any wrongdoing. In addition, to the extent that there are documents created at the time of the events, they tend to support Mr Thomson's account. For these reasons, the Commission is satisfied that it can rely on Mr Thomson's evidence.

Mr Gallacher

Mr Gallacher was a former policeman who entered the NSW Legislative Council in 1996. In 1999, Mr Gallacher was given particular responsibility for the Central Coast and Hunter Valley regions. In this capacity, he described how he attended "countless meetings, public meetings, individual interviews with constituents, attending branch meetings" within the regions. He played a role in identifying suitable Liberal Party candidates for Hunter Valley seats. The former premier, the Hon Barry O'Farrell, told the Commission that Mr Gallacher, as the shadow minister for the Hunter, "was an enthusiast for the Liberal Party in the area", had run "a successful local government campaign a year or two earlier" and was enthusiastic about the prospects of the NSW Liberal Party winning seats in the Hunter Valley region in the upcoming 2011 state election.

In his submissions to the Commission, Mr Gallacher described his involvement in the Hunter Valley 2011

election campaign as "in fact, quite limited". The evidence tends towards the contrary. There is evidence that Mr Gallacher was involved in many aspects of the campaign. For example, Mr Gallacher had a significant role in the selection of Mr Owen to run for Newcastle. He also had a role in encouraging Andrew Cornwell to run for Charlestown. Mr Gallacher was involved in fundraising in Newcastle. Mr Owen described to the Commission how he had a "one-sided" conversation with Mr Gallacher and Mr Thomson where they said they would "look after the money side" and manage the campaign finances.

The Commission is satisfied that, at all relevant times, Mr Gallacher was aware of the requirements of the Election Funding Act relating to the need for accurate disclosure of political donations, the ban on accepting donations from property developers and the applicable caps on political donations.

Evidence that Mr Gallacher was willing to evade the election funding laws came from Andrew Cornwell, the NSW Liberal Party candidate for the seat of Charlestown. Andrew Cornwell had known Mr Gallacher for a long time. Andrew Cornwell recounted a conversation that he had with Mr Gallacher about fundraising through the sale of raffle tickets. Andrew Cornwell told the Commission "it was a brief conversation" in which Andrew Cornwell explained how he was attempting to raise money by selling the raffle tickets to his friends. He said that Mr Gallacher said to him "well, you could technically sell a few raffle tickets to Hilton Grugeon and no one, that would be an option". Mr Grugeon is a well known local property developer. Even though, at that stage, Andrew Cornwell was politically inexperienced, he recognised that what Mr Gallacher had suggested was wrong, and told the Commission "clearly you can't, he's a prohibited donor". Mr Gallacher did not challenge Andrew Cornwell's evidence on this matter.

A further instance of Mr Gallacher's willingness to evade the election funding laws involves a political fundraising event at Doyles Restaurant at Circular Quay on New Year's Eve of 2010. This matter is dealt with in the next chapter.

In assessing Mr Gallacher's evidence, the Commission has taken into account the matters dealt with in the following chapters. The Commission does not consider Mr Gallacher was always a truthful witness and places no reliance on his evidence unless it is corroborated by other reliable evidence or objective facts.

Chapter 25: The New Year's Eve fundraiser

This chapter examines Mr Gallacher's involvement in a political fundraising event at Doyles Restaurant at Circular Quay on New Year's Eve of 2010.

Peter Doyle, the owner of Doyles Restaurant, was a friend of Mr Gallacher's. Mr Doyle said, "I suggested to Mike Gallacher sometime throughout 2010 … that it'd be a good opportunity to do a fundraiser at the restaurant on New Year's Eve. I'm happy to coordinate it with Restaurant and Catering Australia [a representative body for Mr Doyle's industry] and it'd be a good way to make money for the Liberal Party". According to Mr Doyle, Mr Gallacher "thought it was a great idea". Mr Doyle said he would organise a room and that Mr Gallacher "... could bring a number of people along … Restaurant and Catering would bill them, make a donation to the Liberal Party", with some of the funds going to Restaurant and Catering Australia. The charge for attending was $1,000 per head; although it was agreed that as the "star attraction" Mr Gallacher would not pay for himself or his wife.

In November 2010, Mr Gallacher extended a personal invitation to David Sharpe and his family to attend the function. Mr Sharpe was the managing director of Buildev Group Pty Ltd. Under s 96GA of the Election Funding Act, he was therefore a "close associate" of a corporation engaged in property development and therefore a prohibited donor. Mr Gallacher said that he extended an invitation to Darren Williams of Buildev as well but the evidence does not establish whether Mr Williams accepted the invitation. Mr Gallacher told the Commission that he knew that Buildev was a property developer. He understood that Mr Sharpe and Mr Williams were prohibited from donating to a political campaign. Mr Sharpe understood from speaking with Mr Gallacher that the function at Doyles Restaurant was a "fundraiser". On 2 December 2010, Mr Doyle sent an email to Mr Sharpe's executive assistant concerning Mr Sharpe's attendance and advising "it is a fundraiser for Mike Gallacher".

Although Mr Sharpe arranged for a cheque for $7,000 drawn on Buildev Intertrade Consortium Pty Ltd to be paid to Restaurant and Catering Australia, it is not clear from the evidence how much, if any, of this money was ultimately received by the NSW Liberal Party or Mr Gallacher.

Notwithstanding the relatively small amount of money involved, the matter is serious in the following circumstances. There was a close connection between the fundraiser and Buildev's desire to promote another coal terminal. On 24 November 2010, Mr Sharpe sent Mr Gallacher an SMS text message, as follows: "Hi mike can u call David sharpe when u can re new yr eve and port project". There is a telephone record suggesting that Mr Gallacher returned Mr Sharpe's call the next day. When asked if his attendance was an "investment" and involved "lobbying" on Buildev's coal terminal proposal, Mr Sharpe said "you could say that". When he had to account for the $7,000 paid by Buildev for the function, Mr Sharpe entered it into the expenses of Buildev in relation to lobbying for Hunter Ports – a direct reference to the Buildev proposal for a new coal terminal on the Mayfield site.

There were some unsatisfactory features of Mr Gallacher's evidence in respect of the New Year's Eve function. Mr Gallacher attempted to explain away, on several bases, the evidence of his involvement. One basis was his claim that the function was not a fundraiser because it had changed in character. Mr Gallacher said, "due to a lack of interest it changed" and "It was … part fundraiser … part not". In cross-examination by Mr Gallacher's counsel, it was suggested to witnesses that the fundraiser became "more like a … family affair … a get-together".

The Commission rejects this suggestion. It was not consistent with the whole of the evidence and was not supported by any other witness. Mr Doyle said "that's not my recollection", and Mr Sharpe denied

that Mr Gallacher was a close or personal friend of his. Mr Gallacher also claimed that there was no fundraising because he had instructed Mr Doyle not to charge the people from Buildev the full amount, only expenses. In the Commission's view, that was a recent invention; Mr Doyle had no recollection of it, Mr Sharpe did not recall it, and it is inconsistent with the fact that Buildev paid $7,000, the amount of which is consistent with the payment of $1,000 for each adult attendee.

Mr Gallacher's evidence changed over time. There was a noticeable difference between his original evidence given during the course of a compulsory examination on 31 March 2014 and the evidence that he gave during the public inquiry. For example, during his compulsory examination, Mr Gallacher suggested that he had little or no contact with Buildev, "probably" from about 2009 and said, "I cannot recall contact with them, whatever time that was that Tinkler took over [Buildev]".

In fact, there was a great deal of contact between Mr Gallacher and Buildev after Nathan Tinkler became involved with Buildev, intensifying in 2010, and continuing until at least the time of the NSW state election in March 2011. Extensive evidence of ongoing contact was placed before the public inquiry through relevant documents and the evidence of various witnesses. In his compulsory examination, Mr Gallacher claimed only to have relatively little knowledge of Buildev's proprietors, recounting that "there was a fellow by the name of Darren Williams and another fellow whose Christian name I can't remember, however he was … locally known as Sharpie". When asked whether "Sharpie" could be David Sharpe, he said, "I don't know". That does not fit with other evidence demonstrating a genuine familiarity with Mr Sharpe and Mr Williams or with the evidence about the New Year's Eve invitation. The Commission is of the opinion that, at his compulsory examination, Mr Gallacher tailored his evidence to create a false impression with the intention of distancing himself from Buildev, Mr Sharpe and Mr Williams.

The Commission is satisfied that the payments for attending the New Year's Eve function were political donations within the meaning of s 85(2) of the Election Funding Act because they were a contribution, entry fee or other contribution to entitle a person to participate in a fundraising function.

The Commission finds that, in about November 2010, Mr Gallacher sought a political donation from Mr Sharpe by inviting him to attend a New Year's Eve political fundraising function for which Mr Sharpe or Buildev would make a payment. Mr Gallacher knew that they were property developers, and he sought the political donation with the intention of evading the election funding laws relating to the ban on property developers making political donations.

Chapter 26: The Boardwalk Resources donations

This chapter examines the circumstances in which, in December 2010, Boardwalk Resources Limited, a company of which Mr Tinkler was a major shareholder, came to make two payments totalling $53,000 to the Free Enterprise Foundation. This money was subsequently provided to the NSW Liberal Party and used to fund that party's 2011 NSW election campaigns in the seats of Newcastle and Londonderry. There was evidence that funding of $120,000 was expected from "our big man". For the reasons set out below, the Commission has found that "our big man" was Mr Tinkler but that, instead of contributing the expected $120,000, his contribution was limited to $53,000.

Who was involved at Boardwalk Resources?

Troy Palmer was the chief financial officer of Tinkler Group Holdings Administration Pty Ltd, director of Patinack Farm Pty Ltd, and a director of Boardwalk Resources. On 13 December 2010, he drew and signed two cheques on the account of Boardwalk Resources. One cheque was for $35,000, and the other cheque was for $18,000. Both cheques were drawn in favour of the Free Enterprise Foundation.

In his evidence to the Commission, Mr Tinkler said that the $53,000 was a donation intended for the federal Liberal Party. He said he had not heard of the Free Enterprise Foundation and did not know why the cheques drawn by Mr Palmer were made out to that organisation. His evidence was that the donation was suggested by Philip Christensen, the managing director of Boardwalk Resources, in conjunction with Mark Vaile, a director of Aston Resources Ltd. Both Mr Christensen and Mr Vaile denied any involvement. Their evidence was clear and concise and more persuasive than Mr Tinkler's evidence, which the Commission has found to be lacking in credibility. The Commission accepts the evidence of Mr Christensen and Mr Vaile.

In his evidence to the Commission, Mr Palmer claimed to have a poor recollection of the relevant events. On 26 August 2011, a Boardwalk Resources accountant sent an email to Alan Wigan, Boardwalk Resources' chief financial officer, noting, "there are two amounts paid to the Free Enterprise Foundation (Liberal Party) for $35,000 and $18,000" and questioned the subject matter to which these payments related. Mr Wigan forwarded the email to Mr Palmer and asked for his assistance in relation to "donations to the ... Liberals". On the same day, Mr Palmer responded by telling Mr Wigan that the two payments "were organised by Darren Williams on NT behalf". Mr Palmer's response to Mr Wigan demonstrates that Mr Palmer recognised the payments to the Free Enterprise Foundation were donations to the Liberal Party and that he understood Mr Williams was the person responsible for organising these donations.

Mr Williams told the Commission: "I could have [organised the donations], but I don't recall". In all the circumstances, the Commission is satisfied that Mr Williams organised the $53,000 donation. Buildev needed political support for its proposed coal terminal. Mr Williams was involved in supporting the NSW Liberal Party election campaign and he recognised there was likely to be a change of government. Financial support from Buildev for the NSW Liberal Party campaign for the seat of Newcastle was consistent with Buildev's interests.

For the reasons set out in this chapter, the Commission has found that $35,000 found its way to help fund Mr Owen's campaign for that seat. Mr Williams had a close relationship with Mr Gallacher and Christopher Hartcher, and the Commission is satisfied that they were involved in facilitating this donation. Their involvement is detailed later in this chapter. Telephone records indicate that Mr Williams was in contact with Mr Gallacher and Mr Hartcher around the time the donation was made.

The $18,000 cheque was applied towards purchasing a key seats package for the seat of Londonderry. The key

seats package, as described by Chris Stone, campaign manager for the NSW Liberal Party during the 2011 election campaign, was a subsidised package of electoral materials for a seat campaign. It was offered to seats that were identified as "key" in the context of the overall campaign. To participate, identified local campaigns were required to contribute $35,000. In return, they received material in excess of that value. The overall value of the benefit received depended on the emerging strategic significance of the seat. As Mr Stone explained, seats identified by the NSW Liberal Party campaign as "winnable" would receive greater value than other seats only identified as "marginal".

For the reasons set out in chapter 32 of this report, the Commission has found that the NSW Liberal Party candidate for the seat of Londonderry, Bart Bassett, solicited a political donation from Buildev, which culminated in the $18,000 payment by Boardwalk Resources.

Although the cheques were drawn on the account of Boardwalk Resources, the involvement of Mr Williams, who was not a director of that company, in organising the payments demonstrates that the payments were being made for Buildev; the entity that needed political support for the proposed coal terminal.

Mr Hartcher's involvement

The two Boardwalk Resources cheques found their way to Paul Nicolaou, former executive chairman of the Millennium Forum. In evidence given during a compulsory examination, Mr Nicolaou said it was either Mr Hartcher or Raymond Carter who sent the cheques to him. In his evidence to the Commission, Mr Carter could not recall any involvement in this particular matter. Other evidence supports the conclusion that it was Mr Hartcher who arranged for the cheques to be sent to Mr Nicolaou.

It is inherently more probable that, given the cheques were organised by Mr Williams, who knew Mr Hartcher and was in discussions with him about Buildev's projects, the cheques were given to Mr Hartcher rather than to Mr Carter. It is more likely that Mr Hartcher was the person who arranged for them to be passed on to Mr Nicolaou

Mr Thomson told the Commission that, on 15 December 2010, he was told that the seat of Newcastle was to receive $35,000 for election campaign expenses, and that the relevant cheque had been passed on through Mr Hartcher's office, and on to the NSW Liberal Party head office in Sydney. On that day, Mr Thomson sent an email to the NSW Liberal Party campaign manager, Mr Stone, and the deputy state manager, Richard Shields. The email is in the following terms:

> *Confirming today's discussions, the cheque committed to the Newcastle seat has been sent by Chris Hartcher express post to HO* [Head Office] *for the purposes of buying into the Target Seat Package. Newcastle is not buying into the Target Seat Package and accordingly, please hold this cheque for Tim* [Owen] *. He will collect it on Friday at his meeting with you for deposit to the SEC* [State Electoral Conference] *bank account*.

The Commission is satisfied that the cheque referred to in this email is the Boardwalk Resources cheque for $35,000.

Mr Thomson told the Commission that he could not recall the conversation that led to this email but he assumed that he received the information from Mr Owen. This is consistent with the contents of the email, which reflect arrangements organised between Mr Owen and Mr Thomson, and the history of communications leading up to this email between telephone services associated with Mr Owen and Mr Hartcher or his office, and communications between the mobile telephones of Mr Owen and Mr Thomson.

Mr Nicolaou told the Commission that he received the cheques "in a Yellow Express envelope". This coincides with Mr Thomson's understanding that the cheque for Newcastle was delivered by Express Post and is consistent with the evidence of one of Mr Hartcher's electorate officers, Aaron Henry. Mr Henry had electronic diary entries showing that he had made a "note" to himself about sending Free Enterprise Foundation cheques to Mr Nicolaou by "Express Post" on 13 and 14 December 2010. The Commission finds that these diary entries are consistent with Mr Henry sending on the cheques from Boardwalk Resources on 13 or 14 December 2010.

Did Mr Henry act on Mr Harcher's instructions when sending the cheques to the Free Enterprise Foundation? While Mr Henry did not have a specific recollection of discussing with Mr Hartcher the practice of sending Free Enterprise Foundation cheques on to the NSW Liberal Party in Sydney, he told the Commission, "it's likely I would have". Mr Hartcher denied that he was aware that his office had any involvement in sending donations to the Free Enterprise Foundation and claimed that he was unaware until the public inquiry that the Free Enterprise Foundation had been used to channel political donations to the NSW Liberal Party.

As previously stated, however, the Commission considers that Mr Hartcher's evidence is unreliable. The Commission does not accept his evidence on this issue. The Commission is satisfied that a junior electorate officer like Mr Henry would not have been handling cheques totalling $53,000 and sending those through to the NSW Liberal Party without discussing the matter

with his employer, Mr Hartcher. The Commission is satisfied that, in arranging for the cheques to be sent to Mr Nicolaou, Mr Henry was acting on Mr Hartcher's instructions.

On 16 December 2010, Mr Nicolaou sent the cheques, with a cover letter, to the Free Enterprise Foundation. The letter specified that "they [Boardwalk Resources] would like the Trustees to consider donating their contributions to the Liberal Party of Australia NSW Division".

On the same day, Simon McInnes, the NSW Liberal Party finance director, sent an email to Mark Neeham, the NSW Liberal Party state director, attaching a "Target Seat Package Payment Report". That report shows that a credit was entered in the election campaign accounts for the seat of Newcastle for $35,000 "via Free Enterprise". The Commission is satisfied that the $35,000 credit related to the Boardwalk Resources cheque for that amount. Although the $35,000 was credited towards obtaining a key seat package for the seat of Newcastle, the money was ultimately used to buy electioneering material for use in the seat of Newcastle. On 23 December 2010, Mr Stone sent an email to Mr Neeham advising that he had reached an agreement with Mr Thomson by which "the $35,000 contribution already paid to LCHQ [Liberal Campaign Head Quarters]" would be retained by the NSW Liberal Party campaign headquarters but materials consistent with that provided through the target seats package would be provided for use in the Newcastle campaign.

The "Target Seat Package Payment Report" also shows a credit for the seat of Londonderry for $36,824.77, "Trf from B&C + Free Enter". This was used towards the purchase of a key seats package for the seat of Londonderry. Mr Bassett, a close associate of Mr Hartcher's, was the NSW Liberal Party candidate for Londonderry. The Commission is satisfied that $18,000 of this amount related to the Boardwalk Resources cheque for that amount. The source of the balance is explained in chapter 32.

Between 22 and 24 December 2010, Anthony Bandle at the Free Enterprise Foundation sent cheques to the NSW Liberal Party, which, the Commission finds, included the $53,000 from Boardwalk Resources.

There is other evidence of Mr Hartcher's involvement in organising these donations.

Mr Owen told the Commission that three or four days after his preselection, he met Mr Hartcher at Mr Hartcher's electorate office. The Commission finds this meeting occurred on Tuesday, 14 December 2010 (Mr Owen was preselected on Saturday, 11 December 2010, Mr Hartcher had commitments precluding a meeting on Monday, 13 December 2010, and developments on Wednesday, 15 December 2010, indicate that the meeting took place prior to that day). Mr Owen told the Commission that, during their discussion, Mr Hartcher told him that there was a "package of money" coming to be used to secure key seat packages for seats in the Hunter Valley region. Mr Owen told the Commission that he was not told where the money was coming from. He gave the following evidence:

> *All I knew was that Minister Hartcher or Chris Hartcher told me was that there would be a, a funding package, what are you like, you know, you seem a good guy, we might look to see if we can get some sort of funding support package for a key seat package for your electorate and that's really it.*

Mr Hartcher confirmed that he met with Mr Owen a few days after Mr Owen had been preselected. He said that he had previously spoken to Mr Gallacher about an application being made to party leadership, led by Mr O'Farrell, for election funding assistance to the Hunter. He said that his involvement was "to assist Mr Gallacher in putting the case to Mr O'Farrell if requested that the Liberal Party should not just run its standard nominal campaign in the Hunter, [it should] take the Hunter seriously and run a strong campaign in 2011", and "that's exactly why I spoke to Mr Owen, so I could form my own opinion so that if I was asked I could support Mr Gallacher".

Mr Hartcher told the Commission that he spoke to Mr Owen about obtaining assistance for the Hunter "from Sydney". However, he denied indicating to Mr Owen that money would be coming to the Hunter or that a package of money was coming to the Hunter for the purpose of purchasing key seats packages. He said he was not involved in fundraising. He did not solicit cheques for Mr Bassett or Mr Owen, and he was not aware of the Boardwalk Resources cheques passing through his office.

A further indication of Mr Hartcher's involvement is the contact he had with the Liberal Party candidate for Londonderry, Mr Bassett, around the time the Boardwalk Resources donation was made. Telephone records show that there was no contact between the mobile services used by Mr Hartcher and Mr Bassett from April 2010, until a call was made from Mr Hartcher's mobile service to Mr Bassett's mobile service on Thursday, 9 December 2010, two business days before Mr Palmer issued the Boardwalk Resources cheque for $18,000. There were texts from Mr Hartcher's mobile service to Mr Bassett's service on 10 and 12 December 2010, a call from Mr Hartcher's mobile service to Mr Bassett's service on Monday, 13 December 2010, two texts from Mr Hartcher's service to Mr Bassett's service on Tuesday, 14 December 2010, and a further text from Mr Hartcher's

mobile service to Mr Bassett's service on Wednesday, 15 December 2010. After this, there was no further contact between the services until June 2011.

Mr Hartcher told the Commission that he had planned to campaign with Mr Bassett in the week commencing Monday, 13 December 2010, but he was not able to do so on account of Mr Bassett's poor health, and suggested that he had contacted Mr Bassett about this. All seven contacts between Thursday, 9 December, and Wednesday, 15 December 2010, were made from Mr Hartcher's service. There were five text messages imparting information to Mr Bassett's service. This appears to go beyond what was needed to cancel arrangements or to enquire about Mr Bassett's health.

Mr Owen and Mr Thomson understood that $120,000 was to be obtained for use in the NSW Liberal Party election campaign. At 2.39 pm on 15 December 2010, Mr Owen sent Mr Thomson an SMS text message "Hugh, the 120 was split 3 ways as suspected. May want to speak to MG!!". Mr Owen explained this on the basis that it was likely that Mr Thomson had telephoned him and had been asking him about the progress of the $120,000 for the election campaign. Mr Owen said that, as a result, "I would have called Hartcher I would imagine".

At 2.41 pm on 15 December 2010, Mr Thomson responded with an SMS text message "do you know who between?" and a moment later Mr Owen responded "no, just he rang and said nothing more". Mr Owen explained that the "he" to whom he referred was "Chris Hartcher I would think, he would be the only one I would ring about this 'cause he was the one who'd indicated to me that there was a package of money coming".

Mr Gallacher's involvement

There is also evidence that Mr Gallacher was involved in arranging for the $53,000 donation.

As stated earlier, Mr Hartcher told the Commission that he had spoken with Mr Gallacher about funding for the Hunter region election campaign.

Mr Thomson told the Commission that, from about September 2010, he was in regular contact with Mr Gallacher about Mr Owen becoming the NSW Liberal Party candidate for the state seat of Newcastle.

Towards the end of November 2010, there was email correspondence between Mr Thomson and Mr Gallacher about raising funds for Mr Owen's election campaign, in the event that Mr Owen was preselected as the NSW Liberal Party candidate for the seat of Newcastle. In his statement to the Commission, Mr Thomson recounted that, "I first became aware from Mike Gallacher that there was a large donor who was going to contribute to the Newcastle campaign". In his later evidence at the public inquiry, he told the Commission that "leading into the pre-selection" of Mr Owen, on 11 December 2010, Mr Gallacher told him that "there was already a large donation that had been made to the order of $120,000". Mr Thomson was not aware at the time that Boardwalk Resources or the Free Enterprise Foundation were involved.

Who is "our big man"?

On Monday, 13 December 2010, two days after Mr Owen was preselected, Mr Thomson chased up the proposed donation by sending a text message to Mr Gallacher, asking, "How's our big man going with the _ 120K?". A key issue for determination by the Commission was the identity of "our big man".

In his statement given to the Commission Mr Thomson said that, at the time he sent the text message, he was not sure who the "big man" was but "suspected" it was Mr Tinkler. Although he did not have any contact with the "big man", he understood from a discussion with Mr Gallacher that Mr Gallacher knew the identity of the "big man". In any event, Mr Thomson understood Mr Gallacher was the "point of contact" for this matter and was the person responsible for facilitating the donation. Mr Thomson was cross-examined at length on this issue. Ultimately he told the Commission that, although he could not recall Mr Gallacher using Mr Tinkler's name in any of their conversations, he had a "firm view" that Mr Tinkler was the "big man". He said "big man" was common parlance for Mr Tinkler "as he was literally and metaphorically a big man" but rejected the proposition that this was the only source of his suspicion that Mr Tinkler was the "big man".

Mr Thomson told the Commission that, on 15 December 2010, two days after sending the text message to Mr Gallacher, he was told that the $120,000 had been "split between three campaigns" and that the seat of Newcastle was to receive $35,000 for election campaign expenses.

Mr Gallacher told the Commission that he did not know anything about the circumstances in which money from Boardwalk Resources was made available for use in Mr Owen's election campaign and Mr Bassett's election campaign.

Mr Gallacher told the Commission that he never received Mr Thomson's "big man" text, despite records indicating that it had been sent to his mobile service. When asked about the contents of the text, he said, "The only thing I can assume by that is my terminology for Barry O'Farrell, primarily Barry O'Farrell is the big man", and the reference to the $120,000 was "consistent with discussions that I had been having with Hugh Thomson at around about that time

regarding [a] key seats package" and "I've always thought the package was around about $120,000". He told the Commission that, during a discussion with Mr Thomson on 8 December 2010, Mr Thomson had expressed interest in finding out what opportunities there were for Newcastle to get access to key seats package. When asked why Mr O'Farrell would be involved with the key seats package, Mr Gallacher told the Commission: "Mr O'Farrell was the Opposition Leader and he would be interested in what was happening in New South Wales". He told the Commission that, to the best of his recollection, he told Mr Thomson that he would talk to Mr O'Farrell about getting a key seats package for Newcastle and believed that he did speak to Mr O'Farrell on that subject.

Mr Thomson, however, was adamant that in using the term "big man" he was not adopting a term used by Mr Gallacher and others to refer to Mr O'Farrell. He told the Commission that any suggestion that Mr O'Farrell was going to arrange for $120,000 in funding "does not remotely accord with my recollection". In any event, Mr Thomson did not want to purchase a key seats package for Newcastle. This is borne out by the steps he took to secure the $35,000 for use on the Newcastle campaign rather than allowing it to be used to purchase a key seats package. The Commission accepts Mr Thomson's evidence.

There is some evidence that Mr Gallacher referred to Mr O'Farrell as the "big man". Mr Hartcher told the Commission that "Mike Gallacher always referred to Barry O'Farrell as the big man". There were other witnesses, including Mr Carter, who gave evidence of hearing this term being used by Mr Gallacher. Mr Gallacher may have used this term from time-to-time, however, the Commission is not satisfied that, in the context of communications between Mr Gallacher and Mr Thomson, Mr Gallacher used the term "big man" to refer to Mr O'Farrell.

The Commission had before it a significant body of correspondence between Mr Thomson and Mr Gallacher, generated over the months leading up to the 2011 state election. Some of this relates to Mr O'Farrell. At no time did either Mr Thomson or Mr Gallacher refer to Mr O'Farrell as the "big man". At the same time, both use other alternative references for Mr O'Farrell. A common reference for Mr O'Farrell was "BOF". On 24 September 2010, Mr Thomson sent a text message to Mr Gallacher, as follows: "Any chance you could shoot a reminder text to BOF to get him to call Tim?". Earlier, on 21 September 2010, Mr Gallacher sent a text to Mr Thomson in the context of efforts the two men were making to get Mr O'Farrell to meet with Mr Owen: "Just spoke to baz. He is happy to speak via phone. Have also spoken to mcConnell. He has asked you to send him an email to baz co-ordinating call/time etc. Baz will call Tim".

One difficulty with Mr Gallacher's claim that the $120,000 related to a key seats package is that, in relation to a seat such as Newcastle, the value of such a package was nowhere near that amount. The evidence suggested that there was no set value for a key seats package for the 2011 election campaign. Mr Stone explained that the value could increase from a basis level of $35,000 according to the strategic significance of the relevant seat and could exceed $100,000, "where there had been candidates in the field for a long time". That was not the position in Newcastle. The amount that could be spent was also limited from 1 January 2011, when caps were introduced limiting the amount spent on electoral communication to $100,000 per seat.

Mr O'Farrell told the Commission that he did not know the identity of the "big man". He said that Mr Gallacher called him "barry", "boss" or "Premier". He told the Commission that allocation of funding for key seats was the responsibility of the NSW Liberal Party state director and that he had no role in allocating funding for seats in the 2011 election campaign. He did not know to what the "120K" in Mr Thomson's text message referred, and told the Commission that he did not have access to $120,000. He did not believe that he had discussed funding for Newcastle with Mr Gallacher but if such a discussion had occurred he would have followed his usual practice to direct anyone making enquiries about funding to the NSW Liberal Party head office. That Mr O'Farrell was not involved in allocating funding for key seats was borne out by the evidence of Mr Neeham, who told the Commission that all such decisions were made by campaign management. As a senior member of the NSW Liberal Party and experienced campaigner, Mr Gallacher would have known this.

Mr Tinkler told the Commission that he did not know the identity of the "big man" and said that no one had any discussions with him about providing $120,000 to the NSW Liberal Party's election campaign. For reasons given earlier, the Commission does not consider Mr Tinkler's evidence as reliable.

Mr Owen did not shed any light on the identity of the "big man" referred to in Mr Thomson's text message to Mr Gallacher. He was, however, aware that there was funding of $120,000 available for the election campaign. His 15 December 2010 text message to Mr Thomson, in which he advised Mr Thomson that the "120" had been split three ways, referred to "MG". He told the Commission that "MG" was Mr Gallacher. He thought Mr Thomson or Mr Hartcher told him that Mr Gallacher was involved.

The reference to "120" being split three ways, two days after Mr Thomson's "big man" text, further highlights how Mr Thomson and Mr Owen understood the "120K"

and the "120" to relate to actual funds, not a key seats package, as suggested by Mr Gallacher.

Mr Gallacher submitted to the Commission that the "big man" message about $120,000 could not have been referring to a payment of only $53,000. The Commission is satisfied that the timing of events and the surrounding conversations recounted by Mr Thomson and Mr Owen compellingly connect the "big man" message to the $53,000 payment. The monetary difference is not an impediment to the Commission's finding. Mr Thomson understood that the proposed $120,000 donation was to be split three ways, with the Newcastle campaign to receive $35,000. A further $18,000 was used in the Londonderry campaign. The intended third recipient is not evident and it may well be that, for whatever reason, the third payment became unnecessary.

The Commission rejects the suggestion that Mr Thomson's reference to "our big man" was a reference to Mr O'Farrell. The Commission considers that Mr Thomson's text to Mr Gallacher on 13 December 2010, provides strong support for Mr Thomson's evidence that he had been told by Mr Gallacher that there was a donation commitment of $120,000 in circumstances that caused Mr Thomson to understand that the donor was Mr Tinkler. The Commission accepts Mr Thomson's evidence in this respect. That his understanding was correct is supported by the fact that the money came from Mr Tinkler's company, on the very day Mr Thomson sent the "big man" text.

Chronology of events

The following chronology of events around the time Boardwalk Resources cheques were issued (see Table 1) indicates how the transaction unfolded and highlights how the donation Mr Thomson referred to in his "big man" text took the form of the Boardwalk Resources donation and the involvement of Mr Gallacher and Mr Hartcher.

Mr Thomson told the Commission that, "leading into the pre-selection" of Mr Owen, he spoke with Mr Gallacher who told him there was a large donation commitment in the order of $120,000. The donor was called "the big man".

The Commission is satisfied that the $53,000 payment made by Boardwalk Resources was a political donation within the meaning of s 85(1) of the Election Funding Act. This is because it was a gift made for the benefit of the NSW Liberal Party. It was not disclosed to the Election Funding Authority as a donation from Boardwalk Resources.

The Commission finds Mr Hartcher and Mr Gallacher were involved in arranging for the $53,000 donation that Mr Williams organised.

The complicity of Mr Thomson and Mr Owen is less clear. Both knew from their communications with Mr Gallacher and Mr Hartcher that the money was coming from a large donor. Mr Thomson believed that the donor was Mr Tinkler. In either case, Mr Thomson and Mr Owen should have recognised that the way in which the donation was being made was unorthodox. By the time the money was being used, both men should have recognised that it was likely that the money would never be properly declared. However, the Commission is not satisfied on the available evidence that Mr Thomson or Mr Owen were knowingly involved in evading the election funding legislation in relation to these payments.

The position of Mr Bassett in Londonderry is dealt with in chapter 32 of this report.

The Commission finds that, in late 2010, Mr Gallacher, Mr Hartcher and Mr Williams of Buildev were involved in an arrangement whereby two political donations totalling $53,000 were provided to the NSW Liberal Party for use in its 2011 election campaigns for the seats of Newcastle and Londonderry. To facilitate this arrangement, on 13 December 2010, Mr Palmer, a director of Boardwalk Resources, a company of which Mr Tinkler was the major shareholder, drew two cheques totalling $53,000 payable to the Free Enterprise Foundation. These were provided to Mr Hartcher who arranged for them to be sent to Mr Nicolaou. Mr Nicolaou sent the cheques to the Free Enterprise Foundation. The Free Enterprise Foundation subsequently sent money to the NSW Liberal Party, which included the $53,000.

Of the $53,000, some $35,000 was used to help fund Mr Owen's 2011 election campaign in the seat of Newcastle and $18,000 was used towards the purchase of a key seats package for Mr Bassett's 2011 election campaign in the seat of Londonderry. Although the cheques for the donations were drawn on the account of Boardwalk Resources, they were made for Buildev, a property developer. Each of Mr Gallacher, Mr Hartcher and Mr Williams entered into this arrangement with the intention of evading Election Funding Act laws relating to the accurate disclosure of political donations to the Election Funding Authority.

Table 1: Chronology of events

Date	Events
11 December 2010	Mr Owen was preselected as the NSW Liberal Party candidate for the seat of Newcastle.
13 December 2010	Mr Thomson chased up the donation by sending an SMS text message to Mr Gallacher, as follows: "How's our big man going with the 120K?".
13 December 2010	Mr Palmer issued the Boardwalk Resources cheques for $35,000 and $18,000.
13 & 14 December 2010	Mr Henry sent cheques made out to the Free Enterprise Foundation by Express Post to Mr Nicolaou.
14 December 2010	Mr Owen met with Mr Hartcher at Mr Hartcher's Erina office and was told by Mr Hartcher that there would be a funding package to meet the cost of a key seats package for his electorate.
15 December 2010	Series of communications between Mr Owen's mobile telephone and telephone services connected with Mr Hartcher or his office at 9.52 am, 11.22 am, 12.14 pm, 12.42 pm, 1.56 pm, 2.16 pm and 5.04 pm, and communications between the mobile telephone services of Mr Owen and Mr Thomson at 7.41 am, 11.44 am, 12.32 pm, 1.36 pm, 1.50 pm, 1.52 pm and 2.07 pm.
15 December 2010	Mr Thomson is told the seat of Newcastle is to receive $35,000 for election campaign expenses and that the relevant cheque has passed through Mr Hartcher's office. At 2.14 pm, he emails Mr Stone and Mr Shields at NSW Liberal Party head office: "Confirming today's discussions, the cheque committed to the Newcastle seat has been sent by Chris Hartcher express post to HO [Head Office] for the purpose of buying into Target Seat Package. Newcastle is not buying into the Target Seat Package and accordingly, please hold this cheque for Tim [Owen]. He will collect it on Friday at his meeting with you for deposit to the SEC [State Electoral Conference] bank account".
15 December 2010	Text discussions between Mr Owen and Mr Thomson commencing at 2.39 pm, when Mr Owen texted Mr Thomson: "Hugh, the 120 was split 3 ways as suspected. May want to speak to MG". Mr Thomson responded at 2.41 pm: "Do you know who between?". Mr Owen responded at 2.42 pm: "No, just he rang and said nothing more". Forty seconds later, Mr Owen added: "I suspect RP [Robyn Parker] and AC [Andrew Cornwell]". Mr Thomson's evidence indicates that the text discussion related to the same financial package that he addressed in his email to Mr Stone and Mr Shields sent at 2.14 pm, and the same package that he addressed in his "big man" text to Mr Gallacher.
16 December 2010	Mr Nicolaou wrote to Mr Bandle enclosing the cheques for $35,000 and $18,000.
16 December 2010	Mr McInnes sent an email to Mr Neeham at 7.03 pm, headed, "Target Seat Package Payment Report", enclosing a report showing a credit to the Newcastle election campaign account of $35,000 "via Free Enterprise" and a credit for the seat of Londonderry for $36,824.77 "Trf from B&C + Free Enter".
22 –24 December 2010	Mr Bandle sends cheques to the NSW Liberal Party, including the $53,000 donated by Boardwalk Resources.

Chapter 27: The seat of Newcastle

This chapter examines irregularities in funding activities for the NSW Liberal Party's 2011 election campaign in the seat of Newcastle. The irregularities concern the circumstances in which cash donations totalling $30,000 were made to fund Mr Owen's campaign for that seat and the funding of assistance provided to his campaign by Mezzanine Media Australia Pty Ltd, Luke Grant, Joshua Hodges, and Australian Decal Sales and Manufacturing Co Pty Ltd. In all, this funding amounted to approximately $90,000.

The NSW Liberal Party had never won the seat of Newcastle. In 2007, the Liberal candidate ran third; behind Labor and an independent candidate. Mr Owen was preselected as the NSW Liberal Party candidate for the seat of Newcastle on 11 December 2010. Mr Thomson was his campaign director. The campaign required substantial local funding because, according to Mr Thomson, Newcastle was not initially considered to be winnable for the NSW Liberal Party and therefore the party's head office was reluctant to commit funds to Mr Owen's campaign. As a result, local arrangements were put in place to provide funding.

Mr Owen eventually admitted that one part of his evidence was deliberately false and, for this reason, the Commission has exercised caution when assessing his credibility. The Commission finds that some of Mr Owen's evidence was reliable, while at other times he may not have been completely forthcoming about the extent of his involvement.

The Commission is satisfied that, at all relevant times, Mr Owen was aware of the requirements of the Election Funding Act relating to the need for accurate disclosure of political donations, the ban on accepting donations from property developers and the applicable caps on political donations.

The three $10,000 cash payments

Mr Thomson told the Commission that, in February 2011, there was a meeting in the office of Jeffrey McCloy (a local business person and property developer), attended by himself, Mr McCloy, Mr Grugeon and Mr Williams of Buildev, at which there was a discussion concerning the cost of Mr Owen's election campaign. Mr McCloy recalled a meeting in February 2011. A note in Mr Grugeon's diary refers to a meeting in Mr McCloy's office at 4.30 pm on 17 February 2011. The diary note also refers to Mr Thomson and Mr Owen. Mr Grugeon did not deny attending such a meeting and recalled a meeting attended by Mr McCloy and Mr Williams at which there was a discussion concerning Mr Owen's finances.

The Commission is satisfied there was a meeting in Mr McCloy's office on 17 February 2011. This was about two months after Mr Owen's preselection. The meeting was attended by Mr Thomson, Mr McCloy, Mr Grugeon and Mr Williams. During the meeting, there were discussions about funding for Mr Owen's election campaign. According to Mr Thomson, each of Mr McCloy, Mr Grugeon and Mr Williams agreed to provide $10,000 towards the cost of Mr Owen's election campaign.

The Commission is satisfied that, at all relevant times, Mr McCloy, Mr Grugeon and Mr Williams were aware of the requirements of the Election Funding Act relating to the need for accurate disclosure of political donations, the ban on property developers making donations and the applicable caps on political donations.

Mr Thomson told the Commission that, sometime following this meeting, Mr McCloy gave him an envelope containing $10,000 in cash. Mr McCloy agrees that this occurred, and acknowledged that he knew he was making a donation to Mr Owen's campaign. Mr McCloy told the Commission that, "I had 30 companies about seven or eight of those companies regularly make development

applications". As a "close associate" of those property development companies, he was himself, for the purposes of s 96GB of the Election Funding Act, a property developer. However, Mr McCloy claims that he drew the money from a bank account of one of his companies, Acslament Constructions Pty Ltd, which he said was not a property developer. The Commission, however, is satisfied that, although Mr McCloy may have withdrawn the cash from this company's account, it was money under his control. It was a political donation because it was a gift that Mr McCloy made to, or for the benefit of, a candidate and the NSW Liberal Party. It was not disclosed to the Election Funding Authority and exceeded the applicable cap on political donations by individual donors ($5,000 for the benefit of a party and $2,000 for the benefit of a candidate).

The Commission finds that, in about February 2011, Mr McCloy gave Mr Thomson $10,000 in cash as a political donation to fund Mr Owen's 2011 election campaign with the intention of evading Election Funding Act laws relating to the ban on the making of political donations by property developers and the applicable cap on political donations. By not reporting the donation, he intended to evade the disclosure requirements of the Election Funding Act. In accepting the political donation, Mr Thomson intended to evade Election Funding Act laws relating to the ban on accepting political donations from property developers and the applicable cap on political donations. By not ensuring the donation was disclosed, he intended to evade the disclosure requirements of the Election Funding Act.

Mr McCloy told the Commission that he also gave Mr Owen $10,000 for Mr Owen's election campaign. He said he also withdrew this money from the Acslament Constructions account. For the reason given above, the Commission does not accept that this meant the money was not a political donation from Mr McCloy. Mr Owen told the Commission that he was asked to meet Mr McCloy by either Mr Gallacher or Mr Thomson. The meeting occurred in Hunter Street, Newcastle, in Mr McCloy's car. Both Mr McCloy and Mr Owen agree that Mr McCloy passed to Mr Owen an envelope. The envelope contained $10,000 in cash; all in $100 notes. Mr Owen says that there were no formalities and Mr McCloy simply said the money was "to help your campaign, there's a bit of cash for your, your workers". Mr McCloy cannot recall the conversation but accepts Mr Owen's account as accurate. Mr Owen initially told the Commission that he returned the envelope containing the money to Mr McCloy the next day by leaving it in Mr McCloy's letterbox. He later changed his evidence and admitted that he had kept the money and used it to fund his election campaign.

Mr McCloy told the Commission that he wanted the Liberal candidate to win and he said he "wanted to help the campaign" and "it was my contribution and assistance to his campaign". The Commission is satisfied that the $10,000 cash payment made by Mr McCloy to Mr Owen was a political donation. This is because it was a gift that Mr McCloy made to, or for the benefit of, a candidate and the NSW Liberal Party. It was not disclosed to the Election Funding Authority and exceeded the applicable cap on political donations by individual donors.

The Commission finds that, in early 2011, Mr McCloy gave Mr Owen $10,000 in cash as a political donation to fund Mr Owen's 2011 election campaign. In making the payment, Mr McCloy intended to evade Election Funding Act laws relating to the ban on the making of political donations by property developers and the applicable cap on political donations. By not reporting the donation, he intended to evade the disclosure requirements of the Election Funding Act. In accepting the political donation, Mr Owen intended to evade Election Funding Act laws relating to the ban on accepting political donations from property developers and the applicable cap on political donations. By not ensuring the donation was disclosed, he intended to evade the disclosure requirements of the Election Funding Act.

Mr Grugeon told the Commission that there would have been a number of discussions about financial support for Mr Owen's election campaign, including discussions with Mr Thomson, but could not specifically recall an occasion where he was together with Mr Thomson, Mr McCloy and Mr Williams when they discussed funding Mr Owen's campaign (although he did not deny that such a meeting had occurred). He said that he wanted Mr Owen to win the election but denied telling Mr Thomson that he would contribute $10,000 to Mr Owen's campaign and denied making a payment of $10,000 to Mr Thomson for such a purpose.

Mr Thomson's evidence is that Mr Grugeon attended the February 2011 meeting and agreed to provide $10,000 to help fund Mr Owen's election campaign. Mr McCloy's best recollection was that Mr Grugeon agreed to make the donation. Mr Thomson not only had a recollection of receiving the money from Mr Grugeon, but also gave an account as to how he spent some of the money on ancillary election costs, including paying people to door knock and hold up banners.

Mr Thomson recalled that a couple of days after the meeting someone dropped off to him a yellow internal office envelope from Mr Grugeon. The envelope contained $10,000. Mr Thomson thought the person who gave him the envelope may have been Lynda Jane Harkness, Mr Grugeon's personal assistant. She told the Commission that part of her job involved making deliveries for Mr Grugeon and that the office held a stock of yellow envelopes for archiving purposes. She told the Commission that she had no recollection, however, of delivering such an envelope outside the office or making a delivery to Mr Thomson. The Commission does not consider that Ms Harkness' lack of recollection detracts from the inherent credibility and reliability of Mr Thomson. It is also possible that someone else from Mr Grugeon's office may have delivered the money.

Mr Williams was the other person Mr Thomson nominated as being at the meeting and agreeing to provide $10,000 towards Mr Owen's election campaign. He told the Commission that he could not recall such a meeting but it may have occurred. His evidence does not assist in establishing whether or not Mr Grugeon was at such a meeting.

Mr Grugeon was not an impressive witness. He was evasive, preferring not to commit himself to a particular account but to claim a failure of recollection. Mr Grugeon's credibility is questionable in other matters dealt with in this report. In all the circumstances, the Commission prefers the evidence of Mr Thomson to that of Mr Grugeon.

The Commission is satisfied that the $10,000 Mr Grugeon provided to Mr Thomson was a political donation because it was a gift that Mr Grugeon made to, or for the benefit of, a candidate and the NSW Liberal Party. It was not disclosed to the Election Funding Authority and exceeded the applicable cap on political donations by individual donors.

The Commission finds that, in early 2011, Mr Grugeon gave Mr Thomson $10,000 in cash as a political donation to fund Mr Owen's 2011 election campaign. In making the payment, Mr Grugeon intended to evade Election Funding Act laws relating to the ban on the making of political donations by property developers and the applicable cap on political donations. By not reporting the donation, he intended to evade the disclosure requirements of the Election Funding Act. In accepting the political donation Mr Thomson intended to evade Election Funding Act laws relating to the ban on accepting political donations from property developers and the applicable cap on political donations. By not ensuring the donation was disclosed, he intended to evade the disclosure requirements of the Election Funding Act.

By these means, Mr Owen's campaign acquired $30,000 in cash. Mr Thomson was able to account for how he used some of the cash. He told the Commission that payments were made to a variety of persons to pay for letterbox drops. A $6,000 payment was made to Mezzanine Media Australia, the details of which are discussed below. In the end, Mr Thomson had a small amount of money left over which he gave to the NSW Liberal Party.

There is insufficient evidence to enable the Commission to determine how all of the $20,000 given to Mr Thomson was spent, or how any of the $10,000 paid by Mr McCloy to Mr Owen was spent. Despite submissions to the contrary, the Commission does not regard this as undermining the primary findings that the money was paid or the purpose for which the money was paid and received.

While Mr Owen eventually admitted to receiving $10,000 in cash from Mr McCloy, he denied knowing about the other two $10,000 payments made to Mr Thomson. In all the circumstances, the Commission is not satisfied that the available evidence is sufficient to warrant a finding of complicity on his part in relation to the two $10,000 cash payments made to Mr Thomson.

Mezzanine Media Australia

Mr Thomson told the Commission that Mr Williams of Buildev offered to contribute $10,000 towards Mr Owen's election campaign but he did not make such a payment. Instead, Mr Williams paid an amount directly to Mezzanine Media Australia to help pay for Mr Owen's media costs for the election campaign.

Mezzanine Media Australia, a small advertising and media

business based in Newcastle, was retained to provide a range of services and printed materials on behalf of Mr Owen's campaign in Newcastle. One of the owners of Mezzanine Media Australia was Shane Burrell.

Mr Burrell gave a statement to Commission investigators and oral evidence. The Commission regards his evidence as accurate and reliable. Mr Thomson also gave evidence in respect of these matters that was consistent with Mr Burrell's evidence.

The services supplied to Mr Owen's election campaign by Mezzanine Media Australia were paid for through three payments: $5,000 from Keith Stronach through Newcastle Yachting Pty Ltd, $6,000 cash paid by Mr Thomson, and $14,190 from Buildev.

Mr Stronach is a prominent Newcastle-based property developer. He told the Commission that Mr Thomson asked him to make a contribution towards Mr Owen's campaign by contributing towards payment of Mezzanine Media Australia for work it had done on Mr Owen's election campaign. Mr Stronach agreed to contribute $5,000. Mr Burrell told the Commission that, following a discussion with Mr Thomson, Mezzanine Media Australia issued an invoice for $5,000 to Mr Stronach.

On 12 January 2011, Mr Stronach's personal assistant sent an email to Mr Thomson asking for the invoice to be made out to Newcastle Yachting. Mr Thomson forwarded this email to Mr Burrell the same day and, later that day, Mezzanine Media Australia sent Mr Stronach's personal assistant an amended invoice addressed to Newcastle Yachting. Before the end of the day, Newcastle Yachting paid $5,000 into the account of Mezzanine Media Australia. It is common ground that the invoice was false and that Mezzanine Media Australia had never provided services to Mr Stronach or Newcastle Yachting.

Mr Thomson admits his role in this matter. Mr Stronach knew that, as a property developer, he was not able to make a political donation. He told the Commission that he asked Mr Thomson if one of his companies, Newcastle Yachting, would be a suitable entity to make the payment; that company imported yachts and was not involved in property development. Mr Stronach claimed that he believed using Newcastle Yachting to make the payment did not contravene the ban on property developers making political donations. He formed this belief because, he says, Mr Thomson did not tell him that he could not use Newcastle Yachting in this way. Mr Stronach's asserted belief is contradicted by the fact that he made the payment directly to Mezzanine Media Australia rather than to Mr Owen's campaign fund and the falsity of the invoice.

The Commission is satisfied that, irrespective of where Mr Stronach sourced the funds, the payment was made by him using funds under his control. Mr Owen was aware that Mr Stronach was intending to make a contribution to his campaign but claimed in his evidence to the Commission that he told Mr Stronach, "I have no problem with you doing that as long as it is legal". At the public inquiry, this conversation was not put to Mr Stronach by Mr Owen. The Commission finds this conversation was a recent invention by Mr Owen and does not accept his evidence that it occurred. The Commission does not accept that Mr Owen only intended to accept a contribution in circumstances where it was permitted by the provisions of the Election Funding Act.

The Commission is satisfied that the $5,000 payment made to Mezzanine Media Australia was a political donation because it was a gift from Mr Stronach made for the benefit of a candidate, Mr Owen. The payment was from a property developer, was not disclosed to the Election Funding Authority, and exceeded the $2,000 cap on political donations by individual donors for the benefit of a candidate.

The Commission finds that services provided by Mezzanine Media Australia for Mr Owen's 2011 election campaign were paid for, in part, by a political donation of $5,000 made by Mr Stronach, a property developer. The payment evaded the Election Funding Act laws relating to the ban on the making of political donations by property developers. The political donation was not disclosed as required by the Election Funding Act. Mr Owen and Mr Thomson were aware that Mr Stronach was a property developer and were aware Mr Stronach paid money towards Mr Owen's election campaign.

On 24 February 2011, Mezzanine Media Australia deposited $6,000 cash into its account. According to Mr Burrell, this was cash paid by Mr Thomson to cover work carried out on Mr Owen's election campaign. This is corroborated by Mr Thomson. Mr Thomson recounted in this context how, from time-to-time, he was holding large amounts of cash that were earmarked for campaign expenses.

On 1 August 2011, Buildev paid Mezzanine Media Australia $14,190. The payment was made on Mr Williams' instructions. The payment was made in respect of an invoice addressed to Mr Williams at Buildev, dated 16 March 2011, for "Marketing Consultancy". Mr Burrell described to the Commission how he discussed with Mr Thomson ways and means whereby Mezzanine Media Australia could get paid for its work.

On 11 March 2011, Mr Thomson sent Mr Burrell a text message "Invoice _12,148 (ex GST) or something random on an open invoice and email it to Darren – darrenwilliams_buildev.com.au. Cheers mate – go for it!". As a result, Mezzanine Media Australia then

invoiced Buildev for $14,190 (that is, $12,900 plus GST). Mr Burrell told the Commission that Mezzanine Media Australia had never carried out any work for Mr Williams or for Buildev. The Commission accepts this evidence. Buildev eventually paid the invoice in August 2011. Mr Williams said he thought this money was going to pay Mr Hodges for his work on Mr Owen's campaign (a matter dealt with below).

The Commission is satisfied that the $14,190 payment made to Mezzanine Media Australia by Buildev was a political donation because it was a gift made for the benefit of a candidate, Mr Owen. It was made by a property developer, was not disclosed to the Election Funding Authority and exceeded the applicable cap on political donations.

Mr Thomson admits his role in respect of these payments organised for Mezzanine Media Australia.

Mr Owen knew about the work done by Mezzanine Media Australia and that it required payment for that work. Mr Thomson described how he and Mr Owen discussed the "ballooning" expenses of Mezzanine Media Australia and the need to look for third parties to pay for some of the expenses so that the campaign would stay under the spending cap. Mr Thomson's evidence was that he would have let Mr Owen know that pressure needed to be applied to Buildev to get it to pay the money owed to Mezzanine Media Australia. Although Mezzanine Media Australia issued its invoice to Buildev on 16 March 2011, there was a substantial delay in receiving payment. Mr Thomson took this up with Mr Williams on a number of occasions but, when payment was not forthcoming for Mezzanine Media Australia, he sought Mr Owen's intervention. Mr Thomson's evidence was that Mr Owen was aware that Mezzanine Media Australia had invoiced Buildev for work it had done on the election campaign.

On 28 July 2011, Mr Thomson sent an SMS text message to Mr Owen, as follows: "Mate. Can you call DW about the Mezz and aust Decal situation. I am getting abusive calls and he won't respond to any of my calls, texts etc. I need you to lean on him – its [sic] been promised for months". The reference to "aust Decal" is to Australian Decal Sales and Manufacturing Co, another company that had done work for Mr Owen's election campaign and billed Buildev for its work. That matter is dealt with later in this chapter. The reference to "DW" in Mr Thomson's text message is a reference to Mr Williams. In that sense, it shows that each of Mr Thomson and Mr Owen had a clear understanding that Mr Williams was involved in funding these transactions. It also shows that Mr Owen's relationship with Mr Williams and Buildev was sufficiently well established by this time that he was the party selected to intervene on behalf of those who were expecting money. That Mr Owen was willing to intervene is demonstrated by his response to Mr Thomson's text, sent later that day, saying, "Will do". Telephone records show that, within about six minutes after sending this message, Mr Owen telephoned Mr Williams. Buildev paid the invoice within a few days.

The Commission finds that the services provided by Mezzanine Media Australia for Mr Owen's 2011 election campaign were paid for, in part, by a political donation of $14,190 organised by Mr Williams on behalf of Buildev, a property developer. In organising the payment, Mr Williams intended to evade Election Funding Act laws relating to the ban on the making of political donations by property developers and the applicable cap on political donations. By not reporting the donation, he intended to evade the disclosure requirements of the Election Funding Act. Mr Owen and Mr Thomson were aware that Buildev was a property developer and that it had paid money towards Mr Owen's election campaign.

Mr Grant

Mr Grant is a radio personality with training and experience in media and politics. Mr Grant commenced working on Mr Owen's campaign in January 2011. He assisted Mr Owen by providing advice on media relations and related issues. Mr Grant received payment for this work from Mr McCloy, who provided a cheque in the sum of $9,975 through his company, McCloy Administration Pty Ltd, and through Mr Grugeon, who provided a cheque in the sum of $9,900 through his company, Hunter Land Holdings Pty Ltd. Both payments were made pursuant to invoices that falsely represented Mr Grant had done work for the respective companies. A significant issue for determination is whether Mr Gallacher was involved in arranging for Mr McCloy and Mr Grugeon to pay Mr Grant for working on Mr Owen's election campaign.

Mr Gallacher knew Mr Grant. At one stage, they had discussed the possibility of Mr Grant standing as the NSW Liberal Party candidate for Newcastle in the 2011 election. Mr Grant did not pursue a candidacy after meeting Mr Owen. Mr Gallacher acknowledged that he introduced Mr Grant to Mr Owen, that he was privy to discussion about Mr Grant working for Mr Owen, that he agreed with this course, and that he understood that Mr Grant expected to be paid. He described how he did take on some responsibility for arranging for Mr Grant to be paid.

Mr Grant told the Commission that he agreed to work on Mr Owen's election campaign for a period of about two months but told Mr Owen that he needed to be paid about $25,000 for his time. Mr Grant said that Mr Owen responded, "oh well, I'll put it to Gallacher"

and "initially [Mr Owen] took it away I understood he took it to Gallacher and after some time he said Gallacher will sort something out". Mr Grant went on to say that, "I got a call at one point from Hugh Thomson and I raised it with him and he said … Mike's [Mr Gallacher] sorting something out there".

During his evidence at the public inquiry, when Mr Grant was asked why his work agreement had not been reduced to writing, he said that it did not need to be in writing because he trusted those with whom he was dealing: "the potential incoming Police Minister" (that is, Mr Gallacher) and "a pretty fine individual as a candidate" (that is, Mr Owen). In cross-examination, Mr Grant recalled having one discussion with Mr Gallacher in February 2011 about getting paid, in which Mr Gallacher queried, "You're being looked after", which Mr Grant took to mean that "everything's progressing".

Mr Owen did not deny telling Mr Grant that Mr Gallacher would sort something out to ensure that Mr Grant was paid. He told the Commission he recalled speaking to Mr Gallacher on a couple of occasions about Mr Grant working on his election campaign. He said that he "may have" spoken to Mr Gallacher about paying Mr Grant. Mr Owen understood that Mr Thomson and Mr Gallacher were "going to manage the funding for the campaign" and that Mr Thomson spoke to Mr Gallacher frequently. Mr Owen also agreed that the funding of his campaign was essentially the responsibility of his campaign team and the NSW Liberal Party. Mr Owen also understood from Mr Gallacher that the NSW Liberal Party would not pay for Mr Grant to work on Mr Owen's election campaign. At one stage, there was a suggestion that Mr Grant might be employed in a government media role in the event that the NSW Liberal Party won the election but it does not appear that this was pursued. Mr Owen could not recall whether this suggestion was made before or after he told Mr Grant that Mr Gallacher would sort out his payment.

Mr Thomson told the Commission that he had discussions with Mr Owen and Mr Gallacher about paying Mr Grant and that the means by which payment would be made was worked out by Mr Gallacher and Mr Owen. His evidence was that, "[a]s best I can recall it was Mike Gallacher's idea for McCloy and Grugeon to pay Luke Grant to work on Tim Owen's campaign". He went further to say, "I don't believe anyone else, other than Mike Gallacher, would have approached Jeff McCloy and Hilton Grugeon for money. Mike Gallacher knew these men very well".

Mr Gallacher denied it was his idea to arrange for Mr McCloy and Mr Grugeon to pay for Mr Grant's work on Mr Owen's election campaign. In his submissions to the Commission, Mr Gallacher noted that Mr Thomson had been involved in a meeting at Mr McCloy's office (which the Commission has found occurred on 17 February 2011), at which Mr McCloy and Mr Grugeon had each agreed to help fund Mr Owen's election campaign. This, he submitted, showed that Mr Thomson was in a position to directly approach them for money and contradicted Mr Thomson's assertion that only Mr Gallacher was sufficiently familiar with these men to seek such a favour.

Mr Gallacher's submission tends to ignore the detail of Mr Thomson's evidence regarding the meeting of 17 February 2011; namely, that it was arranged by Mr McCloy, not by him. The meeting was held in Mr McCloy's office and, according to Mr Thomson, it was either Mr McCloy or Mr Grugeon who asked him how much money was needed to secure the seat of Newcastle for Mr Owen. Mr Thomson replied, "I don't know. What more can you do?", whereupon each of them committed to providing $10,000. The Commission is satisfied this culminated in the cash payments made by Mr McCloy and Mr Grugeon to Mr Thomson.

The submission also ignores the fact that Mr Gallacher was well known to both Mr McCloy and Mr Grugeon, whereas Mr Thomson was only known to each of them by name and professional reputation in January 2011. A specific request that they fund a member of Mr Owen's campaign staff was more likely to have been met if it came from Mr Gallacher, rather than from a relative stranger. In any event, the Commission accepts that Mr Thomson was a point of contact for fundraising activities, consistent with his role as campaign director. According to Mr McCloy and Mr Grugeon, there were a number of discussions on the subject of funding Mr Owen's campaign with Mr Thomson. That fact does not negate the proposition that Mr Gallacher was instrumental in the arrangement to remunerate Mr Grant, which Mr Thomson put into effect.

Mr McCloy gave evidence that, during the February meeting in Mr McCloy's office, Mr Thomson asked him for $10,000 in cash for the election campaign and a further $10,000 to pay an employee, who Mr McCloy subsequently came to understand was Mr Grant, for working on Mr Owen's election campaign. It will be recalled that Mr McCloy provided two lots of $10,000 cash; one to Mr Thomson and one to Mr Owen. When Mr McCloy gave $10,000 cash to Mr Owen in Mr McCloy's car in Hunter Street, he told Mr Owen the funds were to pay for the workers on the campaign. The Commission finds that this payment was unrelated to the commitment made by Mr McCloy to Mr Thomson on 17 February 2011. None of those funds were used to pay Mr Grant. Mr Thomson's evidence was that the arrangement for paying Mr Grant was an entirely separate

matter from the discussion at the February meeting, and that "the deal [the remuneration of Mr Grant] in my view was one before I was involved. I was merely asked to facilitate it". The Commission accepts Mr Thomson's evidence in this respect. It is consistent with the fact that Mr McCloy's $20,000 was applied to campaign expenses other than the payment of Mr Grant. Mr McCloy's evidence that $10,000 was solicited by Mr Thomson at the February meeting for one particular employee is rejected.

Mr Grugeon told the Commission that he could not recall being approached by Mr Gallacher to support Mr Owen's campaign. This evidence falls short of a rebuttal of the evidence of Mr Thomson and Mr Grant.

On 23 February 2011, Mr Grant sent Mr Thomson an email foreshadowing his wish to be paid. Among other things, he said, "we agreed on 12500 per month for 2 months". Mr Thomson gave evidence about this email that he was "not sure who the 'we agreed' are but I suspect that Mike Gallacher and Tim Owen were involved in that, as Mike Gallacher introduced Luke Grant to me and Tim Owen". Mr Thomson said that, after he received Mr Grant's email, "It is possible I would have telephoned Mike Gallacher". In any event, Mr Thomson responded to Mr Grant by email advising that, "I've got $20K lined up at the moment (2x10K), and they will both be happy to pay in a single instalment. Obviously, I'll leave it to your discretion but something just south of around $10K would be great, $9,986 or something random, and not the same as each other – so it doesn't look obvious". It is clear from the terms of this email that Mr Thomson is referring to "the deal" involving two sources of funds to be paid on two invoices, not the availability of $20,000 in cash.

On 16 March 2011, Mr Thomson sent an email to Mr Grant asking him to "whip up" an invoice for an uneven figure of about $10,000 addressed to "McCloy Administration Pty Limited", a company owned and controlled by Mr McCloy. Mr McCloy admitted that "more than likely" he gave Mr Thomson the name of that company. The next day, Mr Thomson emailed Mr Grant asking him to send a similar invoice addressed to Hunter Land Holdings, one of Mr Grugeon's companies.

Mr Grant did as instructed, and issued two invoices; one to Hunter Land Holdings dated 17 March 2011 for $9,900, and one to McCloy Administration for $9,975. The latter is not dated but was sent by email to Mr McCloy on 17 March 2011. Mr Grant agreed the invoices were false and conceded he had never provided any services of any kind to Mr McCloy, Mr Grugeon or those companies. Both invoices were paid. The $9,975 payment on the McCloy Administration invoice was deposited into Mr Grant's bank account on 21 March 2011. The $9,900 payment on the Hunter Land Holdings invoice was deposited into Mr Grant's bank account on 11 May 2011.

Mr Gallacher's evidence was that he spoke to "someone" at the NSW Liberal Party head office about Mr Grant working for Mr Owen. He recollected the person told him that they would consider the matter. He claimed that, after this inconclusive conversation, he ceased to be involved in arrangements to pay Mr Grant. He told the Commission that, when Mr Grant was later working for Mr Owen, he assumed he was being paid for by the NSW Liberal Party.

The Commission does not accept that Mr Gallacher ceased to be involved or that he assumed that the Liberal Party was paying for Mr Grant. It is inconsistent with Mr Owen's evidence that Mr Gallacher told him the NSW Liberal Party would not pay for Mr Grant. Mr Owen's account is inherently plausible, given that, despite Newcastle having been identified as a target or key seat by Mr Neeham, Mr Thomson had informed the party as early as 15 December 2010 that Newcastle would not be purchasing a key seats package. Mr Owen's campaign staff wished to retain control of the expenditure of its funds. In those circumstances, the Commission is of the view that it is unlikely that Mr Neeham or any member of the Liberal Party responsible for making such expenditure decisions, would favourably consider such a request.

In summary, Mr Gallacher's involvement in securing payment for Mr Grant is consistent with Mr Owen's evidence that Mr Gallacher was, together with Mr Thomson, responsible for the management of the funds applied to his election campaign. Mr Gallacher had an interest in ensuring that Mr Grant was paid. He knew Mr Grant and had been party to the discussion about Mr Grant working for Mr Owen. Mr Thomson understood that Mr Gallacher would organise payment and had used his connections with Mr McCloy and Mr Grugeon to provide for that payment. Mr Grant understood from both Mr Owen and Mr Thomson that Mr Gallacher would arrange for him to be paid. There is insufficient evidence to allow the Commission to conclude that Mr Gallacher was responsible for determining the precise method by which Mr Grant would be paid by Mr McCloy and Mr Grugeon.

In his evidence to the Commission, Mr McCloy admitted Mr Grant had never done any work for him. When asked to explain the payment he said, "clearly it was for the Liberal Party's … campaign", and that he paid it knowing it was a false invoice and "knowing it was a donation". In his evidence, Mr McCloy appeared to maintain that the donation was legal because "Mr Thomson's a lawyer, it's his invoice" and McCloy Administration "just signs cheques, it's not a property developer". Mr McCloy's reasoning is rejected. It was Mr Grant's invoice, not

Mr Thomson's invoice. The Commission is satisfied that Mr McCloy knew the payment was a political donation. He knew that property developers were prohibited from donating. This was the reason he accepted the arrangement involving the false invoice from Mr Grant and directed one of his (non-property development) companies to pay the false invoice.

Mr Grugeon agreed that Hunter Land Holdings was a property development company and that he knew, at the relevant time, that property developers were not permitted to make political donations. He acknowledged that Mr Grant had not provided Hunter Land Holdings with the services claimed in the invoice. He understood that he was paying Mr Grant for work Mr Grant had done for Mr Owen's election campaign. Mr Grugeon claimed that he was relying on Mr Thomson's assurance that the payment was not a donation to an election campaign and that he was told by Mr Thomson that it was "legal". Mr Grugeon did not accept the description of the payment as a gift or donation and claimed that he was "paying for services". He could not explain how the payment was not a donation or gift for the campaign. The Commission does not accept Mr Grugeon's evidence that he did not understand the payment to be a donation to a political campaign. Mr Grugeon paid money on a false invoice. He knew the money was to pay for Mr Grant to work on Mr Owen's election campaign, evidenced by the following:

> *[Counsel Assisting]: And you used your money or your company's money to pay Luke Grant for work he was doing on Tim Owen's campaign, is that what you tell us?*
>
> *[Mr Grugeon]: Yes.*

Mr Thomson and Mr Grant were both open and candid in admitting their role in these events. Mr Owen told the Commission that he became aware towards the end of the campaign that Mr Grugeon "was paying in some way, shape or form" for Mr Grant's services on his election campaign but "to be frank, I left it at that". He told the Commission that he was not aware at the time that Mr McCloy contributed towards paying Mr Grant. That is inconsistent with Mr Thomson's evidence that Mr Owen was involved in the discussions with Mr Gallacher concerning the payment of Mr Grant through Mr Grugeon and Mr McCloy.

In addition, Mr Owen gave evidence that he had spoken to Mr Thomson about the possibility of "donors" paying for Mr Grant. Mr Owen knew during the campaign that Mr McCloy was a major donor who had provided cash towards campaign expenses. From the combination of the evidence of Mr Thomson, Mr Grant and Mr Owen, the Commission finds that Mr Owen was made aware during the campaign of the arrangements for remunerating Mr Grant.

The Commission is satisfied that the payment of $9,975 made to Mr Grant by Mr McCloy through his company, McCloy Administration, and the payment of $9,900 made to Mr Grant by Mr Grugeon through his company, Hunter Land Holdings, were political donations. This is because, in each case, they were a gift made for the benefit of a candidate, Mr Owen. They were not disclosed to the Election Funding Authority.

The Commission finds that Mr Gallacher was responsible for proposing to Mr McCloy and Mr Grugeon an arrangement whereby each of them would contribute to the payment of Mr Grant for his work on Mr Owen's 2011 election campaign and that he did so with the intention that Election Funding Act laws in relation to the prohibition on political donations from property developers and the requirements for the disclosure of political donations to the Election Funding Authority would be evaded.

The Commission finds that Mr Owen, Mr Thomson, Mr Grugeon and Mr McCloy were parties to an arrangement whereby payments totalling $19,875 made to Mr Grant for his work on Mr Owen's 2011 election campaign were falsely attributed to services allegedly provided to companies operated by Mr McCloy and Mr Grugeon. Those involved in this arrangement intended to evade Election Funding Act laws in relation to the prohibition on political donations from property developers and the requirements for the disclosure of political donations to the Election Funding Authority. The payments were also in excess of the caps imposed on individual donors.

Mr Hodges

Mr Hodges worked on Mr Owen's 2011 election campaign. By 2010, he was a relatively experienced political campaigner for the NSW Liberal Party. On 20 December 2010, Mr Hodges met with Mr Thomson and Mr Owen to discuss whether he could make a contribution to Mr Owen's election campaign. Mr Owen and Mr Thomson agreed that Mr Hodges would be an asset. Mr Owen gave evidence that he and Mr Thomson were looking for an assistant campaign manager. He told Mr Thomson, "If you can find a way to get him [Mr Hodges] on let's get him on". Mr Owen added that, "If the Liberal Party was not willing to pay a wage we had to find another way to make that happen". Mr Owen told the Commission he knew that the NSW Liberal Party did not pay for Mr Hodges.

According to Mr Hodges, it was probable that his remuneration was discussed at the first meeting, and the general suggestion was that he was to be paid $10,000 for his work on the campaign.

Mr Hodges was paid over $11,000 for his services

on Mr Owen's election campaign: $3,998.50 by PW Saddington & Sons Pty Ltd and $7,785.80 by Australian Decal Sales and Manufacturing Co.

On 1 February 2011, Mr Owen sent Mr Thomson an email, which read: "Also, Josh [Hodges] had paid Brian about 2.5k out of the money I gave him for the letter box droppers. Would Bill Saddington be happy to start paying him asap and also include that amount?". William Saddington is a business person based in the Hunter area. Mr Owen's email demonstrates that Mr Owen intended that Mr Saddington would contribute towards his election campaign by paying for services provided by Mr Hodges.

Mr Thomson told the Commission that he did not make the initial approach to Mr Saddington asking him to contribute. It is not clear on the evidence who did make the initial approach; however, Mr Thomson was involved in facilitating Mr Saddington's contribution towards payment for Mr Hodges' services.

Mr Hodges told the Commission that Mr Thomson told him to issue an invoice to PW Saddington & Sons to cover part of his costs. On 8 February 2011, Mr Thomson sent an email to Mr Hodges providing him with Mr Saddington's email address and directing him to invoice Mr Saddington for a "Consultancy on Caves Beachside" for a sum "just under $4K (3,997 or similar)". On the same day, Mr Hodges used his business, JMH Consultants Australia, to make up an invoice for "Consultancy advice commercial premises Wyong" for $3,998.50. The invoice was paid by PW Saddington & Sons. Mr Saddington gave evidence that his company did have commercial premises on the Pacific Highway at Wyong, but he also agreed that Mr Hodges had never provided any work in respect of it, and that the description on the invoice was false.

In his evidence to the Commission, Mr Hodges freely agreed that the invoice was false and that he had never carried out any work for Mr Saddington or his company. According to Mr Hodges, the idea to refer to "commercial premises" on the Pacific Highway at Wyong came from Mr Saddington. He told the Commission that he understood at the time that billing PW Saddington & Sons was a way intended to avoid the impact of the election funding laws.

Mr Saddington denied that the payment was a political donation. He claimed that he had retained Mr Hodges as a "consultant" and, as a consultant, Mr Hodges would, among other things, acquire invitations to Liberal Party events for Mr Saddington, and apparently related services. That evidence is not only contradicted by the invoice for which the company paid, but is also clearly contradicted by the evidence of Mr Hodges, who made several admissions against interest, and whose evidence the Commission regards as reliable.

The Commission is satisfied that the payment of $3,998.50 made to Mr Hodges by Mr Saddington through his company, PW Saddington & Sons, was a political donation. This is because it was a gift made for the benefit of a candidate, Mr Owen. It was not disclosed to the Election Funding Authority.

The Commission finds that the services provided by Mr Hodges for Mr Owen's 2011 election campaign were paid for, in part, by a political donation of $3,998.50 made by Mr Saddington of PW Saddington & Sons. The payment was disguised as being for consultancy services provided to that company. The payment had the effect of evading the disclosure requirements of the Election Funding Act. Mr Owen and Mr Thomson were aware that Mr Saddington was contributing to Mr Owen's election campaign expenses by paying Mr Hodges. They did not ensure that the donation was disclosed as required by the Election Funding Act.

Australian Decal Sales and Manufacturing Co

Australian Decal Sales and Manufacturing Co is a small business based in Tuggerah on the Central Coast that prints banners and advertising signs. During the 2011 NSW state election campaign, Australian Decal Sales and Manufacturing Co was contacted by Mr Thomson and Mr Hodges and asked to provide materials for Mr Owen's campaign for the seat of Newcastle. One small job involved attaching decals to the side of Mr Owen's personal motor vehicle advertising his candidacy. The Australian Decal Sales and Manufacturing Co's bill for that work was paid by the NSW Liberal Party. From January 2011, Australian Decal Sales and Manufacturing Co was engaged to carry out some further work by Mr Hodges, including creating corflutes, posters, vehicle decals and stickers of the usual kind seen during an election campaign.

Eric Hanson is a proprietor of Australian Decal Sales and Manufacturing Co. Mr Hanson provided a statement and also gave brief oral evidence at the public inquiry. The Commission accepts his evidence as reliable. Mr Hanson described how he had rendered a bill for his work, but it remained unpaid. He explained how, although the sum was small, it was important to his business. Mr Hanson said Mr Hodges shared his frustration and, around August 2011, Mr Hodges explained to him that he was owed money by Buildev and that he recommended Mr Hanson have Australian Decal Sales and Manufacturing Co invoice Buildev for the whole amount that was owed to each of them.

Mr Hanson did as he was asked and created an invoice for $10,984.60, dated 22 July 2011, addressed to Buildev

Development NSW Pty Ltd. This amount represented $3,198.80, which was owed to Australian Decal Sales and Manufacturing Co for work done on Mr Owen's election campaign, and $7,785.80 owed to Mr Hodges for work he had done for Mr Owen's election campaign. The invoice was paid by Buildev on 10 August 2011.

On 12 August 2011, Mr Hanson received an invoice from JMH Consultants Australia, a business owned and controlled by Mr Hodges. Mr Hodges' invoice was for $7,785.80 and was said to be in respect of "consultancy advice and business plan" in respect of a project on the Pacific Highway at Wyong. On 26 August 2011, Australian Decal Sales and Manufacturing Co paid this money to JMH Consultants Australia. Both invoices were false. Mr Hanson agreed that he had never done any work for Buildev, and Mr Hodges agreed that he had not done any work for Australian Decal Sales and Manufacturing Co.

Mr Williams of Buildev told the Commission that he had a discussion with Mr Thomson about Mr Hodges working on Mr Owen's election campaign and Buildev providing $10,000 to fund Mr Hodges for that work. According to Mr Williams, Mr Thomson told him the payment would not be a political donation because it would be used to pay Mr Hodges' wages for three months. Mr Williams said he agreed to make the payment to help Mr Hodges by ensuring that he got paid for his work on Mr Owen's election campaign but agreed that he knew that, by doing so, he was assisting Mr Owen's election campaign. Mr Williams was attempting to draw some distinction between paying Mr Hodges' wages for working on Mr Owens' campaign and making a financial contribution to that campaign. The Commission rejects such a distinction. The Commission is satisfied that Mr Williams always understood that the money provided by Buildev would be used to help fund Mr Owen's campaign by paying for Mr Hodges' services despite knowing that Buildev, as a property developer, was not permitted to make such a contribution.

The Commission is satisfied that the payment of $10,984.60 that Mr Williams arranged to be made by Buildev to Australian Decal Sales and Manufacturing Co was a political donation. This is because it was a gift made for the benefit of a candidate, Mr Owen, and was intended to be used to help fund his election campaign. It was not disclosed to the Election Funding Authority.

It took until 10 August 2011 before the Australian Decal Sales and Manufacturing Co invoice of 22 July 2011 was paid. On 28 July 2011, Mr Thomson sent the SMS text to Mr Owen (referred to earlier in this chapter in relation to Mezzanine Media Australia), asking Mr Owen to chase up Mr Williams over payment to Mezzanine Media Australia and Australian Decal Sales and Manufacturing Co. This text and Mr Owen's response shows that he was aware that Mr Williams was involved in paying Australian Decal Sales and Manufacturing Co for work on his election campaign.

Mr Owen's evidence was that he knew from the last week of December 2010 that Buildev would contribute towards the cost of the work done by Australian Decal Sales and Manufacturing Co on his election campaign. Mr Owen knew at the time that Buildev was a property developer but told the Commission that, at the time, he did not direct his mind to whether the arrangement was "legal". The Commission does not accept that Mr Owen could have been in any doubt about the legality of the arrangement. He knew that Buildev was a property developer and that, as such, it was prohibited from making political donations. He also knew that the payment was to pay Australian Decal Sales and Manufacturing Co for work that that company had done in relation to his election campaign. The Commission is satisfied that Mr Owen understood that any such payment was a political donation.

The Commission finds that the services provided by Australian Decal Sales and Manufacturing Co for Mr Owen's 2011 election campaign were paid for in August 2011 by a political donation of $3,198.80 organised by Mr Williams on behalf of Buildev, a property developer. By organising the payment, Mr Williams intended to evade Election Funding Act laws relating to the ban on the making of political donations by property developers and the disclosure requirements of the Election Funding Act. Mr Owen and Mr Thomson were aware this political donation had been made by a property developer and participated in this arrangement with the intention of evading the Election Funding Act laws relating to the ban on accepting political donations from property developers. They did not ensure the donation was disclosed as required by the Election Funding Act.

Chapter 28: The FedUp campaign

This chapter examines how a company associated with Mr Tinkler came to provide funding for a third-party anti-NSW Labor Party campaign titled "FedUp", which was conducted in the seat of Newcastle. The campaign was run during the final weeks before the 2011 NSW state election campaign.

The original idea for the campaign came from the advertising agency, Mezzanine Media Australia, which was working on Mr Owen's Newcastle election campaign. According to Mr Burrell, one of the owners of Mezzanine Media Australia, the concept behind the campaign was that people in Newcastle were "fed up" with a lack of progress. Mr Burrell had hoped that the FedUp campaign would be funded by the NSW Liberal Party or by Mr Owen's campaign.

The involvement of the Newcastle Alliance

Mezzanine Media Australia had estimated that the campaign would cost $65,000. Mr Thomson was concerned that the cost of the proposed FedUp campaign could not be met from Mr Owen's campaign funds. On 24 January 2011, Mr Thomson sent an email to Mr Owen and others attaching Mr Owen's campaign budget and advising, "...in the absence of us managing to raise another $50k in the next week, we won't be pursuing the 'Fed-Up' concept mentioned previously". Mr Burrell told the Commission that Mr Thomson then looked for a body independent from Mr Owen's campaign to conduct the campaign and introduced him to Paul Murphy, Rolly De With and Neil Slater of the Newcastle Alliance with a view to the Newcastle Alliance taking responsibility for the FedUp campaign. The Newcastle Alliance is a local business association. At the relevant time, Mr Murphy was its chairman, Mr De With its treasurer and Mr Slater a member.

The Newcastle Alliance is non-political and its objective is the enhancement of the City of Newcastle. Although it is non-political, on 3 March 2011 the board of the Newcastle Alliance decided to instigate and fund a third-party print media campaign during the 2011 election titled "Vote for Real Change". This campaign was not connected with the "FedUp" campaign. Minutes of meetings of the Newcastle Alliance show the proposal to support "Vote for Real Change" was debated and approved. Because the "Vote for Real Change" campaign involved electoral communication expenditure it was necessary for the Newcastle Alliance to register with the Election Funding Authority as a third-party campaigner. That registration was effected in March 2011, and Mr Murphy assumed the role of the official agent of the Newcastle Alliance for the purposes of the Election Funding Act.

There is no evidence that Mr Murphy, Mr De With or Mr Slater told the Newcastle Alliance board or members of their decision to use the Newcastle Alliance to conduct the campaign. There are no records that would suggest that the board of the Newcastle Alliance was alerted to the fact that three of its members were committing the Newcastle Alliance to conducting the FedUp campaign, or obtaining permission to associate the Newcastle Alliance's name with the campaign.

Two key board members, Tracy McKelligott and Nicholas Dan, gave evidence, which the Commission accepts, that they had no idea that the Newcastle Alliance was being committed to such a project, despite some communications to board members from Mr Murphy. For example, on 10 March 2011, Mr Murphy sent an email to Ms McKelligott in which he referred to "radio ads run by another but associated group … not to be booked by us, but using the Alliance booking so we have continuity with things". That appears to be a veiled reference to the FedUp campaign, but the email conceals the extent of the Newcastle Alliance's involvement. On 15 March 2011, Mr Murphy sent an email to Newcastle Alliance members with material that was more explicit about the Newcastle Alliance's role in FedUp, but referred to the work of an

unnamed "sub committee". Ms McKelligott says she did not interpret this reference to mean that the Newcastle Alliance was involved, and only found out about the Newcastle Alliance's involvement much later.

Mr De With and Mr Slater agreed that they were involved in the FedUp campaign. At one stage, Mr Murphy told the Commission that he was not involved in the campaign but this was contradicted by other evidence, including his evidence that he had agreed for his name to appear on FedUp documentation. His name appeared on a FedUp advertisement as the person authorising it and he was nominated as the contact person in a media release for the campaign. When Mr De With was attempting to persuade Mr Williams of Buildev to fund the campaign, he described how Mr Murphy and Mr Slater and he "have agreed that the best third-party vehicle is the Alliance" because "that's the cleanest and Murph will be vocal and the Alliance has credibility". The Commission is satisfied that Mr Murphy was involved in the campaign.

Mr De With understood that the campaign was conducted through the Newcastle Alliance. In his evidence to the Commission, Mr Slater accepted that he, Mr Murphy and Mr De With decided that the Newcastle Alliance would be the best vehicle for running the FedUp campaign. Admix Media Pty Ltd, a business engaged to work on the campaign, and Mezzanine Media Australia both sent bills for their work on the FedUp campaign to the Newcastle Alliance and were paid out of funds from the Newcastle Alliance account.

The Commission is satisfied that the FedUp campaign was conducted by Mr Murphy, Mr De With and Mr Slater using the name of the Newcastle Alliance.

Funding the campaign

The Newcastle Alliance, which had already committed part of its reserves to the Vote for Real Change campaign, could not fund the FedUp campaign as well.

An unincorporated Newcastle business group known as "6.5", of which Mr De With and Mr Slater were members, committed to provide funding of $20,000 for the FedUp campaign, and Mr Williams committed to provide another $50,000.

Mr Williams told the Commission that he knew the Newcastle Alliance was going to run the FedUp campaign and he was asked to contribute $50,000 towards the campaign. He asked Ann Wills, who, at the time, was retained as a political adviser to Buildev, to attend one of the early meetings on the FedUp campaign. Ms Wills told the Commission that Mr Williams asked her to attend the FedUp meeting because "Buildev had been asked to donate and he just wanted me to go to find out what they are doing".

Despite Buildev's involvement, when it came time for the $50,000 to be paid, it was not paid by Buildev. Mr Palmer told the Commission that he was told by Mr Williams that, "I need a cheque for $50,000 made out to the Newcastle Alliance" and that "it was to do with the … Newcastle election". Mr Palmer said that Mr Williams told him that the money should not come from "a normal company account" but from one that was "not very public". He understood this indicated a desire on the part of Mr Williams to keep secret the actual source of the funds.

Although Mr Williams' interest was through Buildev, the payment was arranged through Serene Lodge Racing Pty Ltd, a company owned by Mr Tinkler's father. The money was drawn on the account of Serene Lodge Racing and paid to the Newcastle Alliance on 24 March 2011. As Serene Lodge Racing did not have funds of its own, Mr Palmer transferred the money into it from elsewhere in the Tinkler Group. Mr Palmer agreed that this was all done to keep the actual source of the funds secret. Later, when Mr Palmer was asked by the payroll manager to account for the payment, he explained that the $50,000 was paid to the Newcastle Alliance for a "consulting fee".

Mr Williams and Buildev had Mr Tinkler's permission to commit these funds. The initial contact with Mr Tinkler was made by Mr Sharpe. Mr Sharpe said that he was "approached initially … by Darren … to ask Nathan … whether he'd support this Hunter Alliance" and "my understanding of the Alliance were [sic] they were going to run an anti-Labor campaign". As a result of this, on 8 March 2011, Mr Sharpe sent an SMS text message to Mr Tinkler: "Hi mate we spoke before about helping libs. There is a media campaign going to be done anti labour need commitment $50K tv newspaper run by neil slatter [sic] and Paul Murphy. Are you ok to buy $50K worth of carpet? Another Willie deal!".

The reference to "libs" in the text message is a reference to the NSW Liberal Party. The reference to buying "$50K worth of carpet" is an oblique reference to Mr Murphy – he was the proprietor of a prominent Newcastle carpet retailer. The intention was not to purchase carpet. The reference to "$50K" is a reference to the $50,000 payment to fund the FedUp campaign. "Willie" is a nickname for Mr Williams. The SMS text message demonstrates that Mr Sharpe had previously spoken to Mr Tinkler about helping the NSW Liberal Party. It also demonstrates that Mr Williams wanted to contribute $50,000 to the FedUp campaign. It further demonstrates that Mr Sharpe and Mr Tinkler knew that Mr Slater and Mr Murphy were behind the campaign.

While there is no direct evidence of Mr Tinkler's response to Mr Sharpe's request, the Commission infers from the events that followed that he agreed to make the payment, including the fact that the $50,000 was ultimately paid with Mr Tinkler's money.

The Commission is satisfied that the $50,000 was a political donation because it was a gift intended to be used to enable an entity or person to incur electoral expenditure, being expenditure for the purpose of influencing, directly or indirectly, the voting at an election. The political donation was not disclosed to the Election Funding Authority by Buildev, Serene Lodge Racing or Mr Tinkler. The $50,000 payment was made in March 2011. As of 1 January 2011, caps had been placed on the amounts that could be donated. The $50,000 political donation exceeded the applicable $2,000 cap on political donations made for the benefit of a third-party campaigner.

Mr Tinkler and Buildev were prohibited donors. It was submitted by Mr Tinkler that, "He did not know of the FedUp campaign when he made the donation to Newcastle Alliance". It might be correct to say that Mr Tinkler did not know the campaign was named "FedUp" but he knew that it was a political campaign, anti-Jodi McKay, anti-Labor and pro-Liberal. When Mr Sharpe first asked Mr Tinkler to fund the campaign, he referred to a previous conversation that they had "about helping the Libs". Mr Tinkler provided the money with the intention it be used to unseat Ms McKay. On 11 March 2011, Mr Williams followed up on the request for money and he asked Mr Tinkler "You want her gone don't you?". To which Mr Tinkler responded, "yeah, whatever it takes". At the Commission's public inquiry, Mr Tinkler was asked about the funds that he contributed to the FedUp campaign:

> *[Counsel Assisting]: Well, just to set the facts straight, in fact in the election Jodi McKay ran a very close second, didn't she?*
>
> *[Mr Tinkler]: She did.*
>
> *[Q]: And it could be for example the campaign that you were funding through the Newcastle Alliance that made the difference, don't you agree?*
>
> *[A]: I hope so.*

The Commission finds that a third-party campaign known as "FedUp" was conducted by Mr De With, Mr Slater and Mr Murphy using the name of a local business association, the Newcastle Alliance. The purpose of the campaign was to assist in defeating the sitting member for the seat of Newcastle, Ms McKay, in the 2011 NSW state election. In March 2011, a payment of $50,000 was arranged by Mr Williams of Buildev and authorised by Mr Tinkler to fund the campaign. The payment was ostensibly made by Serene Lodge Racing but was in fact money from Mr Tinkler and was made for Buildev, a property developer. The $50,000 payment was a political donation and was in excess of the $2,000 cap on political donations made for the benefit of a third-party campaigner. The political donation was not disclosed to the Election Funding Authority by Buildev, Serene Lodge Racing or Mr Tinkler.

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Chapter 29: The seat of Charlestown

This chapter examines the circumstances in which the NSW Liberal Party candidate for the seat of Charlestown, Andrew Cornwell, received a $10,000 cash payment from Mr McCloy, a property developer. This chapter also examines the circumstances in which Andrew Cornwell came to receive $10,120 from Mr Grugeon, another property developer.

The NSW Liberal Party selected Andrew Cornwell as its 2011 NSW election candidate for the seat of Charlestown. Andrew Cornwell was a local veterinary surgeon.

Mr McCloy and the $10,000

Mr McCloy told the Commission that he wanted to assist Andrew Cornwell to become the new member of Parliament for Charlestown. He described how, while taking out money for himself for an intended holiday, "I thought oh, Andrew's doing it tough. I'll just make a call, go over and get Tim [sic; him] the 10,000". Mr McCloy explained, "doing it tough" meant "they're on the road, they've got no income coming in, they needed money to … pay for all the dozens of bits and pieces you have when you're running a … political campaign". At this point in time, Mr McCloy and Andrew Cornwell did not know each other. The Commission is satisfied that Mr McCloy intended the money he gave would be used to help fund Andrew Cornwell's election campaign.

In his evidence to the Commission, Andrew Cornwell described how he received a telephone call from Mr McCloy and, about 15 minutes later, was called out to meet Mr McCloy at the front of Andrew Cornwell's veterinary practice. Andrew Cornwell left an animal on his operating table to go out and get into Mr McCloy's car. There, Mr McCloy passed him a sealed envelope and said, "I should be giving this to the Salvation Army". Andrew Cornwell understood that Mr McCloy was handing him cash and that he was receiving a donation from a property developer. He told the Commission that there were few or no other words exchanged and that he was "stunned" and "I just froze".

Despite knowing he was not able to accept a political donation from a property developer such as Mr McCloy, Andrew Cornwell took the envelope home. In his evidence to the Commission, he agreed that he could have returned the money to Mr McCloy at a later time but did not do so. He was concerned that he should not handle a donation from a prohibited source so, some time later, he gave the envelope containing the money to his campaign treasurer, Robin Beaven. Andrew Cornwell told the Commission that he told Mr Beaven, "...it was from Jeff McCloy and could he deal with it appropriately, you know, ie lawfully".

Mr Beaven gave evidence, which the Commission accepts, that Andrew Cornwell told him that "a friend of his wanted to make a donation to the campaign but the condition was he must remain anonymous and could I take care of it". When Mr Beaven was asked whether Andrew Cornwell said anything to indicate that the money was coming from a property developer, he answered, "Yes, I think he did. I … think he told me that it was either a builder or a developer or somebody in the construction industry".

Andrew Cornwell submitted to the Commission that, to the extent there is an inconsistency between his evidence and Mr Beaven's evidence, Mr Beaven "was either mistaken, or was lying to cover up his own misconduct". The Commission rejects that submission. The Commission found Mr Beaven's evidence to be credible. In particular, the Commission does not accept that Andrew Cornwell gave the money to Mr Beaven with instructions that he deal with it "lawfully". Andrew Cornwell knew that there was a prohibition on accepting political donations from property developers such as Mr McCloy. If he did not intend that the money be used in his campaign, then he should have refused to accept it in the first place or, having accepted it, should have returned

it at the earliest opportunity. Instead, he provided it to his campaign treasurer.

On 12 November 2010, Mr Beaven deposited the cash into the account of a company that he owned, Harmony Hill Pty Ltd. He then withdrew the money and deposited it into the Charlestown SEC campaign account as a donation from Harmony Hill. The money was applied towards securing a key seats package for the Charlestown campaign. Harmony Hill declared the donation to the Election Funding Authority as though it was its own donation.

The Commission is satisfied that the $10,000 cash payment that Mr McCloy gave to Andrew Cornwell was a political donation. This is because it was a gift made to, or for the benefit of, a candidate. It was not disclosed to the Election Funding Authority by Mr McCloy and Andrew Cornwell did nothing to ensure it was disclosed.

The Commission finds that, on 6 October 2010, Mr McCloy paid $10,000 in cash to Andrew Cornwell as a political donation for Andrew Cornwell's 2011 election campaign for the seat of Charlestown. By making the donation, Mr McCloy intended to evade Election Funding Act laws relating to the ban on property developers making political donations and the requirement for the disclosure of political donations. By accepting the donation, Andrew Cornwell intended to evade the Election Funding Act requirement relating to the ban on property developers making political donations and the requirement for the accurate disclosure of political donations.

Mr Grugeon and the Rex Newell painting

On 14 February 2011, Samantha Brookes, Andrew Cornwell's wife, deposited $10,120 into her bank account. This money emanated from a company owned by the property developer, Mr Grugeon.

There were two different versions as to how the payment of the $10,120 came about. One version was put forward by Andrew Cornwell, Ms Brookes and Andrew Cornwell's father, Brien Cornwell. The other was given by Mr Grugeon.

In his evidence to the Commission, Andrew Cornwell explained how the payment came about by recounting how, sometime before Christmas 2010, he delivered a number of Christmas presents. These included bottles of wine and Christmas hampers ranging in value from $20 to $100. Andrew Cornwell claimed that, when preparing to leave to make his deliveries, he recognised that he was one present short. He said that, on the spur of the moment, he and his wife decided to include a painting by the artist Rex Newell. The painting had been a gift to Ms Brookes from Andrew Cornwell's parents. They thought that the painting was worth only a few hundred dollars. Ms Brookes supported this account in her evidence to the Commission and added that she had received the painting for her birthday on 14 March 2010.

According to Andrew Cornwell, he made his rounds, delivering the Christmas presents, and arrived finally at Mr Grugeon's office. At this time, Mr Grugeon was someone he barely knew, if at all. When Andrew Cornwell was asked why he would give Mr Grugeon a Christmas present, he agreed that they had not previously exchanged gifts and said, "I was trying to create a better engagement". According to Andrew Cornwell, it was simply a matter of "dumb luck" that the last present he had delivered was the painting. Mr Grugeon was not in his office at the time, so Andrew Cornwell left the painting there without seeing Mr Grugeon. Ms Harkness, Mr Grugeon's personal assistant, told the Commission that she recalled the painting being delivered by Andrew Cornwell and that it was put in Mr Grugeon's office where it remained for a number of months before being donated to a charity.

Andrew Cornwell's evidence is that, later on the day he delivered the painting, he received a telephone call from Mr Grugeon, who thanked him for his generosity but insisted that he must pay for the painting. Andrew Cornwell put Mr Grugeon in touch with his wife, as she was the true owner. According to Ms Brookes, she received a call from an unidentified female, who insisted that she make out an invoice for the painting in the sum of $10,120. On 17 December 2010, she drew up an invoice addressed to Mr Grugeon care of "Hunter Land" for one "Artwork by Rex Newell for $10,120". On 11 January 2011, a cheque was drawn in favour of Ms Brookes on the account of Hunter Land Pty Ltd. In their evidence to the Commission, both Andrew Cornwell and Ms Brookes expressed their surprise that Mr Grugeon made such a generous payment in respect of a painting that they felt was worth only a few hundred dollars. Yet, neither refused the payment.

On 14 February 2011, Ms Brookes deposited the cheque for $10,120 into her account. On 28 February 2011, she transferred the money into an account from which, according to Andrew Cornwell, it was used to pay an outstanding tax bill.

According to Andrew Cornwell's "Disclosure of Political Donation and Electoral Expenditure" for the period, he made self-funding contributions to his campaign of $5,000 on 17 February 2011, $5,000 on 22 February 2011 and $3,000 again on 22 February 2011.

The account given by Andrew Cornwell and Ms Brookes as to how they came to receive $10,120 from Mr Grugeon is inherently improbable. It is unlikely that Andrew Cornwell and Ms Brookes would give away a painting without first making any enquiry as to its true value. The evidence before the Commission suggests that the painting had a retail value in the order of $3,000. The value was readily ascertainable. It is also unlikely that Andrew Cornwell would deliver a Christmas present to someone he barely knew, if at all. It is not credible that Mr Grugeon would then offer to pay such a specific sum as $10,120 for the gift or that Ms Brookes or Andrew Cornwell would accept this amount if they truly believed its value was only a few hundred dollars. Given this was intended as a gift, the acceptance of such a large sum, relative to the value of the painting, lacks credibility.

Mr Newell gave evidence to the Commission that he had donated a painting, *Perrin's Boat Shed*, to help fund Andrew Cornwell's election campaign. Mr Newell explained how this came about. He had been a friend of Brien Cornwell for some years. At Brien Cornwell's request, he had painted a portrait of a former Commodore of the Newcastle Yacht Club. While Mr Newell was at the club delivering the portrait, Brien Cornwell made a further request: "he said that his son was standing [for election] and … he said have you got a painting at home which you could give us to, I thought for a raffle or an auction or something like that". Mr Newell understood that Brien Cornwell wanted him to donate a painting to raise funds for Andrew Cornwell's election campaign. Mr Newell said he provided Brien Cornwell with the *Perrin's Boat Shed* painting in 2010. Mr Newell gave evidence that, within a day or so, he had heard that the painting had been sold.

In their submissions, Andrew Cornwell and Ms Brookes have been critical of the accuracy (although not the honesty) of Mr Newell's evidence. Mr Newell was confused in his recollection of some of the dates. He told the Commission that he was initially asked for the painting when he was delivering a painting of a former Commodore of the yacht club. There was evidence that this painting was delivered as early as March 2009, which is not consistent with Mr Newell's evidence that the request from Brien Cornwell and delivery of the *Perrin's Boat Shed* painting took place in 2010.

Earlier in Mr Newell's evidence, he spoke of delivering the *Perrin's Boat Shed* painting to Brien Cornwell at the yacht club on a Sunday as he "had to deliver another painting to another guy". This evidence is clearly correct. The "other guy" was Michael Webb, a mutual acquaintance of Mr Newell's and Brien Cornwell's. Shortly before submissions were due, Andrew Cornwell and Ms Brookes tendered as evidence a statement by Michael Webb. In this statement, Michael Webb confirmed that he was present receiving a painting from Mr Newell when Mr Newell handed the *Perrin's Boat Shed* painting to Brien Cornwell. Michael Webb confirmed Mr Newell's estimation of when this took place. Mr Newell had said "it was quite cold … definitely 2010". Michael Webb said that the paintings were handed over "during winter in 2010". This seems correct.

However, Michael Webb's account is at odds with Mr Newell's account as to when Mr Newell found out that the painting had been sold. It is apparent that Michael Webb was the person who told Mr Newell about the sale. On Michael Webb's account, he initially received this information from Brien Cornwell, "a number of months after the Meeting [where the paintings were handed over], and possibly as many as 6 or 7 months after the Meeting", rather than the day or so estimated by Mr Newell in his evidence.

In their submissions to the Commission, Andrew Cornwell and Ms Brookes state: "It should be remembered that Newell is 75 years of age. At that age, it is no surprise that the timing of particular events may not be able to be remembered clearly, particularly when those events were relatively insignificant at the time, and occurred over 4 years beforehand". The Commission finds Mr Newell

was an overtly honest witness, irrespective of whether he was confused about some dates. The Commission is also satisfied of the central tenet of Mr Newell's evidence – that the *Perrin's Boat Shed* painting was provided to Brien Cornwell for the purposes of assisting Andrew Cornwell's election campaign.

The Commission is satisfied that the painting was handed over in the winter of 2010, sometime after Ms Brookes' birthday, which fell on 14 March. In addition, Mr Newell's evidence highlights that the painting was handed over to Brien Cornwell for political purposes and the suggestion that it was a birthday present is incorrect.

Mr Grugeon's evidence also contradicts the evidence of Andrew Cornwell and Ms Brookes. According to Mr Grugeon, he had made contact with either Brien Cornwell or Andrew Cornwell to provide financial assistance in circumstances where, as Mr Grugeon understood it, Andrew Cornwell "was having financial needs from having … given up a lot of his practice work to offer himself as a candidate" for the 2011 state election.

Mr Grugeon was aware that, as a property developer, he was prohibited from making a donation to the campaign. In those circumstances, he said, a suggestion was made that Andrew Cornwell or his wife could "sell something" to Mr Grugeon – "In other words dispose of something in exchange for some help for him". Mr Grugeon said, "we agreed that I would buy a painting off him". Mr Grugeon never looked at any painting available for sale. He agreed to pay $10,120. He said "I can't recall" and "I don't know" how the price was calculated or agreed. He did nothing to try to work out a proper value for the painting. Mr Grugeon said this was "because the value to me wasn't as much linked to the painting as to what I could do to help Andrew". Mr Grugeon could not recall having met Andrew Cornwell before this occurred.

The Commission finds that Mr Grugeon's object was to provide a political donation to Andrew Cornwell and that the money was accepted by Andrew Cornwell on that basis. The amount of the payment was similar in size to the cash payment made by Mr Grugeon to Mr Owen's campaign, and Mr Grugeon admitted that he wanted to make the payment as a means of "giving patronage" to Andrew Cornwell. The fact that Andrew Cornwell used the money for private purposes does not matter; Mr Grugeon related the payment to the candidacy, and Andrew Cornwell's use of it is consistent with him receiving a financial benefit during a period in which he was using his own money to fund his campaign.

The Commission is satisfied that the payment of $10,120 made by Mr Grugeon to Ms Brookes was a political donation because it was a gift made for the benefit of Andrew Cornwell as a candidate in the 2011 election. It was not disclosed to the Election Funding Authority.

The Commission finds that Andrew Cornwell, Ms Brookes and Mr Grugeon were parties to an arrangement involving the pretence that a payment of $10,120 made in early 2011 by Mr Grugeon, a property developer, was for a painting. The $10,120 was in fact a political donation made by Mr Grugeon to fund Andrew Cornwell's 2011 NSW state election campaign. In participating in this arrangement, Mr Grugeon intended to evade Election Funding Act laws relating to the ban on the making of donations by property developers and the requirement for disclosure of political donations. In participating in this arrangement, Andrew Cornwell intended to evade Election Funding Act laws relating to the ban on accepting political donations from property developers, and the requirement for accurate disclosure of political donations received. The payment exceeded the applicable cap on political donations.

Chapter 30: The seat of Swansea

This chapter examines the circumstances in which Garry Edwards, the NSW Liberal Party candidate for the seat of Swansea, received a cash payment of about $1,500 from Mr McCloy.

Sometime prior to Christmas 2010, Mr Edwards and Mr McCloy had a meeting. This is not disputed by Mr Edwards or Mr McCloy. Their evidence differs as to who initiated the meeting. Mr McCloy told the Commission that he received a call from Mr Edwards, who was at the Belmont 16 Foot Sailing Club, only five minutes away from Mr McCloy's home. According to Mr McCloy, Mr Edwards said he wanted to see him. Mr McCloy said "come up now". They met and there was a discussion about the forthcoming NSW election. Mr McCloy said he could not recall the substance of the discussion, "but the end result is I put my hand in my wallet and I gave him about $1,500 towards his campaign".

Mr Edwards told the Commission it was Mr McCloy who rang him and asked, "If you're not busy would you like to come and have a chat about your campaign". He also accepted that he received something from Mr McCloy at the meeting, but it was an envelope. Mr Edwards said they talked about local issues and, at the time the envelope was passed, Mr McCloy "indicated to me that it was to go toward some raffles" or "something to kick off your raffles" or "put that toward your raffles", which he thought meant "it could have been a gift voucher to Bunnings for a prize". Mr Edwards was uncertain as to the thickness of the envelope, except to say, "It wasn't very thick at all". Mr Edwards knew Mr McCloy was a property developer but told the Commission he thought that, if Mr McCloy was contributing to a raffle, the contribution would be "a pittance"; although his evidence was that he did nothing to assure himself that whatever was in the envelope was "a pittance".

Mr Edwards told the Commission that he never opened the envelope, and claimed that he never found out what was in it. He told the Commission that "at the first opportunity" he passed the unopened envelope on to Max Newton, who was working on his election campaign. According to Mr Edwards, he was never informed what the envelope contained. As Mr Newton had died, the Commission was unable to take evidence from him.

The Commission accepts Mr McCloy's account as broadly accurate. His evidence constitutes an admission against his interests and is therefore likely to be reliable in this respect. Mr Edwards knew Mr McCloy was a property developer and that, as such, Mr McCloy was prohibited from making a donation and he was prohibited from accepting such a donation. The Commission finds that Mr Edwards' evidence relating to his receipt of the envelope and his ignorance of its contents lacks credibility.

There is other evidence confirming that Mr Edwards knew that he had received money from Mr McCloy for his election campaign. John MacGowan is a senior adviser to the Hon Duncan Gay MLC and had worked for Mr Gallacher between 2008 and May 2014. He had known Mr Edwards since 2008, when he ran a local government election campaign for Mr Edwards. His evidence is that he attended a meeting with Mr Edwards and Mr Edwards' senior electorate officer, Nicholas Jones, at Mr Edwards' office sometime before 9 pm on 12 August 2014. During the meeting, Mr Edwards asked him for advice about Mr Edwards' suspension from the Liberal Party. During their conversation, Mr Edwards told him that he had "received an envelope of cash from McCloy" but that "it was far less than $10,000 that the others had received". Mr MacGowan advised Mr Edwards to report the matter to this Commission. The next day, Mr MacGowan reported the conversation to the acting general counsel of the Department of Premier and Cabinet by way of an email. The email refers to Mr Edwards telling Mr MacGowan that Mr Edwards had received an envelope of cash from Mr McCloy in the lead up to the 2011 state election. Mr MacGowan also created a file note of the conversation.

Mr Edwards agreed that he had a meeting with Mr MacGowan on 12 August 2014, at which Mr Jones was present. His evidence was that he told Mr MacGowan that he had received an envelope from Mr McCloy but he could not recall how that subject came up in conversation and denied that he told Mr MacGowan the envelope contained money. He also denied that Mr MacGowan advised him to report the matter to this Commission.

Mr Jones had known Mr Edwards since about 2006 and had been his senior electorate officer since about October 2012. In his evidence to the Commission, Mr Jones recalled the meeting and that Mr Edwards mentioned that he had received an envelope from Mr McCloy to be used towards a raffle. He denied, however, that Mr Edwards said anything about the envelope containing money or that Mr MacGowan had advised Mr Edwards to report the matter to this Commission.

As pointed out in Mr Edwards' submissions, there is a discrepancy in Mr MacGowan's evidence relating to the date of Mr Edwards' suspension from the NSW Liberal Party. Mr MacGowan told the Commission that there was a discussion at the 12 August 2014 meeting about Mr Edwards' suspension from the Liberal Party. Mr Edwards had not been suspended as at that date. Despite this discrepancy, the Commission accepts Mr MacGowan's evidence as reliable on the core issue; that is, Mr Edwards' awareness that he had received cash from Mr McCloy. Mr MacGowan gave his evidence in a forthright manner and had no apparent motive to fabricate such an admission by Mr Edwards.

The Commission is satisfied that the money Mr McCloy gave to Mr Edwards was a political donation because it was a gift made to, or for the benefit of, a candidate. The political donation was not disclosed to the Election Funding Authority by any person.

The Commission finds that, during the 2011 NSW state election campaign, Mr Edwards received a political donation by way of a cash payment of about $1,500 from Mr McCloy, a property developer. Mr Edwards accepted the donation with the intention of evading the election funding laws relating to the ban on accepting political donations from property developers and the requirements for disclosure of political donations. Mr McCloy knew he was making a political donation and that, as a property developer, he was prohibited from making such a donation.

Chapter 31: The seat of Port Stephens

This chapter examines the circumstances in which Craig Baumann came to receive about $80,000 for his 2007 NSW state election campaign for the seat of Port Stephens and the circumstances in which a political donation of $100,000 was made to the NSW Liberal Party for the 2011 NSW state election campaign.

Mr Baumann was elected as the member for Port Stephens in 2007 and was re-elected in 2011.

The 2007 donations

Mr Baumann is a home builder with two businesses that operate in the Port Stephens area. One business is conducted by a company owned and controlled by Mr Baumann, Mambare Pty Ltd, which trades under the name Valley Homes. On 20 March 2007, Mambare drew a cheque in favour of the Medowie branch of the NSW Liberal Party in the sum of $79,684. In September 2007, Mambare made a declaration to the Election Funding Authority disclosing that it had donated $79,684. The money donated by Mambare was used in Mr Baumann's successful 2007 NSW election campaign.

Mr Baumann admitted to the Commission that the disclosure made by Mambare was false. The evidence establishes that the money was provided by companies associated with Mr McCloy and Mr Grugeon.

Mr Grugeon owned and controlled a company called Hunter Pre-Cast Concrete Pty Ltd. On 13 February 2007, Hunter Pre-Cast Concrete paid Mambare $47,080. Mr Baumann accepted that the purpose of the arrangement, whereby a payment was made to Mambare and then by Mambare to the Medowie branch of the NSW Liberal Party, was to disguise the fact that Mr Grugeon was making a donation to Mr Baumann's election campaign. In his submissions to the Commission, Mr Grugeon admitted that he "donated" money to Mr Baumann's campaign and said that "there is no basis for concluding that [the payment] was anything other than a contribution to the campaign". The bank deposit voucher relating to the deposit into Mambare's bank account records the deposit as "Election – Hunter pre-cast invoice 5170". The Commission did not obtain this invoice.

On 6 March 2007, Mambare issued a tax invoice to McCloy Group Pty Ltd for $32,604 for what was described as "Consultation work on North Lakes Estate". Mr Baumann admitted that the invoice was false. According to Mr McCloy, the purpose behind the payment was "for Mr Baumann to be elected in 2007". Mr McCloy admitted to the Commission that, although he "paid [the money] for [Mr Baumann's] election campaign", he did not disclose it to the Election Funding Authority. Mr Baumann agreed that this payment was a donation for his election campaign and that the invoice was false.

The total of the two payments made by Mr Grugeon and Mr McCloy was $79,684 – precisely the same amount that Mambare paid to the Medowie branch of the NSW Liberal Party. Based on declarations filed with the Election Funding Authority, which made no reference to the receipt of money from Hunter Pre-Cast Concrete and the McCloy Group, the Mambare donations comprised nearly all of the money raised by Mr Baumann during his 2007 election campaign.

In 2007, there was no prohibition on donations being made by property developers; however, there were requirements that political donations be disclosed. Mr Baumann has accepted that he was required by the Election Funding Act to disclose to the Election Funding Authority the donations made by Mr McCloy and Mr Grugeon.

The Commission is satisfied that the monies that Mr Grugeon and Mr McCloy gave Mr Baumann in 2007 were political donations because they were a gift made to, or for the benefit of, a candidate. The political donations were not disclosed to the Election Funding Authority by any person.

The Commission finds that, in 2007, Mr Baumann entered into an arrangement with Mr McCloy and Mr Grugeon to disguise from the Election Funding Authority the fact that companies associated with Mr McCloy and Mr Grugeon had donated $79,684 towards Mr Baumann's 2007 NSW election campaign. As part of this arrangement, a company associated with Mr McCloy made a political donation of $32,604 and a company associated with Mr Grugeon made a political donation of $47,080. These political donations were paid to Mr Baumann's company, Mambare, which, in turn, paid the money to the Medowie branch of the NSW Liberal Party to be used for Mr Baumann's 2007 election campaign. Mr Baumann caused Mambare to lodge a declaration with the Election Funding Authority that falsely claimed that it had donated the money to the NSW Liberal Party. Mr Baumann did so with the intention of evading the election funding laws relating to the accurate disclosure of political donations.

The 2010 donation

Vincent Heufel is Mr Baumann's accountant. Mr Heufel was familiar with the duty of disclosure of donations to the Election Funding Authority, as he was responsible for lodging a disclosure on behalf of Mambare in relation to the 2007 NSW state election, and he lodged a disclosure on his own behalf in relation to the 2011 NSW state election.

On 30 November 2010, Mr Heufel donated $100,000 to the NSW Liberal Party. The $100,000 was paid into a Port Stephens SEC account for use during Mr Baumann's 2011 election campaign.

At the time, Mr Baumann's company, Mambare, was building a house for Mr Heufel. In their evidence to the Commission, Mr Baumann and Mr Heufel accepted that there was an agreement between them whereby Mr Heufel made a donation of $100,000 for Mr Baumann's election campaign and Mr Baumann reduced the amount Mambare charged for building Mr Heufel's house by that amount. Mr Heufel agreed that, in truth, the money he donated was really money that would otherwise have been paid by him to Mambare and the arrangement was intended to make it appear that Mr Heufel was the donor.

The Commission is satisfied that the $100,000 was a political donation because it was a gift made to, or for the benefit of, a candidate. It was a political donation made by Mambare. Mr Heufel, who declared the $100,000 as though it was his donation, made a false declaration to the Election Funding Authority. Mambare did not disclose its donation to the Election Funding Authority.

The Commission finds that, in about November 2010, Mr Baumann entered into an arrangement with Mr Heufel with the intention of evading Election Funding Act laws relating to the truthful disclosure of political donations. Under this arrangement, Mr Heufel made a donation of $100,000 for Mr Baumann's election campaign and Mr Baumann reduced the amount his company, Mambare, charged for building Mr Heufel's house by that amount. This was done so that Mr Heufel could falsely represent that he was responsible for making the political donation, rather than Mr Baumann's company, and so that Mambare could evade disclosing that it had made a political donation for Mr Baumann's 2011 NSW state election campaign.

Chapter 32: The seat of Londonderry

This chapter examines the circumstances in which Mr Bassett, the NSW Liberal Party candidate for the seat of Londonderry, came to be able to purchase a key seats package from the NSW Liberal Party for the 2011 NSW state election. The funds used to purchase this package included a donation of $18,000 from Boardwalk Resources that was channelled through the Free Enterprise Foundation.

Mr Bassett had a long association with the Liberal Party, and for many years had been involved in local government politics in the Hawkesbury City Council. In this capacity, he came to know of Buildev and to meet the people behind it. Buildev had property development interests within the precincts of Hawkesbury City Council and Buildev's fortunes were susceptible to planning decisions made by the council. It was in Buildev's interest to foster a favourable relationship with Hawkesbury councillors, including Mr Bassett. It is clear from the evidence that executives from Buildev, including Mark Regent, made connections with Mr Bassett, and it is clear that in that capacity, executives from Buildev, including Mr Regent and Mr Williams, had contact with Mr Bassett and lobbied him in respect of Buildev's projects.

On 4 July 2008, one particular Buildev entity – Buildev Development (NSW) Pty Ltd – donated $23,500 to the NSW Liberal Party. The donation was permitted at that time. It was credited to the account of the Hawkesbury Local Government Conference (LGC) for the benefit of Mr Bassett's 2008 local government election campaign. The $23,500 was not used, and was allowed to sit in the Hawkesbury LGC bank account for some time.

The state seat of Londonderry overlaps with the Hawkesbury Local Government Area. In 2010, Mr Bassett was preselected as the NSW Liberal Party candidate for the seat of Londonderry. In April or May 2010, the $23,500 in the Hawkesbury LGC account was transferred to the Londonderry SEC account. The purpose of the transfer was to allow the money to be used on the 2011 NSW state election campaign for Londonderry. After adjusting for some expenses and some relatively small contributions to other sources, a balance remained of $18,824.77 in the Londonderry SEC account. On 16 December 2010, Mr McInnes updated his "Target Seat Package Payment Report". This updated the figure for Londonderry with an $18,000 donation made by the Free Enterprise Foundation. This had the effect of increasing the balance to more than $35,000, and this permitted Mr Bassett's campaign to purchase a key seats package for the Londonderry election campaign.

During his evidence to the Commission, Mr Bassett claimed to have very little or no knowledge about how his election campaigns were funded. When asked how he funded his 2011 election campaign he claimed, "I can't exactly answer that". He repeatedly said that he kept himself "at arm's length" from fundraising or money matters, and "I didn't get involved in the money". Whenever he was asked where the money came from he said, "I have no knowledge of where that money came from" and "I don't know where it came from". When the questioning focused on the $23,500, which was donated by Buildev in 2008, Mr Bassett said, "I had no knowledge of those donations", and could not explain how the money arrived in his campaign account. Mr Bassett was asked about his knowledge of the 2010 $18,000 donation that was credited to his account from the Free Enterprise Foundation. Mr Bassett said, "I didn't know anything about this $18,000 until I was made aware of it from this inquiry".

Mr Bassett's evidence is contradicted in several specific respects by that of Mr Regent, who worked for Buildev.

In relation to the 2008 $23,500 donation, Mr Bassett told the Commission that, "I certainly have not made contact with anyone in relation to Buildev about that". Mr Regent told the Commission that, if Buildev made a donation, it would want that fact known by the recipient. He said Buildev would want Mr Bassett in particular "to

know we're supporting him" and Mr Bassett "would have" been told of the $23,500 donation. Although Mr Regent could not recall a specific discussion with Mr Bassett concerning the $23,500, he told the Commission that he assumed they would have discussed it. Mr Regent said that Mr Bassett called him "a few times" to thank him for donations.

There is other evidence that Mr Bassett knew the $23,500 came from Buildev. Mr McInnes was responsible for making the transfer from the Hawkesbury LGC account into the Londonderry SEC account. In his evidence to the Commission, Mr McInnes recalled a conversation with Mr Bassett about the transfer, during which Mr Bassett told him the money came from Buildev. Mr McInnes also recalled that Mr Bassett claimed to have procured the money. The Commission accepts this evidence of Mr Regent and Mr McInnes.

In relation to the $18,000 donation made through the Free Enterprise Foundation, Mr Regent described to the Commission how, in 2010, "Mr Bassett came to my office [at Buildev] and talked about campaign funds in, can't remember the dates and, and asked us for assistance" for the 2011 NSW state election campaign. He said that Mr Bassett "was talking about the difficulty of election funding it's a difficult process" or "how difficult it was". Mr Bassett then asked, "if there was any way we may be able to help which I said we, we can't and then he said do you think you might be able to talk to Darren".

Mr Regent could not recall whether Mr Bassett mentioned an amount of money. Mr Regent said he either spoke to or got a message to Mr Williams about helping Mr Bassett. Mr Regent said Mr Williams responded to Mr Regent, perhaps by SMS text message, "along the lines of Bart's okay". Mr Regent said that, a few days or a week later, Mr Bassett telephoned him and said "can you thank Darren for the support". On 13 December 2010, Mr Williams organised for the $18,000 cheque to be drawn from Boardwalk Resources in favour of the Free Enterprise Foundation. Chapter 26 of this report sets out how the $18,000 ultimately found its way into Mr Bassett's Londonderry SEC account. The Commission finds Mr Bassett solicited this donation from Buildev.

Mr Bassett disputed the evidence of Mr McInnes and Mr Regent. It was submitted that Mr McInnes was "unreliable and mistaken" and that Mr Regent was "unreliable, incorrect and probably deliberately untruthful". The Commission finds Mr McInnes and Mr Regent were generally reliable witnesses. It was notable that both those witnesses (unlike Mr Bassett) readily made admissions against self-interest. Mr Bassett also submitted that the absence of a record of any telephone calls between him and Mr Regent during the period between 17 November 2010 and 17 January 2011 was "a telling and powerful piece of evidence against Mr Regent". This was because the lack of such a record demonstrated that there was no telephone call to Mr Regent from Mr Bassett around the time the Boardwalk Resources cheque was drawn on 13 December 2010 asking Mr Regent to thank Mr Williams for his support. The Commission does not accept that the telephone records, which disclose only those known calls between certain mobile telephones, demonstrate that Mr Regent's evidence – that he received such a telephone call from Mr Bassett – was incorrect.

The Commission is satisfied that the $18,000 was a political donation because it was a gift made to, or for the benefit of, a candidate.

The Commission finds that in 2010, for the purposes of his 2011 NSW state election campaign, Mr Bassett solicited a political donation from Buildev, a property developer. This culminated in the drawing of a cheque, dated 13 December 2010, for $18,000 on the account of Boardwalk Resources, which was payable to the Free Enterprise Foundation. The Free Enterprise Foundation subsequently sent money to the NSW Liberal Party, which included the $18,000. The $18,000

was used towards the purchase of a key seats package for Mr Bassett's 2011 election campaign in the seat of Londonderry. Although the cheque for $18,000 was drawn on the account of Boardwalk Resources, the donation was made for Buildev. Mr Bassett was aware at the time he solicited the political donation that Buildev was a property developer and knew it was not able to make a political donation and that he was not able to accept a political donation from a property developer.

PART 6 – CORRUPT CONDUCT AND S 74A(2) STATEMENTS

Chapter 33: Corrupt conduct

The Commission's principal functions as set out in the *Independent Commission Against Corruption Act 1988* ("the ICAC Act") include the power to make factual findings (see in general s 13(3)(a), s 13(5)(c) and s 74A(1) of the ICAC Act). The Commission is also able to make findings that particular persons have engaged, are engaged or are about to engage in corrupt conduct (see s 13(5)(a) of the ICAC Act) but only if the conduct is serious corrupt conduct (see s 74BA of the ICAC Act). In order for conduct to be categorised as corrupt conduct, it must come within the definition of "corrupt conduct" in s 8 of the ICAC Act and not be excluded by s 9 of the ICAC Act.

During the course of the investigation, reliance was placed on s 8(2) of the ICAC Act as not only affording the Commission with jurisdiction to conduct aspects of the investigation but as a basis for corrupt conduct findings. That section provides that corrupt conduct includes 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 that could involve any of the matters set out in (a) to (y) of that section. Those matters include "election funding offences".

There were numerous instances in this investigation of intentional failures to comply with the requirements of the *Election Funding, Expenditure and Disclosures Act 1981* ("the Election Funding Act") in circumstances where the failures could impact on the exercise of official functions of the then Election Funding Authority of NSW, but where officers of that authority were unaware of any wrongdoing.

As set out in the foreword to this report, until recent litigation in 2014 and 2015, the Commission had operated on the basis that conduct came within the description of corrupt conduct in s 8(2) of the ICAC Act if the relevant conduct could affect the "efficacy" of the exercise of official functions. That is, it was sufficient that conduct could affect the exercise of official functions where the public official exercising the relevant official functions was not aware of, or involved in, any wrongdoing. Following the High Court decision in *ICAC v Cunneen* [2015] HCA 14 it was clear that, without legislative changes, the Commission could not make corrupt conduct findings on this basis.

Changes to the ICAC Act effected by the *Independent Commission Against Corruption Amendment Act 2015* expanded the definition of corrupt conduct by inserting s 8(2A). That amendment, however, did not expand the definition of corrupt conduct in such a way as to enable the Commission to make corrupt conduct findings where persons had acted to evade the requirements of the Election Funding Act where officers of the Election Funding Authority were unaware of any wrongdoing.

In these circumstances, the Commission has accepted the submission of Counsel Assisting in their 18 December 2015 submissions that:

> *...a combination of the decision in* ICAC v Cunneen *and the effect of the (2015 Amendment Act) on the matters investigated in Operation Spicer mean that no findings of corrupt conduct can be made where the only breach relied upon was a breach of the (Election Funding Act).*

In their submissions, Counsel Assisting identified a number of instances where they submitted it was open to the Commission to find that certain payments made to members of Parliament and candidates for election were intended to influence the recipient to exercise his official functions as a member of Parliament in favour of the interests of the giver of the payments. Such conduct would constitute corrupt conduct for the purposes of the ICAC Act. However, for the reasons given in the body of the report, the Commission is not satisfied to the requisite standard that payments examined by the Commission were given or accepted for the purpose of influencing any

recipient to exercise his official functions as a member of Parliament in favour of the interests of the giver of the payments.

Before going further, it is necessary to understand the basis on which corrupt conduct findings are made. The Commission's approach to making findings of corrupt conduct is set out in Appendix 2 to this report.

First, the Commission makes findings of relevant facts on the balance of probabilities. The Commission then determines whether those facts come within the terms of s 8(1), s 8(2) or s 8(2A) of the ICAC Act. If they do, the Commission then considers s 9 and the jurisdictional requirements of s 13(3A) of the ICAC Act. In the case of subsection 9(1)(a) of the ICAC Act, the Commission considers whether, if the facts as found were to be proved on admissible evidence to the appropriate criminal standard of beyond reasonable doubt and accepted by an appropriate tribunal, there would be grounds on which such a tribunal would find the person had committed a particular criminal offence.

The Commission then considers whether, for the purpose of s 74BA of the ICAC Act, the conduct is sufficiently serious to warrant a finding of corrupt conduct.

Joseph Tripodi

In chapter 10 of this report, the Commission made a finding that, sometime shortly before 16 February 2011, Mr Tripodi provided Darren Williams with the confidential 4 February 2011 NSW Treasury report, *Review of Proposed Uses of Mayfield and Intertrade Lands at Newcastle Port*, which he had obtained through his position as a member of Parliament, and did so in order to assist Buildev. The Commission found that, when he provided the Treasury report to Mr Williams, Mr Tripodi was improperly motivated to provide an advantage to Buildev thereby ingratiating himself with the management of Buildev in the hope that he could secure future benefit from Buildev.

This conduct comes within s 8 of the ICAC Act because it is conduct that constitutes or involves the dishonest or partial exercise by Mr Tripodi of his official functions and therefore comes within s 8(1)(b) of the ICAC Act, is conduct that constitutes or involves a breach of public trust and therefore comes within s 8(1)(c) of the ICAC Act, and also comes within s 8(1)(d) of the ICAC Act as it involves the misuse of information acquired by Mr Tripodi in the course of his official functions for the benefit of another.

In considering s 9(1) of the ICAC Act, it is relevant to have regard to the common law offence of misconduct in public office. The elements of this offence have been considered in *R v Quach* (2010) 201 A Crim R 522. Redlich JA (with whom Ashley JA and Hansen AJA agreed) said at 535 that the elements were as follows:

> *1) a public official;*
>
> *2) in the course of or connected to his public office;*
>
> *3) wilfully misconducts himself, by act or omission, for example, by wilfully neglecting or failing to perform his or her duty;*
>
> *4) without reasonable excuse or justification; and*
>
> *5) where such misconduct is serious and meriting criminal punishment having regard to the responsibilities of the office and the officeholder, the importance of the public objects which they serve and the nature and extent of the departure from those objects.*

It is now settled law in NSW that a member of Parliament is a public official to whom the common law offence of misconduct in public office extends (see *Obeid v R* [2015] NSWCCA 309). The offence is made out if the public official is reckless as to whether their conduct was a breach of their duties as a public official or where the public official knows their conduct was such a breach – see *R v Obeid* (No.11) [2016] NSWSC 974.

Mr Tripodi's conduct occurred in the course of, or was connected to, his position as a member of Parliament. The Commission is satisfied that he would not have been in a position to obtain a copy of the confidential NSW Treasury report but for the fact he was a member of Parliament. The Commission is satisfied that Mr Tripodi's action in providing the confidential report to Mr Williams was wilful and there was no reasonable excuse or justification for his action. His conduct was serious and merits criminal punishment having regard to his responsibilities as a member of Parliament, the importance of the public objects that such office serves, and the nature and extent of his departure from those objects.

The Commission is satisfied for the purpose of s 9(1)(a) of the ICAC Act that, if the facts it has found were to be proved on admissible evidence to the criminal standard of beyond reasonable doubt and accepted by an appropriate tribunal, these would be grounds on which such a tribunal would find that Mr Tripodi has committed a common law offence of misconduct in public office.

Accordingly, the Commission is satisfied that the jurisdictional requirements of s 13(3A) of the ICAC Act are satisfied.

The Commission is also satisfied for the purposes of s 74BA of the ICAC Act that this is serious corrupt conduct because Mr Tripodi was betraying his duties and obligations as a member of Parliament to favour Buildev for the purpose of achieving a personal advantage. His conduct as a member of Parliament is likely to seriously impair public confidence in public administration and demonstrates a substantial breach of public trust. The conduct could constitute or involve a serious criminal offence of misconduct in public office.

The Commission finds that Mr Tripodi engaged in serious corrupt conduct by, sometime shortly prior to 16 February 2011, misusing his position as a member of Parliament to improperly provide an advantage to Buildev by providing to Mr Williams of Buildev a copy of the confidential 4 February 2011 NSW Treasury report, *Review of Proposed Uses of Mayfield and Intertrade Lands at Newcastle Port*. Mr Tripodi had obtained this report through his position as a member of Parliament and provided it to Mr Williams to ingratiate himself with the management of Buildev in the hope he could secure future benefit from Buildev.

Chapter 34: Section 74A(2) statements

In making a public report, the Commission is required by s 74A(2) of the ICAC Act to include, in respect of each "affected" person, a statement as to whether or not in all the circumstances the Commission is of the opinion that consideration should be given to the following:

a. obtaining the advice of the Director of Public Prosecutions (DPP) with respect to the prosecution of the person for a specified criminal offence

b. the taking of action against the person for a specified disciplinary offence

c. the taking of action against the person as a public official on specified grounds, with a view to dismissing, dispensing with the services of or otherwise terminating the services of the public official.

Affected persons

An "affected" person is defined in s 74A(3) of the ICAC Act as a person against whom, in the Commission's opinion, substantial allegations have been made in the course of, or in connection with, an investigation.

For the purposes of this chapter, the Commission is satisfied that the following are affected persons:

- Anthony Bandle
- Bart Bassett
- Craig Baumann
- Lee Jay Brinkmeyer
- Samantha Brookes
- Wayne Brown
- Shane Burrell
- Raymond Carter
- Andrew Cornwell
- Brien Cornwell
- Rolly De With
- Nicholas Di Girolamo
- Garry Edwards
- Marie Ficarra
- Michael Gallacher
- Nicholas Gazal
- Nabil Gazal Junior
- Luke Grant
- Hilton Grugeon
- Timothy Gunasinghe
- Eric Hanson
- Christopher Hartcher
- Vincent Heufel
- Joshua Hodges
- Timothy Koelma
- Jeffrey McCloy
- Simon McInnes
- Ian McNamara
- Tony Merhi
- Paul Murphy
- Paul Nicolaou
- Timothy Owen
- Troy Palmer
- Eric Roozendaal
- William Saddington

- David Sharpe
- Neil Slater
- Christopher Spence
- Ekarin Sriwattanaporn
- John Stevens
- Keith Stronach
- Hugh Thomson
- Nathan Tinkler
- Joseph Tripodi
- Timothy Trumbull
- Darren Webber
- Darren Williams
- Ann Wills

Section 74A(2) statements – preliminary issues

This investigation uncovered evidence capable of constituting offences under the Election Funding Act involving a number of people. Relevant offences include breaches of the disclosure requirements, breaches of the prohibition on property developer political donations and breaches of the applicable caps on political donations. The relevant offences are set out in more detail in chapter 3 of this report.

At the time of the relevant conduct, s 111(4) of the Election Funding Act imposed a three-year limitation period on the commencement of proceedings for an offence. That means that any prosecution for any offence under the Election Funding Act arising from this investigation is now statute-barred.

Counsel Assisting identified several instances where agreements were made between persons for the purpose of defeating the impact of the various rules under the Election Funding Act. In each instance, Counsel Assisting accepted that the subsisting offence – that is, the breach of the particular provision of the Election Funding Act – is now statute-barred, but went on to submit that the common law conspiracy entered into by those parties is not affected by the limitation period and could be made the subject of a successful prosecution. It is worth noting in passing that the offence of conspiracy is a serious one and convicted offenders can incur substantial penalties.

The Commission has decided, as a matter of discretion, not to make recommendations that the advice of the DPP be sought in respect of a potential prosecution based on conspiracy. There are two reasons for doing so. The first is that breaches of the Election Funding Act, as it was framed at the time of the offences, were treated as comparatively minor offences. In circumstances where the legislature saw fit to make breaches of the election funding laws minor offences, any conspiracy charge must be characterised as a conspiracy to commit a relatively minor offence. Even if there was a successful prosecution, it is difficult to see how a sentencing court could impose a penalty beyond a fine. The Commission will not recommend that the DPP use valuable resources in relation to matters that the legislature characterised as minor offences.

The other reason relates to the fact that the primary offences are statute-barred. In these circumstances, it may be that a trial court would view a charge of conspiracy as a means of circumventing the limitation period imposed by statute. There is a real prospect that a trial court would stay the proceedings altogether.

For these reasons, the Commission is not of the opinion that consideration should be given to obtaining the advice of the DPP with respect to the prosecution of any person for conspiracy.

Section 87 of the ICAC Act makes it an offence for a person to give evidence at a compulsory examination or a public inquiry that is false or misleading in a material particular, knowing it to be false or misleading, or not believing it to be true. The Commission's public inquiry on this occasion was extensive. The evidence of some witnesses regularly conflicted with the evidence of other witnesses, or with evidence disclosed in documents or other exhibits before the Commission. Human recollection is fallible. Witnesses may perceive the same circumstances differently and witnesses can make honest mistakes. However, the Commission considers that the evidence of some witnesses does not fall into these categories. Throughout this report, the Commission has indicated that it rejects or does not believe evidence given by particular witnesses. This does not always mean that the Commission will make an affirmative statement under s 74A(2) of the ICAC Act in respect of that evidence. The Commission needs to be satisfied that any perceived false or misleading evidence is material to matters under enquiry and that there is sufficient admissible evidence to justify consideration being given to prosecution for giving false or misleading evidence.

Section 74A(2) statements

The Commission is of the opinion that consideration should be given to obtaining the advice of the DPP with respect to the prosecution of the following persons for the following specified criminal offences.

Samantha Brookes

The Commission is of the opinion that consideration should be given to obtaining the advice of the DPP with respect to the prosecution of Ms Brookes for offences under s 87 of the ICAC Act in relation to her public inquiry evidence that:

- she received the Rex Newell painting known as *Perrin's Boat Shed* for her birthday in 2010
- this painting was given to Mr Grugeon as a Christmas gift in return for which Mr Grugeon paid $10,120.

Ms Brookes gave evidence under an s 38 declaration, which means that her evidence is not admissible against her in criminal proceedings other than proceedings for an offence under the ICAC Act. Accordingly, her evidence would be admissible in proceedings for offences under s 87 of the ICAC Act. There is other evidence that would also be admissible against Ms Brookes in such proceedings, including the evidence of Mr Newell, the evidence of Mr Grugeon, the evidence of Michael Webb, and relevant documentary evidence.

Andrew Cornwell

The Commission is of the opinion that consideration should be given to obtaining the advice of the DPP with respect to the prosecution of Andrew Cornwell for offences under s 87 of the ICAC Act in relation to his public inquiry evidence that:

- the painting known as *Perrin's Boat Shed* was given to Mr Grugeon as a Christmas present
- Mr Grugeon subsequently contacted him and insisted on paying for the painting, which resulted in Mr Grugeon paying $10,120.

Andrew Cornwell gave evidence under an s 38 declaration, which means that his evidence is not admissible against him in criminal proceedings other than proceedings for an offence under the ICAC Act. Accordingly, his evidence would be admissible in proceedings for offences under s 87 of the ICAC Act. There is other evidence that would also be admissible against Andrew Cornwell in such proceedings, including the evidence of Mr Newell, the evidence of Mr Grugeon, the evidence of Mr Webb, and relevant documentary evidence.

Timothy Gunasinghe

The Commission is of the opinion that consideration should be given to obtaining the advice of the DPP with respect to the prosecution of Mr Gunasinghe for an offence under s 87 of the ICAC Act in relation to his public inquiry evidence that the cheque made out to the Free Enterprise Foundation was provided following representations by Doug Sneddon that the Free Enterprise Foundation was a lobby group, which lobbied to cut red tape and lobbied on "planning issues, DA issues, all those sort of issues".

Mr Gunasinghe gave evidence under a s 38 declaration and therefore his evidence is not admissible against him in criminal proceedings other than proceedings for an offence under the ICAC Act. Accordingly, Mr Gunasinghe's evidence would be admissible in proceedings for an offence under s 87 of the ICAC Act. There is other evidence that would also be admissible against Mr Gunasinghe in such proceedings, including the evidence of Mr Sneddon, the evidence of Mr Stevens, and associated documentation.

Christopher Hartcher

The Commission is of the opinion that consideration should be given to obtaining the advice of the DPP with respect to the prosecution of Mr Hartcher for an offence of larceny in relation to his dealings with the three bank cheques payable to the NSW Liberal Party totalling $4,000. In this respect, the Commission notes s 116 of the *Crimes Act 1900*, which provides that, "Every larceny, whatever the value of the property stolen, shall be deemed to be of the same nature, and shall be subject to the same incidents in all respects, as grand larceny was before the passing of the Act seventh and eighth George the Fourth, chapter twenty-nine".

Mr Hartcher gave evidence under an s 38 declaration and therefore his evidence is not admissible against him in criminal proceedings other than proceedings for an offence under the ICAC Act. However, there is other evidence that would be admissible, including the evidence of Mr Carter, the evidence of Mr Sriwattanaporn, the evidence of Sebastian Reid, the evidence of Marie Neader, the evidence of Annette Poole, associated bank records, and internal documents of Hartcher Reid.

Timothy Koelma

The Commission is of the opinion that consideration should be given to obtaining the advice of the DPP with respect to the prosecution of Mr Koelma for offences under s 87 of the ICAC Act in relation to his public inquiry evidence that:

- he provided a service to Matthew Lusted of LA Commercial Pty Ltd in return for the payment of $5,000
- he provided a service to Iwan Sunito of Crown Consortium Pty Ltd in return for the payment of $2,200

- he provided advice to Eric Stammer and Scott Johnson in return for the payment of $5,000 by Yeramba Estates Pty Ltd.

Mr Koelma gave evidence under an s 38 declaration, which means that his evidence is not admissible against him in criminal proceedings other than proceedings for an offence under the ICAC Act. Accordingly, his evidence would be admissible in proceedings for offences under s 87 of the ICAC Act. There is other evidence that would also be admissible against Mr Koelma in such proceedings including the evidence of Mr Carter, the evidence of Mr Lusted, the evidence of Mr Sunito, the evidence of Mr Stammer, the evidence of Scott Johnson, the evidence of Bruce Johnson, and associated records.

William Saddington

The Commission is of the opinion that consideration should be given to obtaining the advice of the DPP with respect to the prosecution of Mr Saddington for an offence under s 87 of the ICAC Act in relation to his public inquiry evidence that his payment to Mr Hodges followed a conversation with Mr Hodges in relation to Mr Hodges establishing a consultancy, and he paid Mr Hodges to promote that consultancy.

Mr Saddington gave evidence under an s 38 declaration and therefore his evidence is not admissible against him in criminal proceedings other than proceedings for an offence under the ICAC Act. Accordingly, Mr Saddington's evidence would be admissible in proceedings for an offence under s 87 of the ICAC Act. There is other evidence that would also be admissible against Mr Saddington in such proceedings, including the evidence of Mr Thomson, the evidence of Mr Hodges, and relevant documentary evidence.

Joseph Tripodi

The Commission is of the opinion that consideration should be given to obtaining the advice of the DPP with respect to the prosecution of Mr Tripodi for the common law offence of misconduct in public office in relation to his leaking of the confidential NSW Treasury report, *Review of Proposed Uses of Mayfield and Intertrade Lands at Newcastle Port*, dated 4 February 2011.

Mr Tripodi gave evidence under an s 38 declaration and therefore his evidence is not admissible against him in criminal proceedings other than for an offence under the ICAC Act. There is, however, other admissible evidence in relation to Mr Tripodi's relevant conduct, including the evidence of Mr Williams, the evidence of Ms Wills, and relevant documentary evidence.

The Commission is not of the opinion that consideration should be given to obtaining the advice of the DPP with respect to the prosecution of any of the other "affected" persons for any criminal offence.

Appendix 1: The role of the Commission

The Commission was created in response to community and Parliamentary concerns about corruption which had been revealed in, inter alia, various parts of the public service, causing a consequent downturn in community confidence in the integrity of that service. It is recognised that corruption in the public service not only undermines confidence in the bureaucracy but also has a detrimental effect on the confidence of the community in the processes of democratic government, at least at the level of government in which that corruption occurs. It is also recognised that corruption commonly indicates and promotes inefficiency, produces waste and could lead to loss of revenue.

The Commission's functions are set out in s 13 and s 14 of the ICAC Act. One of the Commission's principal functions is to investigate any allegation or complaint that, or any circumstances which in the Commission's opinion imply that:

i. corrupt conduct (as defined by the ICAC Act), or

ii. conduct liable to allow, encourage or cause the occurrence of corrupt conduct, or

iii. conduct connected with corrupt conduct,

may have occurred, may be occurring or may be about to occur.

The Commission may also investigate conduct that may possibly involve certain criminal offences under the *Parliamentary Electorates and Elections Act 1912*, the *Election Funding, Expenditure and Disclosures Act 1981* or the *Lobbying of Government Officials Act 2011* where such conduct has been referred by the Electoral Commission to the Commission for investigation.

The Commission may report on its investigations and, when appropriate, make recommendations as to any action it believes should be taken or considered.

The Commission may make findings of fact and form opinions based on those facts as to whether any particular person has engaged in corrupt conduct.

The role of the Commission is to act as an agent for changing the situation which has been revealed. Through its work the Commission can prompt the relevant public authority to recognise the need for reform or change, and then assist that public authority (and others with similar vulnerabilities) to bring about the necessary changes or reforms in procedures and systems, and, importantly, promote an ethical culture, an ethos of probity.

The Commission may form and express an opinion as to whether consideration should or should not be given to obtaining the advice of the Director of Public Prosecutions with respect to the prosecution of a person for a specified criminal offence. It may also state whether it is of the opinion that consideration should be given to the taking of action against a person for a specified disciplinary offence or the taking of action against a public official on specified grounds with a view to dismissing, dispensing with the services of, or otherwise terminating the services of the public official.

Appendix 2: Making corrupt conduct findings

Corrupt conduct is defined in s 7 of the ICAC Act as any conduct which falls within the description of corrupt conduct in s 8 of the ICAC Act and which is not excluded by s 9 of the ICAC Act.

Section 8 defines the general nature of corrupt conduct. Subsection 8(1) provides that 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.

Subsection 8(2) specifies conduct, including the 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, in addition, could involve a number of specific offences which are set out in that subsection.

Subsection 8(2A) provides that corrupt conduct is also any conduct of any person (whether or not a public official) that impairs, or that could impair, public confidence in public administration and which could involve any of the following matters:

(a) collusive tendering,

(b) fraud in relation to applications for licences, permits or other authorities under legislation designed to protect health and safety or the environment or designed to facilitate the management and commercial exploitation of resources,

(c) dishonestly obtaining or assisting in obtaining, or dishonestly benefitting from, the payment or application of public funds for private advantage or the disposition of public assets for private advantage,

(d) defrauding the public revenue,

(e) fraudulently obtaining or retaining employment or appointment as a public official.

Subsection 9(1) provides that, despite s 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, or

(d) in the case of conduct of a Minister of the Crown or a Member of a House of Parliament – a substantial breach of an applicable code of conduct.

Section 13(3A) of the ICAC Act provides that the Commission may make a finding that a person has engaged or is engaged in corrupt conduct of a kind described in paragraphs (a), (b), (c), or (d) of s 9(1) only if satisfied that a person has engaged or is engaging in conduct that constitutes or involves an offence or thing of the kind described in that paragraph.

Subsection 9(4) of the ICAC Act provides that, subject to subsection 9(5), the conduct of a Minister of the Crown or a member of a House of Parliament which falls within the description of corrupt conduct in s 8 is not excluded

by s 9 from being corrupt if it is conduct that would cause a reasonable person to believe that it would bring the integrity of the office concerned or of Parliament into serious disrepute.

Subsection 9(5) of the ICAC Act provides that the Commission is not authorised to include in a report a finding or opinion that a specified person has, by engaging in conduct of a kind referred to in subsection 9(4), engaged in corrupt conduct, unless the Commission is satisfied that the conduct constitutes a breach of a law (apart from the ICAC Act) and the Commission identifies that law in the report.

Section 74BA of the ICAC Act provides that the Commission is not authorised to include in a report under s 74 a finding or opinion that any conduct of a specified person is corrupt conduct unless the conduct is serious corrupt conduct.

The Commission adopts the following approach in determining findings of corrupt conduct.

First, the Commission makes findings of relevant facts on the balance of probabilities. The Commission then determines whether those facts come within the terms of subsections 8(1), 8(2) or 8(2A) of the ICAC Act. If they do, the Commission then considers s 9 and the jurisdictional requirement of s 13(3A) and, in the case of a Minister of the Crown or a member of a House of Parliament, the jurisdictional requirements of subsection 9(5). In the case of subsection 9(1)(a) and subsection 9(5) the Commission considers whether, if the facts as found were to be proved on admissible evidence to the criminal standard of beyond reasonable doubt and accepted by an appropriate tribunal, they would be grounds on which such a tribunal would find that the person has committed a particular criminal offence. In the case of subsections 9(1)(b), 9(1)(c) and 9(1)(d) the Commission considers whether, if the facts as found were to be proved on admissible evidence to the requisite standard of on the balance of probabilities and accepted by an appropriate tribunal, they would be grounds on which such a tribunal would find that the person has engaged in conduct that constitutes or involves a thing of the kind described in those sections.

The Commission then considers whether, for the purpose of s 74BA of the ICAC Act, the conduct is sufficiently serious to warrant a finding of corrupt conduct.

A finding of corrupt conduct against an individual is a serious matter. It may affect the individual personally, professionally or in employment, as well as in family and social relationships. In addition, there are limited instances where judicial review will be available. These are generally limited to grounds for prerogative relief based upon jurisdictional error, denial of procedural fairness, failing to take into account a relevant consideration or taking into account an irrelevant consideration and acting in breach of the ordinary principles governing the exercise of discretion. This situation highlights the need to exercise care in making findings of corrupt conduct.

In Australia there are only two standards of proof: one relating to criminal matters, the other to civil matters. Commission investigations, including hearings, are not criminal in their nature. Hearings are neither trials nor committals. Rather, the Commission is similar in standing to a Royal Commission and its investigations and hearings have most of the characteristics associated with a Royal Commission. The standard of proof in Royal Commissions is the civil standard, that is, on the balance of probabilities. This requires only reasonable satisfaction as opposed to satisfaction beyond reasonable doubt, as is required in criminal matters. The civil standard is the standard which has been applied consistently in the Commission when making factual findings. However, because of the seriousness of the findings which may be made, it is important to bear in mind what was said by Dixon J in Briginshaw v Briginshaw (1938) 60 CLR 336 at 362:

> *…reasonable satisfaction is not a state of mind that is attained or established independently of the nature and consequence of the fact or fact to be proved. The seriousness of an allegation made, the inherent unlikelihood of an occurrence of a given description, or the gravity of the consequences flowing from a particular finding are considerations which must affect the answer to the question whether the issue has been proved to the reasonable satisfaction of the tribunal. In such matters 'reasonable satisfaction' should not be produced by inexact proofs, indefinite testimony, or indirect inferences.*

This formulation is, as the High Court pointed out in Neat Holdings Pty Ltd v Karajan Holdings Pty Ltd (1992) 67 ALJR 170 at 171, to be understood:

> *...as merely reflecting a conventional perception that members of our society do not ordinarily engage in fraudulent or criminal conduct and a judicial approach that a court should not lightly make a finding that, on the balance of probabilities, a party to civil litigation has been guilty of such conduct.*

See also Rejfek v McElroy (1965) 112 CLR 517, the *Report of the Royal Commission of inquiry into matters in relation to electoral redistribution, Queensland, 1977* (McGregor J) and *the Report of the Royal Commission into An Attempt to Bribe a Member of the House of Assembly, and Other Matters* (Hon W Carter QC, Tasmania, 1991).

Findings of fact and corrupt conduct set out in this report have been made applying the principles detailed in this Appendix.

I·C·A·C

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