I·C·A·C

INDEPENDENT COMMISSION AGAINST CORRUPTION

NEW SOUTH WALES

INVESTIGATION INTO THE CONDUCT OF THE HON EDWARD OBEID MLC AND OTHERS CONCERNING CIRCULAR QUAY RETAIL LEASE POLICY

ICAC REPORT
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ICAC

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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 the conduct of the Hon Edward Obeid MLC and others concerning the Circular Quay retail lease policy.

Assistant Commissioner, the Hon Anthony Whealy QC, 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 s 78(2) of the *Independent Commission Against Corruption Act 1988*.

Yours sincerely

The Hon Megan Latham
Commissioner

Contents

Summary of investigation and results

This investigation by the NSW Independent Commission Against Corruption ("the Commission") concerned the following allegations that:

- between 1995 and 2011 the Hon Edward Obeid MLC ("Edward Obeid Sr") misused his position as a member of Parliament (MP) to attempt to influence other public officials to exercise their official functions with respect to retail leases at Circular Quay in Sydney without disclosing that he, his family or a related entity had an interest in certain of the leases
- between 2000 and 2011 certain public officials, including the Hon Joseph Tripodi, improperly exercised their official functions with respect to retail leases at Circular Quay for the purpose of benefiting Edward Obeid Sr or his family.

The Commission also conducted a public inquiry held as part of an investigation into other allegations that Edward Obeid Sr misused his position as an MP. These allegations were concerned with whether Edward Obeid Sr misused his position to advance his own personal financial position or that of his family by influencing other public officials to exercise their official functions to favour Direct Health Solutions Pty Ltd (Operation Meeka) and with respect to the review and granting of water licences at Cherrydale Park (Operation Cabot). These allegations are dealt with in a separate report.

Results

Chapter 10 of the report contains three corrupt conduct findings against Edward Obeid Sr, a corrupt conduct finding against Mr Tripodi and a corrupt conduct finding against Steve Dunn who, at the time, was deputy chief executive officer of the Maritime Authority of NSW ("Maritime") and head of its Property Division.

The Commission found that Edward Obeid Sr engaged in corrupt conduct by misusing his position as an MP:

1. in about 2000 to make representations to minister the Hon Carl Scully that Mr Scully should benefit Circular Quay leaseholders by ensuring they were offered new leases with five-year terms and options for renewal for five years at a time when Edward Obeid Sr was influenced in making the representations by the knowledge that Circular Quay leaseholders had donated $50,000 to the Australian Labor Party (ALP) as payment for the carrying out of what they understood to be a promise that their interests as leaseholders would be looked after by the government
2. between 2003 and 2006 by making representations to ministers Michael Costa and the Hon Eric Roozendaal to change government policy to allow for direct negotiations for new leases with existing Circular Quay leaseholders rather than proceed with an open tender process and deliberately failing to disclose to them that his family had interests in Circular Quay leases and would benefit financially from such a change in policy
3. to benefit his family's financial interests by making representations to Mr Tripodi and Mr Dunn to pressure them to change government policy to allow for direct negotiations for new leases with existing Circular Quay leaseholders rather than proceed with an open tender process.

For the purposes of s 8 of the *Independent Commission Against Corruption Act 1988* ("the ICAC Act"), Edward Obeid Sr's conduct in (1) and (3) above could involve the dishonest or partial exercise of his official functions as an MP and therefore come within s 8(1)(b) of the ICAC

Act. Edward Obeid Sr's conduct in (2) and (3) above could constitute or involve a breach of public trust and therefore come within s 8(1)(c) of the ICAC Act. In each case, his conduct could constitute or involve the common law criminal offence of misconduct in public office and therefore come within s 9(1)(a) of the ICAC Act.

The Commission found that Mr Tripodi engaged in corrupt conduct in 2007 by deliberately failing to disclose to his Cabinet colleagues his awareness of the Obeid family's financial interests in Circular Quay leases, knowing that those interests would benefit from Cabinet's endorsement of changes to the *Commercial Lease Policy* by effectively eliminating any material prospect of a public tender process for those leases and instead permitting direct negotiations for their Circular Quay tenancies.

For the purposes of s 8 of the ICAC Act, Mr Tripodi's conduct could constitute or involve the dishonest or partial exercise of his official functions and a breach of public trust and therefore come within s 8(1)(b) and s 8(1)(c) of the ICAC Act. His conduct could constitute or involve the common law criminal offence of misconduct in public office and therefore come within s 9(1)(a) of the ICAC Act.

The Commission found that Mr Dunn engaged in corrupt conduct in 2007 by using his public official position for the purpose of benefiting Edward Obeid Sr and the Obeid family by effectively bringing about a change to the *Commercial Lease Policy* of Maritime to allow for direct negotiations with existing Circular Quay leaseholders, knowing that the Obeid family's financial interests in Circular Quay leases would benefit from the change in policy.

For the purposes of s 8 of the ICAC Act, Mr Dunn's conduct could constitute or involve the dishonest or partial exercise of his official functions and a breach of public trust and therefore come within s 8(1)(b) and s 8(1)(c) of the ICAC Act. His conduct could constitute or involve the common law criminal offence of misconduct in public office and therefore come within s 9(1)(a) of the ICAC Act.

Statements are 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 Edward Obeid Sr for the common law criminal offence of misconduct in public office in relation to his representations to:

- Ministers Costa and Roozendaal to change government policy with respect to Circular Quay leases without disclosing to them that his family had interests in Circular Quay leases and would benefit financially from such a change in policy
- Minister Tripodi to change government policy with respect to Circular Quay leaseholders knowing that such a change would benefit his family's interests in Circular Quay leases.

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 Mr Dunn or Mr Tripodi for any criminal offence. This is because there is insufficient admissible evidence upon which to base a prosecution.

As Mr Dunn is no longer a public official, it is not necessary to consider whether consideration should be given to taking any disciplinary or dismissal action against him.

As identified in chapter 10 of this report, the current parliamentary *Code of Conduct for Members* is "a feeble document" and virtually worthless in addressing the problems identified in this investigation. The Commission has previously made a recommendation to amend the code to deal comprehensively with improper influence by MPs. This recommendation was made in the Commission's October 2013 report, *Reducing the opportunities and incentives for corruption in the state's*

management of coal resources. The Legislative Council Privileges Committee and the Legislative Assembly Privileges and Ethics Committee have established a joint enquiry into this and other recommendations made in that report. In these circumstances, the Commission has not considered it necessary to make any corruption prevention recommendations in this report concerning the code.

The improper influence identified in this investigation arose out of a Circular Quay leasing environment characterised by instability and confusion. Throughout the 1990s, Maritime's leasing arrangements at Circular Quay were both informal and ineffective. Maritime worked to improve its management of these leases, but its attempts to offer its leases via competitive tendering were not adopted and its attempts to develop a commercial leasing policy languished for over eight years. Additional confusion arose from the fact that multiple agencies managed retail leases at Circular Quay and did so in different ways, with an attempt to develop a precinct-wide approach which was ultimately abandoned. Such an environment provided tenants with a strong incentive to lobby ministers given the uncertainty surrounding their leasing arrangements. While the current situation is not greatly improved, a retail strategy is being developed as part of a broader plan for the Circular Quay precinct. The Commission, therefore, does not consider it necessary to make any recommendations concerning retail lease management at Circular Quay.

Recommendation that 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 1: Background

This chapter sets out some background information concerning the investigation conducted by the NSW Independent Commission Against Corruption ("the Commission") and those principally involved.

How the investigation came about

On 21 May 2012, the Commission received a complaint alleging that the Hon Edward Obeid MLC ("Edward Obeid Sr") had used his influence as a member of Parliament (MP) to bring about changes to the policy affecting the Circular Quay leases of the Maritime Authority of NSW ("Maritime")[1] so as to benefit his family's financial interests in certain Circular Quay leases. In particular, it was alleged that the policy had been changed so that, instead of seeking public expressions of interest once existing leases expired, direct negotiations would be held with existing tenants for renewal of their leases for a term of five years with an option for renewal for a further five-year period. It was alleged the policy change financially benefited the Obeid family, which had interests in two of the Circular Quay leases.

The Commission's investigation was initially focused on Edward Obeid Sr's conduct between 2000 and 2011. As the investigation progressed, in the light of certain evidence given by Edward Obeid Sr, the period under investigation was expanded to include the period from 1996. This evidence concerned a donation of $50,000 made to the Australian Labor Party (ALP) in connection with promises said to have been made to the Circular Quay lessees. The Commission investigated whether, in making representations to minister the Hon Carl Scully concerning the Circular Quay leaseholders, Edward Obeid Sr was influenced by the knowledge that the donation had been made as a payment for carrying out what the leaseholders understood to be a promise that their interests as leaseholders would be looked after by the government.

The scope of the investigation was further expanded following the evidence given by Lynne Ashpole, deputy chief of staff to the Hon Joseph Tripodi when he was minister for ports. Ms Ashpole told the Commission that, in about 2006, Mr Tripodi told her that Edward Obeid Sr had interests in one or two Circular Quay leases. This evidence was important as it tended to show that Mr Tripodi knew that Edward Obeid Sr had financial interests in Circular Quay leases at the time that he was exercising his public official duties as a minister to seek Cabinet approval for a change to the *Commercial Lease Policy* affecting Circular Quay that would benefit the Obeid family interests.

Why the Commission investigated

One of the Commission's principal functions, as specified in s 13(1) of the *Independent Commission Against Corruption Act 1988* ("the ICAC Act"), is to investigate any allegation or complaint that, or any circumstances which in the Commission's opinion imply that:

> *(i) corrupt conduct, 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 role of the Commission is explained in more detail in Appendix 1. Appendix 2 sets out the Commission's approach to making corrupt conduct findings.

1 The Waterways Authority replaced the Marine Ministerial Holding Corporation in 2000. It changed its name to Maritime Authority of NSW in 2006 and traded under the name NSW Maritime. For convenience, each of these entities will be referred to in this report as "Maritime".

The matters that came to the Commission's attention were serious and could constitute corrupt conduct within the meaning of the ICAC Act.

In these circumstances, the Commission decided that it was in the public interest to conduct an investigation to establish whether corrupt conduct had occurred, and to ascertain whether there were any corruption prevention issues that needed to be addressed.

Conduct of the investigation

The Commission's investigation involved obtaining information and documents by issuing notices under s 22 of the ICAC Act as well as interviewing and obtaining statements from a number of witnesses. Fourteen compulsory examinations were conducted.

The public inquiry

The Commission reviewed the information that had been gathered during the investigation and the evidence given at the compulsory examinations. After taking into account that material and each of the matters set out in s 31(2) of the ICAC Act, the Commission determined that it was in the public interest to hold a public inquiry. The Commission also took into account that there was cogent evidence that tended to support the allegations.

In determining to conduct a public inquiry, the Commission also took into account evidence it had obtained with respect to other allegations that Edward Obeid Sr had misused his position as an MP to advance his own personal financial position or that of his family by influencing other public officials to exercise their official functions to favour Direct Health Solutions Pty Ltd and with respect to the review and granting of water licences at Cherrydale Park. The Commission decided that, as all the allegations concerned the conduct of Edward Obeid Sr, it was in the public interest to deal with them in one public sitting.

The three public inquiries were conducted between 28 October and 25 November 2013. Assistant Commissioner the Hon Anthony Whealy QC presided at the inquiries. Ian Temby AO QC and Ben Katekar acted as Counsel Assisting the Commission. Evidence was taken from 14 witnesses.

At the conclusion of the public inquiries, Counsel Assisting prepared submissions setting out the evidence and the findings and recommendations the Commission could make based on the evidence. These submissions were provided to all relevant parties and submissions were invited in response. All submissions have been taken into account in preparing the report.

Chapter 2: The Circular Quay leases

Circular Quay is the hub of Sydney Harbour. It is situated in Sydney Cove and is commonly regarded as the founding site for the city of Sydney and, indeed, modern Australia. It is a vibrant and bustling place, with ferries arriving and leaving every few minutes from and to different places in the harbour and surrounding waterways. It is a major transport location, with Circular Quay railway station and a plethora of bus departure points nearby. In the summer months, many thousands of tourists come ashore from the overseas terminal. It is a focal point for tourists, workers and commuters alike, with the central business district, Sydney Opera House, Royal Botanic Gardens and Government House within easy walking distance.

Circular Quay – the early years

For the benefit of the millions of people who regularly pass through or come to Circular Quay, for many years there have been a number of small businesses operating on or near the wharves. These have included, from time-to-time, a pharmacy, a liquor store, souvenir shops, photography shops, newspaper stands and a number of cafes and food outlets, both eat-in and takeaway. The present inquiry is primarily concerned with two of those retail outlets. Shops "W4.1" and "W5.1" are food businesses known as Cafe Sorrentino and Quay Eatery respectively. As these numbers suggest, Cafe Sorrentino is on Jetty 4 and Quay Eatery is on Jetty 5.

During the 1990s and up to late 2002, these two businesses, together with a third, Arc Cafe, on the eastern side of Circular Quay, were owned and operated by Tony Imad and his family's interests.

In September 1993, Juan Antonio Samaranch had announced that the 2000 Summer Olympic Games would be held in Sydney. Several years earlier, in 1988, Sydney had played its part in the bicentennial celebrations. In each of these historic events, Circular Quay played, as might be expected, a highly significant and important part.

Maritime had responsibility for a number of the businesses at Circular Quay, including Cafe Sorrentino and the Quay Eatery. Effectively, it was landlord of those premises. According to Zenon Michniewicz, a former manager of the Property Division at Maritime, the need to refurbish and improve the Circular Quay precinct, both at the time of the bicentennial and, more significantly, prior to the Sydney Olympic Games, threw up an ongoing problem that had troubled Maritime for a number of years. This was the need to regularise the "doubts and ambiguities" that centred on a number of Maritime leases and licences in the Circular Quay precinct. Many were in holdover, the tenant mix was questionable and the rent being paid was considered to be out of touch with commercial expectations.

As Mr Michniewicz put it, the Olympic Games presented a major opportunity to showcase Sydney, and Circular Quay in particular. Circular Quay was to be a prime location for a number of important ceremonies and events. The government determined, on one calculation, to spend up to $40 million in improving the precinct and saw a need to encourage the tenants and occupants of the retail businesses there to spend money on improving fitout and appearance.

This presented "a great opportunity" for Maritime to try to regularise the rather vague and unsatisfactory leasing situation at Circular Quay. Ultimately, a two-step process was adopted. Maritime, with the assistance of the Sydney Harbour Foreshore Authority (SHFA) as its place manager, offered its existing tenants at Circular Quay, most of whom were on monthly tenancies, first opportunity to tender for the various tenancies on the basis that, if successful, they would be given a five-year lease at commercial rental to expire on 31 August 2005. The commercial rental was to be ascertained by a series of valuations and negotiations. As it happened, five of the seven tenancies on the wharves went to existing leaseholders. The second step was to hold an open tender for the remaining tenancies. These tenancies were eventually awarded (again for a five-year term) to new

leaseholders. It was always the intention that, at the end of the five-year lease period, expressions of interest would be sought with a view to a public tender for the various tenancies.

As a result of these arrangements, Mr Imad and his family's interests voluntarily entered into new leases with Maritime for shops W4.1 and W5.1. The term of the lease for shop W4.1 was, as it happened, five years and 28 days and the term for shop W5.1 was five years and eight months. There was a common expiry date of 31 August 2005 (the disparity in tenure occurred because the refurbishment program involved a sequential completion date for each stage of the project; when work was substantially completed on one wharf, reconstruction would then begin on another.) The rental for each shop was $350,000 per annum, an amount that was significantly more than the rental being paid prior to the new arrangements. Significantly, in each case, there was no option for a further term (during the negotiations, Mr Imad and other prospective tenants had sought a term of five years with an option for a further five years but Maritime refused to accept the proposed variation and adhered to its determination to grant a five-year lease only).

Shortly after the new leases were established, Mr Imad, according to Mr Michniewicz, began to re-agitate for better terms. It appears that, on a number of occasions, he complained to Mr Michniewicz about the rent. He also expressed a wish to obtain a longer term for the lease than the five-year period. During these conversations, Mr Michniewicz said that Mr Imad told him that, as he was getting nowhere, he was going to see "Mr Obeid about this matter". Mr Imad was, and had been for many years, a friend of the influential parliamentarian and power broker, Edward Obeid Sr.

It appears that Mr Imad, on behalf of an organisation called the Circular Quay Traders Association (CQTA), made similar representations to the SHFA. The SHFA, presumably at the urging of Mr Imad, wrote to Mr Michniewicz on 26 March 2001. This letter attached a probity advice from Deloitte Touche Tohmatsu dealing with the ability to extend leases by direct negotiations in certain circumstances, and the consequences of so doing from a probity point of view. The letter asked Maritime's Property Division to reconsider the request "to offer 5 year conditional options on the original leases subject to demonstration by the tenants of the cost of fitouts that they claimed to have exceeded their original tender offer by a significant level".

Mr Michniewicz replied to this letter on 30 March 2001. His reply contained the following:

> *In considering your request, I think it is important to recall the unsatisfactory leasing arrangements that existed at Circular Quay for the decade prior to your Authority's calling for Expressions of Interest in 1999. In that ten year period, not only were leases uncommercial but there was the ad hoc granting of additional terms and 'special' deals. Hence, the new leases put in place by your Foreshore Authority on our behalf, have been like a breath of fresh air providing a sound basis for the future management of the precinct with no risk of criticism on either probity or commercial grounds. It is therefore with some concern that I view this CQTA request because it is outside the well managed public tender process that you conducted & seeks to gain a significant commercial advantage without a public competitive process.*
>
> *I note the pressure you are experiencing from the CQTA and indeed this Authority too has received similar requests. I am also aware that one particular trader has made it known that he is seeking a lease extension to enhance the saleability of his tenancy with a view to selling up his business interests.*
>
> *As you would appreciate, a ten year lease is significantly more valuable than a five year lease. Indeed I have received valuation advice that indicates that this benefit at Circular Quay would be in the order of $1M or more per tenancy. In my view, it is totally inappropriate given the strict tender process that was undertaken for a five year lease term, to now grant each lessee the equivalent of a $1M windfall gain. Not only would the government receive none of this enhanced value but it could be criticised because of the lack of transparency in granting the CQTA such favourable treatment.*
>
> *As to the additional costs of the fitouts, this is a minor consideration in the overall scheme of things and I am confident that each lessee recouped well above these extra costs from the additional sales during the Olympic period.*
>
> *In conclusion therefore I am not prepared to agree to the lease extension the CQTA has requested. As the existing five year leases are only in their first year, the appropriate time to review them and to apply the Foreshore Authority's policy for expiring leases would be in the fourth or fifth year of the lease period.*

On 2 April 2001, a copy of this letter was sent by the SHFA to Mr Imad in his capacity as president of the CQTA (this was a loosely structured "organisation" driven, so it seems, principally by Mr Imad).

On 24 April 2001, the issue of public tender process as opposed to direct negotiations was referred by Maritime to the Commission. On 11 May 2001, Grant Poulton, then director of the Commission's Corruption Prevention, Education and Research division, responded in these terms:

> *The Commission expressed the view that, in addition to the reasons advanced by the Authority, it may be the*

case that had a 5x5 option been available at the time of calling for tenders, some of the received tenders may have been for greater amounts. Additional, perhaps higher tenders, might also have been received from parties interested in a ten year, but not interested in a five year, lease.

If the course of action proposed by CQTA were taken those other parties and any others who might emerge in five years time, would be denied the opportunity to tender for the use of this public asset.

Ultimately, the matter is one for the Waterways Authority to determine. However, in the circumstances, and as it is the opinion of the Waterways Authority that there is no compelling public interest to the contrary, the Commission is of the view that the Waterways Authority would encounter difficulty in feeling justified in granting the requested extension to the Circular Quay leases.

On 7 June 2001, Matthew Taylor, then Maritime chief executive officer (CEO), notified Mr Scully of the view that had been expressed by the Commission. In addition, on 27 June 2001, Mr Michniewicz forwarded a copy of the Commission's advice both to the SHFA and to the CQTA. It should be noted that the Commission's advice clearly contemplated that there would be a public tender process at the expiry of the five-year term of the current leases and that this would have been apparent to Mr Imad upon receipt of the advice.

On 23 October 2001, Mr Imad, on his own behalf, wrote to Maritime complaining that he had recently noticed that his new lease for W4.1 was for a term of five years and eight months, rather than the five years originally offered. He queried why this was so. On 17 December 2001, at the request of Maritime, Greg Robinson, the SHFA's CEO, responded by explaining clearly enough the reasons for the apparent discrepancy. The letter said:

It was always envisaged that all leases for the Circular Quay Wharves would be nominally 5 years. There were however a number of important factors, which impacted on the ability of each lease being precisely 5 years. The factors were:

1. *The requirement that all leases shared a common expiry date which was 31 August 2005. This was done to enable a new retail tender to be undertaken in 5 years involving all retailers* [Emphasis added]

Thus it will be seen both from the Commission's advice and, in particular this letter to Mr Imad, that Mr Imad, if he did not know already, could have been in no doubt that on the expiry of the lease in 2005 a new open tender process was to occur. The probabilities are, of course, that Mr Imad well knew this from the time of the commencement of the negotiations in 1999 or, at the latest, when those negotiations were concluded.

This is not without importance because, in all the submissions and representations that were made over the next number of years, there was to appear something of a common refrain. This was that the Circular Quay traders were not aware that a tender process was to be undertaken when the five-year term expired and that there was no document that had ever identified the likelihood of such a process.

In any event, as the evidence of Mr Scully shows, which will be referred to later, it was made perfectly clear prior to the new leases being granted in 2000 that a tender process would be adopted once the five-year term had expired. Indeed, this was a central plank in the deal. The tenants were given first choice in 2000 – rather than having to face an open tender process at that time – and were then given, if that choice were taken up, five years of trade to "brace themselves" for the public tender process that would occur when the leases expired. In fact, Mr Scully said that he not only made this clear to all the tenants, he also made it clear to Edward Obeid Sr who had been making representations on their behalf.

New management and new ownership of Cafe Sorrentino and Quay Eatery

John Abood is Edward Obeid Sr's brother-in-law. Mr Abood was out of work in 2001 and, at the suggestion of Damian Obeid, Edward Obeid Sr's eldest son, he sought and was given work with Mr Imad at Quay Eatery. After some little time, Mr Imad suggested to Mr Abood that he might like to buy the three businesses. These were Quay Eatery and Cafe Sorrentino on the wharves, and the Arc Cafe situated away from the wharves on the eastern side of Circular Quay (the Arc Cafe is not located on Maritime land, consequently, this inquiry is not concerned with it).

Mr Imad indicated to Mr Abood that he was "tired of it all" and, as Edward Obeid Sr was later to say in his evidence, that Mr Imad had been quite sick at the time. Mr Abood was unable, however, to take up Mr Imad's suggestion himself as he did not have the money to do so. Subsequently, he discussed the proposal with Damian Obeid.

After some little time, a decision was made that the three businesses would be acquired by the Obeid family. Despite the evidence of Damian Obeid suggesting to the contrary, there is little doubt that reliable information as to turnover, profitability and expenses was readily available to the Obeid family. After all, Mr Abood had worked there for some time. This information, it may be inferred,

was examined by the Obeid family interests carefully before a decision was made to purchase the businesses. The family had legal representation and also the benefit of the expertise of Dennis Jarbour, a cousin of the Obeid family, who was experienced in rental and related matters. As a family, there is no doubt that the Obeids had a keen eye for business opportunities and were experienced in shrewdly negotiating deals likely to benefit the Obeid family interests. It is inconceivable in this situation that the Obeids were unaware that, at the end of the leases, a public tender process was to take place.

Contracts of sale were entered into in December 2002, under which Circular Quay Restaurants Pty Ltd purchased the three businesses. Completion was scheduled to occur on or before 30 June 2003, although it appears it may not have occurred until later in 2003.

The general nature of the final arrangement was that the Obeid family would provide all the money for the acquisition of the three businesses – Mr Abood would make no capital contribution at all. The amount to be paid to Mr Imad and his family for the three businesses was $2.4 million. Mr Abood would manage the businesses and be entitled to receive 10% of the profits. Despite this arrangement, as it happened, he was in fact paid a wage of $50,000 a year and provided with a car, a telephone and food. He did not take a share of the profits and operated the businesses essentially as an employed manager. When he ended his work there some years later, he received a final payout of $40,000 from the Obeid family.

The transactions underlying these simple acquisitions were not, however, without a level of complexity. Circular Quay Restaurants Pty Ltd was registered on 21 August 2002. Its registered office was at the address of the Obeid family's accountant. A one dollar share was issued and the sole shareholder and director was Mr Abood. A search of Australian Securities and Investments Commission records would have shown, as Mr Abood agreed, that Circular Quay Restaurants Pty Ltd was his company and that no other interest existed. On 21 August 2002, however, Mr Abood had signed "Minutes of the Decision by the Sole Director", which established the Circular Quay Unit Trust. An amount of $10 was notionally contributed to this trust by Mr Abood's family company, and $90 was said to be contributed by the Obeid Family Trust No 2. A commensurate allotment of units in the Circular Quay Unit Trust was allocated, with 90 of the 100 ordinary class units being held by SS Nominees Pty Ltd as trustee for the Obeid Family Trust No 2. Circular Quay Restaurants Pty Ltd became the trustee for the Circular Quay Unit Trust.

The resultant position may be simply stated as, while thereafter Mr Abood held himself out to the world as owning and running Quay Eatery and Cafe Sorrentino, the true ownership was an undisclosed one. Although hidden from view, the true owner was the Obeid family through the trust arrangements. From a practical point of view, Mr Abood was "front of house" and appeared to be the manager of the business. He was, as Damian Obeid put it, "the face of the business". But even a relatively mundane matter such as the collection and banking of the takings was done by the Obeids and not by Mr Abood. In addition, the Obeid accounting facilities were used for all accounting matters. The task of collecting the takings fell, broadly speaking, upon Damian Obeid, in the early years, and was later shared between Damian Obeid and an Obeid employee, Paul Maroon.

Mr Jabour had earlier been engaged by Mr Imad to assist with market review procedures pursuant to the terms of the leases. Thereafter, however, he acted as a real estate consultant for the Obeid family and Mr Abood, tasked to make representations to, and negotiate with, Maritime to achieve, if it were possible, a reduced rent under the new leases. These attempts, however, were unsuccessful. Mr Jabour, of course, was well aware of the Obeid family interests in the Circular Quay businesses.

Sometime later in 2004, at the suggestion of Mr Jabour and with the approval of Damian Obeid, commercial mediator Paul Scanlan was retained to negotiate with the SHFA and Maritime, ostensibly on behalf of three individual tenants in the Circular Quay precinct. These included Circular Quay Restaurants Pty Ltd in connection with its two wharf businesses. Mr Scanlan was not at any stage retained by the CQTA.

Mr Abood continued to operate the premises until February or March 2008, when he was forced through ill health to give up working altogether. To the world at large, however, it was not known that Mr Abood no longer had any involvement. He remained the sole director and shareholder of the company. Thereafter, Damian Obeid took responsibility for the business with the assistance, as has been said, of Mr Maroon. The businesses continued to operate under the Obeid family until the two premises on the wharves were closed and vacated. It appears that this happened in late 2012 and that, by that time, a significant amount of rent remained unpaid.

The Commission finds that, from or shortly after 21 August 2002, Edward Obeid Sr knew of the family business interests in the Quay Eatery, Cafe Sorrentino and Arc Cafe. The purchase price to be paid was, as has been said, $2.4 million. A loan for the purchase money was secured on the family home in Hunters Hill. This property was registered in the name of Edward Obeid Sr's wife, Judith Obeid. The whole of the purchase price came from the Obeid family. Edward Obeid Sr, in any event, agreed that he knew Obeid family money was involved in the acquisitions. In addition, there was evidence from Mr Maroon that, in the period from 2004 to 2012, an

amount of $1,000 per week in cash from the businesses' takings was given as housekeeping to Mrs Obeid. Mr Maroon also suggested that later, in the period from 2008 to 2012, a similar weekly amount was given in cash to Edward Obeid Sr.

It should be noted that in its July 2013 report on Operation Jasper, titled *Investigation into the conduct of Ian Macdonald, Edward Obeid Senior, Moses Obeid and others,* the Commission made findings in chapter 5 that addressed the position of Edward Obeid Sr in relation to family businesses and investments:

> *The Commission is satisfied that, in 2008 and thereafter, Edward Obeid Sr remained in his position as the head of the family unit, which conducted a variety of businesses, and as such made numerous decisions of a business nature. The Commission is satisfied that, in that role, he took the opportunity to initiate business activities on behalf of the family unit and could, and did, exercise a final say in respect of important decisions. In particular, the Commission is satisfied that no important family business decisions would be taken without reference to him and without due deference to his views.*

In chapter 6 of the same report the Commission states:

> *Edward Obeid Sr's precise role in the business affairs of his family is difficult to determine. Edward Obeid Sr, and those members of the Obeid family who testified, generally attempted to diminish or deny his true involvement in and general influence over the family's affairs.*
>
> *The Obeids treat the whole of their operations as a family unit, where – within that unit – the actions of each individual are accepted to have been taken on behalf of the whole family. The consequential gains and losses are, to the degree and in the way described below, shared and borne by the family as a whole.*
>
> …
>
> *The Obeid family has a complex structure of trusts and corporate vehicles through which they conduct their business and financial affairs, but eventually the family's wealth comes back to one principal trust fund, Obeid Family Trust No 1. Each member of the family, including Edward Obeid Sr and his wife, Judith, have their ordinary living expenses paid through the trust, whether by loan or otherwise, and it seems that family members are relatively free, whether by loans or otherwise, to draw upon the same trust for extraordinary expenses.*

These findings, made in July 2013, of course, relate to a period in 2008 and thereafter. The Commission is satisfied, however, that, in a general sense, and without descending to any level of particularity, a similar situation was likely to have existed in the early part of 2002. As has been said, however, Edward Obeid Sr readily conceded that he knew Obeid family money was involved in the acquisition of the Circular Quay businesses and it is clear that he must have known this at an early point of time.

A donation is made

It is necessary to step back a few years to about 1996. As was noted earlier, the scope and purpose of the present inquiry was expanded to include this earlier period in the light of certain evidence given by Edward Obeid Sr himself. This evidence concerned a donation of $50,000 made to the ALP in connection with promises said to have been made to the Circular Quay lessees, including Mr Imad.

In his compulsory examination, Edward Obeid Sr said that promises were made by Mr Scully to the Circular Quay lessees at a dinner at Eliza Blue's restaurant in about 1996 and that, as a result, a $50,000 donation was made by them to the ALP. Edward Obeid Sr had been present at the dinner. He also said that he later complained to Mr Scully that the "promise" had not been satisfied and that it had, in effect, been broken. He also pressed subsequent ministers on the same topic.

The following evidence was given at the public inquiry:

[Counsel Assisting]: *You have recently said that you were at a dinner at Eliza Blue Restaurant in about 1996, Carl Scully was present and so were 50 or so business owners and I suppose people associated with them from the Circular Quay precinct at which Scully gave certain assurances, have I got it right so far?*

[Edward Obeid Sr]: *---Yes. I'm not sure it was '96 but it was after we were elected into Government.*

I understand, I've said about '96, that's as close as you can get?

---Yeah.

Scully was the Minister for Ports at the time?

---Port, Maritime Services it was known at the time, not Waterways.

Okay. And I suppose it was a fundraising dinner?

---It wasn't supposed to be, it was, we didn't, they wanted to have a dinner

for us and Carl [Scully] *to make that commitment to them and it was quite surprising that they donated to the Labor Party $50,000. We didn't know that.*

Raised at the dinner, the [sic] *passed, the hat passed around?*

---Well, I'm not sure how that was done but I knew from the General Secretary that - and the president that that's what they had done.

Okay. So you knew that arising from that dinner there was a $50,000 donation made to the ALP?

---Yes.

And what is the promise that you say the Minister made at that dinner?

---The, that they would be, they would be looked after, their interests would be looked after with new leases for, for their tenancies - - -

Okay?

--- - - - because they had, most of them only had monthly tenancies.

Any more detail than that?

---The detail was made in, in Scully's meetings with Tony Imad where Tony was quite adamant that he had to spend enormous amounts and so did his other shopkeepers and they needed a five plus five option.

But there was no reference to a five by five option at the dinner?

---I don't, I don't recall exactly but they were so happy with the Minister attending and making sure that they would get their leases but I don't recall exact words that were used.

Okay. So, so far as you recollect at the dinner Scully didn't descend to particularity greater than that they as lease holders would be looked after?

---Well they, it would be attend, their needs would be attended to and they'll be very happy.

Okay. Their needs will be attended to and they'll be very happy?

---Something to that effect, yes.

As a result of which they made a $50,000 donation?

---Well they weren't asked, we weren't expecting it, it was a courtesy thing to have a dinner and I think you know they felt they wanted to help the party because they were happy with the new Government.

Sure, I dare say. And all I've put is that he said what we've now gone through and as a result of that a $50,000 donation - - -?

---Yeah.

- - - donation was made. That's fair isn't it?

---He, he didn't know about this but it was done by them to the party.

That may be, Mr Obeid - - -?

- - -?---Yeah, yeah.

- - - but just listen to what I'm putting to you. As a result of what was said by Scully at the dinner a $50,000 donation was made to the ALP, that's fair isn't it?

---That's fair enough.

Yeah, okay. And it's clear isn't it that you continued to make representations to Carl Scully on behalf of Imad and it may be other lease holders down there right through that initial five-year lease period in order to secure more for them?

---Once they gave him that initial lease I was disgusted that they had not fulfilled what they promised them, it was commercially impractical to say to someone come and spend on my property enormous amounts of money but when the five year lease is finished you have to then like everyone else bid for your business.

Yeah, okay?

---I found that unacceptable and as a matter of fact that was the basis of my not, I wouldn't say representation it was, I was having a go at each person that took that portfolio that that's what you have done to these people, you ought to be ashamed, go and change the Retail Leases Act and give more, give more fairness to people that, that rent Government properties.

Okay. So you kept pressing - - -?

---Yes.

- - - Carl Scully to do the right thing by the Circular Quay lessees?

---Exactly, yes.

And later you pressed his ministerial successors?

---Yes.

Right?

---Yes.

Based on this evidence, the Commission finds, first, that a promise or assurance – whatever its precise dimensions – had been made by Mr Scully to the Circular Quay lessees at a dinner. Secondly, although Mr Scully was not aware of it, a consequent donation of $50,000 was made to the ALP with the intention that it should, in effect, "buy" the implementation of the minister's promise. Thirdly, Edward Obeid Sr knew fully of these matters and, armed with that knowledge, he, in his capacity as an MP, pressed Mr Scully, and later others, to keep the promise that had been made. Indeed, as Mr Scully's evidence in his compulsory examination demonstrates, it was in part Edward Obeid Sr's representations that led to the modification of the open tender process to allow Mr Imad and others to secure their leases in 2000 without competition.

It is also clear from Edward Obeid Sr's evidence in his compulsory examination that he knew and appreciated that, once the five-year leases had been granted to Mr Imad, an open tender process was to apply at the expiry of those leases. He knew this prior to his family's investment in the Circular Quay businesses.

In his evidence given at the public inquiry, it is fair to observe that Edward Obeid Sr sought to step back in a number of respects from the very clear admissions made at his compulsory examination. In general terms, the Commission does not regard Edward Obeid Sr as a reliable witness and has concluded, as will appear later, that, in a number of instances, he has given deliberately untruthful evidence. For present purposes, however, it is sufficient to say that Edward Obeid Sr undoubtedly recognised that the evidence he had given in the compulsory examination posed serious problems for him. Consequently, he sought at the later public inquiry to contradict his earlier evidence.

The Commission regards Edward Obeid Sr's version of the events as given by him at his compulsory examination as the more reliable of the two versions. It accepts that the earlier version represents, in general terms, the truth as to the events that occurred during the mid-1990s and early 2000s. It accurately describes Edward Obeid Sr's response in relation to his perception of a breach of promise, a promise for which a substantial donation, carrying conditions, had been paid.

Mr Scully, for his part, could not recall a specific dinner at which any particular promise had been made. He accepted it was possible that he may have attended such a dinner and that he may have given an assurance to Circular Quay tenants. However, despite his inability to recall a specific dinner at which a promise had been made, first, he readily agreed that at all times he had made it quite clear to the tenants, and to Edward Obeid Sr, that the tenants were going to get, subject to the Commission's approval, a first right of refusal for an independently-valued lease at the conclusion of the Circular Quay refurbishment. Secondly, he had always made it clear that any such lease would be for a five-year period only and that, at the end of the lease period, the tenants would have to "brace themselves for a competitive market".

Mr Scully made it clear in his compulsory examination that Edward Obeid Sr's representations prior to 2000 had played a part in persuading him to abandon the full tender process he had originally contemplated. He gave the following evidence:

[Counsel Assisting]: *The question arises, why didn't you, why didn't the Government go to the market via a tender process in 2000?*

[Mr Scully]: *---Eddie Obeid came to me quite early* [in] *the piece and put the case that the concession holders had invested large amounts of their time and effort and money over sustained periods of time and it was not fair that they be thrown to the wolves in an open market tender process. And I, I thought there was some merit in that ... I insisted that it had to be done in a way where the public would still get appropriate value...*

And how was that latter objective achieved?

---I said to Mr Obeid there was no way I was not going to go down an open tender process without ICAC approving the process.

Mr Scully maintained that he had "delivered" on his assurance and that the tenants knew the full situation and were happy with it. The only exception, it seems, related to Mr Imad who, through Edward Obeid Sr, later complained and sought an extension of his leases. This representation by Edward Obeid Sr was graphically described by Mr Scully. It occurred within 18 months or two years after the leases were implemented. The representation occurred, as Mr Scully described it, during an angry encounter in which he bluntly refused Edward Obeid Sr's request made on behalf of Mr Imad. Edward Obeid Sr, in turn, became angry at the rejection of his overtures. The Commission accepts that this incident occurred, generally, as described by Mr Scully.

Mr Scully was unable, however, to recall any other occasion after the five-year leases were signed when Edward Obeid Sr had pressed him on behalf of the other tenants.

Significantly, Mr Scully was adamant that he did not know anything about a $50,000 donation to the ALP at that time. He said he would have been "horrified" if he had known about it and that this would not have been appropriate. Had he known of it, he would have been "extremely uncomfortable".

Finally, Mr Scully said that at no time while he was minister was he ever aware, or made aware, that the Obeid family had interests in any of the businesses at Circular Quay. In particular, Edward Obeid Sr had never disclosed any such interest to him. He said, now that he knew of those interests, he felt "disgusted ... let down". He said that he regarded the situation, as it had now been revealed, as "quasi criminal".

The Commission accepts, in general, the evidence of Mr Scully. Although Mr Scully clearly had a dislike of Edward Obeid Sr, based no doubt on his perception of his own thwarted political ambitions when the Hon Morris Iemma, rather than he, became premier, the Commission does not consider that this dislike has, in any meaningful manner, caused Mr Scully to give other than honest and generally reliable evidence.

Chapter 3: Edward Obeid Sr and Minister Costa

Developments at Circular Quay involving Maritime and Mr Costa

Mr Scully ceased to act as minister for transport in April 2003.His position was taken over by Michael Costa, who held the transport and ports portfolios between April 2003 and August 2005. During this period, Maritime's Property Division, despite renewed representations to consider the granting of extended leases to tenants at Circular Quay, stoutly maintained its robust determination to have an expression of interest (EOI) process followed when the leases came to an end in August 2005.

The initial position of Mr Abood (and hence the Obeid family) can be best seen in a letter of 14 August 2003 that Mr Abood wrote to the SHFA concerning the formal assignment of the Imad leases to Circular Quay Restaurants Pty Ltd. The letter contained the following:

> *It was noted in my recent discussions with you regarding the current state of the precinct that SHFA and the lessor might wish to improve the retail usages and the ambiance of the Circular Quay Precinct.*
>
> *In the time that 'CQR'* [Circular Quay Restaurants] *has been involved in this precinct we feel that 'CQR' has improved the operations of the Arc Kiosk and is enthusiastic about the prospects of improving the ambiance of the Circular Quay take-away precinct in conjunction with SHFA and the lessor.*
>
> *Whilst 'CQR' encloses the lease assignment application 'CQR' herein formally and respectfully requests that the lessor considers granting a new lease to 'CQR' for Shops 4.1 and 5.1 (5 + 5 years) in an effort to make it commercially viable for 'CQR' to commit to revitalising the precinct in conjunction with SHFA and the lessor.*

This letter reinforces, if any reinforcement were necessary, that the Obeid family (and Mr Abood) were fully alive to the fact that the balance of the leases they had acquired was due to expire at the end of the five-year term. It was in that context that this rather mild request for a "new lease" was made. The letter contains none of the more strident claims that were later to emerge in Mr Scanlan's correspondence. In any event, as might be expected, the initial request for a new lease fell on deaf ears and was not fruitful.

A year later, on 2 September 2004, the SHFA as place manager wrote a letter to Mr Abood in these terms:

> *We write to advise that in accordance with your lease agreement for the above premises, your tender at Circular Quay ... will expire on the 31 August 2005.*
>
> *The Sydney Harbour Foreshore Authority (SHFA) on behalf of your Lessor ... would like to make you aware that all the current lease agreements on the Circular Quay wharves will be offered for re-tender upon the expiry.*
>
> *The WWA* [Waterways Authority] *and SHFA will jointly commence the tendering process early in the new year.*

Possibly in anticipation that a letter in these terms would be shortly forthcoming, a group of the tenants at Circular Quay had written to the SHFA on 12 August 2004 indicating their desire "to initiate lease renewal negotiations" relating to the various tenancies. Following on from the SHFA's letter of 2 September 2004, Mr Scanlan was engaged, as has been said earlier, as mediator on behalf of three tenants at Circular Quay. These were Circular Quay Restaurants Pty Ltd, Frederick Gorginian and Dino Manthopoulos. There is a possible issue as to whether Mr Scanlan knew at that time, or thereafter, that he was acting for the Obeid family or, at least, knew that the Obeids had an interest in the Circular Quay businesses. Mr Scanlan was quick to deny any such knowledge. For the moment, however, it is sufficient to

note that Mr Scanlan sent a letter to Carlos Gonzales of the SHFA on 12 October 2004, which contained the following:

> *Each of these tenants are in a similar situation in relation to their leases, which all expire on or about the end of August 2005. In each case they have spent considerable sums in either or both the acquisition and refurbishment of their demised premises. In every case they are individuals who have a long and impressive track record of running successful businesses in the Quay precinct. Arguably they have contributed in no small way to the attraction and the iconic status of the Wharves.*
>
> *Understandably therefore there is deep concern when these tenants are informed that upon expiry of the existing leases, the new lease opportunities for their premises will be put to tender. At this point the understanding is that this will be an open tender. Plainly the incumbent tenants have a great deal to lose in such a situation.*
>
> *Nobody can argue that the lessor has a perfect right to do with the premises what it sees fit after lease expiry, including going to tender. However it would be of great concern indeed if the main driving force behind this decision was the maximisation of rental return rather than critical issues such as the calibre and verifiable performance history of the tenderer.*
>
> *The purpose of this letter is to respectfully draw the lessor's attention to the potential downside of this course of action. It would be a great pity indeed for both the NSW Maritime Authority and the people and tourists of Sydney if the expertise and years of experience gained in operating these Quay businesses were lost to perhaps less experienced operators in the pursuit of extra rent dollars or product mix changes. Such a strategy, if it exists, may be potentially fruitless anyway as the existing operators are prepared to pay rent at the top end of market (as estimated by any reputable valuer) to renew their leases, and to discuss permitted use variations and longer lease terms with mutually-acceptable rent review mechanisms as appropriate.*
>
> *...*
>
> *To be clear nobody is arguing for commercial favouritism or that these individuals ought to be treated differently in financial terms from any other qualified applicant. They have stated clearly that they will pay at the top end of fair market rental as assessed by any arms length valuer of good standing. There is no argument that the Authority should be out of pocket in rental terms.*
>
> *The real issue is one of process.*
>
> *What is submitted is that recognition should be made on ethical grounds of the special category to which this group belongs. They are not just members of the public. They are individuals who have devoted a sizeable portion of their lives and resources, over many years, to the providing of service to the people and overseas tourists of Sydney. As such and providing they can meet the market rent and product mix requirements of the Authority, it is respectfully submitted that they should have the first option of renewing their leases before any tender on their premises is opened to the public. Alternatively they should have the opportunity at the end of any tender process to retain their premises by matching any successful tender.*

An internal memorandum from Mr Michniewicz to the general manager of Maritime's Property Division fairly represents this division's general attitude to Mr Scanlan's letter:

> *It is a good letter but it ignores the fact that at the outset the CQ* [Circular Quay] *traders knew that they had 5 years only & the shops would be put out to EOI afterwards.*
>
> *They also can put in a bid to the EOI anyway.* [Emphasis in original]

On 15 October 2004, Mr Michniewicz, on behalf of Maritime, responded to Mr Scanlan's letter making these points in somewhat more formal language. The letter included the following:

> *However, I must point out to you that it was made very clear to prospective tenants prior to their leases commencing in September 2000, and reiterated to any subsequent enquiry or assignee, that these leases would not be extended beyond September 2005. Each shop would be subject to an open tender process, open to all parties whose prior experience and particular skills might benefit the commuters and tourists who frequent the area.*
>
> *The reason for this is not simply to secure higher rents, but rather to conform to government policy to test the market, in order to allow other capable players to have an opportunity to compete for these highly valued and sought after retail sites.*
>
> *The assessment process will have regard to each potential tenant's prior experience as well as each proponent's financial and business plans, in order to provide maximum choice to Circular Quay visitors for the next five years. Upon commencement of the process, I would welcome submissions from our current lessees who would clearly be well placed to be successful in such a tender process.*

Mr Scanlan replied on 19 November 2004, raising for the first time the proposition that the Circular Quay tenants he was representing "have no recollection or information on file" as to being advised that "their tenancies, upon lease expiry, would be subject to an open tender process". Referring presumably to Mr Abood, Mr Scanlan's letter stated:

> *One particular lessee is offered as a good example. He has invested in the vicinity of $2 million in the acquisition and refurbishment of his two shops (with two and a half years to run on the lease) in the reasonable belief, from the tenor of the negotiations, that he would be in a position to re-negotiate a new lease upon the existing lease expiry. He would thus have the opportunity to amortise his outlays and recoup his investment over a reasonable period. This trader would not have dreamed of entering this arrangement if there was any understanding that his premises would be put to open tender when his current lease expired.*

Mr Scanlan then suggested that Maritime give consideration to "a modified tender process", whereby the existing tenants, while taking part in the tender, would have a right to make a final bid when the tender process was complete.

In his evidence, Mr Scanlan said that his general practice was to secure his clients' agreement to any letter he was proposing to send on their behalf. On the assumption that such a process was followed in this case, the paragraph set out above was (to Mr Abood's knowledge, and to members of the Obeid family, if they saw it) palpably false. Mr Abood had not invested "in the vicinity of $2 million" in the acquisition of the two shops. He had not made any capital contribution, whatsoever. The statement was an extremely misleading one. Moreover, as was said earlier, Edward Obeid Sr knew, prior to his family's purchase of the businesses, that the leases were to go to tender at the end of the five-year term.

Obviously enough, the statements in Mr Scanlan's letter raise again the question as to what Mr Scanlan was told and by whom. It will be necessary to return to the resolution of this question later in this report.

In any event, Mr Michniewicz corresponded further with Mr Scanlan during the latter part of 2004 and into 2005. Mr Scanlan's suggestion for a modified tender process was not accepted. In the meantime, Maritime went ahead with the preparation of the voluminous documentation necessary to support the looming EOI process. It was contemplated within Maritime that advertisements would be placed in national newspapers in mid-February 2005 and that they would run for approximately two weeks. It was also anticipated that the tender process and its final implementation might be concluded by about October 2005. In terms of the commencement of the process, it was Maritime's intention, once the draft EOI process had been fully formulated and documented, to place it before Mr Costa and seek his final approval to proceed forthwith.

Mr Scanlan, however, threw a last-minute spanner into the works. Acting presumably on the instructions of Mr Abood, on 16 February 2005 he wrote a "without prejudice" letter to Maritime and the SHFA. In this letter, he asserted that at the time Mr Abood "began studying the feasibility of buying the business from Mr Imad", he had been told by a Michael Chiodo (who was described as the centre manager at the time) that, provided he paid his rent and was a good tenant, he (Mr Chiodo) could see no reason why the lease would not be renewed. Mr Scanlan's letter continued:

> *Accordingly he went ahead and made the significant commitment of some $2m in purchasing this business with only 2 years to run on the lease.*
>
> *Mr Abood has proven himself to be an astute and hard-working businessman. The large amount of key money paid evidences the fact that he held a firm belief that an opportunity for renewal would be there providing he performed and adhered to the obligations and covenants of the assigned lease. To pay this kind of money without such a firm belief would have been totally out of character and the height of financial foolishness. It would be similarly foolish if Mr Abood had been aware that the Authority intended to put the tenancy out to open tender on lease expiry.*

Mr Scanlan foreshadowed that an affidavit sworn by Mr Chiodo, confirming that he had made the alleged representations, would shortly be forthcoming and made available for inspection.

Maritime delayed the EOI advertisement process for a short time while it considered the allegations made by Mr Scanlan on Mr Abood's behalf. On 21 February 2005, Mr Chiodo contacted both the SHFA and Mr Scanlan to deny the accuracy of the matters asserted by Mr Abood. On 28 February 2005, the SHFA informed Mr Michniewicz that it had received "written evidence" from Mr Chiodo. Mr Chiodo, it appears, confirmed once again that he had not made the representations and that he had, as a consequence, refused to provide Mr Scanlan with any affidavit supporting Mr Abood's claims. Mr Scanlan was informed of this by letter on 7 March 2005.

However, perhaps emboldened by the litigious possibilities available as a consequence of Mr Abood's assertions, Mr Scanlan wrote a letter directly to Mr Costa. This letter, dated 23 February 2005, reiterated a number of the matters he had raised in his earlier correspondence with Maritime and the SHFA. It said:

In one particular case a large amount of money was paid in good faith for a business with 2 years to run on the lease, in complete ignorance of the tender plan. Indeed I am advised that remarks made by a representative of SHFA at the time produced a belief in the mind of the incoming lessee that the opportunity would be there at lease expiry to negotiate a renewal providing there was satisfactory performance and no breaches.

...

In November 2004 I wrote to the Authority requesting that, in the event that the decision was made to go to tender, the incumbent tenants have a last right of refusal. In that event, the tender process would reveal the true market levels, and the incumbents would have the opportunity to meet those levels.

…

This was refused.

It is respectively submitted that there are some fundamental issues of good corporate governance and best practice here, not to mention the Australian notion of a "fair go".

These people have put an enormous amount both in terms of personal effort and private funds into building these businesses. In at least one case there appears to be evidence that representations were made as to future opportunities to renew their leases, with no mention of an open tender upon expiry.

Rights to legal recourse may flow from this.

It is urgently requested that a meeting take place with a representative of the stakeholders so that this matter can be addressed and resolved before the tender process begins.

Mr Costa said that he did not see this letter. Presumably, it was read by one of his policy advisers; although, the thrust of the letter would, more than likely, have been mentioned to the minister.

On 1 March 2005, with the EOI process finally now poised to commence, Chris Oxenbould, Maritime's CEO, informed Chris Hughes, manager of Maritime's Property Division, that he should "postpone the ads for the EoI process". This decision, it seems, came about as a result of discussions within Mr Costa's office.

Mr Oxenbould decided to postpone the EOI process primarily because he had not yet received ministerial approval for its commencement. He had, however, been notified by the minister's policy advisers that there were problems from the minister's point of view. Mr Oxenbould met with the minister in July 2005. At this meeting, the minister gave his reasons for not wishing to proceed at that stage with an EOI process. The minister's preference was to develop a precinct-wide approach to retail leases in the Circular Quay area and, accordingly, did not want the tender process to proceed until this broader issue was resolved.

Edward Obeid Sr engages in "low level lobbying" of Mr Costa

Mr Costa gave evidence that, on a number of occasions, Edward Obeid Sr had indulged in what Mr Costa described as "low level lobbying". This was a reference to lobbying or representations made to Mr Costa as minister concerning the Circular Quay situation. Although he could not recall the precise words used by Edward Obeid Sr, he gave the gist of them at the public inquiry:

[Counsel Assisting]: *All right. Now, let me remind you of certain evidence you gave at a private hearing on 23 April and you can say whether or not you abide by what you then said. You then said that he said to you that the lessees at Circular Quay were not happy. True?*

[Mr Costa]: *---True.*

You then said that he told you they'd been promised things that were never delivered?

---That's true.

You then said he had told you that they were generally unhappy?

---That's true.

And you then said he had told you that they were being treated unfairly?

---That's my recollection.

Okay. Now, is there more that you recollect him telling you on any of these occasions that he spoke to you?

---No, I think that that probably summarises it, given it's nearly eight years ago, I mean- - -

Okay. Now, when he said that they'd been promised things that were never delivered, did you inquire of him what promises- - -?

---No, I didn't.

- - -had been made to them?

---No, I didn't. You've got to remember this, the context of this is that there was other discussions going on and he's, he's thrown these things up.

Yes. You are saying, you're making the point, he didn't sit down and talk to you one on one about this particular topic in isolation?

---That's my recollection. We were talking about other matters or I was in his office and he, and he raised these matters.

Mr Costa said this happened on two or three occasions. Mr Costa said that Edward Obeid Sr had "never asked [him] to do anything specific about any of these things".

Mr Costa was adamant that at the time this "low level lobbying" occurred, Edward Obeid Sr did not disclose to him that he or his family had any interest in leases at Circular Quay. Mr Costa became aware of these interests only through his subsequent reading of matters in the media. He expressed a firm view that, if Edward Obeid Sr intended to make representations, he had an ethical and political obligation to advise any minister he was lobbying of the extent of those interests. Mr Costa maintained that he did not do anything as a direct result of Edward Obeid Sr's low level lobbying. He accepted, however, that as minister he had been examining the issue of those leases at the relevant time. He had no knowledge of a donation said to have been made to the ALP by the Circular Quay lessees, other than by reference to material he had also read recently in the newspapers.

Mr Costa accepted that one consequence of the postponement of the EOI process, and his subsequent decision to put Circular Quay tenants on a month-to-month tenancy, was that the status quo had been preserved for the existing tenants. Mr Costa was adamant, however, that those consequences were unintended so far as he was concerned. They did not have any direct connection to the representations that had been made to him by Edward Obeid Sr. He said he was unaware of a newspaper item published by the *Sydney Morning Herald* in 2004, which stated that Mr Imad had sold out his Circular Quay cafes to Mr Abood who was "the brother-in-law of former fisheries minister Obeid". He had no recollection of seeing the article or of being told about its contents.

Mr Costa impressed overall as a man of blunt integrity. The Commission accepts, in general terms, the truthfulness and reliability of his evidence. In particular, the Commission accepts that he did not, at any relevant time, know of the financial interests of Edward Obeid Sr and his family in the Circular Quay leases. It accepts that he did not know of the $50,000 donation to the ALP. Nor did he know of the expectation on which the donation was based. It is fair to say, however, that the nature of Edward Obeid Sr's low level lobbying involved pressing the minister on the basis that the tenants had been promised "things that were never delivered", and that, as a consequence, according to Edward Obeid Sr, "they weren't being treated well". The nature of the lobbying carried with it the clear message that the minister should remedy this unfairness, and there can be no doubt that, in the circumstances, Edward Obeid Sr's approach was intended to benefit his family interests.

The primary reason for Mr Costa's decision not to proceed with the EOI process can be plainly seen in his letter of 1 August 2005 to then premier, the Hon Bob Carr. This letter stated:

A number of state government agencies own land and manage a range of commercial leases within the Circular Quay precinct.

The government agencies include NSW Maritime, Sydney Ports Corporation, Sydney Harbour Foreshore Authority (SHFA) and RailCorp. Sydney City Council also has some stalls in the precinct.

There is considerable disparity in commercial arrangements for the various state government leases and different rules for tenants seeking to renew leases within the precinct.

For example different guidelines and rules apply to tendering processes for state owned corporations and statutory authorities and a number of these leases are place managed by SHFA while others are not.

...

A common sense approach balancing consistent rules and commercial returns for taxpayers should be in place. That's why we need a co-ordinated plan for the precinct implementing a common set of policies.

...

Such a review should investigate a stronger role for a future coordinating agency than the current place management role of SHFA. Generated revenues, less a management fee, could be retained by the agencies which currently own the properties.

Budget Committee approval should be sought before moving forward with such a review.

Presently NSW Maritime has 8 leases on the Circular

Quay wharves which expire on the 31 August 2005. NSW Maritime will place these leases on a 6 month holdover and then month to month pending a review of the precinct.

There is little doubt that Edward Obeid Sr's "low level lobbying", although not to the forefront, would have been a factor in the minister's reasoning and his conclusions.

For reasons that it is not necessary for the Commission to examine, the proposal for a review and better coordination of the Circular Quay precinct was not at that point resolved in the manner foreshadowed by Mr Costa. Indeed, as the Commission understands, it has never been resolved to this day.

On 13 September 2005, Maritime, through Mr Oxenbould, reported to the minister, referring to the letter written to Mr Carr. Maritime supported the proposed review and noted "the importance for it to be undertaken quickly to prevent NSWM [NSW Maritime] tenants being left in an uncommercial position on holdover indefinitely". It can be seen that it was Mr Oxenbould's then view that the problem with the Circular Quay leases would be best solved by pursuing Mr Costa's suggested review. In the meantime, as has been said, the status quo for the tenants has been preserved. Thus, the Obeid family interests, at least for the present, were protected against the prospect of a public tender for the leases.

Chapter 4: Edward Obeid Sr and Minister Roozendaal

Edward Obeid Sr makes representations to Mr Roozendaal

Mr Costa ceased to be minister for ports and waterways on 10 August 2005. The new minister was the Hon Eric Roozendaal. He held this position for a relatively brief period of time between 10 August 2005 and 17 February 2006. He, like Mr Scully, Mr Costa and Mr Tripodi, was a member of the dominant "Terrigals" faction group of which Edward Obeid Sr has been described as "the titular head".

For a time, Mr Roozendaal had been the NSW general secretary for the ALP, and had earlier worked out of Sussex Street in the ALP's headquarters for a number of years.

Mr Roozendaal maintained that he had not become aware at any time of a donation made to the ALP by the tenants at Circular Quay; although, it might be thought, he was well placed to be aware of a donation of that kind.

Mr Roozendaal accepted that Edward Obeid Sr had been a political supporter of his and had supported his election by caucus. This, in turn, had resulted in his becoming a minister.

Mr Roozendaal recalled that, during the brief time he was the minister responsible for Maritime there had been an issue involving the SHFA wanting to go to market. He was aware that there was a case being put by the tenants at Circular Quay to secure a first right of refusal if the leases went to market. Mr Roozendaal also recalled that certain representations had been made to him at the time he was minister concerning these lessees. These representations were made by Edward Obeid Sr on one occasion, although Mr Roozendaal allowed that there may have possibly been more than one such occasion.

[Counsel Assisting]: *All right. Now what did he say to you obviously as best you can recollect concerning the retail lessees at Circular Quay?*

[Mr Roozendaal]: *---Um, basically to the best of my recollection that he felt they were being poorly treated because they had invested a lot of goodwill into their businesses in the lead up to the Olympics and that they felt that they should, if there was going to be a market evaluation of their leases that they should get the first right of refusal. That's, that's about the way I remember it.*

Did you understand him to be urging that case upon you?

---Yes.

Mr Roozendaal said that Edward Obeid Sr did not disclose to him that he or his family had interests in the leases at Circular Quay. This was information he gleaned much later from reading newspaper reports. He said that, had he had known that Edward Obeid Sr's family had these interests, he would have terminated any discussions with him on the subject. He would have been concerned that he, himself, had thereby been placed in a conflict of interest situation. He would have regarded himself as compromised in such a circumstance.

Mr Roozendaal maintained that, notwithstanding the representations made to him by Edward Obeid Sr, there was nothing he actually did to benefit the Circular Quay tenants. Similarly, he maintained that there was nothing he refrained from doing. He did not, putting it bluntly, do any favours for the lessees at Circular Quay as a result of Edward Obeid Sr's discussion with him; whether by way of positive action or by way of inaction.

In relation to this evidence, it is necessary to say something about the draft *Commercial Lease Policy* sent to Cabinet in December 2005. This policy, a revision of a draft policy dated March 2005, was forwarded to Cabinet on

23 December 2005 under the title *Lease Policy for Marinas and Associated Waterfront Commercial Activities.* It was Mr Roozendaal who forwarded this document to Cabinet for approval.

It is fair to say that, as matters stood in 2005, the development of a *Commercial Lease Policy* was regarded by all concerned as quite a separate matter to the resolution of the Circular Quay precinct problem. The *Commercial Lease Policy* was essentially concerned with a range of much broader issues, such as the vexed issue of the renewal of marina and boating industry leases. That is the way that it was seen by Mr Costa and, effectively, it was seen that way by Mr Oxenbould as well (it may be observed that, during the public inquiry, Mr Oxenbould voiced a possible interpretation of the 2005 *Commercial Lease Policy* that, according to the contemporary documentation, did not appear to have been considered by himself or shared by others at the time). It is, of course, true to observe that, in the events that unfolded, the ultimate *Commercial Lease Policy,* approved in 2008, became the catalyst for the granting of new leases to the tenants at Circular Quay. That situation will be examined in due course. For the moment, it is necessary only to say something briefly about the origins and progress of the draft *Commercial Lease Policy* up to 2005.

Between 2000 and 2005, the NSW Government had grappled with the development of a satisfactory *Commercial Lease Policy* for Maritime lands and foreshore assets. The development of this policy was, clearly enough, an important matter for both the government and the boating and marine industry. In 2005, Maritime and the NSW Department of Lands agreed to review their commercial leasing tenure arrangements in an endeavour to provide a greater level of certainty to the maritime industry. The intention was to encourage appropriate investment in maritime infrastructure.

A draft *Commercial Lease Policy,* dated March 2005, was placed on public exhibition in April 2005. This prompted a vigorous campaign, especially from those persons and bodies associated with the operation of marinas and with the boating industry. They were concerned, among other matters, with the concept of the need for a public tender at the end of lease terms. In all, over 135 submissions were received. These were followed up, with the approval of the then premier, by a number of vigorous and robust meetings where mostly positive exchanges took place between industry representatives and senior personnel within both Maritime and the Department of Lands. In due course, this produced a cooperative round of workshops, as a policy that was more attractive to both the industry and satisfactory to government was thrashed out. It does not appear that Mr Scanlan had any role to play, or sought to play any role, in any of this, given that his concerns were with a much smaller, localised issue.

As has been said, a revised draft *Commercial Lease Policy* was endorsed by Mr Roozendaal on 23 December 2005 and sent to Cabinet.

The December 2005 policy, however, fell over before Cabinet had an opportunity to consider it. It appears that there were two principal reasons for this. First, there was a strong objection raised by then planning minister, the Hon Frank Sartor. His concern was the lack of integration between the process of issuing a lease and that required for seeking approval under planning laws. There was also a complaint raised by the Sydney Harbour Foreshore Committee that it had been unfairly excluded from the consultative process (the committee had been established in 1979 to work for the protection and enhancement of Sydney Harbour). It should also be mentioned that, while generally supporting the policy, then minister for transport and deputy premier, the Hon John Watkins, demanded that the policy be amended to make clear that it was not to apply to sites used for the operation of public passenger ferries (an argument was raised in submissions suggesting that this exclusion did not apply to leases at Circular Quay; it is unnecessary to decide whether this argument is sound). The derailing of the policy before it was finally considered by Cabinet meant that two further years were to elapse before a revised draft policy was finally settled and ultimately approved by Cabinet in January 2008.

The Commission accepts, in general terms, the evidence given by Mr Roozendaal. There were only two matters in respect of which the possibility of corrupt conduct might have been considered in relation to his activities. The first, as was mentioned earlier, stems from the fact that he was the NSW general secretary for the ALP during the period when the $50,000 donation was said to have been made to the ALP. Although this fact must raise a suspicion that he may have known of the donation, his evidence was clear that he did not recall it. There is no other evidence from which an adverse inference could be drawn against him. The Commission accepts that there is no evidence to suggest that he either did anything, or refrained from doing anything, that in any way was to the benefit of the Obeid family interests at Circular Quay.

The second matter concerns the draft December 2005 policy for marinas and associated waterfront commercial activities. This was put to Cabinet over Mr Roozendaal's signature (and that of then minister for lands Tony Kelly).

Clause 6.1 of the policy referred to the fact that it was impractical for a number of commercial marina leases to be subject to a call for public tender on expiry. It also provided that "all existing leases covered by this policy may be renewed on or before expiry without public competition".

Arguments have been addressed to the Commission to suggest that, on its proper construction, the December 2005 draft policy effectively spelt the demise of a public

tender process for commercial leases. It provided, so the submissions urged, for end-of-lease negotiations in place of public tender. This change of policy, it was said, extended to the leases at Circular Quay. Essentially, the argument turns on the meaning to be given to the phrase "all existing leases covered by this policy".

This argument raises a difficult issue of construction but it is not one that is necessary for the Commission to determine. This is so for a number of reasons. First, the draft policy was effectively scuttled and never approved by Cabinet. Secondly, the Commission is not firmly persuaded, in any event, that the draft policy was intended to cover leases such as those existing at Circular Quay. Thirdly, as has been said, the then general view of those involved (with the possible exception of Mr Oxenbould), was that the draft lease policy and the problems arising in the Circular Quay precinct were separate matters and were to be treated and resolved separately. The Commission has not been able to locate any contemporary memoranda or internal documents that suggest that the draft December 2005 policy document resolved or was likely, if it had been accepted, to resolve the Circular Quay precinct problem.

There is no basis, however, to find that Mr Roozendaal put the draft policy to Cabinet as a consequence of lobbying by Edward Obeid Sr. Nor that he did so with any knowledge that the Obeid family had a financial interest in the Circular Quay leases. The Commission accepts that Mr Roozendaal did not have any expectation that the draft policy, if accepted, would have any intended operation on the Circular Quay precinct problem.

Chapter 5: Edward Obeid Sr and Minister Tripodi

The role of Mr Tripodi

Mr Tripodi became minister for ports and waterways in February 2006. He remained in this portfolio until 17 November 2009. It was during his tenure that the Obeid family interests, through direct negotiations, obtained new leases for the Circular Quay businesses. These were leases for a five-year term with a five-year option at a negotiated, but reduced, rental level. In obtaining these leases, the Obeid family interests avoided the prospect of participating in an open tender process for the new leases. Effectively, they secured the very result that Mr Scanlon's overtures had sought from the outset.

At the time Mr Tripodi became minister, the CEO of Maritime was Mr Oxenbould; however, Mr Oxenbould was seconded to run Sydney Ferries for approximately six months. In his absence, Brett Moore was acting CEO of Maritime. After Mr Oxenbould's return to the CEO position in August 2007, Steve Dunn was seconded, and eventually appointed, to the role of deputy CEO of Maritime and, shortly thereafter, became general manager of Maritime's Property Division.

Mr Dunn, who was later to become CEO after Mr Oxenbould's retirement, played a significant role in the development of the draft *Commercial Lease Policy* under consideration in 2007, and, on one view of it, effectively brought about the changes to the policy that cleared Maritime decks and enabled direct negotiations to take place between Maritime and the Obeid family interests at Circular Quay.

Both Mr Tripodi and Mr Dunn, at different times, and, in each case in somewhat unusual circumstances, met with Mr Scanlan. On each of these occasions, Mr Scanlan had advanced the case for new leases and for direct negotiation at Circular Quay in place of the EOI process.

Mr Tripodi acknowledged that Edward Obeid Sr had been a mentor of his. Edward Obeid Sr had, generally, been supportive of Mr Tripodi's ascendency through parliamentary ranks to ministerial status at a high level. He respected Edward Obeid Sr for his support and acknowledged that Edward Obeid Sr had a position of power and influence within the ALP.

Mr Dunn had been director of NSW Fisheries between 1999 and 2000, when, during part of that time, Edward Obeid Sr had been minister for fisheries. The two men worked closely together throughout that period and developed a strong working and business relationship. Mr Dunn accepted that Edward Obeid Sr had been something of a mentor to him in relation to his professional career. As will be seen, Mr Dunn was by no means averse to responding positively to requests for favours emanating from Edward Obeid Sr.

Edward Obeid Sr makes representations to Mr Tripodi

Mr Tripodi, as other ministers had done, gave evidence of occasions when Edward Obeid Sr had made complaints to him relating to the situation of the leaseholders at Circular Quay. He maintained that these statements were in the presence of other people, and were in the context of a general complaint about the government's unfair treatment of tenants, generally. The following evidence by Mr Tripodi gives the flavour of the statements:

> *Mr Obeid was unhappy with me because on several occasions in the company of many people and I can't recall who they were he had expressed the view that the Government was not treating tenants properly and that he gave that as an example of what was happening to the leaseholders down at Circular Quay. Amongst the complaints was that these people would have to re-tender for their leases. I said to him I didn't agree with him, I didn't agree with his view about this issue, um, that I believe that the market place is the best way to determine these matters, he responded by*

saying that I'm an academic and that I don't, I have no, I have no understanding of the reality of, of the business world and we were in, on this policy issue we were in direct disagreement.

Mr Tripodi said that statements of this kind by Edward Obeid Sr were made during the period when Mr Tripodi had been a back bencher and also during his time as minister. He accepted that such a situation may have occurred on four or five occasions. Although initially reluctant to do so, Mr Tripodi ultimately accepted that Edward Obeid Sr's remarks had been designed to achieve a shift in policy to advance the interests of the Circular Quay tenants. They were, Mr Tripodi maintained, an illustration of an MP "discharging a proper function" in urging a shift in policy position.

Mr Tripodi claimed, however, that at no stage had Edward Obeid Sr made known to him that the Obeid family had business interests at Circular Quay. He said, had he known of those interests, he would have sought probity and other advice from the premier's department and from his own chief of staff. When it was suggested to him that the later public revelation of this concealment by Edward Obeid Sr should have been regarded by him as "an act of absolute betrayal", Mr Tripodi's only response, and a less than fully enthusiastic one, was that he was "extremely disappointed".

There is a live issue as to whether, during the time he was minister, Mr Tripodi did, in fact, become aware that the Obeid family had business interests in the Circular Quay leases. The Commission will return to this issue shortly.

Mr Tripodi rings Mr Scanlan

At about 6 pm on 18 July 2006, Mr Tripodi rang Mr Scanlan at his home. According to Mr Scanlan, the call came "out of the blue". It was a complete surprise to him; indeed "a considerable surprise". He said that the minister suggested that there should be a meeting between the two men to discuss the leases down at Circular Quay. Mr Scanlan could not explain to the Commission how Mr Tripodi obtained his number. Nor did the minister tell Mr Scanlan who may have suggested that he make the call.

Mr Tripodi, in turn, accepted the *possibility* that he called Mr Scanlan – having, at his compulsory examination, been shown telephone records that identified the call, he could scarcely say otherwise – but he maintained that he could not recall the conversation. He was, it must be said, evasive as to who or what may have led him to make the call. He did not know Mr Scanlan. He had never met him before. He did not possess Mr Scanlan's telephone number, and could not recall why he had called him. While Mr Tripodi could not rule out the possibility that he had rung Mr Scanlan, he emphatically denied that the call was to arrange a meeting. Given the claimed paucity of his recollection concerning the telephone call, the firmness of this denial is puzzling.

Mr Tripodi also denied that he had asked to be provided with a meeting brief before he rang Mr Scanlan. It is again puzzling and unclear why he was so firm in this denial when, once again, he was apparently able to recall little about the call and the surrounding circumstances.

Mr Tripodi accepted that it was *possible* he rang Mr Scanlan at the suggestion or request of Edward Obeid Sr but he said he did not remember whether this was so. He could not, of course, suggest or identify anyone else who might have asked him to call Mr Scanlan. Mr Tripodi's reluctance to nominate Edward Obeid Sr in this regard does him little credit.

It should be observed that there were a number of telephone calls between Edward Obeid Sr and Mr Tripodi in early July 2006. In particular, there was a relatively lengthy call on 13 July 2006. This was not long before the telephone call to Mr Scanlan. The Commission accepts that the 13 July 2006 call, and the earlier July calls, may

have been concerned with other matters. But there is every likelihood that they included a reference to the need to contact Mr Scanlan and the provision by Edward Obeid Sr of information to allow that call to be made. Obviously enough, Mr Tripodi received this information from somewhere, and the probabilities are that it was Edward Obeid Sr who provided the information. It should be noted that, in his evidence, Edward Obeid Sr readily volunteered that he did ask Mr Tripodi to ring Mr Scanlan. While Edward Obeid Sr is not, in many respects, a reliable witness, there is no reason to suppose that his evidence, on this occasion, was other than accurate.

As a consequence of all this, a highly unusual situation is revealed: an MP urges a minister to contact a mediator/negotiator directly, and the minister does so personally, "out of the blue", and directly to the mediator at his home.

The sequence of events surrounding the call, and its immediate aftermath, is not entirely clear but the documents record the following sequence:

- On 18 July 2006, a draft "meeting brief" was assembled for Mr Tripodi. It included a "context" statement referring to Mr Scanlan's role as representing a number of retail tenants at Circular Quay and gave a brief history.
- The meeting brief referred to a "separate briefing note". This is a very comprehensive document, also dated 18 July 2006. In very clear terms, it espouses why it was that the acting CEO, Mr Moore, favoured the EOI process. It contains a recommendation in very clear terms "that the Minister approve NSW Maritime's proposal to call for EOI for lease of retail shops at Circular Quay".
- The draft meeting brief has two handwritten notes on it; one dated 18 July 2006 and the other dated 19 July 2006. The provenance of these handwritten notes is not clear.
- Mr Tripodi rang Mr Scanlan at his home at about 6 pm on 18 July 2006.
- On 19 July 2006, two Maritime personnel contacted one another. Vanessa Voss emailed Steve Montgomery (general manager of Maritime's Property Division), regarding "URGENT! Meeting Brief Request – Circular Quay", and requested "an approved ministerial meeting brief by 3pm … 20 July 2006".
- Shortly afterwards on the same day, Ms Voss – apparently unable to contact Mr Montgomery – sent a message to Mr Hughes to similar effect. Mr Hughes, in turn, sent a memorandum to the minister's staff discussing the possible content of the meeting brief.
- On 20 July 2006, Mr Scanlan composed and sent a letter to Mr Tripodi. This letter, similar to earlier letters written by him concerning his representations for his three clients at Circular Quay, included the following:

> *There is also the problematic issue with regard to Mr Abood, the owner of "The Quay Eatery" and "Sorrentino".*
>
> *When Mr Abood was considering buying these businesses, he was told by the SHFA manager at the time that provided he (John Abood) adhered to the covenants under the lease and performed acceptably, he would be offered the opportunity to negotiate a lease renewal after the 2 years remaining on the existing lease had expired. On the strength of this assurance Mr Abood went ahead and paid $2 million to purchase the business. Leaving aside for the moment any potential legal issues of misrepresentation, John is obviously now extremely concerned that any tender process would rob him of the promised opportunity to negotiate a renewal and thus preserve his costly goodwill.*
>
> *Notwithstanding many letters and telephone calls attempting to make the above points, SHFA and the NSW Maritime Authority have failed to respond in any meaningful sense. There has been no opportunity for these incumbent tenants to even gain a hearing. They remain in the difficult position of monthly tenants with obviously no security of tenure. To exacerbate matters, the Lessor has applied a 10% increase to the rents, arguably elevating them to above fair market. In addition to refusing to engage on the above points, SHFA refuses to discuss this rental increase.*
>
> *It is arguable that given the quality of these tenants … it is at the very least unprofessional, and at the most a denial of natural justice to continue to ignore their situation.*
>
> *Finally I refer to sections 5.2, 5.3, and 5.4 of the Draft* Commercial Lease Policy *NSW Maritime Authority of March 2005, which provides for all the above elements to be taken into account when making leasing decisions.*
>
> *…*
>
> *I remain available to assist in any way.*

It might be noted that the allegation that a serious misrepresentation had been made by the SHFA centre manager to Mr Abood, although firmly refuted (to Mr Scanlan's knowledge) by Mr Chiodo in early 2005, is repeated here. There is also the repetition of the assertion that Mr Abood "went ahead and paid $2 million dollars to purchase the business".

- A final meeting brief was prepared in which Maritime recommended that the "EOI process take place, rather than direct negotiations with incumbent tenants, for both probity and commercial reasons". This statement appeared over Mr Montgomery's name.
- A meeting was held with Mr Scanlan in Mr Tripodi's office at 3 pm on 25 July 2006.
- Edward Obeid Sr left two telephone messages for Mr Tripodi on 28 and 29 July 2006. Eventually, the two men held a 17-minute telephone conversation on the evening of 29 July 2006. It is highly likely that these calls included reference to the Scanlan meeting.

Mr Scanlan said that, from his perspective, the meeting with Mr Tripodi was "not an easy one". His recollection was that Mr Tripodi continued to espouse the policy to go to open tender on lease expiry. Mr Scanlan said that he embarked on a process of "putting the case" of the tenants to the minister during the meeting. He asked Mr Tripodi to look at the "flexibility" in the draft commercial leasing policy that allowed the lessor to negotiate directly upon lease expiry with the tenants. His recollection was that, at the end of the meeting, Mr Tripodi said he would look at the matter and "[they] left it at that".

Mr Tripodi's recollection was not dissimilar to that of Mr Scanlan's. He was able to recall "the general feeling of the meeting". He felt that Mr Scanlan would have left the meeting without being "too encouraged". He said that he would have told Mr Scanlan that there was a *Commercial Lease Policy* under review at that time and "let's see what happens".

After the meeting, Mr Scanlan drafted a letter, dated 4 August 2006, to Mr Tripodi. Interestingly enough, this draft found its way to Mr Maroon who, in turn, it seems, sent it through to Damian Obeid on 11 August 2006. The draft was accompanied by a memorandum that said, "Attached is the letter from Paul Scanlan please read, and let me know what action you would like taken".

On 14 August 2006, Mr Scanlan sent the settled letter to Mr Tripodi. This letter thanked the minister for the meeting and the opportunity to present the case on behalf of the tenants. It continued:

> *I note that at the conclusion of the meeting you indicated that you were prepared to review the position in the light of the new* Commercial Lease Policy *of the NSW Maritime Authority.*

The letter concludes:

> *It is requested that your Department advise as soon as possible the progress of the New* Commercial Lease Policy, *so that some certainty can be brought to this longstanding and burdensome issue.*

It seems that little of consequence happened during the remainder of 2006. On 5 October 2006, Mr Scanlan sent a follow-up letter to Mr Tripodi again asking for a review of the situation. There does not appear to have been any response from the minister's office.

Chapter 6: What Mr Tripodi knew

Ms Ashpole was Mr Tripodi's deputy chief of staff from about February 2006 to April 2007. She said that part of her responsibility had been to advise Mr Tripodi in connection with the draft *Commercial Lease Policy* for Maritime. She did this in conjunction with her colleague, Jennifer Doherty. She also had advisory responsibility for a number of Maritime property leases and, in particular, responsibility for the leases at Circular Quay.

Ms Ashpole said that she recalled having discussions with Mr Tripodi about the leases at Circular Quay. The view he had expressed to her was that he favoured the adoption of an "expression of interest" upon the expiry of those leases. It was also her general understanding that Maritime held the same view during this period. In this regard, she referred to the briefing note to the minister of 18 July 2006. This was, it will be recalled, from Mr Moore, who was acting in the role of CEO. It had confirmed the favoured approach that Ms Ashpole identified.

Ms Ashpole gave evidence that, in the possible context of discussions with Mr Tripodi about his preference for EOIs for the retail leases at Circular Quay, he had discussed with her the fact that Edward Obeid Sr owned or had an interest in "one or two" of those leases. She was asked:

[Counsel Assisting]: *And consistent with that Mr Tripodi expressed to you that he was in favour of an expression of interest process for retail leases at Circular Quay when they were renewed?*

[Ms Ashpole]: *---That's correct.*

During your discussions over this issue did Mr Tripodi mention to you that Mr Eddie Obeid owned one or two leases down at Circular Quay?

---That's right, or had an interest in those leases.

And he also told you in that context that Mr Obeid was not all that happy with the expression of interest process for those leases?

---His, my memory of his exact words [was] *that Mr Obeid wasn't very happy with him for wanting to have an expression of interest process.*

I see, so Mr Tripodi told you that Mr Obeid had told Mr Tripodi that Mr Obeid was unhappy with Mr Tripodi for wanting an expression of interest process for those leases?

---That's correct.

In her interview with the Commission on 24 May 2013, Ms Ashpole had said Mr Tripodi told her that Edward Obeid Sr or his family had "one or maybe two leases there". Ms Ashpole conceded in the public inquiry that she did not make a note of this conversation in any of her diaries – "it was just a passing comment". She did not recall the date but rather thought the conversation had taken place in 2006. She recalled that the discussion took place in Mr Tripodi's office in Governor Macquarie Tower. Ms Ashpole accepted that, as a matter of logic, the conversation could have occurred in 2007, but said that her memory was that it was not in that year.

In her interview, Ms Ashpole said that her recollection was that Mr Tripodi, notwithstanding his knowledge of the Obeid family interests at Circular Quay, intended to put the leases out for EOI. She was asked, "Do you recall what, if anything, Joe Tripodi was going to do about that issue?", and replied:

I don't think he was going to do anything about it ... my memory is he was going to proceed exactly how he'd intended to which is to have that Commercial

Lease Policy *as the framework and then put the leases out for Expressions of Interest. That's my recollection.*

In his two written submissions, Matthew Tyson, counsel for Mr Tripodi, criticised aspects of Ms Ashpole's evidence. He argued that she had expressed "qualifications and warnings" during her interview. He complained that Ms Ashpole should have "warned" Mr Tripodi or reported him once she knew that he was aware of the Obeid family interests at Circular Quay. The fact that she did not, Mr Tyson argued, suggested that her evidence was a re-construction, based perhaps on media reports she had read. Mr Tyson claimed to have extracted an admission from Ms Ashpole that her recollection of the conversation did not extend to the critical passage in the conversation set out above.

There is no substance to these submissions. Ms Ashpole was quite clear in her original interview that Mr Tripodi had told her that Edward Obeid Sr or his family had "one or maybe two leases there". Her only uncertainty at the time related to the "other thing"; that is, Mr Tripodi's statement "that Eddie Obeid wasn't all that happy with Expressions of Interest". She confirmed in her compulsory examination, however, that this second statement ("something along those lines") had been made to her. She had reflected upon it and was able to say that "with confidence".

As to the second criticism, there was simply no basis on which Ms Ashpole ought to have reported Mr Tripodi. When Ms Ashpole left in April 2007, Mr Tripodi was still firmly wedded to an EOI process. His knowledge of the Obeid family interests at Circular Quay had not prompted any change of position at that time. There was simply nothing to report.

In any event, Mr Tyson's cross-examination of Ms Ashpole did not secure him the victory he claimed. Notably, counsel failed to put the direct question to Ms Ashpole that might conceivably have secured him that result. Ms Ashpole was not asked to, and did not at any point, resile from her evidence that Mr Tripodi told her that Edward Obeid Sr owned or had an interest in one or two leases at Circular Quay. Finally, there was no evidence that Ms Ashpole had paid any particular attention to media reports concerning Edward Obeid Sr and his financial interests. The Commission does not consider that any of the so-called inconsistencies between statements made in her interview, compulsory examination or the public inquiry undermine the central plank of her evidence.

Mr Tripodi gave evidence on two occasions during the public inquiry. The first was on 1 November 2013. He referred to Ms Ashpole as a "reliable officer" and confirmed that she had "responsibility for some part" of his ministerial portfolio in an advisory capacity. Mr Tripodi agreed that his general predisposition, having regard to his background in academic training and qualifications, was that the disposal or utilisation of public assets should be tested in the market. It was, he said, a transparent way of utilising the assets and enabled confidence that "best returns" to the state were likely to be achieved. In dealing with Ms Ashpole's evidence, senior Counsel Assisting put the following questions to Mr Tripodi:

[Counsel Assisting]: *All right. Do you say that you don't know what evidence Ms Ashpole gave to the Commission?*

[Mr Tripodi]: *---I, I have some recollection of what the evidence was, yes.*

Right. She was asked whether you had mentioned to her that Mr Eddie Obeid owned one or two leases down at Circular Quay and she said, "That's right, or had an interest in those leases."?

---I understand that that is recorded in the transcript of what was said.

Yes?

---Yes.

Now is that true?

---No, no, not the way it's presented in that transcript, no.

She has said that you said to her that Mr Obeid wasn't very happy with you for wanting to have an expression of interest process with respect to those leases?

---Sorry, can you ask the question again?

Yeah, sure. She has said that Mr Obeid wasn't very happy with you for wanting to have an Expression of Interest process with respect to those leases?

---Well, I wasn't here yesterday, counsel, so I don't know whether that, that account is what occurred.

Okay. Well, what do you say to the proposition that you told Ms Ashpole that Mr Eddie Obeid had an interest in leases down at Circular Quay?

---I told Lynne Ashpole that Mr Obeid had been complaining about the treatment that these leaseholders were receiving and that he was of the view that they should be reissued leases.

Yes. And what do you say about the proposition that you told her that Mr Obeid had an interest in leases down at Circular Quay?

---I did not say that.

All right. You don't resile from the proposition that you found Ms Ashpole to be a reliable officer?

---No.

It is patently clear that Ms Ashpole's evidence confirmed that Mr Tripodi had mentioned that Edward Obeid Sr owned or had an interest in one or two leases at Circular Quay. As has been said, this was generally consistent with her May 2013 interview and with the statements she made during her compulsory examination. Mr Tripodi, for his part, emphatically denied that he told Ms Ashpole that Edward Obeid Sr had an interest in leases at Circular Quay.

Later in the public inquiry, Mr Tripodi's legal representatives approached the Commission and asked that he be recalled because he wished to correct his earlier evidence in certain respects. Mr Tripodi was recalled and gave the following evidence:

[Counsel Assisting]: *And you know that your solicitor and Counsel later approached the Commission and asked that you be recalled?*

[Mr Tripodi]: *---Yes, sir.*

And you know that the stated reason was that certain evidence you had given required correction?

---Yes, sir.

On the 1 November, this is page 369 at line 16 you were asked, "And what do you say about the proposition that you told her, Ms Ashpole, that Mr Obeid had an interest in leases down at Circular Quay?" and you said, "I did not say that." The correct answer to that question was, "Yes" or "I did say that." Do you agree?

---Yes, sir.

And that is the correction which you now wish to make?

---Yes, sir.

It is necessary to set out some further evidence given by Mr Tripodi so that his clarified position can be better understood. The following exchange took place between Mr Tripodi and the Assistant Commissioner:

[Assistant Commissioner]:

Mr Tripodi, Ms Ashpole gave the Commission evidence and you were asked about this at line 40 or thereabouts on page 368. She was asked whether you had mentioned to her that Eddie Obeid owned one or two licences down at Circular Quay and she said that's right or had an interest in those leases. Do you deny that you said to her that Eddie Obeid owned one or two [leases] down at Circular Quay or had an interest in those leases?

[Mr Tripodi]: *---So Counsel, sorry, Commissioner, if I can clarify, um - - -*

No, I just want you to answer that question and I'll put it to you again?

---Well, yes, yeah.

Did, do you deny that you said to Ms Ashpole Eddie Obeid owned one or two leases down at Circular Quay or had an interest in those leases?

---So to the first part of the answer I deny it. The second part of the answer that is the words that I used, yes.

And do you tell the Commission that you used the word "interest" in that sentence to mean interested or concerned?

---Yes, sir.

You deny that you were saying that you meant financial interest?

---I used the word "interest". My intention of the use of that word "interest" was as in Mr Obeid was interested it was not to intend a pecuniary interest.

Well you've agreed at least in your correction today that he, that he said he had an interest in leases down at Circular Quay?

---He was interested in the - - -

That would normally mean a financial interest wouldn't it?

---Well, sir, just to clarify my exact, to the best of my recollection Mr Obeid said - I, I told Ms Ashpole Eddie Obeid has an interest in the leases at Circular Quay, he will not be happy when they go to EOI.

What I'm suggesting to you is that the expression had an interest in particularly when coming from Mr Obeid would be likely to be a reference to a pecuniary interest?

---But sorry, they were my words to Ms Ashpole they weren't coming from Mr Obeid they were my words to Ms Ashpole and what I intended in the use of the word "interest" was that he was interested in the issues of, of the leases at Circular Quay.

You don't think that that evidence is a bit of a long shot, Mr Tripodi, do you?

---No, sir, it's the truth and that's why I've asked to come back here and clarify it.

Well have you asked to come back here to clarify it because you think you might dig yourself out of a hole from what you said on the last occasion?

---No, Commissioner, this is very serious I mean - - -

I agree it's very serious?

---And I've asked to come here because - - -

That's why we've invited you back?

---Thank you very much and I really appreciate the opportunity. When I reflected on the, on the words that Counsel used on 1 November overnight on the, on the evening of 1 November, the next day I thought about it and it reminded me that I, what the actual words were that I used when I'd spoken to, to Ms Ashpole. So to the best of my recollection they are the words that I used, I never intended pecuniary interest, I meant he was interested in the issue.

Later, in connection with the use of the words "an interest", Mr Tripodi repeated that he had told Ms Ashpole "Eddie Obeid has an interest in the leases at Circular Quay". He claimed that he meant, by the use of these words, that Edward Obeid Sr was "interested in the subject of the leases at Circular Quay, he had a concern about them".

The Commission accepts Ms Ashpole's evidence without reservation. She was an impressive witness and gave her evidence without any unfair emphasis or animosity. She presented as a careful and precise woman. She did not have an axe to grind with Mr Tripodi in any respect. Anybody who saw or heard Ms Ashpole's evidence could have been in no doubt that she was informing the Commission that Mr Tripodi had told her that Edward

Obeid Sr had a financial interest, either by way of ownership or otherwise, in the leases at Circular Quay. It is clear that Mr Tripodi himself so understood the witness' evidence because, during his first evidence, he flatly denied that he had told Ms Ashpole that Edward Obeid Sr "had an interest in leases down at Circular Quay". Mr Tyson did not suggest, when he questioned his own witness, on that first day, that there was any misunderstanding on the point. He did not suggest other than that, as his client had done, there was an outright rejection of Ms Ashpole's evidence. Nor did Mr Tyson suggest to Ms Ashpole that she may have been mistaken or that there may have been a misunderstanding between Mr Tripodi and herself.

In the Commission's view, the subsequent evidence given by Mr Tripodi was an obvious attempt by the witness to rescue himself from a difficult situation. It is not too unfair to conclude that he was, as was suggested to him, attempting to "dig [himself] out of a hole". His attempt to retrieve the position, however, was most unconvincing. The Commission rejects Mr Tripodi's evidence that he intended by his words to convey to Ms Ashpole the meaning that Edward Obeid Sr was merely "interested" in the issue, as opposed to having a pecuniary interest in the leases. The Commission finds that he was clearly telling Ms Ashpole that he understood Edward Obeid Sr had a financial interest in the Circular Quay leases.

The Commission finds that, at some stage during either 2006 or 2007, Mr Tripodi became aware that Edward Obeid Sr and his family had a financial interest in the Circular Quay leases. It may be correct, as Mr Tyson persuasively argued in his written submissions, that Mr Tripodi did not have this knowledge at the time he rang Mr Scanlan. It is more likely, and more probable, that he acquired the knowledge later in that year after he had met Mr Scanlan or possibly early in 2007. Ms Ashpole believed her conversation probably took place in 2006 but she was not definite on this point.

The evidence does not enable the Commission to conclude positively that the knowledge that Mr Tripodi acquired about the Obeid financial interests in the leases came directly from Edward Obeid Sr himself. It is, of course, possible that it did. But it is equally possible, and perhaps not unlikely, that the knowledge was acquired from another source. It may well be that there was scuttlebutt from other sources within ALP circles that provided Mr Tripodi with the information. The comment he made to Ms Ashpole did not contain, in its terms, the assertion that the information came from Edward Obeid Sr himself.

Mr Tyson argued that Edward Obeid Sr's strategy throughout the entire period was likely to have been one where he was determined not to discuss or divulge the fact of his family's financial interests to anyone outside of his immediate family. There is some force to this argument. On the other hand, Edward Obeid Sr had a close political, and indeed personal, relationship with Mr Tripodi so that the strategy was likely to be relaxed if an appropriate situation emerged or if it otherwise suited him to discuss his family's financial interests with his political ally. Mr Tripodi was clearly a discreet man and, notwithstanding the apparent lapse on this one occasion in his discussion with Ms Ashpole, could have been trusted to keep the information to himself.

As to scuttlebutt and general talk, the Commission is aware of media speculation and discussion as far back as 2004 suggesting that Edward Obeid Sr may have had a financial interest in the Circular Quay businesses. For example, an article written by Anne Davies in the *Sydney Morning Herald* on 29 May 2004 – with the headline "Hands on the tiller" – raised the spectre of politicians having interests in businesses connected with harbour foreshore land. One of the matters dealt with in the article is very much to the point:

> *Several of the authority's main tenants are also strong Labor supporters. In the lead-up to the Olympics, the wharves at Circular Quay were renovated and the shops rationalised. It was a nervous period for the former occupants, who were unsure whether they would regain their premises. The Circular Quay Traders Association, headed by Tony Imad, a Lebanese migrant who runs milk bars on the wharves, emerged as the biggest donor to the ALP in 1998–99, donating $50,000. At the time Imad told the media that it was like supporting a football team: "I give to Labor because I believe in them. I believe you have to give back to society and Labor has always been there to help the migrants like me". Imad contributed $20,000 himself.*
>
> *It is of course perfectly legal to make campaign donations to political parties. The Herald is not suggesting that the payments have influenced tenders; however, it highlights the perception that might exist on the part of some tenants that their futures are uncertain.*
>
> *In March 1999, Craig Knowles, as planning minister, approved an application for the redevelopment of Circular Quay. Unlike the initial proposal considered by the Department of Public Works, which was defended by the NSW Government Architect, the new plan retained shops on the wharves, where Imad has traded for 12 years. In August Imad won the tender for the first of the new shops on the renovated Pier 4. He later won the rights to the cafe on Wharf 5 and to the Arc, a cafe on City of Sydney-owned land.*

> *Imad has moved on from the cafes, selling out to John Abood, the brother-in-law of former fisheries minister Obeid. Abood said he had heard the businesses were for sale through one of his nephews. "Yes, I am his (Obeid's) brother-in-law, but no way he is involved ... I have been here for three years and he has never had anything to do with this business. I don't know anything about his business. I don't get involved."*

Although, according to Ms Davies, Mr Abood denied that Edward Obeid Sr had any interest in the business, it is clear that the article raised a suggestion that Edward Obeid Sr may have held such an interest in the business. It is somewhat astonishing, to say the least, that, despite the clear inference raised by this article, minister after minister said that they had never read it or heard of the issues it raised.

The Commission cannot find with certainty when or how Mr Tripodi acquired the knowledge he did. But it is perfectly satisfied that, during the relevant period, and prior to the decisions that were to be made in late 2007 regarding the finalisation of the draft *Commercial Lease Policy,* Mr Tripodi knew that Edward Obeid Sr and his family had financial interests in the Circular Quay leases. His claim that he did not intend to convey this to Ms Ashpole is rejected. His rather clumsy and unsuccessful attempt to rescue his position is seen as mere dissembling on his part.

Chapter 7: The position of the *Commercial Lease Policy* in 2007

At the beginning of 2007, and for a number of months afterward, the Circular Quay issue remained unresolved. The Circular Quay tenancies were in holdover. Much to the dissatisfaction of the tenants, the rent was being increased by 10% per annum during the holdover period, and the key issue – the right to negotiate directly – was being stoutly resisted within Maritime's Property Division.

Despite submissions to the contrary, the evidence establishes that the clear preference in mid-2007 of Maritime's Property Division remained firmly in favour of an EOI process. Submissions that this was the view of only a few recalcitrant members of the Property Division are not accepted.

Nor can it be said that Mr Oxenbould, whatever his private views may have been, was pushing for direct negotiation. While it may be true that Mr Oxenbould had changed his position in 2005, when Mr Costa persuasively argued for a whole-of-precinct review at Circular Quay, it is equally clear, once the possibility of such a review had vanished from view, that Mr Oxenbould was content to allow the Property Division's clear preference to remain as the likely, or at least a possible, outcome. Mr Oxenbould, of course, would have recognised that this preference was not popular with the maritime industry, generally, nor with the tenants. He would, no doubt, have become increasingly frustrated, as the years went by, that the commercial policy had not been finalised. But, whether it was finalised with a preference for an EOI process or direct negotiations for retail leases was not his passionate concern. He was more concerned that the issue should be resolved one way or the other. He was rightly described as "ambivalent" about the outcome. While he probably had a personal preference for a resolution that encompassed direct negotiations, Mr Oxenbould did not push that option or steer the agenda in any decisive manner.

The general position of Maritime can be fairly seen from the draft *Commercial Lease Policy,* as it stood in August 2007. In this version, clause 4.5 dealing with retail leases provides:

> *A Retail Lease is a lease provided in accordance with the provisions of the* Retail Leases Act 1994. *Examples of NSW Maritime Retail Leases are leases for the provision of non-marine commercial activities, including the provision of food or entertainment (other than by a Licensed Club), a takeaway food outlet on a public ferry wharf, or a privately-owned water front restaurant.*
>
> *Retail Lessees operate in a competitive market, and NSW Maritime Retail Leases will be offered via competitive process.* [Emphasis added]

Clause 1.6 of this draft policy makes it clear that its provisions would generally be applied "unless the Chief Executive determines that circumstances exist which justify a departure from all or parts of this policy".

Two brief points may be made. First, although the December 2005 draft *Commercial Lease Policy* was said in the submissions to be "the starting point" for the 2007 document, it is clear that the details of the later draft policy document were much further advanced than those appearing in the earlier document. The August 2007 draft dealt, for example, with a broad but specific range of leases. It no longer focused principally on marina leases and "associated waterfront commercial activities". Secondly, while it has been suggested that the 2005 policy arguably envisaged direct negotiation for leases such as those at Circular Quay – an argument that has been unnecessary to decide – the August 2007 draft policy plainly identified a competitive process for "takeaway or restaurant premises on a public ferry wharf". Emphatically, it did not support direct negotiation for these leases. It makes little sense to argue therefore, in this respect, that the August 2007 document was simply following the lead of the December 2005 draft policy.

Patrick Low's evidence

Patrick Low began working at Maritime in late 2006. His evidence is important because it provides a relatively objective view of the position then held by others in Maritime during the important period in 2007 when the draft *Commercial Lease Policy* was changed to accommodate direct negotiation for the Circular Quay tenants. It also provides a relatively dispassionate description of the circumstances surrounding the dramatic change in policy that was to occur. Mr Low's observations in this regard are particularly important, because he took up the important position of general manager of policy at Maritime.

Mr Low's perception in early- to mid-2007 was that there was a fairly well entrenched policy in Maritime requiring an EOI for retail leases. The Commission accepts this aspect of Mr Low's evidence and, in particular, regards his evidence as more likely to be objective than the evidence given on the topic by, for example, Mr Dunn or Mr Tripodi. Mr Low was not pushing any particular barrow and his evidence may be accepted as objectively more reliable on the point than that of his two superiors. It also accords with the evidence of Ms Ashpole.

Indeed, Mr Low recognised that Maritime's general preference for EOIs in relation to a broad range of commercial leases pervaded and characterised the entire debate. In an important sense, it had effectively held up the finalisation of the *Commercial Lease Policy.* In 2007, there was something of a deadlock between the industry viewpoint and that of Maritime.

Mr Oxenbould had originally given Mr Low the task of advancing the policy in relation to all commercial leasing, including marinas, maritime clubs, industrial sites, and so forth. The retail leases at Circular Quay were only a small part of this overall task. This broader task involved the working out of a policy that would impact on 600 maritime leases. Mr Low was well aware that Mr Tripodi, in general terms, particularly favoured competition for retail leases. Mr Tripodi had, however, made no specific comment about clause 4.5 as it stood in the August 2007 draft policy document; although, of course, as Mr Low pointed out, it was an unapproved draft policy document at that time.

Mr Oxenbould had a clear view as to what he wanted Mr Low to achieve. The draft August 2007 policy reflected an emphasis on EOIs. This remained a bone of contention for the industry, as Mr Low explained. Mr Oxenbould knew that the minister was reluctant to sign-off on a document that would perpetuate this area of contention. If possible, there needed to be a resolution of the problem. Difficult as it might seem, a position had to be reached that had the support of industry, the agreement of Maritime's Property Division and, ultimately, the consent of the minister. Mr Low confirmed that Mr Oxenbould did not advocate direct negotiations over EOI in the process but he, nevertheless, wanted Mr Low to propose a resolution that achieved both industry satisfaction and Maritime acceptance, if that were possible.

Mr Low recognised the problem he faced. He thought the ultimate policy would probably continue to reflect an emphasis on EOIs or that, at the very least, this was the way in which the policy was heading. This was principally because, he said, Maritime's Property Division unanimously felt that direct negotiation was "not a good option". There was, in general terms, no real appetite within Maritime for the concept of direct negotiations across the various categories of lease. Certainly, Maritime's Property Division was unhappy with the notion of direct negotiation for the leases at Circular Quay.

Mr Oxenbould prepared a briefing note for the minister dated 21 June 2007. This is an important document because, as Mr Oxenbould said in his evidence, the

purpose of the briefing note was to try to focus Mr Tripodi's attention on the problem in an endeavour to bring about useful discussion and perhaps resolution. The note included the following as part of the background to the briefing:

> *The tenants of NSW Maritime's shops on Circular Quay (CQ) wharves are currently holding over on a monthly basis, following the expiry of their 5 year leases on the 31 August 2005.*
>
> *NSW Maritime and the Sydney Harbour Foreshore Authority (SHFA) initially proposed to call Expressions of Interest (EoI) for further terms of five years for these highly sought after retail shops. However, following representations from the tenants' representative seeking extension of the existing leases, this process was postponed. Legal advice as well as three probity reviews supports the EoI process.*
>
> *From 2000 onward, both NSW Maritime and the SHFA have consistently advised all incumbent and potential tenants that an EOI was proposed upon expiry of current leases.*
>
> *Five of the original tenants have assigned their leases to others since 2000, based on the expectation that their term expired on 31 August 2005. The value of such an assignment would have been substantially increased if the term of the lease extended beyond that term. If existing leases were renewed, those tenants who had reassigned their leases may claim misrepresentation of the term of the lease remaining.*

Mr Oxenbould commented that this arrangement was "unsatisfactory to all stakeholders". He said:

> *It is considered that the diversity of retail outlets might be improved by testing the market, as well as having the potential to increase income to NSW Maritime.*
>
> *The process of calling an EoI for further 5 year leases has been endorsed by the project Probity Auditor, and subsequently reviewed and endorsed by the former head of the Department of Commerce and a former ICAC Commissioner.*
>
> *Both NSW Maritime and the SHFA support the proposed EoI process*

Thus, the briefing note might be thought to support and positively endorse the competitive approach. Mr Oxenbould in his written recommendation, however, asked Mr Tripodi to do no more than "note the above information". Mr Oxenbould was asked by Counsel Assisting why he did not positively recommend that the EOI process be revived and carried through to completion.

Mr Oxenbould explained that he was endeavouring to use the briefing note as "an opportunity to generate discussion with … the Minister". His idea was to "kick start" the *Commercial Lease Policy,* even though, it must be said, the briefing note makes no mention of either the policy or any recommendation in regard to it. At the public inquiry, Mr Oxenbould said:

> *My objective was to resolve, to find some resolution to the Circular Quay leases issue. Now, whether it was an EOI or whether it was the* Commercial Lease Policy *I was not wedded to it. But I wanted to get a result.*

Mr Oxenbould conceded that, at the time, he did, in fact, support the proposed EOI process as "a possible solution," as a "feasible outcome" to an unsatisfactory situation at Circular Quay. Essentially, he wanted the opportunity to discuss the policy issue with the minister.

The briefing note is important for another reason.

Mr Oxenbould, who is accepted by all involved in the public inquiry as a responsible and honest bureaucrat, referred in the briefing note to a number of background issues supportive of the EOI process. These were later attacked in written submissions by Mr Dunn's counsel, at least when a number of them were repeated in a later report from Geoff Monkhouse, an officer of Maritime's Property Division. Indeed, criticism was levelled at the Commission for not calling Mr Monkhouse, although no request had been made during the public inquiry suggesting that he give evidence. No such criticism, however, was made of Mr Oxenbould, who did give evidence, for his espousal of those same arguments. He was not queried as to the legitimacy of his statement of the background issues.

Be that as it may, it is clear that Mr Oxenbould, at the time of the briefing note, was keen to have the issue of the draft *Commercial Lease Policy* resolved and, if possible, resolved quickly. It is also clear that he was prepared to accept a policy that required an EOI for existing retail leases, if that were the ministerial preference, or in the event that the stubborn stance being taken by Maritime's Property Division did not weaken. This was so, notwithstanding his own personal preference for direct negotiation.

This position is consistent with the view the Commission formed of Mr Oxenbould. He was a dedicated and loyal public servant who, in general terms, was prepared to placate those in the various divisions of Maritime, even where their views did not necessarily coincide with his own. He was a public servant who was loyal to his

minister and generally respectful of the ministerial view on particular policy issues. He was, to adopt a nautical metaphor, not one inclined to rock the boat. Generally, this is the view that Mr Low painted of Mr Oxenbould as well.

Thus, it was that the future direction of the draft *Commercial Lease Policy*, as at August 2007, at least from an industry point of view, appeared somewhat ominous. The prospect of achieving an outcome acceptable to both industry and Maritime's Property Division in relation to the principal issue of contention seemed remote, regardless of the efforts being made by Mr Low to achieve a satisfactory outcome.

What was needed was a circuit breaker. The catalyst for change occurred in mid-August 2007, with the appointment of Mr Dunn.

Chapter 8: Mr Dunn breaks the circuit

On 15 August 2007, Mr Dunn joined Maritime as deputy CEO. On 21 August 2007, he was appointed head of Maritime's Property Division. Thus, his joint position placed him in a perfect position to resolve or, if necessary, override Maritime's opposition to the direct negotiation process.

The sequence of events immediately following Mr Dunn's arrival at Maritime demonstrate how effectively he was able to bring about a position where the Obeid family interests were able to achieve, within a relatively short period, exactly what they had been seeking to achieve over a number of years. The sequence may be briefly stated as follows:

- On 20 August 2007, within days of Mr Dunn's appointment, Mr Scanlan called Mr Dunn. On the next day, Mr Dunn telephoned Mr Scanlan and it is likely that a meeting between the two men was arranged on that occasion. Mr Dunn and Edward Obeid Sr each said that the contact with Mr Scanlan was made at Edward Obeid Sr's suggestion. Edward Obeid Sr tried to ring Mr Dunn three times that day and one three-minute conversation took place between the two men. As will be seen, a meeting was later held on 28 September 2007 at Mr Scanlan's office on King Street in Sydney, at which Mr Dunn and, at Mr Dunn's request, Mr Low, attended.
- Mr Low said that Mr Dunn, at the very first conversation he had with him, asked him to meet Mr Scanlan. Mr Dunn told him that Mr Scanlan was the "representative of an organisation called the Circular Quay Traders' Association or Retail Traders' Association". Mr Dunn told Mr Low that Mr Low "should meet with him to get his views for the *Commercial Lease Policy*".
- In the morning of 21 August 2007, Mr Low emailed Mr Dunn the then current version of the draft *Commercial Lease Policy* (set out above). By then, Mr Oxenbould had made it abundantly clear that he wanted the *Commercial Lease Policy* issue resolved quickly, indeed within weeks, if possible. In the email, Mr Low asked Mr Dunn for his input on the policy.
- Mr Low said that very soon after his email, virtually straight away, Mr Dunn came to his office "in an energetic manner". Mr Dunn told him he wanted to get the *Commercial Lease Policy* issue resolved. He was very "critical of the lengthy delay" and was "very keen" to go through the policy "line by line and resolve all the remaining issues".
- Mr Low described the meeting in some detail. First, he said that Mr Dunn asked him whether they were in a position to resolve the policy and have it adopted and approved by the minister, if they moved to the concept of direct negotiation for retail premises. Secondly, Mr Dunn indicated that the key issue – the direct negotiation issue, was one that he intended to support in both his capacity as deputy CEO and as general manager of Maritime's Property Division. Mr Low gave the following evidence:

[Mr Low]: *---So ah, Mr Dunn indicated that he supported this change in both of his capacities as Deputy Chief Executive and also as the General Manager of the relevant division. Um, ah- -*

[Counsel Assisting]:
Excuse me, can I just as [sic] *you there, did he say why?*

---Because he wanted to get the policy resolved and he felt that this was the, he, he suggested this as the way to get the policy resolved.

Did, did he make any reference to Mr Scanlan at that point?

---No. Now, I said, I remember exactly his words. I said, "Well, Simon won't like it," which I meant Simon Lawton ah, but I suppose I also meant generally the other people in Mr Dunn's division – and he said, "Don't worry, I'll handle Simon." But to be sure I then went to both the Chief Executive and the Minister to get their views on, on the proposed change.

Well, let's talk about those. What did the Chief Executive say?

---Ah, the Chief Executive was pleased that there might be an outcome that would enable the policy to proceed. He had told me previously in, in idle conversation that he preferred the idea of lease renewals rather than EOIs because it would make for a happier Maritime client base, but in fairness he never explicitly required that to be in the policy. So when it was presented to him that we may be able to move forward with this, he was pleased with that.

So if I can just put it in a more vernacular sort of way, the Chief Executive was prepared to roll over on the EOI process if that meant getting industry endorsement?

---And the policy signed off.

Well, the last bit about the policy signed off, that's the policy signed off by the Minister. Is that right?

---Yes, indeed.

Well, let's talk about the Minister?

---Yes.

Did you have a conversation with the Minister about changing from an EOI process to direct negotiations?

---Yes, I did.

And what, was that with Mr Tripodi?

---Yes, it was.

- Mr Low said he went to see Mr Oxenbould shortly after the meeting with Mr Dunn.
- Mr Low also spoke to the minister after the meeting with Mr Dunn. He did so by way of a telephone call:

  I spoke to Mr Tripodi on the phone, Minister Tripodi on the phone, and indicated that ah, gave him the indication of the conversation that had happened with Mr Dunn and that Mr Dunn on behalf of the Property Division was keen to advance this case of direct negotiation if it enabled the property, the policy to proceed. The Minister indicated support for that for retail leases, for commercial marina leases, but not for Maritime industrial sites, these being the three groups with which an EOI process would be feasible potentially. He insisted that Maritime Industrial sites be offered via an EOI process only.

- Mr Low assured Mr Tripodi that they were now in a position where there was agency support via Mr Dunn for direct negotiations for retail leases and commercial marina leases. Mr Low said Mr Dunn, being general manager of the Property Division "considered that he then had the authority on behalf of that division to express a different policy" and that, in that regard, "he spoke for the division". This was so notwithstanding that the position adopted by Mr Dunn was contrary to the advice that had been received from Mr Lawton.
- It was shortly after these discussions that Mr Low, with Mr Dunn's approval, gave an independent lawyer, Lindsay Taylor, instructions to finalise a new draft policy; the instructions being that it was required, if possible, by about 4 September 2007.
- On 28 August 2007, Mr Dunn and Mr Low attended Mr Scanlan's office at King Street (there is an issue as to whether Mr Low was actually at the meeting but the Commission's view is that, on the balance of probabilities, Mr Dunn brought Mr Low with him to the meeting).
- Mr Scanlan described this meeting as "a very professional meeting". Mr Dunn invited him to make his case and he did so, no doubt, persuasively. He said there were no assurances given to him by Mr Dunn, it was just "an exchange of views". He thought he had observed a "preparedness to review the decision similar to what Mr Tripodi said but certainly no, nothing stronger than that".
- Immediately after the meeting with Mr Scanlan, Mr Dunn corresponded with Mr Lawton. Mr Dunn asked him for a response to the three issues raised by Mr Scanlan at the meeting. Mr Lawton, in turn, asked Mr Monkhouse to prepare a response, as Mr Dunn was intending to issue a response letter to Mr Scanlan by 4 September 2007. Mr Monkhouse provided a memorandum that contained some 13 points. These effectively repeated, and sought to justify, the historical position taken by Maritime's Property Division in its continued preference for an EOI process. On 3 September 2007, Mr Lawton forwarded Mr Monkhouse's document to Mr Dunn.
- According to Mr Dunn, he then met with Mr Lawton and proceeded to deconstruct each of the 13 points. In written submissions, Karen McGlinchey, counsel for Mr Dunn, sought to flesh out these attempts at deconstruction in an endeavour to show that Mr Monkhouse's 13 points were wrong, misconceived, irrational or, in some way, unfair. The Commission considers that it is unnecessary to answer these submissions in detail. The majority of these points were the "background" that Mr Oxenbould, without criticism, had earlier made in his briefing note to the minister in June 2007. Mr Dunn had promised to "handle Simon" and it appears that that is precisely what he did by persuading Mr Lawton to accept the changed position that Mr Dunn now advocated on behalf of Maritime's Property Division. Mr Dunn, it must be said, is a very persuasive and forceful man. The Commission accepts that it is highly likely that his meeting with Mr Lawton easily achieved the very result he had anticipated to Mr Low at the earlier meeting in Mr Low's office.
- Thus emboldened, on 4 September 2007, Mr Dunn wrote to Mr Scanlan, saying:

  > *We are in the process of reviewing our lease policy relevant to the premises currently occupied by your clients and I anticipate that a document will be available for public comment later in the year. Whilst the final decision on this matter will be a matter for Government I can assure you that the issue you have raised will be passed on.*
  >
  > *In respect to the issue you raised about compound rent increases during the holdover period I can advise that NSW Maritime will not seek any further increases under the current arrangement.*

  This latter issue is a reference to the 10% per annum increase in rent during the holdover period.
- On the same day, Mr Taylor presented Mr Dunn and others with version 10 of the *Commercial Lease Policy.* Clause 4.5 now read as follows:

  > *Subject to the* Retail Leases Act 1994, *NSW Maritime Retail leases will be offered via direct negotiation in the first instance. Where these negotiations fail to generate a satisfactory outcome in accordance with this Policy, NSW Maritime will generally conduct a competitive process.*

These words reflect a very dramatic change. They demonstrate how effectively Mr Dunn's activities as a circuit breaker had been. Of course, the change still had to formally be approved by Mr Tripodi and, ultimately, by Cabinet. As it happened, there were no difficulties in either of these regards.

The final form of clause 4.5, as approved by Cabinet, was similar to that set out above, although it contained

a number of amendments that did not affect the renewal of lease situation. It provided, for example, that new retail leases (that is, leases for sites upon which there was no current or recently-expired retail lease) would generally be awarded via a competitive process.

On 6 November 2007, a confidential Cabinet minute was prepared seeking Cabinet approval for the adoption of the draft *Commercial Lease Policy,* dated September 2007 (as amended). It was approved by Cabinet on 26 November 2007. The nominal start date for the new policy was 1 January 2008. Thus, the green light was finally given to the Circular Quay tenants to begin direct negotiations for new leases.

The catalyst for change

There can be little doubt that it was Mr Dunn who effectively brought about the resolution of the issue that had stalled the progress of the draft *Commercial Lease Policy* within Maritime. In practical terms, he was the direct and immediate catalyst responsible for the Property Division's acceptance of direct negotiation for retail lease renewals. In addition, he, alone, decided to drop the 10% rental increase for the leases at Circular Quay during the holdover period. Various submissions were received by the Commission urging that it was Cabinet that had approved the *Commercial Lease Policy* and that it was Mr Tripodi's choice, not Mr Dunn's, to send the matter to Cabinet. In other words, the submission was that Mr Dunn was not really responsible for the change. While these submissions were, in a sense, accurate, they do not undermine the proposition that Mr Dunn was the true circuit breaker. It was he who "got it done". As Mr Low said, when asked why the August draft *Commercial Lease Policy* was changed: "It was changed at the direction of Steven Dunn".

The Commission accepts that, within Maritime, this was an accurate and justifiable statement. As Mr Dunn said, however, the new draft *Commercial Lease Policy,* which favoured direct negotiations, still had to get through the minister and then Cabinet. There could be no negotiations with tenants until that happened.

From all of this, emerge the following critical questions. In achieving this change, did Mr Dunn act partially in favour, and at the request, of Edward Obeid Sr? Or was he simply acting with strict and impartial rectitude as an efficient bureaucrat? Throughout this process, did Mr Tripodi act partially towards Edward Obeid Sr and with the intention of benefiting the Obeid family interests? Or was Mr Tripodi simply acting impartially and honourably with only the interests of the state of NSW and the community in mind? Over and above these questions, the principal question arises as to whether it was Edward Obeid Sr who prevailed upon Mr Dunn and/or Mr Tripodi to achieve the clear benefits that arose for his family upon the implementation of the new *Commercial Lease Policy?*

Before examining these critical questions, it is relevant to briefly set out how negotiations were concluded.

Wrapping up negotiations

Mr Scanlan was notified promptly once there had been a determination within Maritime that direct negotiations should prevail. On 29 November 2007, there was a meeting between Mr Scanlan and Mr Low, during which the starting date for the new *Commercial Lease Policy* was confirmed as 1 January 2008. Mr Scanlan was told that, as a consequence of the new policy, Maritime intended to negotiate with existing tenants as from the commencement of 2008.

Mr Scanlan immediately wrote to Mr Abood and Mr Manthopoulos (they being, presumably by then, his two remaining clients) and to Mr Jabour. Mr Scanlan confirmed the discussions he had with Mr Low and gave some preliminary advice regarding the preparation of a business plan and the possibilities for rental negotiation with Maritime. He confirmed that a 10-year lease would be on offer.

Mr Jabour now resumed a prominent role in the negotiations. He had largely been out of the action since Mr Scanlan had been engaged as a mediator. Mr Jabour's expertise lay in the area of rental negotiations. It is clear that he took upon himself the major running of the negotiations from that point in time. Mr Scanlan, however, still had a role to play. Mr Scanlan described the victory he had achieved as "a moment of modest success". That, in the Commission's view, is something of an understatement.

In January 2008, Mr Scanlan also provided further advice when he wrote once again to Mr Abood, Mr Manthopoulos and Mr Jabour. This letter contained some detailed suggestions for the progress of the negotiations for the new leases. In the conclusion of his advice, he said:

> *The better we do with this negotiation, the more valuable will be the leases. We are trying to create an asset here worth a great deal of money. If we are successful in getting new leases for long periods on fair commercial terms, we will have something very valuable to sell.*
>
> …
>
> *Please ring me when you are ready to meet. Give me the ammunition and I will fire the gun.* [Emphasis in original]

Mr Dunn and Mr Low both played a role in the final negotiations between Maritime and Circular Quay Restaurants Pty Ltd. For example, on 5 March 2008, Mr Dunn sent an email to Maritime officer Bruce Green in

which he advised that he had been involved in a number of commercial lease policy site assessments, including the "cafe and like concessions" at Circular Quay.

General agreement was reached between Maritime and the tenants in the middle of 2008. The new leases commenced on 1 January 2009. They were each for a term of five years, with a five-year option. The commencing rental was in the vicinity of $264,000 for shop W4.1 and a similar amount for shop W5.1. As Mr Scanlan has suggested, there was provision for a percentage rental based on turnover. The leases, it might be noted, were signed by Mr Abood, although he had long since ceased having anything to do with the management or operation of the businesses. His signature was witnessed by Sam Achie, one of Edward Obeid Sr's sons-in-law.

During the latter part of 2008, the businesses were the subject of a sale proposal. They were eventually placed on the market for sale in April 2009. Advertisements at the time emphasised the long lease term available for any prospective purchaser. The businesses, however, for reasons that are not entirely clear, failed to sell. In late 2012, as has been said earlier, the businesses closed and Maritime retook possession on a default basis. By then, a considerable amount of rent had accrued due but remained unpaid.

Before concluding the narrative portion of this report, it is necessary to comment briefly on the position of Mr Scanlan. The Commission noted earlier that there was a possible issue that Mr Scanlan, through his work for Circular Quay Restaurants Pty Ltd, may have realised or learned relatively early in the piece that the Obeid family had an interest in the businesses.

Mr Scanlan impressed as a shrewd and diligent negotiator. He is nobody's fool. It seems odd that he would not have divined, or at least suspected, at an early stage that Mr Abood may not have been the true owner of the Circular Quay businesses. Mr Scanlan volunteered that Mr Abood was not a particularly sophisticated man. Was it likely that Mr Abood would have had access to the $2 million or so needed to buy those businesses from Mr Imad? Surely this question would have occurred to Mr Scanlan.

The position is complicated by the presence of Mr Jabour. In 2002, he worked with Damian Obeid at the Obeid offices in Birkenhead Point. Mr Jabour was a person who recommended that Mr Scanlan be appointed. He spoke on various occasions with Mr Abood, Damian Obeid and Mr Scanlan on the issue of the lease renewals. Later in 2007, Mr Jabour once again became involved with the lease issues. At that time, he had discussions and correspondence with Mr Scanlan concerning the proposed business plan to assist in the lease negotiations following Maritime's change of policy. Mr Jabour knew, at all times, that the Obeid family had an interest in the Circular Quay businesses.

A further complication is that Mr Scanlan had been in attendance at a meeting in 2005 at which Moses Obeid, son of Edward Obeid Sr, was also present. He had also spoken to Moses Obeid on the telephone on several occasions in March 2005. Mr Scanlan conceded that these exchanges related to Mr Abood's tenancies.

Nevertheless, Mr Scanlan claimed that his client was, at all times, Mr Abood. Although he knew there was a connection between Mr Abood and Moses Obeid, he regarded Mr Abood as the owner of the business. Throughout his evidence, he maintained that he was not aware that the Obeid family had "a slice of the action" until it came to his attention in 2011.

No submissions were made by Counsel Assisting casting any doubt on Mr Scanlan's evidence in this regard. The Commission has not been asked to make any adverse findings against him. In these circumstances, and particularly as Mr Scanlan was not legally represented during the public inquiry, the Commission, while having some reservations, does not find that Mr Scanlan knew of the true position before he was informed of it in 2011. Accordingly, the Commission makes no adverse findings against Mr Scanlan.

Chapter 9: Critical questions

The Commission now returns to the critical questions identified in the preceding chapter. These relate to each of Mr Dunn, Mr Tripodi and Edward Obeid Sr. It is convenient to start with the position of Mr Dunn.

Mr Dunn

Counsel Assisting submitted that the Commission should make, in substance, two adverse findings against Mr Dunn. These were that, first, to Mr Dunn's knowledge, Edward Obeid Sr had been instrumental in getting Mr Dunn his job at Maritime. Secondly, that Mr Dunn, knowing of the Obeid family interests at Circular Quay and at the request of Edward Obeid Sr, agitated to change, and did, in fact, succeed in changing, Maritime policy to enable the Obeid family interests to engage in direct negotiation for new leases at Circular Quay.

These are serious assertions and consideration must be given as to whether they are made out to the appropriate standard. In making findings of fact and determinations of corrupt conduct, the Commission applies the civil standard of proof on the balance of probabilities, which requires facts to be proved to a reasonable satisfaction taking into account the decisions in *Briginshaw v Briginshaw* (1938) 60 CLR 336 at 362 and *Neat Holdings Pty Ltd v Karajan Holdings Pty Ltd* (1992) 67 ALJR 170 at 171.

Counsel for Mr Dunn and Edward Obeid Sr each pointed to the fact that both men emphatically deny that Mr Dunn was told by Edward Obeid Sr that his family owned or had an interest in the Circular Quay leases. Ms McGlinchey, counsel for Mr Dunn, rejects the argument that her client's position at Maritime was engineered by Edward Obeid Sr.

It is convenient to dispose of this matter first. The Commission is not satisfied to the requisite standard that Edward Obeid Sr was instrumental in securing the Maritime positions for Mr Dunn. There were a number of telephone conversations between Mr Dunn and Mr Tripodi prior to his taking up his new positions. These appeared, at first blush, puzzling, if not incongruous. There were, however, later explanations for these telephone calls. There is no evidence to suggest that there was anything untoward in the calls between Mr Dunn and Mr Tripodi during this period.

Accordingly, the Commission rejects the suggestion that Edward Obeid Sr was instrumental in securing either of the Maritime positions for Mr Dunn.

This is not to say that Edward Obeid Sr would not have been more than pleased to see Mr Dunn's elevation to a senior position in Maritime. The telephone calls between the two men at the time make it likely that, from the outset, Edward Obeid Sr saw the appointment for Mr Dunn looming. Mr Dunn agreed that he would have told Edward Obeid Sr of his success as soon as the appointment came through.

Maritime had effectively blocked the Obeid family interests at Circular Quay from progressing to a satisfactory lease arrangement. Despite the representations made by Edward Obeid Sr, himself, despite the skilful and persistent overtures from Mr Scanlan, and despite the presence of Mr Tripodi, Edward Obeid Sr's long-time political ally and protege in the ministerial portfolio, Maritime had stood firm in its preference for an EOI process. The Circular Quay leases had been in holdover for a long time, the rent was being increased and the turnover was, apparently, in decline. Mr Abood was unwell. In all these circumstances, Edward Obeid Sr would have been keen to see the arrival of a circuit breaker and that, of course, happened, as has been said, with the arrival of Mr Dunn.

The critical questions are whether, at the relevant time and thereafter, Mr Dunn knew of the Obeid family interests at Circular Quay and, if so, whether he acted to benefit those interests. There is no direct evidence of any conversation between the two men on the topic. That must be accepted. There is no admission made by either man to that effect. That is also accepted. Nevertheless, the Commission

has come to the firm view that, applying the *Briginshaw* standard, the evidence establishes as a matter of clear inference that Mr Dunn did know of the Obeid family interests and acted in his office intending to benefit those interests.

When looked at in a broader context, the sequence of events outlined earlier is overwhelmingly supportive of the view reached by the Commission. The behaviour of Mr Dunn was, and must be regarded as, extraordinary, particularly in the context of the extensive communication between him and Edward Obeid Sr at the critical times.

First, the Commission points to the long association between Mr Dunn and Edward Obeid Sr. Secondly, Edward Obeid Sr knew while Mr Dunn was at fisheries that Mr Dunn held the views that a satisfactory tenant should be offered a lease renewal. Thirdly, Mr Dunn was obviously a great admirer of Edward Obeid Sr; he described Edward Obeid Sr as a "charismatic" man who "talks eloquently and well".

Against that background, it makes sense that Edward Obeid Sr, when he knew Mr Dunn was destined for a senior position or positions at Maritime, would have told him of the Obeid family interests at Circular Quay. Of course, he would have "dressed-up" the disclosure, as he did in the public inquiry; those interests ought not, so Edward Obeid Sr argued, cloak or diminish, as he saw it, the merits of the case, namely the unfair treatment of tenants by Maritime. One can well understand the attraction of this argument to Mr Dunn. But it would have been even more powerful and persuasive in the knowledge that those being treated unfairly included Edward Obeid Sr himself. It would have given an additional incentive for unprecedented prompt and decisive action once Mr Dunn had taken up his new position.

The Commission has said that Mr Dunn's actions upon arriving at Maritime were extraordinary. A brief commentary on these events will show that the description is well warranted:

- Within days of arriving at Maritime, Mr Dunn was in contact with Mr Scanlan to arrange a meeting. This "contact" was organised by Edward Obeid Sr with a view to a meeting between the two men. The meeting was designed to give Mr Dunn the "ammunition" he needed (normally, it will be recalled, it was Mr Scanlan who "fired the ammunition": see his letter dated 17 January 2008. But in this instance, Mr Scanlan was to provide the ammunition and Mr Dunn was to fire the gun).
- In his first real conversation with Mr Low, head of policy at Maritime, Mr Dunn directed Mr Low to come to the meeting with Mr Scanlan. This is significant. Mr Low, who had earlier in the year met all the major industry groups, thought he was to meet another major industry group. He was surprised at the meeting on 28 August 2007 to find out how small scale this group was. His "conversion", however, was necessary, since he was head of policy.
- Once the August 2007 draft *Commercial Lease Policy* was submitted to Mr Dunn for comment, he immediately confronted Mr Low in his office and insisted on going through the policy line by line and, in the process, persuading Mr Low to his point of view.
- Mr Low was in no doubt that it was Mr Dunn who was responsible for the significant change in policy. It was, Mr Low said, "changed at the direction of Steven Dunn".
- During this meeting, Mr Dunn also made it clear to Mr Low that it was his intention to bend Mr Lawton to his view. Mr Lawton's position on an EOI process represented the general position of Maritime's Property Division. To get a change in policy through, it was necessary to bring Mr Lawton to heel. In real politik terms, if Mr Dunn could diffuse the arguments in Mr Monkhouse's later memorandum to Mr Lawton, he could rightly say to both Mr Oxenbould and the minister (Mr Tripodi) that Maritime's Property Division no longer stood in the way of direct negotiation at Circular Quay.
- Mr Low, plainly persuaded if not overborne by Mr Dunn, immediately sought tacit approval from both Mr Oxenbould and Mr Tripodi and, as might be expected, encountered little, if any, resistance from either quarter for the proposed change so far as it related to retail leases (the position of Mr Tripodi will be dealt with later).
- Whether on instruction from Mr Low or Mr Dunn (or both), the draft *Commercial Lease Policy* was ordered to be put into its final form (so far as Maritime was concerned) and to be ready within a matter of days.
- On 28 August 2007, Mr Dunn and Mr Low met with Mr Scanlan. One of Mr Scanlan's complaints raised at the meeting was successfully addressed by Mr Dunn within a few days, on 4 September 2007. Mr Dunn decided there were to be no more rent increases while the leases were in holdover; this was despite Mr Monkhouse's rational arguments to the contrary. More significantly, at Mr Dunn's request, the reasons for the traditional Maritime preference for EOIs were reduced to writing by Mr Monkhouse and forwarded to Mr Dunn via Mr Lawton. These reasons were then

effectively deconstructed by Mr Dunn in his meeting with Mr Lawton. He had promised to "handle Simon" and he did so very effectively.

- The new draft *Commercial Lease Policy,* introducing direct negotiations for retail leases, came into being on 4 September 2007. After consultation with Mr Oxenbould and Mr Tripodi, Mr Dunn had no difficulty in seeing it safely through.

It can be seen from all this that, within a little over a fortnight, Mr Dunn had achieved what others, especially Edward Obeid Sr, could not achieve over a period of years.

A significant reason for the adverse inference drawn by the Commission relates to the nature and timing of the communications between Mr Dunn and Edward Obeid Sr in this period. For example, at 10.42 am on 17 August 2007, Mr Dunn and Edward Obeid Sr exchanged messages culminating in a five-and-a-half-minute telephone call. Later that day, at 7.52 pm, Mr Dunn and Mr Tripodi had a 27-minute telephone call, which Mr Dunn accepted would certainly have included some discussion about the draft *Commercial Lease Policy.* The meeting with Mr Scanlan and Mr Dunn was on 28 August 2007. The day before this meeting, Edward Obeid Sr called Mr Dunn at 7.04 pm and an eight-minute conversation ensued. On the day of the meeting, Mr Dunn called Edward Obeid Sr twice from about 7 pm, and conversations occurred totalling 12 minutes. It is highly likely, as the Commission finds, that Mr Dunn was reporting back to Edward Obeid Sr following the meeting and telling him that a change from the EOI requirement was likely. On 3 September 2007, as has been said, Mr Lawton forwarded Mr Monkhouse's document to Mr Dunn. That evening, Mr Dunn and Edward Obeid Sr spoke on the telephone for about 11 minutes.

The frequent exchanges between Mr Dunn and Edward Obeid Sr during this period were necessarily business-related; the business between them at this time was essentially concerned with the resolution of the *Commercial Lease Policy* issue. Clearly, Mr Dunn was reporting to Edward Obeid Sr on his meeting with Mr Scanlan and his progress with people within Maritime.

Submissions on behalf of Mr Dunn assert that there is no justification for a finding that he knew of the Obeid family interests at Circular Quay. Further, it was argued that his activities, upon taking up his new position at Maritime, were merely consistent with those of a vigorous bureaucrat acting with utmost efficiency. Mr Oxenbould said that, once Mr Dunn arrived, responsibility for the *Commercial Lease Policy* was passed on to him. It is certainly true that he took on that responsibility with vigour but the overwhelming inference, in the Commission's view, is that he was acting with a level of commitment that, in all the circumstances, can be explained only by his knowledge of the Obeid family interests and by his desire to advance those interests in a prompt and effective manner.

It should be noted that, in entirely unrelated matters, Mr Dunn, during the same period, demonstrated that he was not averse to doing favours for Edward Obeid Sr. After Mr Dunn had left the NSW Department of Water and Energy and moved to Maritime, he was asked by Edward Obeid Sr to make enquiries concerning water licences at Cherrydale Park. The detail of this is contained in the Commission's report on Operation Cabot, titled *Investigations into the conduct of the Hon Edward Obeid MLC and others in relation to influencing the granting of water licences and the engagement of Direct Health Solutions Pty Ltd*. Briefly put, however, Mr Dunn made those enquiries for Edward Obeid Sr in September 2007. He saw himself as doing Edward Obeid Sr "personal favours" in pursuing the matter. Later, at Edward Obeid Sr's request, he had a telephone conversation on 30 October 2007 with the owner of Cherrydale Park, John Cherry, about the water licences. Clearly, once again, Mr Dunn was doing a favour for Edward Obeid Sr. In all these instances, Edward Obeid Sr had told Mr Dunn of his family's interests in the purchase of Cherrydale Park.

Counsel Assisting submitted that the discussion Mr Dunn had with Mr Cherry, although it was clearly a favour for Edward Obeid Sr, was "simply none of Dunn's business". This drew a sharp response from Ms McGlinchey that it was "unfair in [her] submission". The Commission accepts, however, that it was by no means unfair. The submission filed on behalf of Roads and Maritime Services, in part, comments on the activities of Mr Dunn in relation to his dealings with personnel from the Department of Water and Energy over the Cherrydale Park water licences. The submission notes that Mr Dunn's dealings with these personnel and others over the water licences were not matters that were in any way connected with his role at Maritime. The submission concludes that "such activity was inconsistent with the proper and expected conduct of an officer of Maritime". The Commission agrees with this statement.

The suggestion that Mr Dunn knew of Edward Obeid Sr's interest in the Circular Quay leases obtains some further limited support from an exchange of email and faxes on 19 August 2008. It seems that during the day Mr Dunn enquired of Mr Lawton about an EOI process for three kiosks at Circular Quay. These were originally newsagency stands but they were now available for lease or licence. They were close to wharves 4 and 5 and, thus, quite close to each of shops W4.1 and W5.1.

Earlier in the day, at 11.42 am, Mr Dunn wrote to Robert Domm, an officer of the SHFA, raising concerns as to the potential damaging effect of these kiosks on cafe tenants at the Circular Quay wharves. The concern expressed was that, if leases or licences were granted for the kiosks, they

might sell, for example, soft drinks and other items that would put the kiosk businesses into direct competition with the takeaway cafes on wharves 4 and 5.

At 10.45 am on 19 August 2008, Mr Dunn had faxed a plan of the location of the kiosks and other unidentified information to Ellana Costa at NSW Parliament, who told Mr Dunn that she would "pass that onto Eddie right away". This sequence of events, though by no means conclusive in itself, supports the inference that Mr Dunn knew of the Obeid family interests in the leases.

The Commission rejects the evidence of Mr Dunn that he was, during 2007 and 2008 and thereafter, unaware of the Obeid family interests at Circular Quay. The Commission finds that, prior to or at the time of his entering his new position at Maritime, Edward Obeid Sr told Mr Dunn of those interests and prevailed upon him to bring about a favourable change to Maritime's position concerning retail leases.

What then follows? In the light of these findings, it must be the case that Mr Dunn, despite his protestations to the contrary, favoured the interests of Edward Obeid Sr rather than serving, as he was bound to do, the interests of the people of NSW. His capacity to exercise an impartial and disinterested judgment from the point of view of the public interest was overborne by his determination to assist Edward Obeid Sr's interests.

The Commission accepts that there was a genuine debate at the time as to whether the *Commercial Lease Policy* should, in its final form, permit direct negotiations in certain circumstances or whether it should insist on an EOI process. While recognising the practical and commercial merits of the respective arguments in this debate, the Commission is not called on to express a preference in that regard. Either outcome was permissible. The point to be made, however, is that, quite apart from whether the dramatic change to the *Commercial Lease Policy* was justified or not, Mr Dunn, in acting as he did, served the interests of Edward Obeid Sr instead of serving only the interests of the people of NSW.

Did Mr Tripodi change the policy to benefit the Obeid family interests?

The Commission has earlier found that Mr Tripodi, in either late 2006 or early 2007, became aware that the Obeid family interests included financial interests in leases at Circular Quay. The essential allegation made against him is that in 2007–2008 Mr Tripodi, knowing of those interests, exercised his official functions as a minister with respect to the *Commercial Lease Policy* for the purpose of benefiting Edward Obeid Sr and his family. The allegation raises, obviously enough, the important issue of a potential conflict between interest and duty. It involves the consequential issue of the recognition of conflicts of interest and the steps that must be taken by public officials to avoid those conflicts. On a broader level, it raises an important issue of possible partiality.

Counsel Assisting submitted that Mr Tripodi exercised his power in a partial manner in favour of the Obeid family interests.

Mr Tripodi gave his explanation for the role he played in the shift in the draft *Commercial Lease Policy* between August and early September 2007 as follows:

[Counsel Assisting]: *Patrick Low who was the General Manager Policy for New South Wales Maritime has said that that change was effected at the suggestion of Mr Dunn. My question to you is what role if any did you play in the shift in position between late August and early September in the draft Lease Policy?*

[Mr Tripodi]: *---I can't give you a date and I'm only going by my best recollection but I believe that there reached a point where Mr Oxenbould said to me that we really do need to make a decision about this and just to give some context about what was occurring I always knew and understood that this was a contentious issue. I also had my own personal view about it which I think I pushed as hard as I could which is things should go to tender. And there reached a point, and, and so this contentious issue at least in the mind, in my mind and in the minds of those I was talking to was put aside and left in the document as I would have preferred it. But there reached a point where Mr Oxenbould said, look we really do need to make a decision on this, it's been such a long time. So on his very polite, and his very polite and, and charming way he coaxed me into making a decision. I sensed very strongly that it was his view that we should go to direct negotiations. Also my staff were of that view, or some of my staff. I didn't like it, but given the weight of industry pressure and urging I accepted that this change was the appropriate policy for the Government. Mind you, Mr Temby, I don't need to tell you that in the previous policy which I'd inherited*

from the pervious [sic] *Minister, and I know there's some argy bargy about this, but the policy was it will be an automatic renewal. That was the policy. On retail leases and commercial leases, as I understand this, as I read it. Here it is that you will enter negotiations. And there's also a clause in this, in this policy that says that no one has a right to renewal. That if the agency chooses there will be no renewal. And so I felt that this ultimately was the compromise that would allow us to progress and finally give the industry the policy that they deserved, the policy that they'd been waiting for for such a long time.*

But you'd agree Mr Tripodi that the new draft policy of 4 September is one which countenanced direct negotiations and set up direct negotiations as the general rule?

---Yes.

Whereas the previous version of the policy - - -?

---Yeah. Mind you my policy, this is the policy I put out to public consultation that we should have competitive tendering.

The previous version of the policy required at least as a general rule competitive tendering?

---Yes.

So there had been in that respect a complete change in position?

---Yeah. But Mr Temby, I want to give some context to this. I always understood from the first day that we went out and even before that under, under the advice of Mr Oxenbould that what I wanted to do was a very contentious reform. But I still pressed ahead with it. And it became contentious and it remained, it remained contentious and it remained in the document because I said ultimately we'll make a call on that. Let's work on everything else and then we'll make a call on that. And then obviously at some point of time Mr Oxenbould, rightfully, almost fatherly said to me, this has been going on for a while now Minister, we need to make a call. And to be honest I would be out there alone almost with no backup trying to push through with competitive tendering as I would have liked to have seen it. So being a, being a Minister that listens to everybody, I accepted that we needed to go back to and if not, not as, not as overwhelming as it was in the, in the Lands policy that we would have to take. You know I have, I have to listen to industry. I'm there to serve constituencies and I changed the policy. I accepted that the policy need to be changed.

Counsel Assisting submitted that Mr Tripodi's evidence must be treated with caution. First, Counsel Assisting said, Mr Tripodi had changed his evidence on the critical issue as to whether he knew of the Obeid family interests at Circular Quay, and did so in a manner that was not credible. Secondly, it was submitted that, in a number of respects, Mr Tripodi was evasive and, in effect, dissembling. Mr Tripodi's counsel rejected these assertions and asked the Commission to accept Mr Tripodi's evidence as revealing the genuine reasons for his shift on the policy issue.

Counsel Assisting made these further points. First, the political association between Mr Tripodi and Edward Obeid Sr was such that Mr Tripodi was vulnerable to making a decision that benefited Edward Obeid Sr and his family. Secondly, the course of communication between Mr Tripodi and Edward Obeid Sr during the relevant time was such that an inference could be drawn that they were discussing the *Commercial Lease Policy*. Thirdly, Mr Tripodi knew that Mr Dunn had met with Mr Scanlan in August 2007, and that Mr Dunn was proposing a change to the *Commercial Lease Policy* to meet the desires of the Circular Quay tenants, contrary to Maritime's advice to Mr Tripodi at the time. Finally, the Commission should reject Mr Tripodi's explanation that Mr Oxenbould had talked him into changing the *Commercial Lease Policy* and that, had it not been so, Mr Tripodi would have been "out on a limb on his own".

The ultimate submission made by Counsel Assisting was that a finding should be made that Mr Tripodi had exercised his power in approving the amended form of the *Commercial Lease Policy* in a partial manner, having regard to his relationship with Edward Obeid Sr and for the purpose of benefiting Edward Obeid Sr's family. In effect, the

submission made is that Edward Obeid Sr and Mr Tripodi were involved in a deliberate agreement to benefit Obeid family interests.

The Commission has concluded that the submission, in all its breadth, cannot be accepted. In doing so, however, the Commission reserves a subsidiary question for further discussion: did the fact that Mr Tripodi promoted the revised *Commercial Lease Policy* through Cabinet, without disclosing his knowledge of the Obeid family interests, constitute corrupt conduct or, at the very least, a breach of a moral obligation?

As to the broader issue, the Commission is once again mindful that it must apply the civil standard in the context of the caution stated in *Briginshaw v Briginshaw*. While many of the matters relied on by Counsel Assisting in support of their submission have weight, there are at least two substantial matters that stand in the way of the broad finding sought in the submission. The first relates to the communications between Edward Obeid Sr and Mr Tripodi at the relevant time. The position of these communications must be viewed in a different light than the communications between Mr Dunn and Edward Obeid Sr. This is especially so because of the broad range of ALP issues that necessarily were the concern of Edward Obeid Sr and Mr Tripodi. It has to be accepted that this broad range of issues involved not only policies within the right-wing ALP faction group to which both belonged, but it also included broad policy issues in relation to issues being fought between the government and the opposition. No doubt, it included a range of tactical decisions on a day-to-day basis for political manoeuvres and other strategies of a wide-ranging nature.

First, put simply, the number of communications between Edward Obeid Sr and Mr Tripodi in the period under discussion does not carry with it any positive inference that the matters they discussed necessarily included repeated exchanges concerning the draft *Commercial Lease Policy*. In addition, it needs to be recalled that, although Mr Tripodi knew of the Obeid family interests at Circular Quay, there is no evidence that he acquired this knowledge from Edward Obeid Sr.

Secondly, it also needs to be recalled that Mr Tripodi, following on from the meeting with Mr Scanlan, did nothing at that time to advance the Obeid family interests. If Mr Tripodi had come to some agreement with Edward Obeid Sr to benefit Edward Obeid Sr, that was the time to move promptly towards a change in policy. But nothing happened for well over a year. Similarly, as Ms Ashpole's evidence makes clear, Mr Tripodi did not, while she worked for him, move away from his steadfast intention to espouse EOIs for retail leases.

There are, however, matters that, it must be said, raise a level of suspicion as to Mr Tripodi's motivations and behaviour. First, his credibility must, in a number of respects, be doubted. This is particularly so in the case of Ms Ashpole's evidence and Mr Tripodi's unconvincing attempts to reconcile his evidence with that of his former policy adviser. There is also his attempt throughout his evidence to distance himself from Mr Dunn. This can be seen in the manner in which he has attempted to downplay Mr Dunn's role in the change of policy and his denial of any knowledge of Mr Dunn's meeting with Mr Scanlan. There was also his reluctance to speak candidly about the circumstances leading to his own meeting with Mr Scanlan.

Doubts about Mr Tripodi's credibility also arise in relation to his attempts to bolster and magnify the role of Mr Oxenbould in the policy change. Mr Low's evidence was that, after he had his initial lengthy discussion with Mr Dunn, he contacted the minister who stated his position very clearly. Mr Tripodi immediately accepted much of the argument concerning direct negotiations, although he qualified that acceptance in one important respect, not relevant to the retail lease issue. There was a distinct difference between Mr Low's emphasis on the discussions he had with Mr Tripodi and the evidence Mr Tripodi gave regarding the circumstances leading to his change of heart. In this regard, Mr Low's evidence is to be preferred to that of Mr Tripodi.

Secondly, there is the curious denial by Mr Tripodi of any knowledge of the 21 June 2007 briefing note. It will be recalled that this note was written by Mr Oxenbould specifically to generate discussion with the minister. It was written to bring to a head a situation that had lay dormant for a considerable period of time. It is inconceivable that Mr Oxenbould's briefing note was not in some form or another brought to Mr Tripodi's attention. He claimed, however, that, as his signature did not appear on the document, he had not seen it. This reluctance to admit the obvious may be because Mr Tripodi was well aware, when he gave evidence, that the briefing note demonstrates that there was a strong view within Maritime for preferring EOIs to direct negotiation. He wanted to persuade the Commission that it was he, and he alone, who stood against the tide, and that Mr Oxenbould, in the end, persuaded him to take a different position. The briefing note does not support his evidence and the Commission considers it highly probable that he would have seen it or been told generally of its contents.

The combined effect of these matters is to leave a lingering sense of suspicion that Mr Tripodi was not fully candid with the Commission and that his evidence does not tell the entire story.

This element of lingering suspicion, concerning though it is, is not sufficient to enable the Commission to draw, in all the circumstances, an inference that Edward Obeid Sr and Mr Tripodi between them effected a deliberate exercise by Mr Tripodi of his ministerial power in a partial manner to favour the Obeid family interests.

The remaining question as to Mr Tripodi's non-disclosure

There remains, however, this question: if Mr Tripodi knew of the Obeid family interests at Circular Quay (as the Commission has found he did), did he, nevertheless, act corruptly in participating in, and endorsing, the altered *Commercial Lease Policy* and forwarding it to Cabinet for approval? The point here is that, at no time during this process, did Mr Tripodi inform the senior members of his staff or Cabinet (or the premier, for that matter) of the Obeid family interests. Nor did he disclose that those interests stood to benefit if the *Commercial Lease Policy* were adopted and approved.

On one view of it, this failure to disclose may be seen as a deliberate concealment of a matter about which both Mr Tripodi's department and Cabinet were entitled to be informed. It could scarcely be regarded as something that had slipped his mind. On the other hand, it may be that Mr Tripodi, while conscious of the Obeid family interest, did not act deliberately so as to conceal those interests. Either way, Mr Tripodi's behaviour, by any ordinary standards, must be seen as reprehensible and improper. It would be rightly regarded by the general community, the Commission suggests, as both reprehensible and improper.

The question as to whether Mr Tripodi's failure to disclose his knowledge of the Obeid family interest constitutes corrupt conduct within the meaning of s 8 and s 9 of the ICAC Act, however, is more difficult to resolve. This will be examined in the following chapter.

Edward Obeid Sr – a figure of great power

Throughout this report, the figure of Edward Obeid Sr has dominated. His presence and influence can be seen at almost every stage. It can be seen when he first made representations on behalf of the Circular Quay tenants in the mid-1990s. It can be seen from 2002 onwards, when the Obeid family acquired the Circular Quay businesses, and right through to 2012 when the Circular Quay businesses closed.

Edward Obeid Sr was a powerful force throughout the mid-1990s, lobbying successfully on behalf of the Circular Quay tenants and, in particular, his close friend, Mr Imad. His representations were, plainly enough, a significant factor in persuading Mr Scully to back away from the open tender process, which he had originally favoured. They were a significant factor in leading Mr Scully to adopt a first offer of refusal in favour of the existing tenants at Circular Quay.

Edward Obeid Sr admitted that he had, in one form or another, pushed the case for recognition, as he saw it, of the unfair treatment received by Circular Quay traders. He freely admitted that he had pushed this case with the ministers who succeeded Mr Scully. He candidly, indeed brazenly, admitted that, from 2002 onwards, he deliberately did not disclose his family interests in the leases on the wharves. Significantly, he did not disclose that his family interests were likely to benefit financially if direct negotiations were permitted in place of an open tender process. On the basis of his evidence, he did not disclose these interests, nor mention the benefits that would flow to his family, in any of his dealings with Mr Roozendaal, Mr Costa and Mr Tripodi. Extraordinarily, he maintained that he was perfectly entitled to take this stance.

Edward Obeid Sr maintained that he was entitled to be reticent on the issue of his family's involvement because he wanted the Circular Quay issue to be dealt with "on its merits". He wanted the relevant ministers to be able to make decisions without the "pressure" of knowing that the Obeid family had business interests in the Circular Quay precinct. Moreover, he purported to be lobbying on behalf of retail lessees generally – advocating, so he claimed, against the evil of the *Retail Leases Act 1994* (it might be observed that significant amendments to the *Retail Leases Act 1994* were made in 2005 and came into force on 1 January 2006. The "evil" had by this time been well and truly addressed; yet, Edward Obeid Sr continued his lobbying throughout 2006 and 2007). Edward Obeid Sr asserted that, on some occasions, he was not lobbying at all but merely expressing his own opinions in the hope that someone would listen to him.

There are two matters to be determined. The first is the issue of the $50,000 donation to the ALP in the period between 1996 and 1998. The second relates to Edward Obeid Sr's lobbying of ministers between 2002 and 2009 without disclosure.

The $50,000 donation

The facts surrounding this donation have been dealt with at length in this report. Edward Obeid Sr's own evidence is that a $50,000 donation was made to the ALP in or about the mid-1990s by the Circular Quay lessees. In his compulsory examination, having referred to the *Retail Leases Act 1994*, he said:

> *…it wasn't about my family, it was about the principle that we had promised these people by Carl Scully in front of me and at … a restaurant ... called Eliza Blues, these shopkeepers, there was over 50 of them, they'd had a dinner for Carl Scully, I was there, he made promises ... and he had not honoured what he had promised them and they had outlaid the money and they didn't get what they expected. My insistence from then on was this is a dud lease, you're unfair to these people... you have not fulfilled what you promised.*

The Commission finds that Edward Obeid Sr, on behalf of the Circular Quay lessees, had lobbied Mr Scully in his capacity as the responsible minister. He did this not in his private capacity but in his role as a member of the Legislative Council (MLC). He was clearly seeking to participate in or affect the decision-making process in circumstances where, at least on the basis of his evidence, money had been paid to the ALP as a form of valuable inducement for the carrying out of a promise.

The Commission finds that the circumstances thus revealed by Edward Obeid Sr's evidence may properly be said to involve a form of bribery. Of course, in this state, donations to political parties have been seen as commonplace, although viewed in some situations by the community with a justifiable degree of suspicion. There is a clear dividing line, however, between general party donations and money paid to effect a particular outcome. On the evidence placed before the Commission by Edward Obeid Sr, the $50,000 donation was regarded by him as a payment for the carrying out of a promise given by Mr Scully. Section 8(2)(b) of the ICAC Act lists bribery as a component of corrupt conduct. Obviously enough, a money bribe has the capacity to adversely affect the exercise of official functions by a public official. It may properly be said that Edward Obeid Sr regarded himself as being under an obligation or an inducement, following the payment of the money to the ALP, to participate in and, if possible, affect the outcome of the decision-making process at Circular Quay. That is the role he took upon himself. His conduct, in this regard, may be properly regarded as involving the dishonest exercise of official functions (see s 8(1)(b) of the ICAC Act).

As the submissions of Counsel Assisting point out, Edward Obeid Sr, in this situation, although exercising his position as an MP, was no longer acting properly and honestly as a representative of the people. Rather, he was serving the Circular Quay lessees in meeting their expectations as a consequence of, and in consideration for, their substantial donation to the ALP. Accordingly, it must be accepted and the Commission so finds, that a breach of public trust thereby occurred (see s 8(1)(c) of the ICAC Act).

In the next chapter, the Commission will make its final findings in relation to the statutory framework of the ICAC Act regarding corrupt conduct.

Edward Obeid Sr's lobbying of Mr Scully, Mr Costa, Mr Roozendaal and Mr Tripodi

It was accepted by Counsel Assisting that it must follow from Mr Scully's evidence that Edward Obeid Sr did not make any representations to him concerning the Circular Quay issue after the Obeid family interests came into existence at Circular Quay in 2002. There were, as has been said, representations made to Mr Scully before this time. Indeed, there were successful representations made by Edward Obeid Sr prior to Mr Scully's decision in 2000 to give first option to the existing tenants. But it has been conceded that there was no evidence of any representation made to Mr Scully after 2002.

It is not in contest, however, that Edward Obeid Sr made representations to Mr Costa, Mr Roozendaal and Mr Tripodi. As has been said, the submissions from Edward Obeid Sr contend that he chose in good faith not to disclose his family's interests to those ministers, and that he had a number of justifiable reasons for the non-disclosure.

It was further submitted on his behalf that he did not intend to influence any public officials in the exercise of their official functions with respect to the retail leases at Circular Quay. Nor did he intend that any of the ministers should act improperly. That is to say, the submission stated, Edward Obeid Sr did not intend the ministers to act directly (as opposed to incidentally) to benefit his family's financial position.

Moreover, it was submitted that Edward Obeid Sr's remarks to the ministers did not warrant the label of representations. He sought to do no more than express his opinions in the settings of normal factional exchanges on policy issues. Further, it was submitted that he was not acting in his role as an MP when he spoke to these various public officials.

In the case of Mr Dunn, it was submitted that any representations made to him were in the context that Mr Dunn was unaware of the Obeid family interests in the Circular Quay leases. As far as this last submission is concerned, the Commission has already rejected the evidence of both men in this regard. It has found that there is a compelling inference that Edward Obeid Sr told Mr Dunn of his family's interests in the Circular Quay businesses.

The Commission rejects Edward Obeid Sr's evidence that he did not tell Mr Dunn of these family interests.

The Commission, in general terms, does not accept the submissions made on Edward Obeid Sr's behalf. The Commission makes the following specific findings:

- Edward Obeid Sr's representations to the various ministers after 2002 were made by him primarily in an endeavour to benefit his own family interests. The Commission rejects his evidence in so far as it purports to dress up his overtures as essentially concerned with the general mistreatment of lessees. It rejects the proposition that his real concern was a broader issue and that complaints about Circular Quay were intended to be no more than an example of this wider

concern. The Commission is in no doubt that, in each instance, Edward Obeid Sr was, in truth, urging the particular minister to make or support decisions that would directly advantage his and his family's financial interests. This was Edward Obeid Sr's primary purpose.

- Edward Obeid Sr's attempt to justify his actions on the basis that it would have been inappropriate to "pressure" the particular minister by revealing the Obeid family interests, and that to do so would have prevented the minister from dealing with the issue "on its merits", pointedly highlights Edward Obeid Sr's lack of perception concerning his own obligations as a parliamentarian. In the Commission's view, it highlights the moral vacuum at the core of his political being. For a decision to be made by a minister or, for that matter, by Cabinet on a ministerial recommendation, the fact that an MP's own financial interests stand to be directly advantaged must be a significant factor in making a proper determination on the merits and, at the very least, in ensuring that any decision made is transparent and open.
- Edward Obeid Sr's concealment of his family's business interests, and his failure to disclose those interests when making representations to ministers, were repugnant to proper political process.
- The Commission accepts that, on each of the occasions that Edward Obeid Sr made representations to ministers, he was acting in his capacity as an MLC. Two points can be made:
    - First, Edward Obeid Sr, himself, recognised that his power and authority had operation only while he remained an MP. Once he ceased to be an MLC, his capacity to influence, and indeed his sphere of influence, came to an end.
    - Secondly, as Mr Costa observed, any occasion on which a member of the Legislative Council speaks to a minister about a matter that concerns the community or some particular issue ought to be regarded, generally, as either lobbying or the making of representations. This observation is particularly germane in the case of Edward Obeid Sr, whose trademark talent appeared to include a significant ability to bend his colleagues to his particular point of view or to his political will.
- Contrary to the submissions made on behalf of Edward Obeid Sr, the Commission finds that his status as an MP gave him access to the various ministers and coloured the nature of the representations he made to them. It was argued on his behalf that any leverage he applied emerged from his position as a leader of the Terrigals faction, rather than his status as an MP. It is the Commission's view, however, that Edward Obeid Sr operated simultaneously with two levers. One was his position as a member of the Legislative Council and the second was his titular leadership of his faction; one gave him access to make his representations, and the other gave him the influence to strengthen the force of those representations. The two operated at all times in tandem and were effectively indivisible.
- Edward Obeid Sr's attempt to sidestep the reprehensible aspects of his overtures to the various ministers was not convincing. Indeed, it was far from convincing. He argued that his subjective intentions were to do good for the community, to provide an avenue of access for the community's concerns about its dealing with government, and to advance the proper interests of the ALP. This high-flown rhetoric is completely deflated and brought to Earth by the realisation that he was, as the Commission finds, acting in all these matters with the more mundane, indeed grubby, pursuit of improving his family's financial position. No amount of window dressing or pretence can disguise or conceal this unpleasant reality.
- The Commission does not accept Edward Obeid Sr's grandiose view of his motivation and conduct. It is not the truth. Rather, he cloaked his own financial interests under this seemingly altruistic guise because he thought it the best way to advance his family's financial interests. It was at the heart of his deception. It was the core of his strategy.
- In all the representations he made concerning the Circular Quay leases, Edward Obeid Sr intended to bring about a situation that would actually improve and benefit his family's interests. The Commission rejects any suggestion that his real motive was anything other than this. His evidence suggesting the contrary in these matters is neither reliable nor truthful and it is rejected.

In the next chapter, the Commission will consider the behaviour of Edward Obeid Sr against the full framework of the ICAC Act and, in particular, whether it constitutes corrupt conduct. It will also give consideration to the requirements of s 74A(2) of the ICAC Act.

Chapter 10: Corrupt conduct and s 74A(2) statements

Corrupt conduct

In making findings of fact and corrupt conduct, the Commission applies the civil standard of proof on the balance of probabilities, which requires facts to be proved to a reasonable satisfaction taking into account the decisions in *Briginshaw v Briginshaw* (1938) 60 CLR 336 at 362 and *Neat Holdings Pty Ltd v Karajan Holdings Pty Ltd* (1992) 67 ALJR 170 at 171.

Corrupt conduct is defined in s 8 and s 9 of the ICAC Act. Those sections and the Commission's approach to making findings of corrupt conduct are 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) or s 8(2) 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 s 9(1)(a), 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 their submissions to the Commission, Counsel Assisting did not suggest any other part of s 9(1) as a basis for making a corrupt conduct finding. The Commission has, however, given consideration, for reasons that follow, to s 9(1)(d) of the ICAC Act.

Steve Dunn – corrupt conduct?

In 2007, in his capacity of deputy CEO of Maritime and general manager of Maritime's Property Division, Mr Dunn used his public official position for the purpose of benefiting Edward Obeid Sr and the Obeid family by effectively bringing about a change to Maritime's *Commercial Lease Policy* to allow for direct negotiations with existing Circular Quay leaseholders, knowing that the Obeid family's financial interests in Circular Quay leases would benefit from the change in policy.

Mr Dunn's conduct was corrupt conduct for the purposes of s 8 of the ICAC Act. This is because his conduct constituted or involved the dishonest and partial exercise of his official functions and therefore comes within s 8(1)(b) of the ICAC Act. His conduct also constituted or involved a breach of public trust and therefore comes within s 8(1)(c) of the ICAC Act. In reaching these findings, the Commission has accepted the submission that Mr Dunn:

- failed to exercise his powers impartially
- failed to act with fidelity and with a single-mindedness for the welfare of the community
- used his position and power to advance the interests of the Obeid family rather than solely to advance the interests of the people of NSW
- breached his fiduciary duty in his capacity as a public officer by improperly using his position to gain an advantage for someone else.

For the purposes of s 9(1)(a) of the ICAC Act, the common law offence of misconduct in public office is relevant. The elements of that offence are set out later in this chapter.

The Commission is satisfied for the purpose of s 9(1)(a) of the ICAC Act that, if the facts it has found were 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 Mr Dunn committed the offence of misconduct in public office. The conduct of Mr Dunn in this regard might properly be regarded as both wilful and deliberate. It clearly is of sufficient seriousness, if proved to the criminal standard, to warrant criminal sanction.

Accordingly, the Commission is satisfied that the jurisdictional requirements of s 13(3A) of the ICAC Act are satisfied.

Joseph Tripodi – corrupt conduct?

In *D'Amore v Independent Commission Against Corruption* (2013) 303 ALR 242 at 282 Basten JA at [208] said:

> *The definition of "corrupt conduct" is complex. Part 3 of the ICAC Act is entitled "Corrupt conduct". It provides (in s 7) that corrupt conduct is any conduct falling within s 8(1) and (2) and not excluded by s 9. Section 8(1) includes any conduct "that could adversely affect … the honest and impartial exercise of official functions by any public official" or that constitutes or involves dishonest or partial exercise of official functions or a breach of trust or misuse of information: s 8(1). Section 8(2) expands that definition to cover any conduct of any person that could adversely affect "the exercise of official functions" and which could involve a non-exclusive list of unlawful activities.*

It could be argued, perhaps faintly, that Mr Tripodi's behaviour falls within s 8(1)(a) of the ICAC Act. It might be said that, on one hand, it would have been difficult for Cabinet to consider the *Commercial Lease Policy* honestly and impartially without knowing that the Obeid family had a (hitherto hidden) interest that was likely to be benefited by Cabinet approval. At least from a pragmatic point of view, that would certainly be the case. On the other hand, it could hardly be said that Cabinet's decision, in the absence of such knowledge of the Obeid family interests, was other than honest or impartial.

The position under s 8(1)(b) and s 8(1)(c) of the ICAC Act is clearer. Was Mr Tripodi's non-disclosure "conduct ... that constitutes or involves the dishonest or partial exercise of any of his ... official functions"? Was it "a breach of public trust"?

There could be no doubt that, had Mr Tripodi's endorsement of the policy been motivated by a plan to benefit the Obeid family interests, this would have been a clear example of conduct falling within s 8(1)(b) of the ICAC Act (involving the dishonest or partial exercise of Mr Tripodi's official functions) and s 8(2)(a) and s 8(2)(y) of the ICAC Act (involving official misconduct on the part of Mr Tripodi or a conspiracy between him and Edward Obeid Sr involving official misconduct). Equally, there could be no doubt, had the non-disclosed interest been that of Mr Tripodi, himself, this would have been conduct that fell within s 8(1)(c) of the ICAC Act. The references to partial and impartial conduct in s 8 must be read as relating to conduct where there is a duty to behave impartially. As Gleeson CJ stated in *Greiner v Independent Commission Against Corruption* [1992] 28 NSWLR 125 at 145, "the law refuses to countenance decision-making with a personal interest in the outcome".

What then of the position in the present circumstances? Although the espousal by Mr Tripodi of the new *Commercial Lease Policy* and his endorsement of it for Cabinet approval occurred in circumstances where, as has been found, there was no agreement between him and Edward Obeid Sr to benefit the Obeid family interests, Mr Tripodi must have known that the new *Commercial Lease Policy* would confer a benefit on the business interests of his colleague. He knew of the Obeid family's financial interests, that Edward Obeid Sr was vehemently opposed to a public tender, and that Edward Obeid Sr wanted direct negotiations. He knew the issue was one of personal and significant importance to his colleague and friend.

Returning to the principal question, the Commission considers that there is a powerful case to be made that, although Mr Tripodi may not have been primarily motivated by a plan to benefit the Obeid family, his non-disclosure and concealment of the Obeid family

interests, nevertheless, comes within s 8(1)(b) and s 8(1)(c) of the ICAC Act.

In the circumstances described earlier, Mr Tripodi's failure to disclose to Cabinet the circumstance of the Obeid family's financial interests at Circular Quay must be seen as an act of wilful and deliberate concealment on his part. It could not be dismissed as mere inadvertence or inattention. Mr Tripodi was well aware that Cabinet's adoption of the *Commercial Lease Policy* would benefit the Obeid family's financial interests by effectively eliminating any material prospect of a public tender and by permitting direct negotiations for their Circular Quay tenancies.

Mr Tripodi's conduct could constitute or involve the dishonest or partial exercise of his public official functions and a breach of public trust and therefore come within s 8(1)(b) and s 8(1)(c) of the ICAC Act.

It is also necessary to consider s 9 of the ICAC Act. This section provides a limitation on the nature of corrupt conduct. It provides relevantly:

> *(1) Despite section 8, conduct does not amount to corrupt conduct unless it could constitute or involve:*
>
> *(a) a criminal offence, 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.*

The expression "applicable code of conduct" in relation to a minister of the Crown is defined to mean a code of conduct prescribed or adopted by the regulations. In relation to a member of the Legislative Council or the Legislative Assembly, it is a code adopted for the purposes of s 9 of the ICAC Act by resolution of the House concerned.

There are two codes of conduct of possible relevance presently in force. The first is the NSW *Code of Conduct for Members,* and the second is the *Code of Conduct for Ministers of the Crown*. Two points may be made. First, the NSW *Code of Conduct for Ministers of the Crown* has not, to date, been prescribed or adopted so to make it an applicable code of conduct for the purposes of s 9 of the ICAC Act. Secondly, while the *Code of Conduct for Members* has been prescribed, it is (as it was described in submissions) a feeble document; it is, in its terms, virtually worthless in addressing the very real problem identified by the facts presently under consideration by the Commission.

It should be mentioned that, in its October 2013 report, *Reducing the opportunities and incentives for corruption in the state's management of coal resources,* the Commission made recommendations concerning the conduct of members and ministers. The Commission wrote:

> *The NSW* Code of Conduct for Members *does not provide a broad framework within which acceptable conduct can be measured. Similarly, the principle of frank and fearless advice is not enshrined in the NSW* Code of Conduct for Ministers of the Crown. *The adoption of comprehensive and objective standards to assess the conduct of members and ministers is necessary to establish clear boundaries for acceptable behaviour.*

Among other recommendations, the report recommended that consideration be given to amending the *Code of Conduct for Members* to deal comprehensively with the issue of improper influence by members. In that regard, the report noted:

> *The* Code of Conduct for Members *does not contain specific provisions concerning members attempting to influence ministerial or bureaucratic decisions that affect their private interests and those of their family and associates, although such conduct seems quite contrary to the preamble. This ignores the reality that major decisions of considerable value are taken by the executive and by state agencies, and do not come before Parliament.*

The Commission must next consider whether Mr Tripodi's non-disclosure could constitute, on the evidence before the Commission, the criminal offence of misconduct in public office.

A leading case in Australia on the point is *R v Huy Vinh Quach* (2010) 201 A Crim R 522. This was a decision of the Supreme Court of Victoria, Court of Appeal. The principal judgment was given by Redlich JA (with whom Ashley JA and Hansen AJA agreed). The elements of the offence of "misconduct in public office" were identified thus:

- a public official
- in the course of, or connected to, his public office
- wilfully misconducts himself by act or omission, for example, by wilfully neglecting or failing to perform his duties
- without reasonable excuse or justification
- where such misconduct is serious and meriting criminal punishment, having regard to the responsibilities of the office and the office holder the importance of the public objects with which they serve and the nature and extent of the departure from those objects.

As to the element of "misconduct meriting criminal conduct" Redlich JA said at [47]:

> *…the conduct must be so far below acceptable standards as to amount to an abuse of the public's trust in the office holder. As in the case of criminal negligence, and offences such as culpable driving and dangerous driving, it is recognised that it is necessary to distinguish the conduct sufficient to attract criminal sanction from less serious forms of conduct which may give rise to civil proceedings.*

The Commission unreservedly finds that Mr Tripodi should have disclosed the information he had gleaned concerning the Obeid family interests at Circular Quay. To do so would have paved the way for Cabinet to act openly and transparently in an, admittedly, difficult situation. Full disclosure would have upheld standards of public probity, even though the disclosure would have scarcely pleased Edward Obeid Sr.

The Commission is satisfied that, because of the special relationship between Edward Obeid Sr and Mr Tripodi, the revealed circumstances demonstrate that Mr Tripodi, by deliberately failing to disclose the Obeid family's financial interests, wilfully misconducted himself and wilfully failed to perform his duty as he should have done.

The relationship between Mr Tripodi and Edward Obeid Sr is critical in this regard. It has been fully explored throughout this report. The detail need not be repeated. Edward Obeid Sr was not merely a political ally of Mr Tripodi; Edward Obeid Sr was his mentor and Mr Tripodi, in turn, was Edward Obeid Sr's protege and friend. Another factor was Edward Obeid Sr's special position of power and influence as titular head of the Terrigals, a group within the major Centre Unity faction of the ALP, a group to which both men belonged. Despite the difference in age and background between the two men, Edward Obeid Sr retained sufficient power and influence to further advance Mr Tripodi's career.

The Commission is satisfied that Mr Tripodi's conduct is sufficiently serious so as to meet the element of meriting criminal punishment. The Obeid family's financial interests in question were, by any standard, valuable. The potential benefit to those financial interests was considerable. Cabinet was entitled to know, and be supplied with, the full picture before making its decision. Public confidence in the process demanded full disclosure. Although the *Code of Conduct for Ministers of the Crown* is not an applicable code of conduct for the purpose of s 9 of the ICAC Act, its contents, nonetheless, offer some guidance in understanding the duties of a minister, in a general sense. For example, in its preamble, the code states that ministers must "exhibit, and be seen to exhibit, the highest standards of probity in the exercise of their offices, and that they pursue and be seen to pursue, the best interests of the people of New South Wales to the exclusion of any other interest".

Clause 1.1 of the code requires that ministers "exercise their office honestly and in the public interest". Clause 1.2 of the code provides that ministers "should avoid situations in which they have, or might reasonably be thought to have, a private interest which conflicts with their public duty". Clause 1.5 of the code provides ministers must be "frank and honest in official dealings with colleagues". Clause 3.2 of the code provides that a minister shall not "use his or her position for the private gain of the Minister or for the improper gain of any other person".

In the Commission's view, these requirements give further weight to the conclusion that Mr Tripodi's conduct, having regard to the standards required of his office as a minister, the responsibilities of that office, the importance of the public objects that his responsibilities serve, and the nature and extent of his departure from those objects, comes within s 9(1)(a) of the ICAC Act.

The Commission is satisfied for the purposes of s 9(1)(a) of the ICAC Act that, if the facts as found in relation to Mr Tripodi's deliberate failure to disclose to his Cabinet colleagues his awareness of the Obeid family's financial interests in Circular Quay leases, knowing that those interests would benefit from Cabinet's endorsement of changes to the *Commercial Lease Policy,* were 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 Mr Tripodi committed a criminal 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.

Edward Obeid Sr – corrupt conduct?

In about 2000, Edward Obeid Sr misused his position as an MP to make representations to Mr Scully that Mr Scully should benefit Circular Quay leaseholders by ensuring they were offered new leases with five-year terms and options for renewal for five years. He was influenced in making these representations by the knowledge that Circular Quay leaseholders had donated $50,000 to the ALP as payment for the carrying out of what they understood to be a promise that their interests as leaseholders would be looked after by the government.

Such conduct on the part of Edward Obeid Sr is corrupt conduct for the purpose of s 8 of the ICAC Act. This is because it is conduct that involved the dishonest and partial exercise of his official functions as an MP and therefore comes within s 8(1)(b) of the ICAC Act.

The Commission is satisfied for the purposes of s 9(1)(a) of the ICAC Act that, if the facts as found in relation to Edward Obeid Sr were 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 Edward Obeid Sr committed a criminal offence of misconduct in public office. The misconduct is serious and would be sufficient to warrant criminal punishment.

Accordingly, the Commission is satisfied that the jurisdictional requirements of s 13(3A) of the ICAC Act are satisfied.

During the period from 2003 to 2006, Edward Obeid Sr misused his position as an MP to make representations to Mr Costa and Mr Roozendaal to change government policy to allow for direct negotiations for new leases with existing Circular Quay leaseholders rather than proceed with an open tender process. In doing so, Edward Obeid Sr deliberately failed to disclose to the ministers that his family had interests in Circular Quay leases and would benefit financially from such a change in policy.

Such conduct on the part of Edward Obeid Sr is corrupt conduct for the purpose of s 8 of the ICAC Act. This is because such conduct on his part constitutes or involves a breach of public trust and therefore comes within s 8(1)(c) of the ICAC Act.

The Commission is satisfied for the purposes of s 9(1)(a) of the ICAC Act that, if the facts as found in relation to Edward Obeid Sr were 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 Edward Obeid Sr committed a criminal offence of misconduct in public office. The wilfulness and seriousness of this conduct would be sufficient to warrant criminal punishment.

Accordingly, the Commission is satisfied that the jurisdictional requirements of s 13(3A) of the ICAC Act are satisfied.

Edward Obeid Sr misused his position as an MP to benefit his family's financial interests by making representations to Mr Tripodi and Mr Dunn to pressure them to change government policy to allow for direct negotiations for new leases with existing Circular Quay leaseholders rather than proceed with an open tender process.

Such conduct on the part of Edward Obeid Sr is corrupt conduct for the purpose of s 8 of the ICAC Act. This is because his conduct involved the dishonest or partial exercise of his official functions as an MP and therefore comes within s 8(1)(b) of the ICAC Act. It is also conduct on his part that constitutes or involves a breach of public trust and therefore comes within s 8(1)(c) of the ICAC Act.

The Commission is satisfied for the purposes of s 9(1)(a) of the ICAC Act that, if the facts as found in relation to Edward Obeid Sr were 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 Edward Obeid Sr committed a criminal offence of misconduct in public office. The wilfulness and seriousness of the misconduct would be sufficient to warrant criminal punishment.

Accordingly, the Commission is satisfied that the jurisdictional requirements of s 13(3A) of the ICAC Act are satisfied.

Section 74A(2) statements

In making a public report, the Commission is required by the provisions of 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 specific grounds, with a view to dismissing, dispensing with the services of or otherwise terminating the services of the public official.

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, the investigation.

The Commission is satisfied that Edward Obeid Sr, Mr Dunn and Mr Tripodi are "affected" persons.

Before dealing with each of the above, it is worthwhile to set out the approach the Commission takes to making statements under s 74A(2)(a) of the ICAC Act.

In each case, the Commission first considers whether there is any evidence of a criminal offence. If there is insufficient evidence capable of constituting a criminal offence, it follows that the Commission will not be of the opinion that consideration should be given to obtaining the advice of the DPP. If there is evidence capable of constituting a criminal offence, the Commission assesses whether there is, or is likely to be, sufficient admissible evidence to warrant the commencement of a prosecution. In undertaking this assessment, the Commission takes

into account declarations made pursuant to s 38 of the ICAC Act. The evidence of a witness that is given subject to such a declaration cannot be used in evidence against that person in any criminal proceedings unless those proceedings are for an offence under the ICAC Act. In such cases, it is therefore necessary to consider whether there is other sufficient evidence that is admissible before stating an opinion that consideration should be given to obtaining the advice of the DPP.

Each of Edward Obeid Sr, Mr Dunn and Mr Tripodi gave their evidence subject to a declaration made pursuant to s 38 of the ICAC Act and therefore their evidence is not admissible against them in any criminal prosecution.

Edward Obeid Sr

The Commission is of the opinion that consideration should be given to obtaining the advice of the DPP with respect to the prosecution of Edward Obeid Sr for the criminal offence of misconduct in public office in relation to his representations to Mr Costa and Mr Roozendaal to change government policy with respect to Circular Quay leases without disclosing to them that his family had interests in Circular Quay leases and would benefit financially from such a change in policy. Each of Mr Costa and Mr Roozendaal could provide evidence of the representations and the fact that Edward Obeid Sr did not disclose his interest. Documentary and other evidence of the Obeid family interests in Circular Quay leases at the relevant times would also be available.

The Commission is also of the opinion that consideration should be given to obtaining the advice of the DPP with respect to the prosecution of Edward Obeid Sr for the criminal offence of misconduct in public office in relation to his representations to Mr Tripodi. Mr Tripodi could provide evidence of the representations. Documentary and other evidence of the Obeid family interests in Circular Quay leases at the relevant times would also be available.

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 Edward Obeid Sr for the criminal offence of misconduct in public office in relation to his representations to Mr Dunn. This is because there is insufficient admissible evidence upon which to base a prosecution.

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 Edward Obeid Sr for the criminal offence of misconduct in public office in relation to his representations to Mr Scully. This is because the evidence concerning Edward Obeid Sr's knowledge of the $50,000 donation came from Edward Obeid Sr and, because of the s 38 declaration, would not be available to be used against him in any prosecution.

Steve Dunn

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 Mr Dunn for any criminal offence. This is because there is insufficient admissible evidence upon which to base a prosecution.

Joseph Tripodi

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 Mr Tripodi for any criminal offence. This is because there is insufficient admissible evidence upon which to base a prosecution.

Chapter 11: Corruption prevention

For retail lessees, the price and tenure of their lease can be critical to their future livelihood. If the price rises suddenly or they are forced out of the premises it can spell the end of their investment, business and income. Any tenant acting reasonably would do whatever they could, within the law, to influence the landlord to treat them favourably or, at least, more equitably.

When the government is the landlord, the attempts to influence can be likened to lobbying, which brings with it clear limits as to what is appropriate. When the tenant is an MP, and the lease holding undeclared, however, the lobbying and pressure to manipulate government administration of the leases immediately crosses the divide into corrupt behaviour.

The uncertain state of the lease situation at Circular Quay proved to be both the source of the motivation to corruptly manipulate the leasing, as well as the opportunity. The government lurched from irregular and haphazard negotiation with tenants, to a proposal of contested leases, to direct allocation of five-year leases, to holdovers and extensions as these expired, and back to negotiations. Meanwhile, Maritime tried to develop a *Commercial Lease Policy* at the same time as a Circular Quay precinct solution was sought. With years of inaction on the Circular Quay plan, there were, as this report shows, many opportunities to manipulate the leasing and many reasons for wanting to do so.

A chronic state of flux: the opportunities

Throughout the 1990s, the management of the leases at Circular Quay by Maritime could be best described as informal and ineffective. The tenants appear to have evolved a right to continued tenure by virtue of their presence in their shops. Maritime had no formal approach to the management of each of the leases on the wharves, and appears to have simply negotiated continuations or unquestioningly rolled the tenancies along. The quality of the product offered by individual tenants, and the effect of the mix of business types on the performance of Circular Quay as a whole, was not formally addressed through Maritime policy.

Further, the rents varied between tenants; a result of direct negotiations between individual shopkeepers and Maritime staff. Rents were generally below market rates and below the rate needed to meet the informal Maritime goal of using the collective rent to pay for the upkeep of the wharves. In effect, the difference between a commercial economic return on the wharf assets and the rents charged was being gifted by the state to the tenants. Understandably, any attempt to end this arrangement would be, and was, resisted by the tenants.

A new future: the move to contested leasing arrangements

The opportunity to improve the situation finally presented itself in the run up to the Sydney Olympics. As part of the preparations for the Olympics, the Circular Quay wharves were renovated. The renovation provided the justification needed to put the leasing arrangements on a more professional and commercial footing. It was Maritime's intention to achieve a commercial return on these leases by putting the leases to market; arguing, this approach would provide government with the best return for each lease. This approach was initially supported by Mr Scully, then minister for transport.

But renovated wharves or not, this sudden end to the informally–negotiated, below-market rents and tenure in perpetuity, presented an immediate threat to the leaseholders. It is not surprising that at least one lessee made representations to government that such a sudden shift in the arrangements was "unfair". It was to his friend Edward Obeid Sr that the leaseholder, Mr Imad, made his representations.

Contested leasing is over before it starts

The interests of the tenants dictated that Maritime's fully-competitive lease plan be quashed, and this is what ultimately happened, albeit with the assistance of Edward Obeid Sr. Edward Obeid Sr shifted the decision-making and planning from the department into the political sphere, where he was able to lobby relevant ministers and argue "unfairness". While, in the main, lease prices were raised and formal leases put in place with existing tenants, by the end of the five-year lease period, the foreshadowed competitive lease plan was on hold, lessees had reverted to unlimited tenure, and Maritime still had no regime for dealing with the Circular Quay leases.

In 2000, Edward Obeid Sr had played a key role in stopping the leases from going to market. This was through his lobbying of Mr Scully; although he was unsuccessful in obtaining extensions to the five-year leases. When Edward Obeid Sr learnt of Maritime's initial intention to put the leases out to market, he argued that the tenants had invested considerable time and money into their leases, and thus needed five-year leases directly negotiated with them prior to facing a competitive process. The arrangement of a five-year lease, perhaps with a five-year option, and close to market rent with a clear forewarning of the contestable arrangements to be introduced, was suggested to be a fairer transitional arrangement.

The argument for a transitional position had some merit, and was adopted in part by Mr Scully. As the former minister put it in his evidence to the Commission, the five-year gap would brace the tenants for the competitive process to follow. He refused, however, to allow a further five-year option. Maritime then obtained an independent valuation of the leases and entered into direct negotiation with the then current lessees. Of the seven tenants at that time, five obtained leases in this manner, with the other two being put to a contestable process.

The net effect of the process in 2000 was, thus, a move from an ad hoc model of lease management to a valuation-based model that achieved an approximate commercial return on the assets. Given the leases were to be put out to tender in 2005, it was still Maritime's and Mr Scully's intention that a move to a competitive model ultimately be made. Maritime was, however, receiving a more reasonable return from these leases so the situation had improved as a result of the process.

Following the signing of five-year leases in 2000, Edward Obeid Sr moved his attention to extending these leases, in general, and for Mr Imad, in particular. In about 2001, he lobbied Mr Scully, arguing that one of the tenants, Mr Imad, should be given an extension of his leases. Mr Scully firmly refused this request, as it was clearly contrary to the transitional arrangements Mr Scully had established. Mr Imad, it should be stressed, had known since 2000 that, at the end of his five-year term, EOIs would be sought for all the businesses at Circular Quay. His claim of unfairness had little or no merit.

In December 2002, the Circular Quay leases held by Mr Imad were sold to Obeid family interests, albeit in circumstances where those interests were hidden. In attempts to extend these leases or to stop them from going to market, Edward Obeid Sr lobbied Mr Costa, Mr Roozendaal and Mr Tripodi. He was now, however, lobbying for his own and related financial interests. Edward Obeid Sr well knew, when his family made its purchase, that a public tender process was to occur in August 2005.

In the end, the leases did not go to market. In 2005, Mr Costa stopped the process when he became aware that the approach being pursued by Maritime was significantly different from the approaches adopted by other government agencies at Circular Quay. Tenants in the same precinct were subject to quite different commercial relationships with government. Maritime wanted contestable market arrangements, the SHFA tended to directly negotiate, and

RailCorp used a right-of-first-refusal approach. For Mr Costa, this was a problem of inefficiency that needed to be fixed.

The attempted shift to a precinct-wide policy represented yet another model of managing the leases. Instead of merely being concerned with managing its own leases, Maritime was now to be part of a coordinated, Circular Quay-lease-management model. While this precinct policy was being explored, new leases were not signed and the state of flux and uncertainty facing the tenants continued. Lessees were first granted a six-month extension and the leases were then placed into holdover. Given that some of these leases were held by Obeid family interests, this meant that a side effect of Mr Costa's effort to improve interagency coordination was the de facto extension of these tenancies. At the very least, it was a preservation of the status quo and prevented, for the time being, the need for the Obeid family interests to face a public tender process.

Parliamentary influence

With no long-term plan or clear policy on the part of Maritime, it is not surprising that the decision-making process became political and subject to attempts by a parliamentarian to influence decision-makers. In such an environment, there may be nothing improper about parliamentarians lobbying ministers on behalf of concerned constituents and stakeholders. Indeed, this principle is an essential element of the Westminster system. But lobbying on behalf of one's own private interest, especially when the interest is not declared, is completely antithetical to the ideals of the Westminster system.

The Commission examined controls on parliamentary use of influence in its October 2013 report, *Reducing the opportunities and incentives for corruption in the state's management of coal resources.* Of particular relevance to the current investigation is recommendation 22, which states:

> *That the NSW Parliament's Legislative Council Privileges Committee and the Legislative Assembly Privileges and Ethics Committee consider amending the Code of Conduct for Members to deal comprehensively with improper influence by members.*

The Legislative Council Privileges Committee and the Legislative Assembly Privileges and Ethics Committee have established a joint enquiry into this and other recommendations made in that report. In these circumstances, the Commission has not considered it necessary to make any corruption prevention recommendations in this report concerning the Code of Conduct for Members.

Maritime's ongoing struggle to develop a *Commercial Lease Policy*

By 2005, the situation was effectively back to square one. After more than five years of uncertainty, the lessees were in the same place as they had been in the 1990s, albeit paying an approximate market rate on the leases. The whole of the Circular Quay situation had become an inter-departmental project and Maritime still had not managed to develop a leasing policy that included Circular Quay. It would be another three years before Maritime finally managed to develop a policy that would guide its dealings with the Circular Quay tenants.

By late 2007, the situation had dragged on for more than eight years. The policy needed to be finalised and certainty needed to be provided to the tenants. It was in this context that Mr Dunn was able to take the lead as general manager of Maritime's Property Division. He grasped the opportunity and decisively finalised the *Commercial Lease Policy* for Maritime. As he did so, he also shaped the policy to allow new leases to be negotiated with the current tenants of Circular Quay, including, to his knowledge, entities related to Edward Obeid Sr. Edward Obeid Sr finally had what he wanted. It had been achieved under the cloak of a long period of flux, which stemmed from a failure to develop departmental policy, from chopping and changing of political goals, and from a mercurial responsibility that moved from department to ministers and back to inter-departmental committees.

There was no specific whole-of-government guidance regarding conducting commercial leasing to assist Maritime at that time, and there remains none today. The whole-of-government framework surrounding the management of government property continues to provide only minimal guidance on the topic and different agencies report using different processes and policy documents to manage their leasing arrangements.

The present situation

Nearly a decade after the failed first attempt to develop an integrated approach to Circular Quay by an inter-departmental committee, the goal of an integrated policy is again being pursued by another inter-departmental group. The SHFA is leading a multi-agency government project to develop a Circular Quay Strategic Framework. Development of this framework is being overseen by the minister for planning and infrastructure.

As yet, the retail strategy, which is part of this framework, has not been finalised; yet again, leaving the tenants uncertain as to what will happen. For the tenants on the wharves, the uncertainty over their future continues, nearly

one-and-a-half decades after the reforms to the leasing policy were first mooted. The tenants' incentive to pressure government to protect their interests remains; indeed, the opportunity to influence decisions will continue as long as the policy situation continues to remain uncertain and in a state of flux.

Managing the latest plan

Despite some progress in the development of the Circular Quay Strategic Framework, the situation on the ground has not materially shifted. Tenants still face the risk that government decisions can lead to a sudden loss of livelihood, which creates incentives for improper lobbying of MPs and ministers. This is the same situation that led Mr Imad to approach Edward Obeid Sr, and allowed Edward Obeid Sr to lobby Mr Scully and other ministers. Just as Edward Obeid Sr and Maritime tenants were able to pressure various ministers to resolve the policy in their favour, so it can be expected that pressure will be brought to bear to resolve the current uncertainty in ways favourable to the tenants.

As the SHFA develops the latest incarnation of a Circular Quay management plan, it has the clear benefit of hindsight. Certain factors, such as the likelihood that lessees will be motivated to fight for their businesses and that they will take opportunities to influence policy decisions in their favour, should be built into any management plan for the development and implementation of the Circular Quay Strategic Framework.

The draft material discussing the development of the plan indicates it is quite wide-ranging. It considers that precinct more broadly than the coordinated leasing arrangements that were Mr Costa's focus. The plan considers the physical rejuvenation of the area, the flow of people and the transport arrangements, as well as indicating that a retail strategy is needed. It is looking at Circular Quay more as a singly economic entity; in much the same way, for example, as a shopping mall is a single entity with a retail strategy. The group working on the framework has identified a coordinated retail strategy as a priority for improving the Circular Quay precinct.

To achieve this, the SHFA has indicated to the Commission that the retail strategy may well require an invitation for some tenants to bid for leases, direct negotiation with other tenants, and several tenants to be provided with the incentive of below market value leases while others pay full market price. Such an approach to leasing is typical of private sector approaches to management of economic precincts such as shopping malls. It is less typical of government approaches to leasing; although, clearly, such an approach may be appropriate in this situation. Business decisions need to be made about matters, such as the appropriate tenant mix, whether the use of an anchor tenant would attract customers to the area, and how lease terms should be structured to ensure tenancies are not simultaneously vacated. Each of these decisions carries a multitude of associated business risks, including decisions on the type of lessees, the conduct of negotiations, the pricing and conditions of leases, and so on. The Commission understands that work on market research has commenced.

Each of these decisions not only comes with risks related to effective execution of the strategy but also with incentives and opportunities for corruption. Any situation where direct negotiations are required to be held behind closed doors with a single, potential tenant can create opportunities for manipulation and corruption. Even in the absence of any improper motive or conduct, direct negotiations may infer a degree of favouritism, unfairness and secrecy. There is a risk that such a perception could deter other potential tenants from seeking to be involved in the precinct.

The opportunities for corruption are not limited to direct negotiations. If a business decision is made to offer below-market rent to attract particular retailers, a potential tenant will naturally have an incentive to obtain as big a rental reduction as possible, for as long as possible. This is not inherently corrupt but it is a situation where the risk of so-called "rent-seeking" increases. Rent-seeking occurs when individuals expend resources on lobbying – properly or improperly – in order to influence decision-makers and capture the value of an asset through a transfer of resources and rights from the public sector to the private sector. Rent-seeking is typified by attempts to manipulate a given policy and regulatory environment in order to secure a part of the existing wealth. In the present inquiry, for example, Edward Obeid Sr engaged in rent-seeking activities in order to get his family's leases at Circular Quay extended.

A further risk for corruption relates to the identity of the person invited to be involved in negotiations or participate in a restricted tender. Clearly, existing tenants will wish to participate but there is a broader risk of favouritism and bias in deciding which potential retailers should be invited.

None of this should be read as a criticism of the retail strategy or those managing it. Complexity breeds a range of risks, including a risk of corruption and, to achieve its urban development aims, the retail strategy must be complex. A simple, price-based approach will not ensure that the right combination of tenants will put in the best bids. The answer to dealing with this complexity is not to shy away from it, as this will not achieve the aims of the Circular Quay Strategic Framework; rather, it is a case of ensuring that those implementing the framework have the necessary expertise and capability to do so.

As stated earlier, the management of a precinct such as Circular Quay is an unusual function for the public sector. The SHFA has some experience in dealing with a similar Sydney precinct, as it has had to deal with comparable issues at The Rocks. With regard to these issues at The Rocks, the SHFA has partnered with a global facilities firm in the management of the precinct in order to strengthen the SHFA's own capabilities.

The SHFA also plans to leverage similar private sector expertise in the management of Circular Quay. This appears to be a sensible response. The Commission cannot comment on whether this approach will address all of the risks that may exist at Circular Quay. It may be necessary for the SHFA to consider a broader examination of its internal capabilities to ensure it has the expertise to address both the business and corruption risks associated with the execution of the Circular Quay Strategic Framework. Options for addressing any identified gaps include building the expertise internally, continuing to source expertise through a relationship with private sector experts and seeking assistance with regard to lease management from within a central government agency.

Appendix 1: The role of the Commission

The ICAC Act is concerned with the honest and impartial exercise of official powers and functions in, and in connection with, the public sector of NSW, and the protection of information or material acquired in the course of performing official functions. It provides mechanisms which are designed to expose and prevent the dishonest or partial exercise of such official powers and functions and the misuse of information or material. In furtherance of the objectives of the ICAC Act, the Commission may investigate allegations or complaints of corrupt conduct, or conduct liable to encourage or cause the occurrence of corrupt conduct. It may then report on the investigation and, when appropriate, make recommendations as to any action which the Commission believes should be taken or considered.

The Commission can also investigate the conduct of persons who are not public officials but whose conduct adversely affects or 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. The Commission may make findings of fact and form opinions based on those facts as to whether any particular person, even though not a public official, has engaged in corrupt conduct.

The ICAC Act applies to public authorities and public officials as defined in s 3 of the ICAC Act.

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 role of the Commission is to act as an agent for changing the situation which has been revealed. Its work involves identifying and bringing to attention conduct which is corrupt. Having done so, or better still in the course of so doing, 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 principal functions of the Commission, as specified in s 13 of the ICAC Act, include investigating any circumstances which in the Commission's opinion imply that corrupt conduct, or conduct liable to allow or encourage corrupt conduct, or conduct connected with corrupt conduct, may have occurred, and cooperating with public authorities and public officials in reviewing practices and procedures to reduce the likelihood of the occurrence of corrupt conduct.

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 either or both s 8(1) or s 8(2) and which is not excluded by s 9 of the ICAC Act.

Section 8 defines the general nature of corrupt conduct. Section 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.*

Section 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.

Section 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.

Section 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.

Section 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 s 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.

The Commission adopts the following approach in determining whether corrupt conduct has occurred.

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) or s 8(2) of the ICAC Act. If they do, the Commission then considers s 9 and the jurisdictional requirements 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 s 9(5). In the case of s 9(1)(a) and s 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 s 9(1)(b), s 9(1)(c) and s 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.

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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AGAINST CORRUPTION

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