

advise the Cabinet Standing Budget of the proposal Australian Water Holdings Pty Ltd to seek endorsement to proceed negotiations.

# I·C·A·C

INDEPENDENT COMMISSION  
AGAINST CORRUPTION  
NEW SOUTH WALES

Minister	Cabinet-in-Confidence	Solicited Holdings Pty Limited	Minister for Infrastructure	April 2010	To advise the Cabinet the Budget of the proposal received from the Australian Water Holdings Pty Limited (AWH) and to seek endorsement to proceed with the negotiations.
Date of Minute	Nil	None	N/A	State Plan - Infrastructure, increase the amount of water available, increase the amount of supply and demand and la	
Main Purpose	Required for Cabinet Decisions	Previous	None	State Plan - Infrastructure, increase the amount of water available, increase the amount of supply and demand and la	

# INVESTIGATION INTO DEALINGS BETWEEN AUSTRALIAN WATER HOLDINGS PTY LTD AND SYDNEY WATER CORPORATION AND RELATED MATTERS

# ICAC REPORT AUGUST 2017



ICAC

INDEPENDENT COMMISSION  
AGAINST CORRUPTION

NEW SOUTH WALES

INVESTIGATION INTO  
DEALINGS BETWEEN  
AUSTRALIAN WATER  
HOLDINGS PTY LTD  
AND SYDNEY WATER  
CORPORATION AND  
RELATED MATTERS

ICAC REPORT  
AUGUST 2017

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advise  
Budget of the prop  
tralian Water Holdings Pty Limited  
to seek endorsement

# I.C.A.C

INDEPENDENT COMMISSION  
AGAINST CORRUPTION

NEW SOUTH WALES

The Hon John Ajaka MLC  
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Legislative Council  
Parliament House  
Sydney NSW 2000

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

Mr President  
Madam Speaker

In accordance with s 74 of the *Independent Commission Against Corruption Act 1988* I am pleased to present the Commission's report on its investigation into dealings between Australian Water Holdings Pty Ltd and Sydney Water Corporation and related matters.

The former Commissioner, the Hon Megan Latham, 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 Reginald Blanch AM QC  
Acting Commissioner

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# Foreword

The publication of this report was principally delayed by civil and criminal litigation, legislative change and the need to ensure that parties were afforded procedural fairness.

The last sitting day of the Operation Credo segment of the public inquiry was 16 April 2014. The Operation Spicer segment of the public inquiry was conducted over several days, between 28 April and 12 September 2014. Counsel Assisting the Commission were required to prepare written submissions setting out the findings then available to the NSW Independent Commission Against Corruption (“the Commission”).

A primary purpose of these submissions was to afford procedural fairness by notifying relevant parties of potential adverse findings. On 13 June 2014, Counsel Assisting’s submissions for Operation Credo were provided to affected parties. The submissions contended for findings of corrupt conduct against some persons, who were not public officials, on the basis that their conduct could have affected the efficacy of the conduct of public officials. Written submissions in response from relevant parties were received by 7 July 2014. On 18 July 2014, Counsel Assisting provided written submissions in reply.

In preparing the report, a further potential adverse finding affecting one person was identified. On 21 June 2017, a submission dealing with that matter was sent to the person’s legal representative. A submission in response was received on 17 July 2017.

At the time it conducted the Operation Spicer and Operation Credo investigations, the Commission was exercising its jurisdiction on the basis that corrupt conduct under s 8(2) of the *Independent Commission Against Corruption Act 1988* (“the ICAC Act”) extended to the conduct of persons who were not public officials (or public officials not acting in a public official capacity) where that conduct could affect the “efficacy” as well as the “probity” of the exercise of official functions by a public official.

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

This decision impacted on aspects of Operation Credo as well as the Commission’s jurisdiction in general.

The Commission applied for special leave to appeal to the High Court of Australia.

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

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

Following this decision, the Commission suspended activity in respect of the Operation Spicer and



Operation Credo investigations pending a decision by the NSW Government regarding whether it would amend the ICAC Act in relation to the Commission's jurisdiction.

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

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

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

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

The panel provided its report to the premier on 30 July 2015.

The NSW Parliament subsequently passed the *Independent Commission Against Corruption Amendment Act 2015* ("the 2015 Amendment Act"). The 2015 Amendment Act came into force on 28 September 2015. It amended the ICAC Act in relation to the jurisdiction and functions of the Commission.

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

On 18 December 2015, these supplementary submissions were provided to affected parties. Between 18 and 25 February 2016, written submissions in response to the supplementary submissions were received by the Commission. On 25 February 2016, Counsel Assisting provided written submissions in reply.

The completion of the Operation Credo report was also affected by the requirements of s 18(2) of the ICAC Act. That section provides that, to the extent it thinks it necessary to do so to ensure that an accused's right to a fair trial is not prejudiced, the Commission should defer making a report to Parliament during the currency of the proceedings. Section 18(2A) provides that the requirement under s 18(2) does not apply:

- (a) *(in the case of committal proceedings) before the commencement of the committal hearing, that is, the commencement of the taking of the evidence for the prosecution in the committal proceedings, and*
- (b) *(in any other case) after the proceedings cease to be proceedings for the trial of a person before a jury.*

By 2015, Edward Obeid Sr was being prosecuted for an offence of misconduct in public office arising from the Commission's Operation Cyrus investigation into his conduct concerning Circular Quay retail lease policy. On 9 March 2015, the Director of Public Prosecutions (DPP) presented an ex officio indictment before the District Court. The DPP also sought and obtained the permission of the Chief Justice of the NSW Supreme Court to have

the matter removed to the NSW Supreme Court. The trial, before a jury, commenced in February 2016, but the jury was subsequently discharged. A further jury trial was held. On 28 June 2016, the jury returned a verdict of guilty.

Also in 2015, the DPP commenced prosecution proceedings against Edward Obeid Sr and Moses Obeid for conspiracy to commit misconduct in public office. Those prosecutions arose from the Commission's Operation Jasper investigation into the granting of a coal exploration licence in the Bylong Valley. It was anticipated that those matters would proceed to committal; however, on 29 May 2017, both Edward Obeid Sr and Moses Obeid elected to forego committal proceedings. Although it is anticipated that their trial will be before a jury, the date for the trial has not yet been set.

Section 18(2) of the ICAC Act requires the Commission to delay making a report "to the extent to which the Commission thinks it necessary to do so to ensure that the accused's right to a fair trial is not prejudiced". In all the circumstances, the Commission does not consider that publication of this report, at this time, will prejudice the right of Edward Obeid Sr or Moses Obeid to a fair trial, given that such a trial will not occur for some time.

In making this decision, the Commission took into account the public interest in reporting on the outcome of a public inquiry that was conducted in 2014 that affected a number of other people and the desirability of publishing the Commission's findings. It is desirable that witnesses in the public inquiry are told if no adverse findings have been made against them. This can only finally be done once the report has been furnished. The Commission also took into account that if, as a result of the evidence obtained during its investigation, the advice of the DPP is sought with respect to the prosecution of any person for a criminal offence it is desirable that the DPP provide advice and any prosecution occur in as timely a fashion as is possible.

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to seek endorsement

## **PART 1 – INTRODUCTION**

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# Chapter 1: Investigation summary and results

Between 2012 and 2014, the NSW Independent Commission Against Corruption (“the Commission”) conducted a composite investigation in two parts – Operation Credo and Operation Spicer. This report concerns the investigation in Operation Credo. The Commission’s report in relation to Operation Spicer was published in August 2016.

The Operation Credo investigation was concerned with the following allegations:

- a) whether, between 2004 and 2012, persons having an interest in Australian Water Holdings Pty Ltd (AWH), its predecessors and subsidiaries, obtained or sought to obtain a financial benefit as a result of adversely affecting official functions of Sydney Water Corporation (SWC) by inflating charges made to SWC and deliberately preventing SWC from ascertaining whether the charges were justifiable
- b) whether, in 2010, public officials and others were involved in the falsification of a Cabinet minute relating to a public private partnership proposal made by AWH with the intention of misleading the NSW Government Budget Cabinet Committee and obtaining a benefit for AWH
- c) whether, in 2010, the Hon Edward Obeid MLC (“Edward Obeid Sr”), the Hon Joseph Tripodi and the Hon Anthony Kelly MLC misused their positions as members of Parliament to attempt to influence public officials to exercise their official functions with respect to a public private partnership proposal by AWH submitted to the NSW Government Budget Committee of Cabinet
- d) whether, on or about 20 November 2012, Nicholas Di Girolamo and Edward Obeid Jr created a false instrument, namely a deed of confirmation, with a view to misleading the Commission and any future investigation into whether Edward Obeid Sr

misused his position as a member of Parliament to attempt to influence public officials to exercise their official functions with respect to a public private partnership proposal by AWH submitted to the NSW Government Budget Committee of Cabinet in 2010

- e) the circumstances in which false allegations of corruption were made against senior executives of SWC.

The Commission also examined the circumstances that led to the signing of the current contract between SWC and AWH.

Although the investigations and public inquiries for operations Credo and Spicer were formally separated, there was an overlap in the factual matters examined. It was decided that, in those circumstances, the evidence elicited in one of the public inquiries would also be available for use in the other public inquiry.

## Corrupt conduct findings

Chapter 34 of this report contains the Commission’s findings of serious corrupt conduct. The Commission found that the following persons engaged in serious corrupt conduct:

- **Gilbert (Laurie) Brown** by, in 2010, misusing his public office through his involvement in the preparation of a minute for submission to the Cabinet Standing Committee on the Budget (“Budget Committee of Cabinet”) with the intention of improperly favouring Edward Obeid Sr by enabling AWH to proceed to direct negotiation with the NSW Government concerning its public private partnership (PPP) proposal for the purchase, supply and operation of water infrastructure in the North West Growth Centre

- **Mr Kelly** by, in 2010, misusing his office as a minister of the Crown by arranging for the preparation and submission of a minute to the Budget Committee of Cabinet, with the intention of improperly favouring Edward Obeid Sr by enabling AWH to proceed to direct negotiation with the NSW Government concerning its PPP proposal for the purchase, supply and operation of water infrastructure in the North West Growth Centre
- **Edward Obeid Sr** by, between late 2007 and 2010, misusing his position as a member of Parliament to promote AWH's interests to each of Michael Costa, the Hon Nathan Rees, the Hon Morris Iemma, Phillip Costa and the Hon Kristina Keneally, at a time when he knew that the advancement of those interests would financially benefit the Obeid family in the event a member of the Obeid family or an Obeid family entity acquired shares in AWH
- **Edward Obeid Sr** by, in 2010, misusing his position as a member of Parliament to influence Mr Kelly, Mr Brown and Mr Tripodi to advance Obeid family interests by working towards the submission of a minute to the Budget Committee of Cabinet recommending the NSW Government enter into direct negotiations with AWH with respect to the AWH PPP proposal at a time when he knew that a successful outcome for that proposal would financially benefit the Obeid family in the event a member of the Obeid family or an Obeid family entity acquired shares in AWH
- **Mr Tripodi** by, in 2010, misusing his position as a member of Parliament to prepare a draft Cabinet minute with the intention that it would be used by Mr Brown and Mr Kelly as the basis for a minute to be submitted by Mr Kelly

to the Budget Committee of Cabinet, with the intention of improperly favouring Edward Obeid Sr by enabling AWH to proceed to direct negotiation with the NSW Government concerning its PPP proposal for the purchase, supply and operation of water infrastructure in the North West Growth Centre.

## Section 74A(2) statements

Chapter 35 of this report contains statements, made pursuant to s 74A(2) of the ICAC Act, that the Commission is of the opinion that consideration should be given to obtaining the advice of the Director of Public Prosecutions (DPP) with respect to the prosecution of Mr Brown, Mr Kelly, Edward Obeid Sr and Mr Tripodi for common law criminal offences of misconduct in public office.

## Recommendation that this report be made public

Pursuant to s 78(2) of the *Independent Commission Against Corruption Act 1988* ("the ICAC Act"), the Commission recommends that this report be made public forthwith. This recommendation allows either Presiding Officer of the Houses of Parliament to make the report public, whether or not Parliament is in session.

# Chapter 2: Background

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

## How the investigation came about

The Commission's investigation commenced as a result of a complaint made to the Commission in 2012 under s 10 of the ICAC Act. That section provides that any person may make a complaint to the Commission about a matter that concerns or may concern corrupt conduct. The complaint concerned the possible acquisition by Obeid family interests of an interest in AWH in return for Edward Obeid Sr using his political influence with the then NSW Labor Government to further the interests of that company.

If substantiated, the complaint would involve serious corrupt conduct and the misuse of political position for private benefit. After assessing the complaint and undertaking some initial enquiries, in August 2012 the Commission commenced a preliminary investigation. A preliminary investigation can be conducted for the purpose of assisting the Commission to discover or identify conduct that might be made the subject of a more complete investigation or to decide whether to make particular conduct the subject of a more complete investigation.

During the course of the preliminary investigation, other information came to light suggesting that AWH had obtained significant amounts of money above and beyond what it was properly entitled to by inflating its costs for work relating to the provision of water infrastructure in the North West Growth Centre and deliberately preventing SWC from ascertaining whether the costs were justifiable.

In November 2012, the Commission determined to conduct a full investigation. During the course of that

investigation, other information came to light suggesting that, in 2010, public officials, including a then minister of the Crown, and other members of Parliament, may have misused their positions to falsify a cabinet minute relating to a public private partnership (PPP) proposal made by AWH in order to obtain a benefit for AWH by misleading the Cabinet Standing Committee on the Budget ("Budget Committee of Cabinet") (a PPP is a general term covering a contractual relationship between the public and private sectors to produce an asset or deliver a service). In 2013, other information came to light concerning the creation of a deed of confirmation in relation to certain dealings between Mr Di Girolamo and Edward Obeid Jr. The Commission investigated the circumstances surrounding the creation of that instrument in order to ascertain whether it had been created with the intention of misleading the Commission with respect to whether Edward Obeid Sr had misused his position as a member of Parliament to attempt to influence public officials to favour AWH.

Concerns had been raised publicly about the circumstances that lead to SWC and AWH entering into a new contract in January 2012 involving the provision of water infrastructure services. The Commission, therefore, also examined the circumstances surrounding this agreement in order to ascertain whether any improper influence had been brought to bear on SWC.

In 2010, the Commission had received an anonymous complaint alleging that senior SWC officers had engaged in corrupt conduct. The Commission examined the complaint and found it to be false. The Commission also investigated the circumstances in which this complaint came to be made to it, including whether Mr Di Girolamo had been involved in order to undermine the reputations of senior SWC managers. There was evidence that he had an interest in undermining the reputations of these people because of their involvement in disputes with AWH.

## The public inquiry

The Commission reviewed the information obtained during the course of its investigation and, after taking into account that material and each of the matters set out in s 31(2) of the ICAC Act, determined that it was in the public interest to hold a public inquiry. In making that determination, the Commission had particular regard to the seriousness of the allegations. The Commission considered that, while there was a risk of prejudice to the reputations of those involved in the allegations, the public interest in exposing the matters under investigation outweighed the public interest in preserving the privacy of the persons concerned.

The investigation into Operation Credo was part of a composite investigation that included Operation Spicer. The reasons for conducting a public inquiry for Operation Spicer are set out in the Commission's August 2016 report on that investigation, titled *Investigation into NSW Liberal Party electoral funding for the 2011 state election campaign and other matters*. As explained in that report, the decisions to conduct both public inquiries were related. This was because there were factual links and some of the witnesses were common to both inquiries. It was decided that the evidence in one public inquiry would, where relevant, be evidence available to be taken into account in the other public inquiry.

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

The Operation Credo segment of the public inquiry commenced on 17 March 2014 and continued over 22 days<sup>1</sup> until 16 April 2014. There was then a short adjournment to allow for preparation of Operation Spicer.

<sup>1</sup> In the Operation Spicer report, this was incorrectly recorded as 23 days.

The Operation Spicer segment of the public inquiry commenced on 28 April 2014 and continued over 17 days until 20 May 2014, when the public inquiry adjourned to permit further investigation. The public inquiry resumed on 6 August 2014 and continued over 24 days until 12 September 2014.

In all, there were 63 days<sup>2</sup> of hearings during which oral evidence was taken from 162 witnesses, of which 46 gave evidence in the Operation Credo public inquiry. The combined transcript tally from Operation Credo and Operation Spicer was 7,711 pages. During Operation Credo, 123 separate exhibits were marked. During Operation Spicer, 243 separate exhibits were marked. Many of the exhibits were voluminous.

At the conclusion of the public inquiry, Counsel Assisting provided detailed written submissions. These set out, *inter alia*, what adverse findings they contended it was open to the Commission to make against named parties. These were provided to affected parties on 13 June 2014. Written submissions in response were received from 30 parties. The last of these submissions was received on 7 July 2014. Counsel Assisting provided written submissions in reply on 18 July 2014.

As a result of the civil litigation and legislative changes explained in the foreword to this report, Counsel Assisting provided supplementary written submissions on 18 December 2015. Written submissions in response were received by 25 February 2016. Counsel Assisting provided brief written supplementary reply submissions on 25 February 2016.

In preparing this report, a further potential adverse finding affecting one person was identified. A submission dealing with that matter was sent to the person's legal representative on 21 June 2017. A submission in response was received on 17 July 2017.

<sup>2</sup> In the Operation Spicer report, this was incorrectly recorded as 64 days.

The Commission considers that, in these circumstances, relevant parties had a reasonable opportunity to respond to proposed adverse findings.

All of the submissions have been taken into account in preparing this report.

The reasons for the delay in the publication of this report, and why the decision has been taken to publish the report now, are explained in the foreword.

## A note on jurisdiction

As can be seen, some of the allegations investigated by the Commission did not involve any allegation that a public official had acted wrongfully.

At the time it conducted the Operation Credo investigation, it was generally understood, by the Commission and others, that the Commission could exercise its jurisdiction on the basis that corrupt conduct under s 8(2) of the ICAC Act extended to the conduct of persons who were not public officials, where that conduct could affect the “efficacy” as well as the “probity” of the exercise of official functions by a public official. The Commission’s investigation, including the public inquiry, was conducted on the basis of this understanding.

That understanding changed as a result of the High Court of Australia decision in *ICAC v Cunneen* [2015] HCA 14, which was handed down on 15 April 2015. The majority of the High Court held that the definition of corrupt conduct in s 8(2) of the ICAC Act did not extend to conduct that adversely affects or could adversely affect the “efficacy” of the exercise of an official function by a public official in the sense that the official could exercise a function in a different manner or make a different decision.

On 6 May 2015, the NSW Parliament passed the *Independent Commission Against Corruption Amendment (Validation) Act 2015* (“the Validation

Act”). The Validation Act validated things done by the Commission before 15 April 2015, which depended on the Commission’s previous construction of s 8(2) of the ICAC Act. One effect of this was to validate those actions of the Commission in Operation Credo, which had depended on the interpretation of s 8(2) to include conduct that could adversely affect the “efficacy” of the exercise of official functions.

# Chapter 3: Relevant water infrastructure arrangements

This chapter sets out some relevant background information on SWC and AWH and various agreements entered into by those entities, or related entities, for the provision of water-related infrastructure in what became known as the North West Growth Centre.

## The Water Board and SWC

The *Water Board Act 1987* established the Water Board as a corporation. Its functions included managing water resources and providing, constructing and operating systems for the supply of water and sewerage and drainage systems.

The *Water Board Act 1987* was repealed by the *Water Board (Corporatisation) Act 1994*. That Act established SWC as a State-owned corporation tasked with the supply of water, the provision of sewerage and storm-water drainage systems, and the disposal of wastewater in Sydney and other regions. As from 1 January 1995, SWC assumed all the rights and liabilities of the Water Board. References in this report to SWC include references to the Water Board.

As a statutory State-owned corporation under the *State Owned Corporations Act 1989*, SWC is accountable to the relevant portfolio minister and has two shareholder ministers; one being the NSW Treasurer and the other a minister nominated by the NSW Premier. It is subject to ministerial control in relation to the exercise of its functions and is required to have a chief executive officer (CEO) who is appointed by the Governor of NSW on the recommendation of the portfolio minister.

## RHIC/AWH

Rouse Hill Infrastructure Consortium Pty Ltd (RHIC) was established in 1989 for the purpose of providing water, sewerage and drainage infrastructure work in what was then known as the Rouse Hill development area and which, from about 2007, came to be referred to as

the North West Growth Centre. It was envisaged that RHIC would be responsible for engaging the necessary contractors to undertake the design and construction of requisite water infrastructure works and also undertake project management so that landholdings could be subdivided for mainly residential development. It operated on the reimbursement model; that is, it would be reimbursed for expenses incurred by it in delivering water infrastructure works.

The initial shareholders in RHIC were a number of local landholders, including the NSW Land and Housing Corporation ("Landcom"). Between 1990 and 1999, most of the shareholders ceased to be shareholders, leaving only Landcom and Stockland (Constructors) Pty Ltd. In December 1999, those entities agreed to terminate the shareholder agreement. The shares in RHIC were transferred to John Rippon.

In late 2008, RHIC changed its name to Australian Water Holdings Pty Ltd. For ease of reference RHIC will hereafter be referred to as AWH.

## Australian Water

Australian Water Pty Ltd was established in February 2007 as part of the AWH group of companies. It was envisaged that it would develop a private funding model for the design, project management, construction and commissioning of water-based infrastructure to greenfield areas throughout Australia. It initially sought to interest SWC in undertaking work in the South West Growth Centre. It was also intended that Australian Water would become involved in the delivery of water infrastructure in the North West Growth Centre, possibly through acquiring AWH.

## The 1990 Deed

On 24 May 1990, SWC entered into the Water Sewerage and Drainage Infrastructure Deed ("the 1990 Deed")

with various landholders and AWH in order for AWH to procure the construction of certain water, sewerage and drainage infrastructure work in the North West Growth Centre. The actual design and construction work was to be carried out by contractors engaged by AWH. The 1990 Deed envisaged the work would be conducted over 11 stages. The timing of the commencement of each stage was dependent upon the demand for urban development in the North West Growth Centre.

## The 1992 Other Stages Deed

On 16 October 1992, the parties to the 1990 Deed entered into the Infrastructure Deed (Other Stages) ("the Other Stages Deed"). It effectively replaced the 1990 Deed. As with the 1990 Deed, the Other Stages Deed provided for an overarching relationship between AWH and SWC. It confirmed that construction of water infrastructure would be undertaken in stages.

It was envisaged that landowners who benefitted from the provision of water infrastructure would pay for the infrastructure through contributions payable to SWC pursuant to s 27 of the *Water Board Act 1987*. Those contributions would be used to repay loans obtained by AWH to undertake the relevant work and to reimburse SWC for costs it incurred in relation to the relevant work. Once the work was completed, SWC would own the infrastructure.

One issue with the Other Stages Deed, which emerged in about 2008, was whether that agreement required SWC to contract exclusively with AWH for the delivery of water-related infrastructure in the areas covered by the Other Stages Deed. AWH claimed that the Other Stages Deed gave it an exclusive right to procure the design, construction and commissioning of water infrastructure in the North West Growth Centre. This issue is discussed in part 3 of the report.

## Stage 1 Deed and Stage 2 Deed

The Other Stages Deed noted that the parties (other than AWH) and an AWH-owned entity, Rouse Hill (Stage 1) Pty Ltd ("RHI"), would enter into the "Stage 1 Deed". The Stage 1 Deed, which was also dated 16 October 1992, set out the arrangements for RHI to undertake construction of the stage 1 works. Stage 1 comprised about 1,300 hectares.

On 7 July 1999, SWC and another AWH-owned entity, Rouse Hill Infrastructure Pty Ltd, entered into the Rouse Hill Development Infrastructure Deed (Stage 2) for work on stage 2 ("the Stage 2 Deed").

Work was successfully completed with respect to each of stages 1 and 2. As they no longer served a purpose,

both RHI and Rouse Hill Infrastructure Pty Ltd were de-registered in June 2012.

## Stage 3 Deed

On 5 March 2004, SWC and Rouse Hill Infrastructure (Stage 3) Pty Ltd ("RH3") entered into the Rouse Hill Development Infrastructure Deed (Stage 3) ("the Stage 3 Deed") setting out the terms and conditions for RH3 to "...procure the financing, design, supply, construction, commissioning and completion of the Stage 3 Works in the Stage 3 Area". RH3 was a wholly owned entity of AWH.

To finance the requisite stage 3 work, RH3 entered into a credit facility with the Commonwealth Bank. Under this arrangement, RH3 would draw funds from the facility to pay for the construction work and the cost of its own operations. Under the Stage 3 Deed, SWC was obliged to remit developer charges collected from developers to the Commonwealth Bank and repay any outstanding debt at the expiry of the finance facility.

## Package 1 Deed

After stage 3, future water infrastructure construction areas in the North West Growth Centre were referred to as packages rather than stages. On 6 November 2008, SWC and another AWH entity, Australian Water (No 1) Pty Ltd ("AW1") entered into an agreement for AW1 to design, supply, construct and complete water infrastructure work for the package 1 area ("the Package 1 Deed"). There was no credit facility established under the Package 1 Deed. The Package 1 Deed provided for fixed monthly payments to be made to AW1 by SWC.

## The termination of the trust and the move to profit

Clause 17.1 of the 1990 Deed provided that AWH would be governed by a deed of trust. The Rouse Hill Infrastructure Trust was established by deed of trust dated 23 May 1990. It was not clear, however, how the trust was intended to affect the relations of the parties with respect to work on particular stages, particularly given that clause 12.1(f) of the Stage 1 Deed provided that AWH did not enter into the Other Stages Deed as trustee of a trust.

In December 1999, the then unit holders in the trust, Landcom and Stockland (Constructors), authorised the trustee to terminate the trust.

After the termination of the trust, AWH continued to work on a not-for-profit basis for a number of years. Indeed, Recital B of the Stage 3 Deed noted that AWH "...is an organisation which does not operate for profit..." .

That subsequently changed.

Whether the termination of the trust was ever communicated to SWC and, if so, when, remains controversial. It is not clear from the evidence when SWC became aware that AWH intended to move to being a profit-based operation. SWC was certainly aware of the change during the course of negotiations for the package I work. It is not necessary to determine when precisely AWH moved to being a profit-based company or when SWC became aware of the change. This is because the money dispute between SWC and RH3, which is discussed in part 2 of this report, did not arise because AWH was using RH3 to make a profit (in the sense of accumulating surplus funds through its dealings with RH3 that it retained as savings or paid out as dividends). Rather, that dispute was whether AWH was seeking to recover excessive costs or costs to which it was not entitled through its arrangements with RH3.

## AWH executives

Mr Rippon was a civil engineer with project management experience who was contracted to work for AWH in about 1991. He became AWH's CEO and company secretary in 1992, and managing director in 1998. He was subsequently appointed chairman but stepped down from that role in November 2010, and stepped down as secretary in December 2010, but continued as a director of the company until July 2012.

William MacGregor-Fraser was another engineer contracted to work for AWH in 1991. He was a director of the company between December 1999 and July 2012. He was directly employed by AWH from 2001.

Mr Di Girolamo was the managing partner of a major Sydney law firm that did legal work for AWH. He was a director of AWH between November 2005 and April 2013. He left his law firm in February 2007 at which time the shares in AWH were reallocated so that Mr Rippon, Mr MacGregor-Fraser and Mr Di Girolamo each held one-third. Over the following years, the shareholdings changed so that, by about mid-2008, Mr Di Girolamo held 60% of the shares, with Mr Rippon holding 30% and Mr MacGregor-Fraser the remaining 10%. Mr Di Girolamo and Mr MacGregor-Fraser ceased being shareholders in June 2012.

Each of Mr Rippon and Mr MacGregor-Fraser were directors of RH3 between 30 June 2003 and 5 June 2012. Mr Di Girolamo was a director of RH3 between 23 November 2005 and 5 June 2012. The company was de-registered in June 2012.

On 19 February 2007, Mr Di Girolamo commenced as CEO of Australian Water, another AWH-related entity.

He was a major shareholder in that company. Australian Water was created as the vehicle through which to pursue further business opportunities beyond the existing relationship with SWC. Australian Water was initially funded by loans from a group of investors who held convertible notes. From 1 July 2008, Mr Di Girolamo was formally "seconded" from Australian Water to AWH.

Arthur Sinodinos was the finance director of the NSW Liberal Party between 18 June 2009 and 16 August 2011 and state president from 25 July 2011 to 15 December 2012. He had previously worked for former prime minister the Hon John Howard, including as his chief of staff, between 1997 and 2006. He subsequently worked in the finance and banking industry.

In October 2008, Mr Sinodinos was appointed a director and deputy chairman of the board of AWH. He replaced Mr Rippon as chairman in November 2010. He ceased being chairman and a director in November 2011. Mr Sinodinos told the Commission that he was invited to join AWH to assist in finding investors to fund a PPP proposal. He agreed that his political connections and expertise were also a factor.

At the AWH board meeting of 27 January 2011, it was resolved to provide Mr Sinodinos with a 5% equity share in AWH and a 2.5% equity share bonus should AWH successfully negotiate a PPP agreement with the NSW Government. No shares were registered in his name and, in February 2013, he relinquished his rights to the 5% shareholding.

## The disputes between AWH and SWC

From about 2008, two significant disputes emerged between AWH and SWC.

One related to money and involved what RH3 regarded as the unreasonable refusal of SWC to agree to the funding of certain costs incurred by RH3. SWC was concerned that RH3 costs were exceeding what SWC considered reasonable, given that work on stage 3 was winding down. For the purposes of this report, that dispute is referred to as "the money dispute". It is dealt with in part 2 of this report.

The other dispute involved what AWH considered was SWC's failure to accept AWH's interpretation that the Other Stages Deed gave AWH a legal mandate to provide all new water infrastructure in the North West Growth Centre. Related to this was AWH's attempts to enter into a PPP for the provision of new water infrastructure. For the purposes of this report, that dispute is referred to as "the work dispute". It is dealt with in part 3 of this report.

## **PART 2 – THE MONEY DISPUTE**

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## Chapter 4: The cost-recovery process

Before examining the money dispute in detail, it is necessary to understand the process in place whereby AWH and RH3 were entitled to recover their costs in relation to the delivery of the stage 3 work.

The project budget for stage 3 work was prepared by RH3 and approved by SWC. The budget of over \$287 million was divided into various categories. Category F was for RH3's "costs of operations" and was set at \$15,490,000. The Stage 3 Deed provided that RH3 could not obtain funds for any category of expenditure that exceeded the budget amount for that category without the prior written approval of SWC. If RH3 needed additional funds for a particular category of expenditure and there were surplus funds available in another category, it could request SWC to approve a reallocation of funds from the category with the surplus funds. The Stage 3 Deed provided that SWC "...will not unreasonably withhold or delay its approval". SWC took the view, which the Commission accepts as correct, that it should only approve a reallocation request if it considered the additional funding sought was reasonable and necessary.

While funding for the stage 3 work would, ultimately, mainly come from funds SWC obtained from stage 3 landowners, including funds provided by landowners pursuant to s 74 of the *Sydney Water Act 1994*, immediate funding was provided through a Commonwealth Bank credit facility from which RH3 drew down funds for the payment of its expenses.

Under the Stage 3 Deed, RH3 could only draw down from the credit facility after receiving a certificate from the project certifier that the amounts to be drawn down were costs incurred in relation to the stage 3 work. From about March 2004, Peter Phillips, a senior management consultant with TSA Management Pty Ltd, was responsible for that certification. He provided drawdown reports that, together with a drawdown

request signed by an authorised RH3 signatory, were sent to the Commonwealth Bank, which then transferred the certified amount to RH3.

RH3 did not lease premises or employ staff for the purpose of the stage 3 work. These were provided by AWH. AWH invoiced RH3 for rent, office expenses and "Management and Administration" costs. The latter included various expenses such as staff salaries, legal fees, and payments to Mr Rippon and Mr MacGregor-Fraser for their services. The AWH invoices to RH3 did not provide any breakdown of the "Management and Administration" costs. The expenses AWH claimed from RH3 were reviewed by Ian George of MBT Chartered Accountants for the purpose of certifying that they were "reasonably and properly incurred" in relation to RH3.

In undertaking his role, Mr Phillips was generally provided with a copy of the relevant invoices paid by RH3. In relation to the AWH "Management and Administration" claims, however, he was only given the MBT certification and did not see the AWH invoice. He was not provided with any further information detailing how those costs were calculated. As he explained to the Commission:

*...I would get very detailed invoices for almost everything, with detailed explanations of where they came from and how they were made up and so on, with the exception of RH3's management and admin costs [which] came on a single form from [MBT] which just had a single number and a statement to the effect that these charges had been reasonably and properly incurred as part of the Stage 3 works.*

Mr Phillips' role in relation to the AWH invoices was therefore effectively limited to confirming that MBT had certified the amounts claimed by RH3 that were related to RH3's work and that there were sufficient funds in the relevant budget category to pay those costs.

# Chapter 5: SWC becomes concerned

This chapter examines how SWC became concerned about the costs of operation sought by RH3 and the action it took to ascertain whether those costs were reasonable and properly attributable to RH3's work under the Stage 3 Deed.

Records obtained by the Commission demonstrated how the costs charged by AWH, and certified by Mr George as "reasonably and properly" incurred in relation to RH3, increased over time.

During 2007, an amount of about \$1.840 million (exclusive of GST) was certified as being payable to AWH by RH3. This represented an average monthly amount of about \$153,000. During 2008, an amount of about \$4.5 million (exclusive of GST) was certified as being payable to AWH by RH3. This represented an average monthly amount of about \$375,000; that is, over twice the average monthly payment for the previous year.

As RH3's costs of operation mounted, they came to exceed the budget allocation of \$15.490 million. Therefore, RH3 needed SWC's consent to reallocate money from other areas of the budget to meet its costs of operations.

## RH3 reallocation requests

On 22 December 2006, RH3 notified SWC that its category F costs of operation budget was exhausted and requested a reallocation of \$2.4 million from the project contingency budget category. SWC approved this request. A further request was made in July 2007 for a reallocation of \$2.5 million. After requesting and receiving further information from RH3, SWC approved a reallocation of \$1.421 million.

Despite these reallocations, by early 2008, the category F budget was almost depleted, with less than \$140,000 remaining. In order to fund its continuing costs of operations, on 9 May 2008 RH3 wrote to SWC

requesting a reallocation of \$6.589 million. While SWC did not approve the request in full, on 27 May 2008, it approved a reallocation of \$1.09 million.

The position taken by SWC was that it would approve reallocations if they were necessary to enable RH3 to complete its obligations and the amounts sought were reasonable in the circumstances. It understood, correctly, that "Management and Administration" costs might not decline, as work on stage 3 declined, and might even be expected to increase over time with general price increases. SWC was concerned, however, that the costs for "Management and Administration" billed to RH3 by AWH had increased beyond what SWC considered necessary in relation to the stage 3 work. SWC estimated the average level of "Management and Administration" costs claimed by RH3 between March 2004 and March 2008 was about \$160,000 per month. In a letter dated 30 June 2008, SWC agreed to an increase in "Management and Administration" costs to \$200,000 per month for the period between 1 April 2008 and 30 June 2009, with payments after that date to be on the basis of a baseline amount of \$200,000 per month indexed on a quarterly basis. SWC agreed to a budget reallocation of \$3 million to cover "Management and Administration" expenses for the period between 1 April 2008 and 30 June 2009 and a further \$590,000 to cover such expenses to the end of the stage 3 work.

The average monthly "Management and Administration" costs charged by AWH in 2008 were over \$364,000. The \$200,000 monthly amount allowed by SWC was substantially lower than the amount claimed by AWH. In these circumstances, it was clear that RH3 would suffer financial difficulty unless it could reduce the costs claimed by AWH or reach agreement with SWC to reallocate additional funds.

RH3 took the latter course. Between 12 December 2008 and 10 February 2009, it made five further requests for budget reallocations. Those requests were not approved by SWC.

## Concerns about rising costs

Adrian Miller was one of the SWC officers responsible for managing the stage 3 project. He told the Commission that he became concerned about the costs of operations claimed by RH3 about the time of the July 2007 reallocation request. This lead to SWC requesting further information from RH3 as to what constituted its costs of operations. From the information provided, Mr Miller understood that a large component of these costs was constituted by the “Management and Administration” costs AWH charged RH3. Although SWC sought details from RH3 on the composition of those costs, Mr Miller told the Commission that insufficient information was provided by RH3 for SWC to determine the reasonableness of those costs.

Ronald Quill was the SWC general manager of asset solutions. As such, he was responsible for the delivery of SWC engineering projects. The issue of RH3’s ballooning costs came to his attention in 2007. Mr Quill told the Commission that his concerns about potential overcharging by RH3 were based partly on the fact that RH3’s costs of operations were increasing despite work on stage 3 winding down and partly on a comparison of costs associated with previous stages of work. The comparison showed that, while the work in the earlier stages was comparable to the stage 3 work, costs of operations for earlier stages were much lower. He formed the view that SWC was not getting value for money. That view was shared by others within SWC including the CEO, Dr Kerry Schott.

It was not only SWC that was concerned about the level of costs claimed by RH3. Mr Phillips, the project certifier, also raised concerns. He told the Commission that, from about 2007, he became concerned about the continued rise in costs being charged to RH3 by AWH, despite the work on stage 3 drawing to a close. He raised his concerns with SWC and suggested that it take some action.

## The AWH/RH3 position

It is relevant to consider the position taken by RH3 and AWH with respect to the interpretation of the Stage 3 Deed. This was set out in a 2009 position paper prepared on behalf of RH3 for the purposes of an expert determination of the money dispute between RH3 and SWC. The position expressed in that paper on behalf of RH3 was that SWC did not have the right to assess or determine RH3’s entitlement to payment for costs in relation to the stage 3 work because that was the responsibility of Mr Phillips, the project certifier. RH3 considered that certification by the project certifier that certain costs fell within RH3’s costs of operation was conclusive and it was not open to SWC to contend that any such certified costs were not RH3’s costs of operation and, accordingly, payable to RH3. On this view, SWC was obliged to agree to payment of all amounts certified by the project certifier as costs incurred in relation to the stage 3 work.

On this basis, given that Mr Phillips effectively relied on Mr George’s certification that the amounts claimed by AWH from RH3 related to RH3’s stage 3 work, provided that Mr George issued such a certificate, RH3 was entitled to payment from the credit facility (and any reallocation of funds necessary to meet such payment).

## Steps taken by SWC

Clause 13.3 of the Stage 3 Deed provided that SWC could, at any time and at its own cost, require RH3 to provide additional or supporting details in relation to its monthly financial reports. Given its concerns over the level of RH3’s costs of operations claims, SWC, in accordance with the provisions of the Stage 3 Deed, sought information from RH3 as to how these were calculated. In particular, it sought details of how AWH arrived at the “Management and Administration” costs it charged RH3. Despite a number of requests, that information was not

disclosed. Those refusals fuelled SWC's concerns that the costs passed on to RH3 by AWH might be unreasonable or not related to stage 3 work.

## The 2009 audit of RH3

Clause 13.4 of the Stage 3 Deed provided that SWC could audit:

*...the financial accounts and records of RH3 in order to verify that all expenditures incurred and drawdown claims made have been in accordance with the generally accepted accounting principles and within the approved Project Budget.*

As a result of its concerns, SWC decided to exercise this right to audit the financial accounts and records of RH3 from 1 December 2006 to verify that its expenditure and drawdown claims were appropriate. SWC engaged IAB Services ("IAB") to undertake the audit.

Gary Clarke, the IAB auditor, calculated that the payments to AWH represented 95% of the total of RH3's expenditure on its costs of operations.

Therefore, Mr Clarke considered it important to have access to sufficient information to be able to assess the appropriateness of those payments. Although RH3 provided IAB with access to some of its records, no access was given to documentation to enable IAB to verify the appropriateness of the costs being charged by AWH. The reason given for not providing relevant documents was that they were the records of AWH, not RH3.

In the May 2009 IAB audit report, Mr Clarke expressed the opinion that "...at this stage, [SWC] should not consider any further budget reallocation towards RH3's Cost of Operations" without an independent audit to verify all expenditures.

## The dispute resolution process

The Stage 3 Deed provided that a dispute resolution committee, comprising two members nominated by SWC and two members nominated by RH3, could deal with disputes between the parties. On 22 April 2009, RH3 gave notice to SWC calling for the establishment of a dispute resolution committee. It nominated Mr Rippon and Mr Di Cirolamo as its members of the committee. As described in the notice, the dispute primarily concerned what RH3 considered was SWC's failure to provide it with reasonable funding and its entitlement to payment from the stage 3 budget for costs associated with package 1 pre-development work. RH3 sought either payment of over \$2 million from SWC or SWC approval for reallocation of the amount claimed.

SWC appointed Mr Quill and Malcolm Crabb as its members of the committee. At the time, Mr Crabb

was responsible for managing the delivery of SWC's infrastructure capital works program.

The committee met on 15 May 2009. There was some evidence before the Commission that RH3 provided Mr Quill with a letter setting out a breakdown of some AWH invoices issued to RH3. The breakdown included the amounts attributable to "salary, director's fees and salary related costs" for some months but did not distinguish between general salaries and amounts paid to directors and executives. Mr Quill told the Commission that he did not recall receiving this information. In any event, the dispute remained unresolved.

In accordance with the relevant provision of the Stage 3 Deed, the dispute was escalated to the CEOs of SWC and RH3. On 17 June 2009, Dr Schott and Mr Rippon met but failed to resolve the dispute. SWC remained concerned that it had insufficient information to determine whether the AWH charges to RH3 were reasonable and appropriate.

## The expert determination

As the relevant CEOs were unable to reach agreement, the dispute was ultimately referred for expert determination under the Stage 3 Deed. Graham Easton was appointed as the expert. He reported in January 2010 and July 2010. In his January report, he found that there was no evidence that RH3 had ever asked AWH for relevant documents in order to provide them to SWC and had provided no justification for its failure to cooperate. He concluded that RH3 had acted unreasonably in that regard. He found that, pursuant to the Stage 3 Deed, RH3 had an obligation to use its best endeavours to provide SWC with additional information.

Mr Di Cirolamo told the Commission that, after reading that finding, he sought advice "...because I was worried about whether that meant we had to provide the documents...". He said that the advice he received was that Mr Easton's determination was not a "final order" and therefore the documents did not have to be provided to SWC.

In his January 2010 determination, Mr Easton also determined that SWC had no right under the Stage 3 Deed to assess the reasonableness of RH3's claims. In his July 2010 determination, however, he stated that that did not mean SWC was obliged to provide whatever funding RH3 sought and there was an onus on RH3 to establish that its claims were reasonable and necessary to its obligations under the Stage 3 Deed. He agreed with the SWC position that the history of RH3 expenditure was relevant to whether its current claims were reasonable. On this basis, he determined that, out of the total amount of over \$1.6 million then claimed by RH3, \$955,402.15

was reasonable funding to permit RH3 to undertake its outstanding obligations under the Stage 3 Deed. He also determined that, of the almost \$238,000 claimed by RH3 in respect of expenditure associated with the pre-development costs of the package 1 works, RH3 was entitled to \$166,793.64.

## The failure to provide information

The position maintained by Mr Rippon, Mr MacGregor-Fraser and Mr Di Girolamo throughout these processes and before the Commission was that AWH was not obliged to provide any documents to SWC and therefore none should be provided, even though they went to the basis of the AWH calculation of costs due to it by RH3. As Mr Di Girolamo told the Commission, the documents were not provided "...because it wasn't within the confines of the contractual relationship" between SWC and RH3. It was also claimed that, in any event, RH3 did not have power to compel AWH to hand over documents because they were separate legal entities. There is no evidence, however, that RH3 even made any endeavour to obtain from AWH the type of detailed information sought by SWC.

Whether RH3 had power to compel production of documents from AWH is beyond the point. The two entities were closely linked. All the shares in RH3 were held by AWH, they had common directors and shared the same premises. They also had a common interest in ensuring that RH3 had access to adequate funds from which to pay AWH. The position adopted by RH3 and AWH appeared to lack common sense. As Phillip Costa, minister for water between December 2009 and March 2011, told the Commission:

*...why would anybody who has only one customer, who has only one person paying the bills, why wouldn't they just deliver the documentation that [SWC] required? And it just didn't make sense that they did not co-operate ... it's not about what was legal and what was not legal, it was about what was right and what was wrong and they needed to pass that information through.*

The Commission is satisfied that one reason for the failure by RH3 and AWH to provide any detailed information to SWC as to the makeup of the AWH charges to RH3 was that Mr Rippon, Mr MacGregor-Fraser and Mr Di Girolamo feared that such information would only fuel SWC's concerns about the reasonableness and appropriateness of AWH's charges and give rise to further dispute.

A central issue for the Commission's investigation was to establish whether the reason RH3's costs of operations had exceeded the allocated budget was due to AWH

charging RH3 excessive and unwarranted amounts. There was evidence before the Commission that the increase in AWH's "Management and Administration" costs passed on to RH3 was caused by increased payments to AWH directors and executives and the inclusion of other costs not directly associated with RH3's work in the North West Growth Centre. That evidence is explored in the following chapters.

# Chapter 6: Payments to AWH executives

The “Management and Administration” fees AWH charged RH3 included salaries and wages of AWH staff engaged on stage 3 work. One reason for the increase in these fees was that the amounts paid to Mr Rippon and Mr MacGregor Fraser had increased. Another reason was the decision, from July 2008, to include Mr Di Girolamo’s salary.

## Mr Rippon

In the financial year ending 30 June 2008, Mr Rippon was paid \$720,000 by AWH. In the financial year ending 30 June 2009, he was paid \$1,690,172, followed by a slightly lesser amount at the end of the following financial year. He told the Commission that his salary increased in 2008 because there had been no adjustment over the previous 10 years. He said that SWC was not told about the increase in his salary because that “...was not relevant to the information we were obliged to give them”. He denied that the increase was the result of recognising an opportunity to “rip off” SWC by grossly escalating his pay and then charging that to SWC, through RH3, as an expense. Both he and Mr MacGregor-Fraser also justified the increases in their AWH salaries on the basis that the Package 1 Deed, which was signed in November 2008, introduced a profit component into the contractual arrangements with SWC.

The AWH “Management and Administration” fees charged to RH3 included payments to Mr Rippon’s company for his services as CEO of AWH. During 2007 and up to September 2008, the monthly payments to Mr Rippon’s company were \$43,692 (inclusive of GST). The payment for September 2008 was \$94,116. The payment for October 2008 was \$43,692. The payment for November 2008 was \$110,000. The payment for December 2008 was \$137,500. By January 2009, it was \$175,000 but had increased to \$237,500 for March 2009. These amounts were usually paid three or four months in advance, so that, for example, the \$237,500

due for the March 2009 payment was actually part of the November 2008 AWH costs billed to RH3.

After January 2009, the fees paid to the AWH executives came from monies paid to AWI under the Package 1 Deed. The package 1 funding model was different from the reimbursement model applicable to the stage 3 work. Under the Package 1 Deed, AWI was entitled to receive a fixed amount per month. Provided it satisfactorily completed the agreed work, it was entitled to expend the money as it saw fit.

## Mr MacGregor-Fraser

Mr MacGregor-Fraser was paid \$425,000 by AWH in the financial year ending 30 June 2008. This increased to \$750,000 in the financial years ending 30 June 2009 and 30 June 2010. He told the Commission that the increase was justified because he was also working on the delivery of the package 1 works and involved in pursuing other work for AWH. He said he did not give any thought at the time to advising SWC that his salary had been increased.

During 2007 and 2008, the AWH fees charged to RH3 also included payments to Mr MacGregor-Fraser’s company for his services as project director. During 2007 and 2008, the monthly payments to Mr MacGregor-Fraser’s company varied from about \$30,000 to about \$35,000 (inclusive of GST).

## Mr Di Girolamo

On 19 February 2007, Mr Di Girolamo was appointed CEO of Australian Water. His contract of employment entitled him to a “joining incentive payment” of \$250,000, a total remuneration package of \$750,000 per annum, and a “minimum” bonus of \$250,000 in the event Australian Water or a related entity secured an agreement with SWC to deliver water-based infrastructure in the first-release precinct of the North West Growth Centre.

In February 2008, his total remuneration package was increased to \$1.1 million per annum. The funds to pay Mr Di Girolamo and to finance Australian Water in general were intended to come from convertible noteholder investors.

From 1 July 2008, Mr Di Girolamo was “seconded” from Australian Water to work for AWH. Between then and December 2008, RH3 was billed for a monthly salary of about \$50,000 for Mr Di Girolamo.

One of the issues explored in the public inquiry was whether the secondment was a ruse so that Mr Di Girolamo could continue to be paid once funding from the convertible noteholders, which financed Australian Water, ran out. The Commission is not satisfied to the requisite standard that this was the case. In his evidence to the Commission, Mr Di Girolamo described himself as being “completely devoted” to dealing with the disputes between AWH, RH3 and SWC. There was other objective evidence that Mr Di Girolamo was directly and substantially involved in dealing with those disputes. In those circumstances, it was not inappropriate that he be paid by AWH, either through a secondment arrangement or by Australian Water billing AWH for his services.

## The appointment of new directors

In October 2008, Mr Sinodinos was appointed a director of AWH and deputy chairman of the AWH board. His annual salary was \$200,000. In March 2009, Gregory Skehan was appointed a director of AWH. His director’s fees were paid directly to the legal firm for which he worked.

There is no evidence that any of the fees paid to Mr Sinodinos or Mr Skehan were charged to RH3. In any event, from February 2009, AWH was earning profits through AWI from the package 1 fixed-price contract and was in a financial position to meet payments of directors’ fees without charging them to RH3.

## Analysis

There was evidence that the salaries paid to Mr Rippon, Mr MacGregor-Fraser and Mr Di Girolamo were high in relation to the work they performed.

Michael Costa, who became chairman of AWH in 2011, told the Commission he was “completely shocked” when he learnt about the salaries being paid to AWH executives. Apart from being a director of AWH between March 2009 and January 2013, Mr Skehan was also one of the convertible noteholders who invested in Australian Water. He told the Commission that he considered Mr Di Girolamo’s remuneration was “high” and the \$1.6 million paid to Mr Rippon was out of all proportion to the job he was performing.

Roderick de Aboitiz was one of the convertible noteholder investors in Australian Water. He told the Commission that, in early 2010, Mr Di Girolamo asked him for a personal loan. It was at that stage that Mr de Aboitiz became aware that AWH had a cash-flow problem. In order to consider the request for a loan, Mr de Aboitiz asked to see AWH’s accounts. He told the Commission that AWH’s employment expenses “seemed extremely high, over \$4 million from what I could see”. He told Mr Di Girolamo “...you’re bankrupting yourself through stupid remuneration practices”. He told the Commission he also raised the issue with Mr Sinodinos in May 2010. In that conversation, he compared the AWH executive remuneration to that paid at the company where he worked. He recalled telling Mr Sinodinos:

*...if I compared what the board and the executive team at Abacus where I worked for example was getting, compared to [AWH] they weren’t that different. Abacus was a large [sic] with over \$2 billion of assets, had over 70 employees and made some substantial profits and this is a business that was not for profit, had liquidity issues and hadn’t turned a dollar.*

He described the position as “risible”.

Robert Groom was the AWH chief financial officer (CFO) between October 2010 and April 2013. In about June 2012, he created “normalised accounts” for AWH for the period 1 July 2007 to 30 June 2012. He explained to the Commission that those accounts “...take away those things that are not ordinary or you would not otherwise expect to occur”. Those accounts contained the salaries that he believed, based on his experience and judgment, should have been paid to Mr Rippon, Mr MacGregor-Fraser and Mr Di Girolamo over that period.

His assessment was that no salary should have been paid to Mr Rippon because his services were not required, while Mr MacGregor-Fraser should have been paid \$175,000 per annum for the 2007–08 and 2008–09 financial years and \$200,000 per annum for the 2009–10 and 2010–11 financial years. He assessed Mr Di Girolamo’s AWH salary at \$50,000 for the 2007–08 financial year, \$350,000 for the following two financial years, and \$400,000 for the 2010–11 financial year. Whether Mr Groom’s calculations reflected fair value for the services rendered by Mr Rippon, Mr MacGregor-Fraser and Mr Di Girolamo between 2007 and 2009 was disputed by them. The point was also made by them that Mr Groom made the notional adjustments for the purpose of enhancing AWH’s attractiveness for sale and it did not follow that the figures represented fair value for their services.

However, in the absence of expert evidence on the appropriate levels of remuneration for persons in the positions of Mr Rippon, Mr MacGregor-Fraser and Mr Di Girolamo, the Commission is not satisfied that their salaries demonstrated a dishonest intention on their part. As pointed out by senior counsel for SWC, a private company such as AWH may pay its officers and employees whatever it considers fit, subject to any restraint in its constitution and subject to the ability to pay its debts when they fall due. While the amounts paid to Mr Rippon,

Mr MacGregor-Fraser and Mr Di Girolamo were certainly generous, AWH was entitled to determine what it considered to be appropriate levels of remuneration.

Provided that AWH provided the services of the relevant people to RH3 for the purposes of RH3’s operations under the Stage 3 Deed, it was entitled under the Stage 3 Deed to charge RH3 for those services as part of its costs of operation in respect of the performance of its obligations under that deed. If, as happened, its costs of operation exceeded the budget allocation, then it could only continue to draw funds from that budget if SWC agreed to reallocate funds from another budget. SWC could, as happened, exert some control over expenditure by first determining whether or not to agree to the budget for costs of operation and ultimately by refusing requests for reallocation from other budgets.

In all the circumstances, the Commission is not satisfied that any of Mr Rippon, Mr MacGregor-Fraser or Mr Di Girolamo sought to dishonestly obtain money from SWC by claiming their levels of remuneration.

## Chapter 7: Legal fees

There was evidence that legal fees incurred by AWH were passed on to RH3 and included in RH3's costs of operation for the stage 3 project. This chapter examines whether it was appropriate to pass those fees on to RH3.

### The April 2008 claim

The "Management and Administration" fees certified by Mr George as having been "reasonably and properly" incurred in relation to RH3 in April 2008 included legal fees of \$48,243.50 (exclusive of GST) billed by solicitors Allens Arthur Robinson. The fees were in two itemised bills, jointly addressed to Australian Water and AWH. The details in one of the itemised bills showed it primarily related to AWH's work dispute with SWC and the obtaining of advice on the Other Stages Deed. Details in the other itemised bill related in large part to work concerning a deed of release for an equity investor in Australian Water. The Commission is satisfied that neither of these matters related to RH3's costs of operation with respect to stage 3 work.

### The May 2009 claim

Mr George's certification for May 2009 included legal fees of over \$18,000 (exclusive of GST) billed to AWH by Allens Arthur Robinson. The fees were in two itemised bills. One bill was for \$13,958.50 (exclusive of GST). It related to the money dispute with SWC and included work in April 2009 on drafting the notice of dispute that triggered the dispute resolution process. The other bill was for \$5,327 (exclusive of GST). Of this amount, \$4,279.50 was passed on to RH3 on the basis that it related to RH3's claims against SWC for unpaid monies.

### The July 2009 claim

The amount that AWH claimed from RH3 for July 2009 included legal fees of \$25,408 (exclusive of GST) billed

to AWH by Allens Arthur Robinson. From the limited information contained in the itemised bill, it appears that the bill related to the costs dispute. The legal fees were included in the amount that Mr George certified as having been incurred in relation to RH3's work.

### The August 2009 claim

The amount that AWH claimed from RH3 for August 2009 included legal fees of \$65,940.37 (exclusive of GST) billed to AWH by Allens Arthur Robinson. From the limited information contained in the itemised bill, it appears the work primarily concerned the costs dispute. The fees, however, also related to other work unrelated to that dispute. This included work in relation to the registration of other companies, AWH intellectual property rights and reviewing "brand issue with Australian Water Project Management". Despite this, all the legal fees were certified by Mr George as having been incurred in relation to RH3's work.

### The September 2009 claim

The amount that AWH claimed from RH3 for September 2009 included legal fees of \$89,974.02 (exclusive of GST) billed to AWH by Allens Arthur Robinson. From the information contained in the itemised bill, it appears the fees related to the money dispute between RH3 and SWC and, in particular, work done with respect to the expert determination then being conducted by Mr Easton. The amount was included in the expenditure Mr George certified as having been incurred by AWH in relation to RH3's work.

### The November 2009 claim

The amount that AWH claimed from RH3 for November 2009 included legal fees of \$92,619.03 (exclusive of GST) billed to AWH by Allens Arthur Robinson and \$5,405.10

(exclusive of GST) billed by Colin Biggers & Paisley to AWH. From the limited details in the Allens Arthur Robinson itemised bill, it appears that the fees related to the costs dispute and the expert determination. It is not clear from the information contained in the itemised Colin Biggers & Paisley invoice whether it related to the money dispute or other matters. Both were included in the expenditure Mr George certified as having been incurred by AWH in relation to RH3's work.

## The December 2009 claim

The amount that AWH claimed from RH3 for December 2009 included legal fees of \$31,823.12 (exclusive of GST) billed to AWH by Allens Arthur Robinson and \$9,208.48 (exclusive of GST) billed by Colin Biggers & Paisley to AWH. The itemised invoice from Allens Arthur Robinson concerned work in relation to the costs dispute, including further work in relation to the expert determination. The itemised invoice from Colin Biggers & Paisley also appeared to relate to that dispute. Both were included in the expenditure that Mr George certified as having been incurred by AWH in relation to RH3's work.

## Analysis

There was disagreement between SWC and AWH over whether legal fees should be paid from the credit facility.

Dr Schott told the Commission that she was aware at the relevant time that AWH's position was that its legal costs associated with the expert determination should be funded through the RH3 budget, but that she did not agree with that position.

Both Mr Di Girolamo and Mr Rippon told the Commission that they believed the legal expenses incurred by AWH in its disputes with SWC could be properly recouped through the credit facility. Mr Di Girolamo told the Commission that his belief was founded on his understanding of the contractual relationships between SWC, AWH and RH3, including those set out in the Stage 3 Deed.

Mr MacGregor-Fraser told the Commission that he looked at the Stage 3 Deed a number of times but was:

*...unclear whether I came to any conclusion of whether the legal costs were actually included, I think there were [sic] some ambiguity, I thought perhaps there was an ability to, to charge legal costs but I'm not 100 per cent sure.*

He also understood that legal advice had been provided that legal costs in relation to the AWH disputes with SWC were a proper cost that could be passed on to RH3.

Under the Stage 3 Deed, RH3 was entitled to recover its "costs of operation in respect of the performance of its obligations under the Project Documents". The term "costs of operation" was not defined in the Stage 3 Deed. The Commission considers, however, that it was reasonably open to Mr Rippon, Mr MacGregor-Fraser and Mr Di Girolamo to form the view that it covered costs associated with obtaining legal services with respect to the money dispute. Although the legal services were obtained by AWH, rather than RH3, they were directly relevant to RH3 and were incurred in connection with whether funds from other budget categories would be reallocated to pay for costs incurred by RH3. To that extent, it was reasonably arguable that such costs related to the operation of RH3 and were therefore part of its "costs of operation". In these circumstances, the Commission is not satisfied that Mr Rippon, Mr MacGregor-Fraser and Mr Di Girolamo acted dishonestly with respect to the above claims made on RH3 for the payment of legal fees associated with the money dispute.

That leaves for consideration the April 2008 and August 2009 claims. The April 2008 claim included legal fees primarily related to AWH's work dispute with SWC and the obtaining of advice on the Other Stages Deed.

Mr Di Girolamo told the Commission that, based on the relevant contractual provisions, he believed that the costs associated with disputes with SWC fell within "costs of operation" and were therefore recoverable. The relevant contractual provisions on which he relied included the provisions, in the Other Stages Deed, that AWH would procure construction of the project works in stages and the provision, in the Stage 3 Deed, that RH3 would carry out other works in relation to the future stages. It was submitted on his behalf that it was therefore open to him to conclude that SWC had to fund the operational costs of maintaining contractual rights and ensuring contractual rights.

It was submitted on behalf of Mr MacGregor-Fraser that it was reasonably arguable that "costs of operation" included the costs of legal and other disputes under the Stage 3 Deed, including disputes associated with work for the next stage. A similar submission was made on behalf of Mr Rippon.

While there is doubt as to whether legal costs associated with the work dispute properly fall within the "costs of operation" of RH3, the Commission is not satisfied to the appropriate standard that any of Mr Rippon, Mr MacGregor-Fraser or Mr Di Girolamo did not genuinely believe that to be the case at the relevant time.

The Commission is satisfied that the April 2008 claim for legal fees with respect to a deed of release for an equity investor in Australian Water had nothing to do with RH3's "costs of operation". The same is the case

with respect to that part of the August 2009 claim for legal fees concerning AWH intellectual property rights and reviewing a “brand issue”. There is, however, insufficient evidence to establish that any of Mr Rippon, Mr MacGregor-Fraser or Mr Di Girolamo were responsible for the inclusion of these costs in the AWH claims on RH3 or knew at the relevant times that such costs had been included.

# Chapter 8: Other transactions

This chapter examines some of the other costs included in the AWH costs passed on to RH3, and claimed by it as “costs of operation”, and other transactions that were examined during the course of the Commission’s public inquiry.

## The November 2008 and December 2008 claims

The amount claimed by AWH from RH3 for November 2008 included \$712 for flights to Queensland for Mr Di Girolamo and Edward Obeid Jr. It also included payments for chauffeur-driven limousines to various sporting arenas. These amounts were included in the amount that Mr George certified as having been incurred in relation to RH3’s work.

The \$841,554.86 claimed by AWH from RH3 for December 2008 included \$156,962 for “Other Consultant”. This claim remains unexplained. AWH also claimed \$5,725.51 for “Travel”. This involved airfares to and from Queensland for Mr Di Girolamo and Edward Obeid Jr. Other claims included accommodation, meals and taxi fares in Brisbane. These amounts were included in the amount that Mr George certified as having been incurred in relation to RH3’s work.

The amounts charged with reference to Queensland related to work being done by Australian Water and had no connection with RH3’s work for SWC.

The submissions to the Commission made on behalf of Mr Di Girolamo accepted that the travel and accommodation expenses claimed for these months were unrelated to the contracts with SWC. It was submitted that the fact these types of expenses were only included over the relatively short period of two months demonstrated that they were isolated incidents. It was also submitted that this occurred coincidentally at a time when RHIC changed its name to AWH. A number of

the receipts contain the handwritten prefix “AW”. It was submitted that this suggested they were to be paid by Australian Water, not AWH, and therefore they were not intended to form part of the expenses charged by AWH to RH3. The Commission accepts the submission that there is no documentary or oral evidence to suggest that Mr Di Girolamo was involved in the decision to include these expenses in the AWH claims on RH3.

Mr George’s evidence in relation to his certification of these claims is dealt with in the next chapter.

## The \$176,000 invoice

On 30 April 2008, Australian Water issued an invoice to AWH for \$176,000 (inclusive of GST) for “[s]ervices rendered by Australian Water Pty Ltd in providing assistance, advice and attendance at meetings for and on behalf of [AWH]...” for the period from 1 March to 28 April 2008. This was included in the “Executive Fees” category of fees charged to RH3 by AWH and in the amount that Mr George certified as having been incurred in relation to RH3’s work. The services provided by Australian Water were effectively the time claimed to have been spent by Mr Di Girolamo providing assistance to AWH with respect to the disputes with SWC.

As previously stated, Mr Di Girolamo was formally seconded from Australian Water to AWH in July 2008. The April 2008 invoice covered a period prior to that secondment. Mr Di Girolamo told the Commission that, in late February 2008, he had a conversation with Mr Rippon and Mr MacGregor-Fraser to the effect that they needed him to be completely devoted to dealing with matters in dispute with SWC. He told the Commission that he understood that raising an invoice to AWH, which would, in turn, be passed on to RH3, for the time he spent in relation to the disputes with SWC was “within the confines of the contractual relationship”.

The payment of the \$176,000 came at a convenient time for Australian Water. The money was deposited into Australian Water's account on 10 June 2008. Just prior to that deposit, the balance in the account was only \$796.09. Without the AWH deposit, Australian Water would have had difficulty continuing to operate and would not have been able to pay Mr Di Girolamo's salary. This raised the suspicion that the Australian Water invoice was merely a device used to replenish its depleted coffers.

There is evidence, however, that, from about February 2008, Mr Di Girolamo was directly and substantially involved in dealing with the disputes involving SWC, RH3 and AWH. The Commission is satisfied that Australian Water was entitled to recoup from AWH the cost of Mr Di Girolamo's time spent dealing with those disputes. The Commission is also satisfied that, given the relevant contractual arrangements, it was not unreasonable for AWH to take the position that it could recoup from RH3 those costs attributable to Mr Di Girolamo's time spent dealing with issues relevant to RH3.

### **The \$298,505.02 invoice**

On 30 June 2008, Australian Water issued an invoice to AWH for \$298,505.02 (inclusive of GST). It was expressed in similar terms to the 30 April 2008 invoice but for the period from 1 May to 30 June 2008. It was included in the "Other Consultant" category of fees charged to RH3 by AWH and in the amount that Mr George certified as having been incurred in relation to RH3's work. Part of the services related to the time that Mr Di Girolamo claimed to have spent providing assistance to AWH with respect to its disputes with SWC. The balance of the services related to legal fees paid to Allens Arthur Robinson.

Once again, the payment came at a convenient time for Australian Water. The \$298,505.02 was deposited into Australian Water's account on 1 August 2008. Just prior

to that deposit, the balance in the account was only \$293.19. For the reasons given above, however, the Commission is not satisfied that the claim made on RH3 was improper.

### **The \$446,859.74 deposit**

On 26 October 2007, AWH deposited \$446,859.74 into the Australian Water account. The payment was reimbursement of AWH's share of the fit-out costs for a new office at Bella Vista, which was shared by AWH and Australian Water. The entire fit-out cost had initially been paid by Australian Water.

The Commission accepts the submission made on behalf of Mr Di Girolamo that there is no evidence of any fraudulent claim made by RH3 on SWC with respect to the office fit-out costs.

### **The \$663,812.19 deposit**

There was evidence of AWH receiving \$663,812.19 on 20 March 2009. The transaction was recorded in the AWH accounts as "Dividend from Col First State".

Bruce Chadban was the chief financial officer of AWH between December 2008 and early 2010. Mr Chadban told the Commission that he understood that at least \$633,000 of the money came from interest earned on another AWH account. The rest came from funds left over from stage 2 work. Mr Di Girolamo told the Commission that the money came from the closing of an AWH bank account. He denied the suggestion by senior counsel for SWC that it was money to which SWC was entitled. Neither Mr Rippon nor Mr MacGregor-Fraser was asked about the transaction. There are no primary accounting records in evidence to establish that AWH was not entitled to those funds. The Commission is not satisfied to the requisite standard that AWH was not entitled to the money.

## Other expenses

During the course of the public inquiry, the Commission examined a number of other expenses, which AWH incurred, in order to determine whether they had been passed on to RH3 and, if so, whether there was a proper basis for doing so.

During his evidence at the public inquiry, Mr Chadban recalled an incident when Mr MacGregor-Fraser approached him and said, "Nick's been to Queensland. He's incurred some out-of-pocket expenses in relation to the activities of the company up there and he wants to be reimbursed for them". When Mr Chadban suggested an expense claim form be submitted, Mr MacGregor-Fraser "sort of smiled" and said, "Oh, but Bruce, there's no expenses, it's just around \$20,000 and Nick wants to be paid today". Mr Chadban told the Commission that, when he asked if there was any documentary evidence to support the claim, Mr MacGregor-Fraser told him to just pay the money. Mr Chadban also told the Commission something similar may have occurred a second time, possibly involving \$10,000.

Mr MacGregor-Fraser told the Commission he "vaguely" recalled asking Mr Chadban to pay \$20,000 to Mr Di Girolamo for his expenses. He said he did so because Mr Di Girolamo asked him. He said he did not ask Mr Di Girolamo what the money was for.

AWH banking records recorded various expense claims paid to Mr Di Girolamo. These included payments of \$20,000 on 10 June, 11 June and 7 October 2009, a payment of \$10,000 on 3 August 2009 and a payment of \$12,000 on 1 March 2010.

Mr Chadban told the Commission that, under the procedure he implemented from February 2009, only costs associated with RH3 were billed to RH3. He was "sure" that the money he was asked to pay to Mr Di Girolamo was not billed to RH3. There is no

documentary evidence that these expenses were passed on to RH3.

Dennis Jabour is the nephew of Edward Obeid Sr and a cousin of Edward Obeid Jr. He was employed by AWH between about February 2010 and April 2013. He told the Commission that his work did not relate to the North West Growth Centre. There is no evidence, however, that his salary was part of any claim made on RH3.

Between 27 February 2009 and 8 April 2011, AWH paid \$159,500 to Paul Nicolaou's company, Solutions R Us Pty Ltd. Solutions R Us was originally engaged by Australian Water in April 2007. There is no documentary evidence that these fees were passed on to RH3.

Between 21 April 2009 and 20 May 2011, AWH paid Eightbyfive, a business controlled by Timothy Koelma, just over \$183,000. Both Mr Di Girolamo and Timothy Koelma told the Commission that Eightbyfive was retained to provide public relations consultancy advice. The relationship between Eightbyfive and AWH was dealt with in chapter 18 of the Commission's Operation Spicer report. The Commission found that the payments were political donations, not payment for any consultancy services. In any event, there is no documentary evidence that these payments were passed on to RH3.

There was evidence that, between 31 May 2010 and 18 May 2012, AWH paid over \$167,000 to Stadium Australia for a box that it shared with the Obeid Corporation. Between 31 March 2009 and 29 March 2012, AWH paid a chauffeur limousine service over \$28,000. Between 11 March 2009 and 21 December 2010, AWH donated about \$72,000 to the NSW Liberal Party. There is no documentary evidence that any of these expenses were passed on to RH3.

While the other expenses identified above were paid by AWH, there is evidence that AWH obtained the funds from the earnings of AWI with respect to its package 1 work.

## Chapter 9: Mr George's evidence

As explained in chapter 4 of this report, Mr George of MBT Chartered Accountants was responsible for certifying that the expenses AWH claimed from RH3 were reasonably and properly incurred. The certificates were then passed on to Mr Phillips so that he could certify what amounts could be drawn down from the credit facility. The certificates contain the following standard paragraph:

*We have examined the books and records of [AWH] for the [relevant monthly period] so as to certify that the amounts set out hereunder have been reasonably and properly incurred in relation to [RH3].*

In his evidence to the Commission, Mr George accepted that Mr Phillips, the stage 3 project certifier, relied on his certification as to what costs had been incurred in relation to RH3. He also accepted that Mr Phillips' reliance on his certification led indirectly to SWC also relying on his certification.

The terms of the certificates issued by Mr George would suggest to any third party seeing them that Mr George had undertaken a rigorous process in determining whether or not expenses submitted by AWH to RH3 were properly incurred in relation to RH3's work on the North West Growth Centre. The evidence, however, indicates that the process undertaken by Mr George was less than rigorous.

Mr George told the Commission that, each month, he received documentation from AWH to support its claims for payment from RH3. Although he understood his role was to certify that the costs claimed by AWH had been actually incurred in relation to RH3's work, he only reviewed a sample of the documents. He explained that, at least in 2006 and 2007, he approached the certification process on the basis that all the AWH invoices given to him related to the stage 3 project.

The problem with only reviewing a sample of the invoices became evident during the course of the Commission's public inquiry. Mr George was shown a number of expense claims that he agreed did not relate to RH3's

work but which he had certified as having been incurred in relation to RH3's work.

The amount certified for the period from 1 to 30 November 2008 included a \$500 payment to the "Terrigal SEC Liberal Party", a payment of \$9,000 for radio advertising, \$346 for lunch at a restaurant, \$524.70 for airfares for Mr MacGregor-Fraser to travel to and from Brisbane, \$712 for airfares for Mr Di Girolamo and Edward Obeid Jr to fly from Sydney to Cairns, and \$885 for a chauffeur-driven limousine to take people to sporting arenas and the airport.

Some of those expenses clearly relate to Australian Water rather than AWH or RH3. In his evidence to the Commission, Mr George agreed that those expenses should not have been included in the amount he certified and told the Commission he included each of them in his certificate by mistake.

The amount certified for the period from 1 to 31 December 2008 included a \$2,200 payment to attend a gala ball held by the Italian Chamber of Commerce. The certified amount also included \$355 for accommodation at a Brisbane hotel and another amount of \$640.50 for hotel accommodation in Cairns. The accommodation payments clearly related to Australian Water rather than AWH or RH3.

In his evidence to the Commission, Mr George acknowledged that these expenses did not "appear" to relate to RH3 work in the North West Growth Centre. The certified amount for this period also included a payment of \$5,000 to Solutions R Us. Mr George told the Commission he did not know what that had to do with work in the North West Growth Centre. He agreed that, although the amount certified included \$1,013.98 for flights, there was "no way" that flights could be associated with the work being done by RH3.

The amount certified for the period from 1 to 31 January 2009 included expense reimbursements for Mr Di Girolamo of \$166.95 for a charity golf day

at a Queensland golf club and a total of \$1,160.50 for four lunches at various restaurants. The certificate also included costs for the use of a limousine service in Queensland that was billed to Australian Water. Mr George told the Commission that he had included these expenses in his certificate by mistake.

Mr George did not accept the proposition put to him by senior Counsel Assisting that all he did was to get the relevant documents, add up the figures and then certify them without applying any independent judgment. He noted that, in October 2008, he had rejected costs claimed in three Solutions R Us invoices. He also recalled rejecting some other claims that he believed related to expenses incurred by Australian Water rather than AWH. He reiterated that it was not his practice to review every expense. He told the Commission that he mainly directed his attention to claims for amounts over \$7,500.

While there is evidence that Mr George did reject a few claims for expenses associated with Solutions R Us, the overwhelming majority of claims were certified as relating to RH3's work. As demonstrated by the examples above, some of these expenses clearly did not relate to that work.

One of the issues explored in the Commission's public inquiry was whether any of Mr Rippon, Mr MacGregor-Fraser or Mr Di Girolamo were responsible for any of the expenses identified above being included in the amounts sought to be recovered through RH3.

Josephine Power was the AWH office manager between 2008 and 2011. She told the Commission that invoices and receipts relating to AWH's office running costs were placed in a box. She collected them from the box and provided them to Mr George each month, together with the AWH cheque book, deposit book and bank statement. She also prepared one or more monthly memoranda setting out details of AWH payments made by cheque. She told the Commission that she only sent those invoices to Mr George that related to

entries in the memoranda. The memoranda, which were sent to Mr George, were usually jointly signed by Mr Rippon and Mr MacGregor-Fraser, but occasionally by Mr Di Girolamo. Although the receipts or invoices for the November and December 2008 and January 2009 expenses were included in the documentation provided to Mr George, they were not referred to in the memoranda for those months. This is consistent with Ms Power's evidence that she did not deal with invoices and receipts in relation to project costs and expense claims.

There is insufficient evidence to identify who was responsible for sending the relevant receipts and invoices to Mr George. In any event, the Commission is not satisfied to the requisite standard that any of Mr Rippon, Mr MacGregor-Fraser or Mr Di Girolamo knew at the relevant times they had been sent to Mr George or that any of them intentionally sought to have the relevant expenses reimbursed by RH3.

## **PART 3 – THE WORK DISPUTE**

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# Chapter 10: Genesis of the dispute

The work dispute between AWH and SWC essentially involved two related issues.

One of these was whether the Other Stages Deed gave AWH a mandate to procure the design, construction and commissioning of all water infrastructure in the North West Growth Centre. The position taken by AWH was that SWC was legally obliged to contract with it for the provision of all future work and, in consequence, between stages SWC had an obligation to provide AWH with work so that it remained a viable business. That position was not shared by SWC.

The other issue concerned AWH's attempts to enter into a PPP for the provision of water infrastructure. That issue commenced as a dispute between SWC and AWH but subsequently became a matter for consideration by the NSW Government.

## How the dispute arose

From about December 2006, AWH sought to commence work in relation to pre-development and design work for water-related infrastructure in what was known as the "First Release Precincts" of the North West Growth Centre. That was work AWH expected to obtain given the imminent completion of the stage 3 work. Between about mid-2007 and mid-2008, AWH became concerned about what it considered was SWC's failure to agree to AWH undertaking pre-development and design work for the First Release Precincts. AWH was also anxious to secure the income that would eventuate from this work. It required additional income in order to remain financially viable.

There was a significant amount of interaction between AWH and SWC concerning the work dispute. For the purpose of understanding what occurred, the most relevant interactions are set out below.

On 27 April 2007, Dr Schott wrote to Mr Rippon advising that, in accordance with the Other Stages Deed, SWC intended to put a proposal to AWH for the procurement of design, construction and commissioning of water infrastructure in the First Release Precincts.

On 29 June 2007, Mr Quill wrote to AWH in order to keep it informed of "the strategy to be adopted going forward" in relation to the First Release Precincts. The letter advised an intention that the work would be split into three distinct packages, with SWC internally financing the required work and being the principal "for all delivery contracts". AWH would be invited to submit an offer to provide project management services for the package 1 work. The letter noted that, if SWC considered the offer made by AWH did not provide value for money, then SWC would seek offers from the open market.

Given the terms of that letter, AWH understood that SWC was seeking to limit the role of AWH to that of project manager. AWH believed that such a limitation represented a fundamental and unilateral change in the contractual relationship between it and SWC and was at odds with Dr Schott's letter of 27 April 2007.

On 13 July 2007, AWH responded to Mr Quill's letter of 29 June 2007. AWH made it clear in its letter that it understood that the Other Stages Deed gave it exclusive rights to procure water-related infrastructure in the North West Growth Centre.

On 18 July 2007, Mr Quill wrote back to AWH, setting out SWC's position. In the letter, Mr Quill advised that the Other Stages Deed required SWC to put a proposal to AWH in relation to water infrastructure work and that, while SWC intended to put such a proposal, no such proposal had been made in the letter of 29 June 2007.



The position of SWC was made clearer in Mr Quill's letter of 14 September 2007 to Mr Rippon. Mr Quill reiterated that no proposal had been made to AWH under the Other Stages Deed. He made it clear that SWC did not accept that it was legally obliged to contract with AWH to provide water infrastructure in the North West Growth Centre. He went on to advise that SWC's "broad" position was that it did not have any financial obligations to AWH beyond those contained in the Stage 3 Deed and SWC could not "make work" to keep AWH's people employed. He noted that little, if any, new water infrastructure work was currently required in the North West Growth Centre.

Mr Quill told the Commission that SWC was reluctant to approve further stages of infrastructure in the North West Growth Centre unless there was a demand for such services. The position taken by SWC was that infrastructure should only be constructed if SWC could generate revenue from it.

On 6 December 2007, following further correspondence and meetings between representatives of SWC and AWH, SWC proposed to AWH that AWH provide project management services for the design and construction work for the package 1 project in the First Release Precincts. The package 1 area encompassed Riverstone and North Kellyville. SWC proposed to directly engage a contractor to undertake the design and construction work.

On 17 December 2007, AWH responded with a letter to SWC claiming that SWC's proposal was in breach of the Other Stages Deed (the AWH letter enclosed opinions received from Allens Arthur Robinson to that effect). A copy of the letter was sent to Michael Costa, then NSW treasurer, and Michael Schur, then deputy secretary of the Office of Infrastructure Management at NSW Treasury.

A meeting on 21 December 2007 between Mr Di Girolamo, Dr Schott and Mr Quill failed to resolve the dispute.

Following a meeting on 31 January 2008 between Mr Schur and Mr Di Girolamo, Mr Schur wrote to AWH on 1 February 2008. In his letter, Mr Schur noted that, following discussions between SWC and AWH, he understood that SWC would seek a priced bid from AWH for delivery of water-related infrastructure for the First Release Precincts.

AWH prepared a draft deed for a Build Own Operate (BOO) arrangement for the First Release Precincts. If accepted, that proposal would have resulted, on SWC's calculations, in AWH owning over \$400 million of water assets. The SWC position was that it was not contemplating privatisation of water assets but, if it were to do so, it would require competitive bidding for those assets in order to ensure that NSW obtained best value for those assets. The SWC response to AWH was that any proposal from AWH had to be limited to package 1 of the First Release Precincts. AWH considered that this was not financially viable.

On 10 April 2008, Dr Schott wrote to Mr Di Girolamo noting that AWH had elected not to take the opportunity to submit a proposal in response to SWC's invitation of 6 December 2007. Dr Schott advised that, as a consequence, SWC intended to proceed to issue requests for tender to the market for project management services and a design and construction contract for the First Release Precincts.

Further correspondence and a meeting between Dr Schott, Mr Quill, Mr Di Girolamo and Mr MacGregor-Fraser failed to resolve differences. SWC and AWH remained at an impasse.

On 21 April 2008, SWC released an invitation for public tender for the design and construction contract for Package 1 of the First Release Precincts. On the same

date it released an invitation for public tender for the project management of that work. Tenders were to close on 29 May 2008. By those actions, SWC was clearly rejecting the position put forward by AWH that, under the Other Stages Deed, SWC was obliged to contract with AWH for the provision of water infrastructure in the North West Growth Centre.

On 23 April 2008, Mr Di Girolamo sent an email to the NSW treasurer and the Hon Nathan Rees, then minister for water, requesting that they intervene in the dispute. Later that day, Mr Rees' chief of staff responded by email. He advised that Mr Rees would not intervene in what he considered was a commercial dispute between AWH and SWC and that any intervention by the minister would be "entirely inappropriate".

## AWH and SWC obtain legal advice

The next step taken by AWH was to seek legal advice from counsel as to whether SWC was able, under the existing contractual arrangements, to exclude it from involvement in the future development of water-related infrastructure in the First Release Precincts.

On 9 May 2008, Bret Walker SC and James Lockhart provided a joint written opinion to AWH. Their opinion was that, under the Other Stages Deed, SWC could only exclude AWH from the role of procurement of the design, construction and commissioning of work in circumstances where it first put a proposal to AWH for that work, and AWH failed to agree to implement or failed to implement the proposal within the time period specified by SWC and on the terms and conditions acceptable to SWC. They were of the opinion that the proposal put by SWC in its 6 December 2007 letter did not comply with the requirements of the Other Stages Deed and any steps SWC took to proceed with any proposal for the design, construction and commissioning of relevant infrastructure without involving AWH would be in breach of the Other Stages Deed.

Mr Walker and Mr Lockhart noted that one option open to AWH was to commence proceedings in the NSW Supreme Court seeking relief restraining SWC from entering into agreements with any other party in relation to the design and construction contract for any of the First Release Precincts. They also considered that it would be open for the portfolio minister to issue a ministerial direction to SWC under s 20P of the *State Owned Corporations Act 1989*. That section provides that the portfolio minister, with the approval of the treasurer, may give the board of a statutory state-owned corporation a written direction if the portfolio minister is satisfied that, because of exceptional circumstances,

it is necessary to give the direction in the public interest. Once such a direction is given, the board of the state-owned corporation must ensure that the direction is carried out.

SWC also obtained legal advice from counsel. Dr Schott told the Commission that the legal advice supported SWC's contention, that the Other Stages Deed did not give AWH a monopoly on the supply of water infrastructure in the North West Growth Centre.

## The solicitor general's advice

In relation to the entitlement of SWC to call for tenders for delivery of water infrastructure in the North West Growth Centre, the secretary of the Treasury sought advice from NSW Solicitor General Michael Sexton SC. Mr Sexton provided a written opinion dated 19 May 2008. He noted that the relevant provisions of the Other Stages Deed "...are far from clear and it is impossible to say with any confidence how they would be construed by a court". He considered that one option available to SWC was to seek a court ruling. If AWH wanted to prevent SWC from continuing with the tender process commenced on 21 April 2008, it would need to initiate legal proceedings that could be defended by SWC. While not confident that SWC would succeed, he considered it had "...an arguable case". Another option he suggested was a mediation or arbitration "...in the course of which the parties might vary their rights in relation to the existing contract and/or substitute a new agreement for future dealings".

A copy of the solicitor general's opinion was provided to SWC on 27 May 2008.

## The package 1 contract

Neither party favoured the prospect of litigation. In an attempt to resolve differences, AWH and SWC agreed to mediation. Although the mediation failed, by late 2008, both SWC and AWH acknowledged the urgent need to progress delivery of water-related infrastructure in the package 1 area of the First Release Precincts.

On 6 November 2008, SWC and an AWH entity, AW1, entered into a new agreement titled North West Growth Centre First Release Precincts (Package 1) Head Contract ("the 2008 Contract") for the delivery of the necessary infrastructure for that area. Under the 2008 Contract, AW1 was responsible for procuring the "design, supply, construction, commissioning and completion" of the package 1 works.

The immediate work issue had been resolved. However, the wider issue of whether AWH was entitled to a monopoly on work in the North West Growth

Centre had not been resolved. Indeed, as will be seen in the next chapter, this was about to take on a new dimension.

# Chapter 11: The public private partnership proposal

This chapter sets out how AWH came to make its PPP proposal to provide future water infrastructure in the North West Growth Centre.

## Dr Schott's letter of 8 August 2008

Following the failed mediation between SWC and AWH in 2008 concerning their contractual relationship, Dr Schott wrote to AWH on 8 August 2008 concerning package 1 of the First Release Precincts. The following paragraph was included in the letter:

*On the 7 August 2008 it was agreed that [AWH] could put a proposal to [SWC] that involved private finance for further works and that such a proposal may be structured like a public private partnership or a BOO/BOOT [Build Own Operate or Build Own Operate Transfer]. [SWC] will consider such a proposal and if it equals or betters a Public Sector Comparator, compiled in line with NSW Working with Government Guidelines, then [SWC] and [AWH] will seek approvals needed for such a proposal from Government. Both parties agree that the scope of the proposal from [AWH] should be one that [SWC] agrees with.*

AWH interpreted Dr Schott's letter as providing it with an invitation to submit a PPP proposal to SWC.

## The AWH response and subsequent events

On 18 November 2008, Mr Di Girolamo wrote back to Dr Schott. In his letter, Mr Di Girolamo referred to Dr Schott's letter of 8 August 2008 as confirming that "... our company could submit a Public Private Partnership Proposal..." for further works in the North West Growth Centre. He advised that AWH wanted to progress the development of a PPP and was "...currently developing a scope and staging plan which we propose to provide to

[SWC] on a preliminary basis for its consideration within the next 2 – 3 weeks". He went on to enquire whether SWC had a preference for a BOO or BOOT arrangement.

Dr Schott responded to this letter on 23 December 2008. In her response, she emphasised that in her letter of 8 August 2008 she had confirmed that AWH "could" put a proposal that involved private finance, that such a proposal "could be structured like a public private partnership or a BOO/BOOT". She advised that SWC's only commitment was to consider any such proposal. She also made it clear that SWC had not, and was not, soliciting such a proposal.

Dr Schott told the Commission that she never intended to solicit any PPP proposal from AWH.

Having regard to the terms of her letter of 8 August 2008, the Commission is satisfied that Dr Schott's subsequent letter of 23 December 2008 correctly stated the position and that SWC had not solicited a proposal from AWH. AWH, however, did not accept that position and maintained that, in the letter of 8 August 2008, SWC had solicited a proposal.

Although the letter of 8 August 2008 had advised AWH that it could put a PPP proposal to SWC, the AWH proposal was ultimately made not to SWC but to the NSW Government. This was no doubt because AWH knew that it was unlikely SWC would look favourably on any such proposal.

After receiving the letter of 23 December 2008, Mr Di Girolamo sought to meet with NSW Treasury officials to discuss AWH's proposal for a PPP. By letter dated 26 March 2009, Mr Schur, who was then NSW Treasury secretary, advised Mr Di Girolamo that under the *Working with Government: Guidelines for Privately Financed Projects* ("the Guidelines") the AWH proposal had been classified as unsolicited and, as such, the director general of the NSW Department of Premier and Cabinet should be AWH's first point of contact.



The issue of whether the AWH proposal had been solicited or not was relevant to the way it would be dealt with under the Guidelines.

The Guidelines dealt with proposals for the creation of privately financed infrastructure projects that would remain under private sector ownership for a specified period. The Guidelines provided that unsolicited proposals could be considered by government but that the government should normally test such proposals in the market place through competitive tendering with the aim of maximising “both financial efficiencies and effective service delivery”. The Guidelines provided that requests to bypass the competitive tendering process and negotiate directly with the government had to be approved by the Budget Committee of Cabinet. Such approval would only be granted “where the proponent can show that there would be no viable competition for the delivery of the proposal’s essential outcomes”.

The process for solicited proposals was different. A number of steps was involved. First, the relevant agency was required to identify the need for the delivery of particular infrastructure. It then needed to obtain Budget Committee of Cabinet approval to procure the project. It could request the Budget Committee of Cabinet to approve procurement through private financing. Procurement could be by way of direct negotiation, where the agency demonstrated to the Budget Committee of Cabinet the reasons for, and net benefits of, not undertaking a competitive tender process.

## AWH submits a PPP proposal

On 6 July 2009, Mr Di Girolamo sent AWH’s PPP proposal to Brian McGlynn, the associate director of investment and economic development in the major projects coordination unit of the Department of Premier and Cabinet.

The proposal was for AWH to provide all future water infrastructure in the North West Growth Centre by way of a PPP. The AWH proposal was for it to privately finance the development of this infrastructure, at a cost of between \$1.2 billion and \$1.4 billion, and then operate it for an agreed period. AWH also proposed that, for payment of between \$160 million and \$190 million, it would either purchase or acquire by way of a long-term lease all the existing water infrastructure it had delivered in the North West Growth Centre and operate that infrastructure.

In return, AWH required an availability payment of between \$25 million and \$35 million per year and the right to collect all retail payments that would accrue to the infrastructure assets under its control. The proposal noted that AWH was “open” to a variety of retail pricing policies, ranging from retaining the SWC price to “options which have far higher charge levels reflecting improved environmental sustainability and service quality”. AWH also sought NSW Government compensation for any revenue shortfall if the sale and development of housing lots did not meet expectations.

AWH requested that its proposal “is undertaken by way of direct negotiation with the State”. Acceptance of that request would mean that AWH’s proposal would not face market competition.

It is relevant to note that, if the AWH PPP proposal were accepted, the shareholders in AWH would gain a substantial financial benefit. In 2009, PricewaterhouseCoopers was asked by AWH to provide a valuation of the company. It valued the company without the PPP at about \$47 million. It valued the company with a PPP at over \$156 million. Also in 2009, an investment bank valued AWH at between \$38 million and \$45 million without a PPP and at between \$100 million and \$150 million with a PPP.

## Dealing with the PPP proposal

An Initial Review Panel was established to analyse the PPP proposal in accordance with the Guidelines.

Mr Di Girolamo, however, did not wait for the Initial Review Panel to complete its assessment. On 14 August 2009, he wrote to then premier, Mr Rees, and then minister for infrastructure and finance, Joseph Tripodi. In his letters, he referred to the “agreement” he claimed had been reached between SWC and AWH for a PPP by virtue of Dr Schott’s letter of 8 August 2008 and SWC’s refusal to progress the PPP. He enclosed a copy of his 6 July 2009 letter to Mr McGlynn and a copy of a 6 August 2009 advice obtained from Mr Walker and Mr Lockhart on the ability of the Budget Committee of Cabinet to permit direct negotiations between the state and AWH. Mr Walker and Mr Lockhart were of the opinion that there was a “sound and reasonable basis” for the Budget Committee of Cabinet to be satisfied that there were net benefits of not undertaking a competitive tender process such as to enable direct negotiations because of AWH’s existing contractual rights of first refusal under the Other Stages Deed, which, in their view, were inconsistent with the undertaking of any competitive tendering process. Mr Di Girolamo concluded each letter by recommending that approval for direct negotiations be given.

On 10 September 2009, the deputy director general of the Department of Premier and Cabinet, acting on behalf of Mr Tripodi (then minister for infrastructure and finance), sought advice from the solicitor general as to “...whether there is any impediment to the Government approving direct negotiations in relation to an unsolicited proposal submitted by [AWH] for a public private partnership”. The request for advice referred to the 6 August 2009 legal opinion provided to AWH by Mr Walker and Mr Lockhart and also noted that Mr Tripodi:

*...has advised that the [PPP] proposal appears to have the potential to provide significant benefits to the State and is, on its face, consistent with a number of Government policies including accelerated land release, private sector infrastructure delivery and the promotion of compensation in the water sector.*

The solicitor general provided written advice dated 15 October 2009. He considered that, under the Guidelines, it would be necessary for SWC to demonstrate the reasons for, and net benefits of, the proposal proceeding by way of direct negotiation rather than by competitive tender. He suggested it would be prudent for SWC to first obtain an independent assessment of the question as to whether the reasons for not undertaking a competitive tender process had been demonstrated. If the assessment were favourable, he was of the opinion that there would be no impediment under the Guidelines to the Budget

Committee of Cabinet approving direct negotiations with AWH “...subject to the remaining requirements of the Guidelines being satisfied”.

In relation to the proposal for AWH to purchase or long-term lease existing water infrastructure, the solicitor general was of the opinion that it would be necessary for SWC (or the Department of Premier and Cabinet, if it were considered that AWH had made the proposal to that department rather than SWC) to demonstrate to the Budget Committee of Cabinet the reasons for, and net benefits of, direct negotiations as opposed to a competitive tender process.

As will be seen in chapter 26 of this report, there was evidence that Mr Tripodi wanted a Cabinet minute to be prepared by the Department of Premier and Cabinet and intended that minute would be submitted to the Budget Committee of Cabinet in December 2009. However, the Hon Kristina Keneally replaced Mr Tripodi as minister for infrastructure on 17 November 2009. She became premier on 4 December 2009 and Anthony Kelly became minister for infrastructure on 8 December 2009.

On 9 December 2009, Mr Di Girolamo wrote to Ms Keneally and Mr Kelly concerning the AWH PPP proposal. The letters were in similar terms to the letters of 14 August 2009 sent to Mr Rees and Mr Tripodi.

On 18 December 2009, Mr Kelly responded to the letters of 9 December 2009 on behalf of the premier and himself. He advised that, after seeking a briefing from the Department of Premier and Cabinet, he had been advised that the PPP proposal would be assessed and that a meeting had been scheduled with the Department of Premier and Cabinet for the purpose of Mr Di Girolamo providing further details to enable the assessment to be completed.

The meeting foreshadowed in Mr Kelly’s letter occurred on 21 December 2009.

On 23 December 2009, Dianne Leeson, the director of major projects coordination at the Department of Premier and Cabinet, wrote to Mr Di Girolamo setting out the next steps to be taken. They included the preparation of a minute for submission to the Budget Committee of Cabinet dealing with whether or not direct negotiations should be approved. Ms Leeson requested further information from AWH in order to proceed. On 5 February 2010, AWH provided additional information in response to Ms Leeson’s request. A request for further information was made to AWH on 8 March 2010. AWH provided a response by way of letter dated 26 March 2010.

In addition to the information provided by AWH, the Department of Premier and Cabinet also obtained information from SWC. KPMG was commissioned to

provide a Public Sector Comparator by which to measure the AWH proposal.

What happened with the AWH PPP proposal is dealt with in part 6 of this report. Before considering that matter, it is necessary to examine the evidence concerning the involvement of members of the Obeid family with AWH. Determination of the level, if any, of their involvement is relevant to the question of whether Edward Obeid Sr misused his position as a member of Parliament to further the interests of AWH.

## **PART 4 – AWH AND THE OBEIDS**

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## Chapter 12: Moses Obeid and Edward Obeid Jr become involved

Edward Obeid Jr and Moses Obeid are sons of Edward Obeid Sr.

Mr Di Girolamo and Edward Obeid Jr were longstanding, close personal friends. Edward Obeid Jr was godfather to one of Mr Di Girolamo's children.

The evidence establishes that, at least from about May 2006, Edward Obeid Jr and Moses Obeid were aware that Mr Di Girolamo was involved in AWH. On 16 May 2006, Moses Obeid sent an email to Cosmas Kapsanis advising him that Mr Di Girolamo was "an old school friend" who was on the "RHIC" board.

In his evidence to the Commission, Moses Obeid agreed that the purpose of the email was to arrange a meeting between Mr Di Girolamo and Mr Kapsanis to discuss a possible investment in AWH by the investment bank where Mr Kapsanis worked. Edward Obeid Jr told the Commission that he probably told Moses Obeid about Mr Di Girolamo's involvement in AWH.

The meeting arranged by Moses Obeid occurred on 18 May 2006. Apart from Mr Di Girolamo and Mr Kapsanis, Moses Obeid also attended the meeting. Mr Di Girolamo told the Commission that Moses Obeid attended for the purpose of introducing him to Mr Kapsanis. Mr Kapsanis told the Commission that Moses Obeid introduced him to Mr Di Girolamo but could not recall Moses Obeid telling him what involvement he had in AWH. Ultimately, the bank in which Mr Kapsanis worked did not make any investment in AWH.

In his evidence to the Commission, Mr Di Girolamo agreed that, by about February 2007, Edward Obeid Jr was working at Australian Water and had some involvement in management decisions; although, he rejected the suggestion that Edward Obeid Jr had a "key" involvement in such decisions.

By that time, Edward Obeid Jr was involved in introducing another potential investor in AWH to

Mr Di Girolamo. He was also copied into emails between that potential investor and Mr Di Girolamo. These emails contained confidential information about AWH and its potential profit once work on the First Release Precincts commenced. Edward Obeid Jr was also involved in introducing other potential investors to Mr Di Girolamo, including his friend Anthony Karam, who ultimately made a substantial investment in Australian Water. Mr Di Girolamo agreed that Edward Obeid Jr attended several meetings involving one potential investor, John McGuigan, and accepted that he was "closely involved" in all the negotiations with Mr McGuigan.

There was evidence that Edward Obeid Jr's involvement was more than just introducing potential investors. In October 2007, there was an enquiry from Raj Sharma about whether Australian Water was interested in work in India. Edward Obeid Jr responded by email that Australian Water was focused on Sydney and Queensland and:

*...our focus cannot be taken away from the immediate opportunity here in Australia. Raj this is not to say that India is not on our radar, we are grateful to be able to run off your contacts in India, but we have to wait until the timing is right for Australian [sic].*

The use of the terms "our" and "we" in that context suggested that he was centrally involved in important decision-making processes, at least at Australian Water. In his evidence to the Commission, however, Edward Obeid Jr denied that that was the case and claimed that he used those terms for the purpose of "embellishing" his role; although, he could not explain why he needed to embellish his role when dealing with Mr Sharma.

Edward Obeid Jr accepted that he was working with Australian Water from at least July 2007 and trying to find business opportunities for Australian Water in Queensland. There was evidence that he was reimbursed for some expenses incurred by him in relation to the Queensland venture. Some of that evidence is set out

in chapter 8 of this report. Edward Obeid Jr told the Commission that, while he received reimbursement for some expenses, the majority of his expenses, which he estimated to have been between \$85,000 and \$110,000, were borne by him. He told the Commission he was not paid any salary for his work but undertook it on the basis that he would receive some financial reward if he were successful in finding such opportunities.

The Commission did obtain a copy of a draft January 2011 employment contract between AWH and Edward Obeid Jr, under which he was to be employed by AWH as director of strategic growth to oversee operations in Queensland at a salary of \$350,000 per year.

The contract obtained by the Commission was not signed and Edward Obeid Jr told the Commission that it was never executed and he was never paid the proposed remuneration. Mr Groom, the AWH chief financial officer (CFO), told the Commission that AWH did not have the money to pay such a salary and, as far as he was aware, Edward Obeid Jr was never paid any salary but was reimbursed for some expenses he incurred. There is no documentary evidence that AWH or any AWH entity paid any salary to Edward Obeid Jr.

The Commission is satisfied that Edward Obeid Jr was not paid any salary by AWH or any AWH entity.

## Chapter 13: The 2007 deed of option

The closeness of the relationship between Mr Di Girolamo and Edward Obeid Jr was demonstrated by their decision, in about May 2007, to instruct a lawyer, Mr Skehan, to draw up a deed of option to provide “mutual support” in their various business arrangements. In his evidence to the Commission, Edward Obeid Jr agreed with the proposition that he and Mr Di Girolamo had a pact or blood-brother agreement to enter into a kind of life investment where they split their assets between them.

Mr Skehan created a number of drafts of the deed of option in July 2007. He told the Commission that the final version reflected his instructions from Mr Di Girolamo and Edward Obeid Jr. That version was signed by Edward Obeid Jr in September 2007 but was not signed by Mr Di Girolamo.

The final version of the deed of option contained the following seven recitals:

*A. The Vendor [Mr Di Girolamo] and Purchaser [Edward Obeid Jr] are involved in business together.*

*B. The Vendor and Purchaser desire to mutually support one another in their various business arrangements. However, both the Vendor and Purchaser have very limited funds. Accordingly, mutual support is envisaged through future acquisition of part of certain shareholdings held by the Vendor or Purchaser.*

*C. The Vendor is the owner of 50% of the issued shares in Australian Water Pty Limited and [AWH] (the Vendor's shareholding).*

*D. The Purchaser is the owner of 1/5 of the units in the Milland Unit Trust of which Milland Pty Limited is the Trustee (the Purchaser's unitholding).*

*E. The Vendor and Purchaser recognise that both the Vendor's shareholding and the Purchaser's unitholding have very limited value at present but that such value is anticipated as improving. The Vendor*

*and Purchaser recognise there is no guarantee of any improvement in value.*

*F. The Vendor has agreed with the Purchaser to grant the Purchaser an option to purchase the Vendor's shareholding upon and subject to the conditions hereinafter set out.*

*G. The Purchaser has agreed to grant to the Vendor a put option to require the Purchaser to purchase the Vendor's shareholding upon and subject to the conditions hereinafter set out.*

Milland Pty Ltd was an Obeid family company and the Milland Trust was an Obeid family trust.

The deed provided that, in consideration of payment of \$100 by Edward Obeid Jr to Mr Di Girolamo, the latter granted Edward Obeid Jr or his nominee an option to purchase his shareholding not earlier than three months from the date of the deed and not later than 18 months from the date of the deed. The deed also provided that Mr Di Girolamo could require Edward Obeid Jr to purchase Mr Di Girolamo's shareholding within the same period of time. That meant the parties had up to about March 2009 to effect the transfer of shares.

Edward Obeid Jr told the Commission that, although he was interested in acquiring Mr Di Girolamo's shares, his brothers were not supportive of the idea and the proposed arrangement “died” about a week after he signed the deed.

Mr Di Girolamo told the Commission that he knew from about this time that Edward Obeid Jr was interested in acquiring shares in AWH.

Recital C provided that Mr Di Girolamo was the owner of half the shares in AWH and Australian Water. That was factually correct.

The minutes of the AWH board meeting held on 29 January 2007 recorded a decision to approve the issue of further shares to Mr Di Girolamo to bring his

holding up to half of the issued shares. Mr Rippon told the Commission this was done so that Mr Di Girolamo could eventually sell part of his shareholding to new investors. Mr Rippon told the Commission that, although Mr Di Girolamo mentioned names of potential investors, he never mentioned the Obeids in that context. Mr Di Girolamo denied that the purpose of acquiring the additional shares was because he knew at that time Edward Obeid Jr was interested in acquiring shares in AWH and he wanted to increase his shareholding so he could sell shares to Edward Obeid Jr.

The minutes of the Australian Water board meeting of 1 February 2007 recorded a decision to approve the issuing of a further 100 shares to Mr Di Girolamo, bringing his shareholding up to half the issued shares in that company.

There was no evidence that the option to purchase shares was exercised under the deed of option. As will be seen in chapter 15, that deed was effectively superseded by a further agreement entered into in November 2010, under which an Obeid family interest acquired an equitable interest in AWH and Australian Water. What the evidence concerning the 2007 deed of option does establish is that, by May 2007, a member of the Obeid family was contemplating acquiring a shareholding in AWH and Australian Water. That Edward Obeid Jr was at least contemplating acquiring a shareholding in those companies is supported by his conduct in working for Australian Water without a salary and expending his own money in pursuit of the aims of AWH and Australian Water without reimbursement. That conduct indicated an understanding, on his part, that what he did to progress the aims of AWH and Australian Water could potentially benefit him further down the track if he acquired shares in those companies.

Edward Obeid Jr's level of involvement in management decisions affecting Australian Water, and his access to confidential information about AWH's profitability, also demonstrated that both he and Mr Di Girolamo

understood there was a real likelihood that he would be more than a mere employee of Australian Water but that he would one day be an investor in that company and AWH.

## Chapter 14: Mr Brook's evidence

Paul Gardner Brook was an investment banker who previously worked for Lehman Brothers. He became friends with Moses Obeid during 2008, when working with him in relation to the exploitation of certain mining leases in the Mount Penny tenement. Those dealings are set out in detail in the Commission's July 2013 Operation Jasper report, *Investigation into the conduct of Ian Macdonald, Edward Obeid Senior, Moses Obeid and others*. By 2012, they had fallen out and were no longer friends.

During the course of the Commission's investigation in this matter, Mr Brook provided a statement concerning his relationship with Moses Obeid and discussions involving AWH. Mr Brook recalled, in particular, meeting Moses Obeid in a café opposite Moses Obeid's home in Elizabeth Bay. Mr Brook told the Commission that, during that meeting, Moses Obeid mentioned AWH and said that he and his family had ownership in that company and had great influence over it. Moses Obeid told him that AWH was looking at a privatisation deal that would give effective control of Sydney's water and that "We are going to make a fortune out of it".

The statement concerning privatisation of water assets was consistent with the early 2008 AWH BOO proposal for the First Release Precincts (discussed in chapter 10 of this report) and what eventuated as the AWH PPP proposal (discussed in chapter 11). Moses Obeid asked Mr Brook if he needed a job because Moses Obeid could arrange for him to work at AWH in a very senior position. As Mr Brook was then working at Lehman Brothers, he declined the offer.

Although Mr Brook did not put a date on this meeting, the fact that he was working for Lehman Brothers at the time means that it must have occurred before the collapse of that bank in September 2008. Mr Brook also related a second conversation that, he said, occurred in about late July 2008. That places the likely time of the first conversation as sometime before July 2008.

Mr Brook said the second conversation involved Moses Obeid and someone from AWH whose first name was "Nick". It occurred at a meeting at Lehman Brothers to discuss financing a potential deal involving water distribution rights over an area of Sydney. Mr Brook believed that "Nick" was the Obeid family business partner in AWH. His evidence in his statement was that "they spelt out what they were doing which was effectively getting behind this vehicle that would afford them the water distribution rights over an area of Sydney". That conversation implied that the Obeid family either already had a financial interest in AWH or was interested in acquiring such an interest.

Mr Brook also recalled that Moses Obeid arranged a meeting at his Elizabeth Bay home in mid- to late August 2008. When Mr Brook arrived, he was taken into the house by Moses Obeid. They entered a room where Mr Tripodi was present. As Mr Brook sat down, Moses Obeid said, "This meeting is not happening".

In his statement to the Commission, Mr Brook said that he did not consider it was appropriate to question Moses Obeid's comment. He said "[i]t all seemed very clandestine and I got the impression that Mr Tripodi didn't like me". Mr Brook said that Moses Obeid "again mentioned [AWH] but only in very general terms". Mr Brook told him he was not interested in being involved in AWH. After between 20 and 30 minutes, the conversation turned to the privatisation of NSW electricity assets.

Mr Brook recalled that, shortly thereafter, Edward Obeid Sr entered the room, at which stage Moses Obeid repeated that, "This meeting is not happening". The discussion about electricity privatisation continued and there was discussion about whether Lehman Brothers would be able to introduce potential buyers for NSW electricity assets.

Telephone call charge records showed there was a

number of calls and text messages between Moses Obeid and Mr Brook on 22 August 2008 and some calls between Mr Tripodi and Edward Obeid Sr on that date. Mobile telephone traffic records showed that, from about 4 pm that day, each of Mr Tripodi, Edward Obeid Sr, Mr Brook and Moses Obeid were in the Elizabeth Bay area. After seeing those records at the public inquiry, which also showed his whereabouts prior to attending the meeting, Mr Brook was able to tell the Commission that the meeting occurred on 22 August 2008.

When giving evidence at the public inquiry, Mr Brook said that the contents of his statement were “[a]bsolutely true”. He recalled that, at the meeting at Lehman Brothers, Moses Obeid told him the Obeid family would make over \$100 million from the water deal. He identified Mr Di Girolamo as the person he knew as “Nick” from that meeting.

Mr Brook maintained his evidence under cross-examination. Under cross-examination, he said that, at the meeting with Mr Di Girolamo, Moses Obeid had, in Mr Di Girolamo's presence, represented that the Obeid family “had a high equity interest in a water management company”. He told the Commission that Mr Di Girolamo “did not dispel my understanding of the participation of the Obeids in that company” and that what happened at that meeting was consistent with the Obeids having a large equity stake in AWH.

Under cross-examination by senior counsel for Edward Obeid Sr, Mr Brook recalled driving to the Elizabeth Bay house in the afternoon of 22 August 2008 and correctly identified the date as a weekday as opposed to a day on the weekend. He denied that he was intoxicated. He also denied that Edward Obeid Sr left shortly after arriving and told the Commission that Edward Obeid Sr was still there when he left.

Mr Brook acknowledged that he had an accident in 2010 in which he hit his head and, as a consequence, he was in a coma for a period of time. He denied undergoing an operation and no evidence of any such operation was put forward. He agreed that it was possible he had told Moses Obeid that he had suffered some memory loss as a result of the accident and that he did have memory problems “sometimes”, but denied that he had difficulty recalling the events about which he had given evidence.

In his evidence to the Commission, Moses Obeid acknowledged that he had been fairly close to Mr Brook but they had subsequently fallen out. He agreed they had talked about business but said he had never spoken to him about any Obeid family interest in AWH or the value of any family interest in water infrastructure. He said that he had introduced Mr Di Girolamo to Mr Brook at Mr Brook's Lehman Brothers office with a view to

Mr Brook assisting Mr Di Girolamo to find funding for Australian Water. He said that Mr Brook had been to his home, including when Edward Obeid Sr was present. He denied that Mr Brook had been to his Elizabeth Bay house on 22 August 2008 and denied that Mr Tripodi was at his home on that date or had ever been present when Mr Brook had been at his home.

In his evidence to the Commission, Edward Obeid Sr agreed that he had met Mr Brook at Moses Obeid's Elizabeth Bay house but said that Mr Tripodi had never been present. He said that Mr Brook was intoxicated when he arrived at Moses Obeid's house and denied that Moses Obeid talked about an Obeid family interest in AWH.

Mr Tripodi told the Commission he had never met Mr Brook and was not present in a room with him and Moses Obeid when the latter talked about AWH.

The Commission accepts Mr Brook's evidence. He had no interest in the outcome of the Commission's investigation and did not waver under cross-examination. His evidence that he was at a meeting with Moses Obeid, Edward Obeid Sr and Mr Tripodi at Moses Obeid's Elizabeth Bay home in August 2008 is supported by relevant telephone records. On the other hand, the Commission does not regard Moses Obeid, Edward Obeid Sr and Mr Tripodi as credible witnesses. Each of Moses Obeid, Edward Obeid Sr and Mr Tripodi were often evasive in their evidence and did not always give truthful evidence.

The timing of the meeting at Moses Obeid's home is consistent with the matter of AWH being discussed at that meeting. The meeting occurred on 22 August 2008, just days after AWH had received Dr Schott's letter of 8 August 2008, which AWH interpreted as an invitation to submit a PPP proposal. Acceptance of any PPP proposal would have a significant impact on AWH and its value. It is not surprising that, in those circumstances, and given the relationship between Mr Di Girolamo, Moses Obeid and other members of the Obeid family, AWH was a topic of conversation. As Mr Brook was still at Lehman Brothers at the time and Lehman Brothers could, potentially, assist with raising the funding needed for the PPP, it is not surprising that the matter was discussed in Mr Brook's presence.

The Commission accepts that Moses Obeid told Mr Brook that the Obeid family owned part of AWH. Although such a statement was made to Mr Brook, it does not follow that it was a true statement at the time it was made. Although the 2007 deed of option made provision for the purchase of shares in AWH, there was no documentary evidence the option was exercised. Certainly, as of July 2008, no shares had been registered in the name of any member of the Obeid family or any Obeid family entity and no share transfers had been

executed in favour of any member of the Obeid family or any Obeid family entity. The Commission is not satisfied that, as at mid-2008, the Obeid family had any legal or beneficial ownership in AWH.

What is clear from the evidence is that Moses Obeid had sufficient interest in AWH to organise a meeting with Mr Brook to discuss financial arrangements and to attend and participate in that meeting. He knew sufficient details about AWH to know that it was aspiring to create an effective monopoly over the provision of water services in the North West Growth Centre and that, if it succeeded, there would be substantial profits to be made. Moses Obeid expected that the Obeid family would have a share in those profits to the extent of over \$100 million. That return could only have come through a share in the ownership of AWH. The Commission is satisfied that Moses Obeid was interested, as of at least about mid-2008, in an Obeid family entity acquiring a shareholding in AWH.

The Commission is also satisfied that the fact that Mr Di Girolamo did not dispel Moses Obeid's claim in 2008 that the Obeid family had an interest in AWH indicated that, at that time, there was an understanding between him and Moses Obeid that Moses Obeid was interested in an Obeid family entity acquiring a shareholding in AWH.

Mr Tripodi was part of the general discussion about AWH at Moses Obeid's home on 22 August 2008. Mr Brook did not give evidence that the discussion included reference to the Obeid family having any intention to acquire ownership in AWH. Given the absence of any detailed account of what was said and by whom at the meeting of 22 August 2008, there is insufficient evidence on which to base any finding that Mr Tripodi knew, at that time, that the Obeid family was interested in acquiring ownership in AWH.

# Chapter 15: The 2010 Heads of Agreement

While it does not appear that the rights under the 2007 deed of option were ever exercised, there was evidence that it was replaced by another agreement, known as the Heads of Agreement. This chapter examines that agreement and other evidence relating to whether the Obeid family obtained any legal or beneficial interest in AWH and Australian Water.

## The Heads of Agreement document

The "Heads of Agreement – Australian Water" document was dated 4 November 2010 and signed by Mr Di Girolamo, Paul Obeid and Moses Obeid. Edward Obeid Jr signed as witnessing the signature of Mr Di Girolamo. A copy of this document is at Appendix 4 to this report.

Two share transfer forms were signed by Mr Di Girolamo in connection with the agreement; one was for the transfer of 30 shares in AWH and the other for the transfer of 100 shares in Australian Water. The share transfer forms were not signed by any transferee and no share transfers were registered. The issue before the Commission was whether the Heads of Agreement document established that the Obeid family obtained a shareholding in AWH and Australian Water or whether the agreement merely represented a loan made to Mr Di Girolamo.

There were aspects of the agreement that indicated it was for the purchase of shares by the Obeid family. It purported to be between the "Obeid Family Trust" as the "Purchaser" and Mr Di Girolamo as the "Vendor". The effect of clause 1 was that, in consideration of the payment of \$3 million by the "Purchaser" to the "Vendor", the "Vendor" agreed to transfer to the "Purchaser" 30 out of his 60 shares in AWH and 100 out of his 200 shares in Australian Water. The transfer of shares was to occur on 8 November 2010, although the payment was to be made

in two tranches: the first of \$1 million on 8 November 2010 and the second of \$2 million no later than 31 March 2011. The total amount to be paid under the agreement was expressed as being the "Purchase Price".

The fact that Mr Di Girolamo signed share transfer forms for the number of shares specified in the agreement tended to support the contention that the agreement was concerned with the sale of interests in the two companies to the Obeid family.

At the public inquiry, it was argued by Mr Di Girolamo and members of the Obeid family that the agreement was not one for the sale of shares but rather an agreement for a loan of \$3 million made to Mr Di Girolamo. Clause 3.1 of the agreement was relied on to support that contention. Clause 3.1 was in the section of the agreement headed "Interest and Consultancy". It provided:

*The Vendor shall pay to the Purchaser a return of no less than \$300,000 per annum payable monthly in advance on the first day of each month as interest on the investment made by the Purchaser pursuant to this agreement. This payment shall commence at the time the payment referred to in clause 1.22 [sic] is made. If these payments are not made on the due date, the payment shall increase to \$360,000 per annum as a genuine loss suffered by the Purchaser for the payment being late.*

There was no direct reference in clause 3.1 to a loan; only to "interest on the investment". The use of the word "investment" suggested that the payments were intended to be returns on an investment rather than a loan.

Clause 3.2 provided that the "Vendor" would arrange for AWH and Australian Water to enter into a consultancy agreement "with an entity nominated by the Purchaser".

On 4 November 2010, Obeid Corporation Pty Ltd drew a cheque for \$1 million payable to Mr Di Girolamo. The cheque was banked by Mr Di Girolamo on the same day.

On 22 March 2011, Obeid Corporation drew a further cheque for \$2 million payable to Mr Di Girolamo. That cheque was deposited into Mr Di Girolamo's account on that day.

## Mr Di Girolamo's evidence

In his February 2014 compulsory examination, Mr Di Girolamo told the Commission that, from about 2007, he had discussions with Edward Obeid Jr about Edward Obeid Jr taking a 5% share in AWH for \$3 million. Mr Di Girolamo said they entered into an agreement whereby Edward Obeid Jr could "potentially" acquire shares in AWH from him. At the public inquiry in April 2014, he maintained that, although there had been discussions about Edward Obeid Jr acquiring shares in AWH, neither he nor the Obeid family had ever acquired a stake in that company.

Mr Di Girolamo accepted that he had signed the Heads of Agreement document and that he understood at the time he signed it that it provided for the sale of some of his shares in AWH and Australian Water. He told the Commission that, despite the "Purchaser" being described in the agreement as "Obeid Family Trust", the intention was to sell the shares to Edward Obeid Jr rather than to an Obeid family entity. He was unable, however, to point to anything in the agreement that either explicitly or implicitly indicated that Edward Obeid Jr was a party to the agreement.

While the Commission accepts that Mr Di Girolamo had discussed the sale of shares with Edward Obeid Jr, it does not accept that his intention in signing the agreement was that shares would be sold to Edward Obeid Jr as opposed to an Obeid family entity. This is because, under the agreement, Edward Obeid Jr was not nominated as the Purchaser. Nor had he executed the agreement as the Purchaser. Although Edward Obeid Jr did sign the agreement, he did so in the capacity as a witness

to Mr Di Girolamo having signed it. The agreement was signed on behalf of the Purchaser by Paul Obeid in his capacity as a director. Mr Di Girolamo agreed that each party to an agreement would independently sign the agreement and have it separately witnessed. Mr Di Girolamo admitted that he carefully read the agreement before he signed it. As an experienced lawyer, Mr Di Girolamo would have appreciated that Edward Obeid Jr was not a party to the agreement and that the intention of the agreement was that the shares would be sold to an Obeid family entity.

Although Mr Di Girolamo accepted that the agreement provided for the sale of shares, he told the Commission that no such sale was effected. He said that clause 3.1 of the agreement contained an alternative to a sale of shares by way of a loan and the payment of \$3 million was made as a loan and not to purchase shares. Although he was willing to sell the shares to Edward Obeid Jr, the latter had told Mr Di Girolamo that the Obeid family did not want to buy shares but was willing to provide a loan. He told the Commission he signed the agreement, even though he did not want a \$3 million loan. He explained that he accepted the position because, at the time he signed the agreement, he had received payment of \$1 million and when, about two weeks later, Edward Obeid Jr told him the transaction would proceed as a loan rather than a share purchase, he did not consider he was in a position to do anything because he had already spent the money. When asked why, if he did not want a loan, he nevertheless accepted the second tranche of \$2 million, he responded, "I can't answer that". When asked why the decision to proceed by way of a loan was not subsequently recorded by way of a written agreement, Mr Di Girolamo's response was "we just didn't". He acknowledged that he had signed share transfers for shares in AWH and Australian Water and had provided them to Edward Obeid Jr but said that the transfers were held by Edward Obeid Jr as security for the loan and no transfer was effected.

## Edward Obeid Jr's evidence

In July 2009, PricewaterhouseCoopers prepared a report for AWH setting out its opinion on the “indicative value of a 100% shareholding” in AWH under various scenarios as at 30 June 2009. The report was marked “Strictly Private and Confidential” because it contained commercially sensitive information about AWH. The report placed a value of over \$156 million on AWH in the event it succeeded in obtaining a PPP. The estimated value without a PPP was \$47 million.

Edward Obeid Jr acknowledged that the report was confidential, but told the Commission that he had “viewed” it; although, he could not recall whether he was given a copy. He did agree with the proposition that it was the type of document that would be shown on a confidential basis to a potential cornerstone investor. The Commission is satisfied that, after seeing the report, Edward Obeid Jr appreciated that, in the event AWH succeeded in obtaining a PPP, there would be a substantial increase in the value of AWH.

In his September 2013 compulsory examination, Edward Obeid Jr told the Commission that he had considered investing in AWH but eventually loaned Mr Di Girolamo money instead. He said that he could not deny that he may have told people that he owned shares in AWH but, if he had done so, that was just “maybe gloating, mucking around.” He told the Commission that Mr Di Girolamo had to repay the loan and interest but had not made any such payments.

At the public inquiry, Edward Obeid Jr maintained that, although he wanted to purchase shares in AWH, his family did not agree and therefore the transaction proceeded as a loan rather than a share purchase. He said that the share transfers were held by him as security for the loan and he never received share certificates for shares in AWH or Australian Water. He agreed with senior Counsel Assisting that the agreement did not provide any time for the repayment of a loan. He said repayment was a matter for discussion between him and Mr Di Girolamo.

At the public inquiry, Edward Obeid Jr initially claimed that the Heads of Agreement was created for the sole purpose of recording a loan from him to Mr Di Girolamo. His assertion – that that was the sole purpose of the agreement – was contrary to the evidence of Mr Di Girolamo and was not consistent with the wording of the document. As will be seen, it was also contrary to the evidence of the lawyer who drafted the document on the instructions of Edward Obeid Jr. Under cross-examination by senior counsel for Mr Di Girolamo, Edward Obeid Jr agreed that one purpose of the document was to make provision for the sale of shares; although, he maintained that no sale had

eventuated and the transaction had proceeded as a loan to Mr Di Girolamo.

## Evidence of Paul Obeid and Moses Obeid

Paul Obeid signed the agreement. Although he agreed the agreement looked like one for the sale of shares, he said that it was an agreement to lend \$3 million to Mr Di Girolamo at 10% interest on the basis that Mr Di Girolamo would provide security over his shares. He said that his father, Edward Obeid Sr, was not asked to, and did not, authorise any such loan or payment. He told the Commission he understood clause 1 of the agreement was the means of giving the Obeid family control over the relevant shares in the event Mr Di Girolamo defaulted on the loan. He also told the Commission that Mr Di Girolamo had not paid any interest or repaid any part of the \$3 million.

When he gave evidence in a compulsory examination in September 2013, Moses Obeid claimed to know “nothing really” about AWH other than that he had heard of it in the media. That evidence was clearly wrong. Apart from his involvement with the Heads of Agreement, he admitted at the public inquiry that he knew AWH had “tax issues” and that his brother was “consulting” for Australian Water. There was also the evidence of his introduction of Mr Kapsanis and the evidence of Mr Brook. The latter in particular established that, by at least mid-2008, Moses Obeid knew enough about AWH to know that it was potentially a highly profitable business, in the event it was able to get some form of PPP involving the privatisation of the water supply.

At the public inquiry, Moses Obeid told the Commission that he could not recall signing the Heads of Agreement; although, he acknowledged his signature on the agreement as witness to Paul Obeid signing it. He told the Commission that he only “skimmed through it, I didn’t read it in depth”. In particular, he said that he had not seen the reference to a sale of shares in the agreement, had not read clause 1 of the agreement, and had not seen the reference to payment of \$1 million or the reference to payment of \$2 million.

Considering that the agreement involved a payment of \$3 million from Obeid family funds and that Moses Obeid was a senior member of that family, the Commission does not regard his evidence – that he did not read the document before signing it – as credible. Despite claiming not to have fully read the document at the time he signed it, he was adamant that it was not an agreement for the purchase of shares but a loan agreement under which Mr Di Girolamo would pay interest. He said the Obeid family never owned shares in AWH. Having read the

agreement at the public inquiry, he told the Commission that he was unable to say what was meant by the term “sale of Shares” in clause 1 of the agreement.

## Mr Chalabian’s evidence

Sevag Chalabian was a solicitor who undertook legal work for members of the Obeid family. He was instructed by Edward Obeid Jr to prepare the Heads of Agreement document.

During a compulsory examination on 22 October 2013, Mr Chalabian told the Commission that Edward Obeid Jr’s instructions were that he was buying shares in two companies as an investment and was to be employed as a consultant by AWH and Australian Water. Mr Chalabian said he drew up the Heads of Agreement document to reflect those instructions.

Mr Chalabian also gave evidence at the public inquiry on 27 March 2014. He told the Commission that he had received instructions from Edward Obeid Jr on 4 November 2010 to prepare a document concerning his interest in AWH and Australian Water. At the time, he made a file note reflecting his instructions. His file note recorded an entry “OF – 25%”. He told the Commission that that entry reflected his instructions from Edward Obeid Jr that the Obeid family (“OF”) was to acquire a 25% shareholding in AWH. He told the Commission that other entries on the file note reflected his instructions that \$3 million was the consideration for the acquisition of shares and that the shares were to be transferred after the initial payment of \$1 million. He told the Commission that he had “no doubt” the transaction was for the sale of shares. He said he was also instructed that the agreement was to provide for Edward Obeid Jr to receive \$350,000 per year for working as a consultant. It was because the agreement embodied a provision beside the transfer of shares that he titled it “Heads of Agreement” rather than “Share Sale Agreement”.

Mr Chalabian told the Commission that he identified the “Purchaser” in the agreement only as “Obeid Family Trust” because he had not been instructed by Edward Obeid Jr which Obeid family entity was to be the beneficiary of the transaction.

Mr Chalabian was asked about clause 3.1. He told the Commission that the interest represented the return on the investment in the shares.

It was put to Mr Chalabian in cross-examination by senior counsel for Mr Di Girolamo that the Heads of Agreement was intended to record two alternative transactions; one transaction was for the sale of shares but the alternative transaction concerned a loan, evidenced by the requirement for the payment of interest. Mr Chalabian gave the following evidence:

[Q]:

*And you’d accept wouldn’t you that it would be somewhat unusual for a vendor to sell shares to a purchaser and then after the completion of that transaction pay interest to the purchaser on the purchase price?*

[Mr Chalabian]:

*I can’t comment on the commercial arrangements the parties had, I just drafted what was, what I was instructed to draft.*

Subsequently, Mr Chalabian said that “quite possibly” the reason the document was titled “Heads of Agreement” was that it contained two alternative primary transactions. One was for a sale of shares and the other was for a loan with a consultancy arrangement attached. He said it was quite possible that clause 4.2 of the agreement, which provided that it was contemplated “that each of the above arrangements will be documented in a manner which will involve execution and exchange by 30 November 2010”, was meant to provide Mr Di Girolamo and Edward Obeid Jr with the opportunity to decide which alternative they wished to adopt.

## The AWH November 2010 minutes

Mr Jabour was employed by AWH from about February 2010 to April 2013. He is Edward Obeid Sr’s nephew. He told the Commission that, at some stage, Edward Obeid Jr told him that the Obeid family was considering investing in AWH.

One of Mr Jabour’s duties at AWH was to record the AWH management meeting minutes. Mr Jabour was present at the AWH management meeting held on 24 November 2010 and prepared typed minutes of that meeting. Item 1.1 in the minutes was described as “New Shareholder”. The entry under this item was “Obeid family group (siblings) to buy John Rippon’s (JR) shareholding”.

The minutes recorded that the first payment had been made, with completion due in approximately six months. The timing of the payments was broadly consistent with the timing in the terms of the Heads of Agreement for the payment of the \$3 million. It will be recalled that the first payment of \$1 million under the Heads of Agreement was due on or before 8 November 2010 and the second payment of \$2 million as due no later than 31 March 2011. In fact, as the relevant banking records showed, the first payment was made on 4 November 2010; some 20 days before the management meeting.

On 30 November 2010, Mr Jabour sent an email to Mr Di Girolamo attaching the minutes. In the email,

Mr Jabour asked Mr Di Girolamo to consider the minutes before they were sent out and specifically requested “[c]an you also please confirm if the comments re [Mr Rippon’s/Edward Obeid Jr’s] shareholding buy out are acceptable to leave in or if you want me to take out [sic]”. Mr Jabour initially told the Commission that he did not know what he meant by those words but later said it was “possible that there was some, some form of an arrangement there regarding a buy-out”. He said it was normal practice to send the minutes to Mr Di Girolamo to “clarify” the entries.

The minutes comprised three pages. Item 1.1 was one of nine items dealt with on the first page of the minutes and took up less than one-tenth of the space on that page. The other pages dealt with 11 other matters. Mr Jabour was unable to adequately explain to the Commission why, out of all the matters recorded in the minutes, he only raised with Mr Di Girolamo the one matter dealing with the Obeid family purchase of shares. He denied that it was because the shareholding was meant to be a secret.

In relation to the actual minutes, Mr Jabour told the Commission that he drew them honestly and accurately to reflect what was said at the meeting. He told the Commission that the references to the Obeid family buying Mr Rippon’s shares and that the first payment had been made were not typographical errors and was information he had obtained from discussion in the management meeting.

When shown the minutes at the public inquiry, Mr Di Girolamo said that, about November 2010, Edward Obeid Jr and Mr Rippon were in discussions about Edward Obeid Jr acquiring AWH shares from Mr Rippon. He agreed that, on their face, the minutes appeared to be acknowledging that the Obeid family actually owned shares in AWH. He maintained that was not the case, but conceded that he was not able to explain away that implication. In relation to Mr Jabour’s email, he told the Commission Mr Jabour probably wanted him to check the entry because Mr Jabour would have thought it was “commercially sensitive” that a significant shareholder such as Mr Rippon was disposing of shares in AWH.

Edward Obeid Jr was shown the minutes at the public inquiry. He said it was “incorrect” that any payment had been made by the Obeid family for the purchase of Mr Rippon’s shares.

The minutes recorded a management meeting on 24 November 2010. This was two weeks after the date of the Heads of Agreement. The reference in item 1.1 of the minutes to the first payment having been made is consistent with the \$1 million payment under the Heads of Agreement having been made to Mr Di Girolamo on 4 November 2010, with a further payment to be made later. Mr Jabour’s

email to Mr Di Girolamo is consistent with a desire to keep secret any Obeid family interest in AWH.

The reference in the minutes to buying Mr Rippon’s shares is explained below.

## Mr Rippon’s evidence

Mr Rippon gave evidence that Mr Di Girolamo arranged to sell a 30% shareholding in AWH. Although he never saw any of the relevant documents, Mr Rippon told the Commission he “knew”, from what he was told by Mr Di Girolamo, that “an Obeid entity was involved” in the purchase, but did not know the name of that entity. He understood the involvement of the Obeids was to be kept quiet because they did not want their involvement publicised. Under cross-examination he denied that, in late 2010, Mr Di Girolamo told him the sale of shares had not proceeded and that instead Mr Di Girolamo was going to borrow money from Edward Obeid Jr. There is documentary evidence supporting Mr Rippon’s evidence on this issue.

On 23 March 2011, Mr Di Girolamo sent an email to Mr Rippon attaching a draft agreement created by Mr Di Girolamo. The draft agreement contained a clause recording that Mr Di Girolamo had secured the sale of 2.5% of the shares held by each of Mr Rippon and Mr Di Girolamo in AWH for \$3 million and that the “sale has been completed and [Mr Rippon] has received \$500,000 from the proceeds”. Despite the clear words in that document, Mr Di Girolamo told the Commission that the shares referred to there had not been sold. He claimed that, in any event, the clause referred to an anticipated sale of Mr Rippon’s shares to him. He claimed that he represented in the draft agreement that the sale had been completed because “it was the only way that I could get shareholding from Mr Rippon who received \$2m out of \$3m that I received from Eddie Obeid Jr”.

The Commission does not accept Mr Di Girolamo’s claim that the clause referred to an anticipated sale of shares by Mr Rippon. Mr Di Girolamo was an experienced lawyer. If the position was that the agreement was meant to record the possibility of a future sale of shares, as distinct from recording an actual sale, then the Commission would expect that an unequivocal statement to that effect would have been included in the agreement by Mr Di Girolamo. The Commission is satisfied that, in drawing the relevant clause, Mr Di Girolamo intended to represent that shares in AWH had been sold to a third party for \$3 million. Mr Di Girolamo did concede that the \$3 million related to the payment made by the Obeids.

Although the draft agreement was never executed, a memorandum of understanding (MOU) dated 6 April 2011

was signed by Mr Rippon and Mr Di Girolamo. It threw further light on the matter.

The MOU contained six recitals setting out a number of transactions between Mr Di Girolamo and Mr Rippon. Recital D provided that "Di Girolamo facilitated the sale of a 5% shareholding in AWH for the sum of \$3,000,000. The proceeds were distributed as per \$2,000,000 to Rippon and \$1,000,000 to Di Girolamo".

Mr Rippon told the Commission he understood from Mr Di Girolamo that the sale was to the Obeids and that a share transfer had been signed.

In his evidence to the Commission, Mr Di Girolamo reiterated that, of the \$3 million he had acquired through Edward Obeid Jr, \$2 million had been given to Mr Rippon. He said that Mr Rippon did not want to borrow the money but wanted to sell his shares. He agreed that recital D referred to a \$3 million payment for the acquisition by a third party of AWH shares but again claimed that no sale had actually occurred.

The Commission rejects Mr Di Girolamo's claim that recital D was incorrect and no sale had occurred. Recital D stated in clear terms that Mr Di Girolamo had "facilitated the sale". Recital E referred to a proposal "to facilitate" the sale of further AWH shares held by Mr Rippon. The agreement clearly drew a distinction between an event that had occurred and one that was yet to occur. Mr Di Girolamo agreed that he had read the MOU carefully and closely and turned an acute lawyer's eye towards its terms before signing it. As a trained and experienced lawyer, Mr Di Girolamo would have appreciated the distinction between a transaction that had occurred and one that was proposed to occur in the future. The Commission is satisfied that he would not have signed a document of this nature knowing that it contained such an inaccurate statement. The Commission is satisfied that the MOU was intended to record that there had been a sale of shares for \$3 million.

## Mr Achie's evidence

Hassam Achie was the financial controller for Obeid Corporation. He told the Commission that he had done the Obeid family accounts from about 10 to 11 years and was a director of at least one of their companies. He was also responsible for a large number of companies related to the Obeid family.

He told the Commission that he understood from Edward Obeid Jr that the payment of \$3 million was a loan to Mr Di Girolamo and that Mr Di Girolamo was to pay interest and provide shares as security. Despite that understanding, the entry in the Obeid Family Trust No 1 general ledger with respect to the first payment of

\$1 million recorded the amount next to "Aust Water". Mr Achie initially told the Commission that the entry was correct because he understood from Edward Obeid Jr that, although the money would be given to Mr Di Girolamo, it would be used for Australian Water. He later said that the entry was "technically not right". The Obeid Family Trust No 1 remittance advice for the \$1 million payment also recorded the account detail as "Aust Water" rather than Mr Di Girolamo. Mr Achie explained that that advice was also "technically" incorrect.

There was a similar entry in the Obeid Family Trust No 1 general ledger with respect to the second payment of \$2 million, which was recorded next to "Aust Water" and a similar entry in the remittance advice for that amount. Mr Achie gave the same explanation for those entries. He agreed that, if the \$2 million were truly a loan to Mr Di Girolamo, then the remittance advice should have recorded Mr Di Girolamo as the recipient.

The balance sheet for the Obeid Family Trust No 1, as of 22 February 2013, recorded the \$3 million as a payment to "Aust Water" under the heading "Loans to Beneficiaries".

Mr Achie told the Commission that there was "a lot of discontent" within the Obeid family concerning the \$3 million payment. As a result, in early 2012, it was orally agreed between Edward Obeid Jr and his brothers that it would be treated by the Obeid family as a loan from Edward Obeid Jr to Mr Di Girolamo, and that Edward Obeid Jr would ultimately be responsible for it in the event it was not repaid by Mr Di Girolamo. In that event, the outstanding amount would be deducted from any future distributions Edward Obeid Jr would receive from the family trust. Mr Achie told the Commission that the agreement was never reduced to writing and, as at the time of his evidence at the public inquiry, nothing had been deducted from Edward Obeid Jr's entitlements to cover the loan or outstanding interest.

Mr Achie confirmed that Mr Di Girolamo had not repaid any part of the \$3 million or made any payments of interest.

In his evidence at the public inquiry, Edward Obeid Jr agreed that, on their face, the ledger entries indicated that the Obeid family had invested in AWH, but denied that the family had done so.

The entries in the general ledger, the remittance advices and the Obeid Family Trust No 1 balance sheet are consistent with \$3 million being provided for the purpose of an investment in "Aust Water". The Commission is satisfied that "Aust Water" was shorthand for AWH and Australian Water. The Commission rejects Mr Achie's evidence that the general ledger entry was meant to record a loan to Mr Di Girolamo. If it were intended

to record a loan then, as an experienced bookkeeper and financial controller, Mr Achie would have entered Mr Di Girolamo's name.

As will be seen later in this report, by 2012 it was clear that the AWH PPP proposal would not succeed. The large profit from investing in AWH envisaged by Moses Obeid was dependent on the PPP proposal proceeding. For the reasons given in chapter 18 of the report, it is likely that, by 2012, the Obeid family became focused on getting back its \$3 million and some return, by way of interest, on that investment. It would therefore suit the Obeid family to regard what had been intended to be an ownership investment in AWH as a loan upon which interest was due. That would explain the 22 February 2013 Obeid Family Trust No 1 balance sheet record and the decision to treat the transaction as a loan from then on.

## **Evidence of a heated exchange**

In his evidence to the Commission, Mr Achie recalled a conversation between Edward Obeid Jr and his brothers about when they could expect to receive some "interest payments" from the loan. He said that Edward Obeid Jr told his brothers he would "work on it" and try to get something from "Australian Water". Mr Achie initially sought to explain that, although the loan was to Mr Di Girolamo, he understood that Mr Di Girolamo had, in turn, lent the money to Australian Water and therefore it would have to pay interest on that loan. That did not explain why Australian Water would pay the Obeid family. Later, he explained that because Mr Di Girolamo worked for Australian Water "he obviously got his wages from the company so the only way you could get your return was going to be from the company". The Commission does not regard either explanation as convincing.

Moses Obeid was asked about the conversation recounted by Mr Achie. He told the Commission he recalled a rather

"heated exchange" sometime after May 2011 about the lack of receipt of any interest payments on the money lent under the Heads of Agreement. In response to being asked by senior Counsel Assisting what it was anticipated would be received from AWH, he responded "interest payments". When then asked why AWH would be paying interest, he said he needed to correct his evidence because it was Mr Di Girolamo, not AWH, who was responsible for paying interest. He told the Commission he had "nothing to say" about Mr Achie's evidence that the conversation concerned a failure by Australian Water to pay money to the Obeids.

## Chapter 16: Other matters

This chapter examines other financial transactions involving AWH and the Obeid family and other evidence concerning the involvement of that family with AWH.

### Other payments to AWH

The 3 November 2011 CFO report prepared for the AWH board by AWH CFO Mr Groom referred to an “[i]nvestment loan of \$400k received from Calvin Holdings Pty Limited on 20 September”. Calvin Holdings was an Obeid family company. The 30 November 2011 CFO report recorded another “[i]nvestment loan” of \$58,000 from Calvin Holdings. An AWH balance sheet reconciliation recorded these transactions as loans. The AWH MYOB general journal recorded the \$58,000 as “Loan from Calvin Holdings”. The AWH bank account statement recorded a deposit of \$58,000 from Calvin Holdings on 5 November 2011.

There was evidence of a third payment of \$28,000 made on 28 December 2011. The AWH bank account statement recorded a deposit on that date of \$28,000 from Calvin Holdings and the AWH MYOB general journal recorded that amount as “Loan from Calvin Holdings”.

Edward Obeid Jr told the Commission that, by September 2011, AWH was “struggling” and needed money to pay tax. He said that he agreed to provide money as a loan to Mr Di Girolamo but told the Commission that the money came from him, not the Obeid family. That evidence was incorrect. Relevant banking and accounting records show that the money came from Calvin Holdings. When records were shown to him, Edward Obeid Jr attempted to reconcile his earlier evidence with the records by claiming that, although the money came from an Obeid family company, the loan was “attributed” to him and he had orally guaranteed his family that it would be repaid, either by Mr Di Girolamo or himself. There was no written record of any such attribution.

Mr Groom, recalled a discussion with Mr Di Girolamo in May 2012 concerning \$486,000 deposited by the Obeids into the AWH account. As a result of that conversation, he understood that the money had been paid because AWH needed money and there was no one else available to inject money into the business. That the money was needed by AWH, rather than Mr Di Girolamo, is confirmed by the fact that the payments were deposited into the AWH bank account at times when that account had low balances. Mr Groom told the Commission that the \$486,000 was treated as a loan from the Obeid family.

Mr Di Girolamo told the Commission that the payments were loans from Edward Obeid Jr to him that he, in turn, loaned to AWH. He was unable to explain why the \$400,000 and \$58,000 payments had been described in the CFO reports as investment loans rather than as loans from him, particularly given that another entry, in the 30 November 2011 report, specifically referred to another amount as being a loan from him. That amount was money that had been lent to Mr Di Girolamo who, in turn, lent it to AWH.

In about May 2012, the money AWH received ceased being accounted for as a loan and was converted into equity as shares issued to Mr Di Girolamo. Mr Groom said that this was done on Mr Di Girolamo’s instructions. This is explained by the fact that, by May 2012, it was necessary to convert all loans and convertible notes into shares in order for AWH to secure an investment from BG&E Pty Ltd. Mr Di Girolamo sold the shares but, as at the time of the public inquiry, he had not repaid any part of the money to Edward Obeid Jr or the Obeid family or paid any interest.

### Other evidence

There was other evidence consistent with the Obeid family having a level of control over AWH consistent with part-ownership.

Mr Jabour worked as a consultant for one of the Obeid family entities at Circular Quay. After a falling out with one of the Obeid brothers, his consultancy work there was terminated. He told the Commission that, after this, he needed “consistency in income” and Edward Obeid Jr asked him if he was interested in full-time employment at AWH. From about February 2010, he was employed as land development manager with a salary of \$150,000. Although there was some evidence that he did some work assisting Edward Obeid Jr to investigate possible work in Queensland, he agreed that he was employed in a position within AWH that never actually produced anything for him to do in relation to AWH.

Edward Obeid Jr agreed that he introduced Mr Jabour to AWH. Mr Di Girolamo agreed that Mr Jabour was employed at the request of Edward Obeid Jr.

Mr Chadban said that, in his view, Mr Jabour was not needed, particularly given that, at the time he was employed, AWH had cash-flow problems.

The Commission is satisfied that Mr Jabour was employed by AWH at Edward Obeid Jr’s request despite there being no real work for him to do. Edward Obeid Jr’s motive was to find work for his cousin after his income from work relating to Obeid family interests at Circular Quay dried up. That Edward Obeid Jr was able to do this, at a time when AWH was experiencing cash-flow problems, demonstrates that he was able to exercise a considerable level of control over AWH’s affairs.

Michael Costa told the Commission that, in about November 2011, Edward Obeid Sr arranged to meet with him. Edward Obeid Jr was also present. Edward Obeid Jr told Michael Costa that Mr Di Girolamo wanted to know whether he was interested in becoming chairman of AWH. During the course of the discussion, Edward Obeid Jr told him that he had an arrangement with Mr Di Girolamo to purchase some shares in AWH. Michael Costa told the Commission that he concluded from that conversation that Edward Obeid Jr had some sort of call option on AWH shares. Subsequently, he was told by Mr Di Girolamo that his arrangement with Edward Obeid Jr involved a loan secured by shares.

Mr Di Girolamo told the Commission that it was Edward Obeid Jr’s suggestion that Michael Costa be approached to become chairman.

In November 2011, Joseph Craparotta agreed to loan Mr Di Girolamo \$100,000 for AWH purposes. The loan agreement, as drawn up by Mr Di Girolamo, identified him and Edward Obeid Jr as the borrowers. It provided that the borrowers would repay the \$100,000 loan plus interest of \$25,000. Mr Craparotta told the Commission that Edward Obeid Jr’s inclusion in the agreement had not been discussed but that Edward Obeid Jr had been

involved in following up discussions about the loan. Clause 4 of the loan agreement provided that the borrowers, being Mr Di Girolamo and Edward Obeid Jr, could “convert the terms of this Loan Agreement into shares in [AWH] equal to a value in the sum of \$250,000”. Clause 5 provided that, if Mr Craparotta took up the share option referred to in clause 4, then the loan agreement would be “null and void” on AWH issuing the shares to him.

The terms of the agreement suggested that Mr Di Girolamo and Edward Obeid Jr could arrange to convert the loan into AWH shares and provide them to Mr Craparotta in lieu of repaying the loan.

Edward Obeid Jr told the Commission that he agreed to be a party to the agreement in order to reassure Mr Craparotta because Mr Craparotta told him he was not comfortable with lending money to Mr Di Girolamo. He wanted the loan to be made because he knew Mr Di Girolamo desperately needed the money so that AWH could pay wages. He said that he had no authority from AWH to enter into an agreement that could result in the conversion of a loan into AWH shares.

Mr Di Girolamo told the Commission that Edward Obeid Jr was included as a party to the agreement, not because he or his family had any ownership rights in AWH, but because he wanted to help Mr Di Girolamo by being the guarantor of the loan.

In early 2012, AWH was in negotiations with another company, BG&E, to provide a multi-million dollar investment in AWH. On 20 January 2012, Mr Di Girolamo sent an email to Mr Rippon, Mr MacGregor-Fraser, Mr Skehan and Edward Obeid Jr attaching the agreement setting out the key principles of the deal with BG&E. At that time, Mr Rippon and Mr MacGregor-Fraser were shareholders in AWH and Mr Skehan was an existing investor with the potential of converting his investment into equity. An available inference to the inclusion of Edward Obeid Jr as a recipient is that he represented another investor in AWH. Edward Obeid Jr told the Commission he believed that the email and attachment were sent to him because Mr Di Girolamo knew that he was concerned about AWH’s financial position and was “trying to calm me”.

Edward Obeid Jr was copied into key communications that led to AWH entering into a new agreement with SWC in 2012. He was unable to explain to the Commission why he was copied into those communications and said that he had not seen the communications until they were shown to him at the public inquiry. Mr Di Girolamo agreed that Edward Obeid Jr was closely involved in that matter in terms of being told details of the negotiations.

In May 2012, Standard Edge Consulting addressed its letter, concerning its retainer for arranging the sale of

AWH, to Edward Obeid Jr. Edward Obeid Jr denied that the fact the letter was sent to him rather than to Mr Di Girolamo or one of the other AWH owners indicated that he was responsible for key decisions regarding the sale of AWH. Although further Standard Edge Consulting correspondence was sent to him, he claimed this was only because he had been the original contact between that business and AWH.

Mr Di Girolamo told the Commission that the correspondence was sent to Edward Obeid Jr because he was the Standard Edge Consulting “contact” and denied it was because his family owned part of AWH.

Edward Obeid Jr accepted that the documents he was shown in the public inquiry would suggest to a reader that he or the Obeid family had an interest in AWH.

Joseph Georges owned a company that made a number of loans to AWH. The first was in August 2011. By January 2012, the loans totalled \$700,000. He was introduced to Mr Di Girolamo by Edward Obeid Jr and told the Commission that, before advancing any money, he asked Edward Obeid Jr about the company and was told that he had loaned \$3 million to AWH. This contrasts with what Edward Obeid Jr told the Commission; namely, that he had lent the money to Mr Di Girolamo. The Commission, however, does not accept that what Edward Obeid Jr told Mr Georges was true.

## Chapter 17: Three more agreements

This chapter deals with the evidence concerning three other agreements that were examined during the course of the Commission's public inquiry. Two of these were created by Mr Di Girolamo in November 2012. The third, a deed of confirmation, was created in 2013.

Edward Obeid Jr told the Commission that the two November 2012 agreements came about because Mr Di Girolamo was concerned that the Obeid name might tarnish AWH and he did not want Edward Obeid Jr to be connected with AWH. Edward Obeid Jr understood that Mr Di Girolamo wanted to clearly define their relationship because:

*...at this particular time, 20 November 2012, I think there was a lot of, a lot of debate going around about the Obeid involvement um, via the media with [AWH]. Nick as the CEO was very concerned. He came to me, he said look, we have to be definitive about our relationship, we have to ... clear up all these mis-truths [sic] from the media.*

It appears from his evidence that some media interest arose as a result of the Obeid cheques payable to Mr Di Girolamo coming to media attention during unrelated civil litigation involving an Obeid enterprise.

There was other evidence that the Commission's Operation Jasper public inquiry may have had some impact on the decision to draft the agreements. On 14 November 2012, during the Operation Jasper public inquiry, Christopher Rumore, a lawyer who acted for the Obeid family, gave evidence of a meeting on 18 July 2008 in relation to a proposal with respect to mining in the Bylong Valley. During the course of his evidence, he identified the persons present at the meeting as including Moses Obeid, Paul Obeid, Gerard Obeid and Mr Di Girolamo. That evidence publicly linked Mr Di Girolamo with members of the Obeid family.

On 23 January 2013, a summary of Obeid Family Trust No 1 transactions was made an exhibit in that public

inquiry. That document referred to a loan of \$3.4 million to "Aust Water". The Heads of Agreement attracted some media interest when Moses Obeid was questioned about it on 1 February 2013, during the public inquiry, and a redacted version was made an exhibit. The Operation Jasper events of January and February 2013 were prior to the date on the two agreements but were the catalyst for the creation of the deed of confirmation dealt with below.

Mr Di Girolamo said that he may have been aware in November 2012 that he had been mentioned in the Commission's Operation Jasper public inquiry, but denied that agreements were created because he had become aware that the Commission was looking at the relationship between him and the Obeid family. He said the agreements were created because of the "intense media scrutiny that the Obeids had been receiving over the course of the last six to eight weeks leading up to [the creation of the agreements]". He said that, at the time he created the two agreements, he had no idea the Commission might investigate the affairs of AWH, Australian Water, Edward Obeid Jr or himself.

### The unsigned 20 November 2012 agreement

This agreement purported to be between "Obeid Corporation" and AWH. Although the agreement was dated 20 November 2012, it was not signed.

Clause 1 of the agreement recorded that "Obeid Corporation (OC) has provided funds to [AWH]". That, and the absence of any reference in the agreement to Obeid Corporation providing any money to Mr Di Girolamo, tends to support the evidence in chapter 16 that the money provided by the Obeid family in 2011 was for AWH, not Mr Di Girolamo.

Clause 2 provided that, "AWH understood that the funds provided by OC were provided by OC to AWH on behalf of Edward Obeid Jr".

Clause 5 provided that the agreement was to supersede any previous agreement entered into between Obeid Corporation and AWH.

Clause 6 provided for AWH to repay \$480,000 to Obeid Corporation in 24 monthly instalments of \$20,000, with the first due on 30 November 2011.

Clause 7 provided that Obeid Corporation agreed that “the Agreement entered into with AWH on 10 November 2010 is now null and void”.

Clause 8 provided that Obeid Corporation agreed that “neither it, nor any associated company, nor associated director, nor associated shareholder, nor associated beneficiary will ever be a shareholder or director or employee of AWH”. The agreement specified that clause 8 applied even in the event of a default in the repayment of Obeid Corporation.

Clause 10 provided that, in the event of a default in repayment, Obeid Corporation would “extend the period to repay the debt in good faith” and, if agreement could not be reached as to an extension of time, provided for an independent accountant to be appointed to make “a final binding decision”.

Edward Obeid Jr explained to the Commission that clause 1 of the agreement referred to the \$3 million of Obeid money he had loaned to Mr Di Girolamo. Mr Di Girolamo told the Commission that he created the document at home. He told the Commission that, on checking with Mr Groom, he realised clause 1 was incorrect because the funds had been provided to him, not AWH.

Clause 4 of the agreement referred to “agreements” entered into between Obeid Corporation and AWH. Edward Obeid Jr explained that he understood this was a reference to the fact that the money he lent Mr Di Girolamo came from the Obeid Family Trust.

Mr Di Girolamo told the Commission that, when drafting clause 5, he had in mind the Heads of Agreement. Clause 5, however, only made sense if his earlier evidence, that the Heads of Agreement was, in effect, a document that recorded a loan of \$3 million, not to AWH but to him, was wrong.

As to clause 6, Mr Di Girolamo could give no reason for AWH repaying Obeid Corporation. He told the Commission that he did not have all the relevant documentation or accounting records with him when he typed up the agreement, which was why he had made mistakes in drafting the agreement.

Edward Obeid Jr told the Commission that he understood the reference in clause 7 to an agreement of 10 November 2010 was meant to be a reference to the 4 November 2010 Heads of Agreement document. He denied that there was an agreement between the Obeid Corporation and AWH and explained that clause 7 was the result of Mr Di Girolamo “being a little loose there in terms of his terminology”.

## **The signed 20 November 2012 agreement**

There was another agreement also dated 20 November 2012. That agreement was expressed to be between Edward Obeid Jr and Mr Di Girolamo, and was signed by them.

Clause 1 provided that the agreement superseded any prior agreement between them.

Clause 2 provided that Mr Di Girolamo would repay Edward Obeid Jr \$3 million “at the earliest possible convenience that the financial affairs of [Mr Di Girolamo] allow but no later than 31 December 2016”.

Clause 3 provided that, in the event of default of payment, Edward Obeid Jr would waive “any right to seek from [Mr Di Girolamo] any shareholding or rights in [AWH]”.

Clause 4 provided that Edward Obeid Jr agreed he would “never be a director nor employee of AWH”.

Clause 5 was a handwritten addition. It provided that, in relation to clause 2, interest would accrue at the rate of 10% per annum.

Both Mr Di Girolamo and Edward Obeid Jr denied that the agreements were a sham to try and hide the Obeid family interest in AWH. Edward Obeid Jr agreed that one of the purposes of the signed agreement was to represent to the world that the Obeids were not involved in AWH. He said that, given the “media hype” around his family, there was “no way” Mr Di Girolamo could have sold shares in AWH to other investors if it was known that the Obeid family held share transfers by way of security for a loan. The only other purposes were to confirm the loan made to Mr Di Girolamo and provide for its repayment with interest.

Edward Obeid Jr also acknowledged that the signed 2012 agreement provided no security for the repayment of the \$3 million and, instead, specifically abrogated the security obtained in 2010 by way of the executed share transfers. He told the Commission that he forewent that security because Mr Di Girolamo told him he was going to sell some of his AWH shares and Edward Obeid Jr therefore believed there was “a very good chance of Nick paying me back”. Mr Di Girolamo said that clause 3 “was there to sever the nexus between my shareholding and Eddie Obeid Jr”. He said that this was necessary because of his concerns about the adverse media the Obeid family was receiving. He believed that Edward Obeid Jr agreed to surrender his security because of their friendship and because “the adverse media attention could be detrimental to [AWH]”.

Moses Obeid told the Commission that the first time he saw this agreement was when it was shown to him in the public inquiry and was unable to shed any light on it.

## The 2013 deed of confirmation

Mr Di Girolamo told the Commission that his telephone “wouldn’t stop ringing from media enquiries” on 1 February 2013, after the redacted version of the Heads of Agreement was made an exhibit in the Operation Jasper public inquiry. In late February 2013, he received legal advice that, in light of the media interest around Edward Obeid Jr’s financial arrangement with AWH and the lack of clear documentation evidencing the loans, a deed of confirmation should be prepared to set out the nature of the arrangement. Various draft versions of this document were created.

Senior and junior counsel were engaged on behalf of Mr Di Girolamo. Theognosia Chrysanthou was engaged

as junior counsel. She told the Commission that she and senior counsel were engaged to deal with prospective defamation proceedings arising from newspaper articles suggesting Mr Di Girolamo had acted “corruptly” by attempting to hide a \$3 million Obeid family interest in AWH. Her instructions were that the \$3 million was a loan. She wanted to ensure that, in the event defamation proceedings were instituted, it was clear that the arrangement involving the \$3 million was a loan, not a sale of shares. Having reviewed the earlier documentation, both she and senior counsel considered it was “unsatisfactory” and advised Mr Di Girolamo that a deed of confirmation should be prepared. She prepared the first version of the draft deed based on instructions she received from Mr Di Girolamo.

The front page of the draft deed she prepared was headed “DEED OF CONFIRMATION” and referred to “Loan to Nicholas Anthony Di Girolamo”. The deed described Mr Di Girolamo as “Borrower”, “Corporate trustee Obeid family trust” as “First lender”, Edward Obeid Jr as “Second lender”, Moses Obeid as “Third lender” and Paul Obeid as “Fourth lender”. The “Background” section of the deed contained a number of recitals, including, in some cases, comments.

The recitals, together with the comments as drafted, are set out below :

- A. *By Heads of Agreement dated 4 November 2010 the Parties sought to enter into an agreement whereby the Obeid Family Trust purchased shares in [Australian Water] and [AWH] from the Borrower for a price of \$3,000,000 (the “Heads of Agreement”).*
- B. *The Heads of Agreement was not executed correctly by all relevant parties.*
- C. *The agreement referred to in the Heads of Agreement did not go ahead by agreement of all the Parties.*
- D. *The Parties subsequently made an oral agreement, on or about [date] to the effect that:*
  - a) *the Borrower would borrow from the Lenders the amount of \$3,000,000;*
  - b) *the loan would be secured as against the Borrower’s shares in Australian Water Holdings Pty Limited;*
  - c) *the Second lender would be engaged from time to time as a consultant for Australian Water Pty Limited and Australian Water Holdings Pty Ltd; [query whether this should be included] and*

d) interest would accrue on the loaned amount at a rate of 10% per annum.

E. On or about [date] the Lenders loaned to the Borrower \$3,000,000.

F. On or about [date] the Lenders loaned to the Borrower a further sum of \$486,000.

G. The loans referred to in paragraphs D, E and F were personal loans to the Borrower for his benefit (referred to collectively as the "**Loaned amounts**").

H. In or about November 2012 the Parties, by way of oral agreement, agreed that the *Loaned amounts* would no longer be secured over the Borrower's shares in Australian Water Holdings Pty Limited.

I. On or about 20 November 2012, in an attempt to record the agreement referred to the preceding paragraph, the Borrower and the Second Lender executed a written agreement which provided that:

- a) all previous agreements were void *ab initio*;
- b) the Borrower was to repay to the Lenders \$3,000,000 as soon as possible, but no later than 31 December 2016;
- c) the loan of \$3,000,000 was no longer secured over the Borrower's shares in Australian Water Holdings Pty Limited;
- d) The Second Lender would never be a director or employee of Australian Water Holdings Pty Limited [this clause is curious – query whether to include it here] and;
- e) Interest would accrue on the loan at the rate of 10% per annum.

J. The Parties have entered into this deed to:

- i. Record the lending of the *Loaned amounts* by the Lenders to the Borrower;
- ii. Confirm the terms of those loans;
- iii. Ratify the agreement referred to in paragraphs H and I, above;
- iv. Confirm that the *Loaned amounts* were personal loans made by the Lenders to the Borrower for his own benefit;
- v. Confirm that the *Loaned amounts* are repayable by the Borrower, at the latest, by 31 December 2016;
- vi. Confirm the *Loaned amounts* are unsecured;
- vii. Confirm that the *Loaned amounts* are not

secured against the Borrower's shares in Australian Water Holdings Pty Limited;

viii. Confirm that interest accrues on the *Loaned amounts* at a rate of 10% per annum.

The deed went on to provide that the parties ratified the terms of the 20 November 2012 agreement and agreed to be bound by it.

Ms Chrysanthou told the Commission that she was told by Mr Di Girolamo that at least one of the entities she referred to as a "lender" had loaned money, but she was not sure which one so she included all of them in the draft on the basis that, when Mr Di Girolamo reviewed it, he would identify the correct party.

Recital A referred to the Heads of Agreement as an agreement to purchase shares. Ms Chrysanthou told the Commission that she drafted that recital on the basis of her understanding of the Heads of Agreement. She considered there was uncertainty in the Heads of Agreement as to whether the \$3 million was for the purchase of shares or a loan. She was instructed that, at the time the Heads of Agreement was entered into, the parties contemplated a share purchase but at some point between November 2010 and November 2012 the parties changed their minds and made an oral agreement that the \$3 million would be a loan. In her evidence to the Commission, she confirmed that her instructions from Mr Di Girolamo were that the original intention was for a transfer of shares.

With respect to recital I, Ms Chrysanthou told the Commission that she was given a copy of the 20 November 2012 agreement between Mr Di Girolamo and Edward Obeid Jr and was told by Mr Di Girolamo that that had been an attempt to put in writing a previous oral agreement made sometime after November 2010 but before 20 November 2012.

In his evidence to the Commission, Mr Di Girolamo confirmed that he provided instructions to Ms Chrysanthou and agreed that the content of recital D was based on those instructions. He confirmed that his instructions arose from his concern with media reporting that the Obeid family had a "stake" in AWH.

After drafting the deed, Ms Chrysanthou emailed it to a solicitor. It was then reviewed by Todd Alexis SC, Mr Di Girolamo's senior counsel.

On 3 March 2013, Mr Alexis sent an email to the solicitor, Ms Chrysanthou and Mr Di Girolamo attaching a revised draft deed. Some changes were made to the wording of the recitals but these did not alter the substance of the deed, which was to record that the original agreement involved the sale of shares but that this was subsequently

changed, by way of oral agreement, so that the monies advanced were loans to Mr Di Girolamo. A final version was prepared on 20 March 2013. It included some further changes that did not affect the substance of the deed.

Mr Di Girolamo told the Commission that, after receiving the draft deed, he spoke to Edward Obeid Jr and told him he had received legal advice that they should enter into a deed to confirm their various arrangements. He provided Edward Obeid Jr with a copy for his comments.

Edward Obeid Jr agreed that Mr Di Girolamo gave him a copy of the deed. He said he discussed the draft deed with his brothers and may also have obtained legal advice. He made a correction concerning interest and returned it to Mr Di Girolamo. Mr Di Girolamo made the requested change, signed the corrected version and gave it to Edward Obeid Jr, who then signed it. There was no evidence that the deed was signed by anyone else.

Moses Obeid was asked why he was cited as the "Third lender" in the deed of confirmation. He told the Commission he had not previously seen the deed but assumed he was so cited because he was one of the beneficiaries of the trust from where the money came to be loaned to Mr Di Girolamo.

## Chapter 18: Conclusion

A central issue for determination was whether the Obeid family acquired any ownership in AWH or Australian Water. The Commission has already found that the option under the 2007 deed of option for Edward Obeid Jr to purchase shares in AWH and Australian Water from Mr Di Girolamo was not exercised. The Commission has also found that, by May 2007, Edward Obeid Jr was contemplating acquiring shares in AWH and Australian Water and that, by about mid-2008, Moses Obeid was contemplating an Obeid family entity acquiring shares in AWH. One of the matters that remains to be established is whether the \$3 million paid in accordance with the November 2010 Heads of Agreement and the further payments made in late 2011 provided the Obeid family with any legal or beneficial interest in either of those companies.

### The \$3 million

As discussed in chapter 15, on 4 November 2010, Obeid Corporation paid \$1 million to Mr Di Girolamo and made a further payment to him of \$2 million on 22 March 2011. Those payments were made pursuant to the 4 November 2010 Heads of Agreement. Mr Di Girolamo also gave Edward Obeid Jr share transfer forms signed by him for 100 shares in Australian Water and 30 shares in AWH.

Mr Di Girolamo, Edward Obeid Jr, Paul Obeid and Moses Obeid told the Commission that the \$3 million was a loan to Mr Di Girolamo and was not for the purchase of shares. They said that the share transfer forms signed by Mr Di Girolamo were not evidence of a sale of shares but were provided as security for the loan.

While the evidence is clear that no share transfers were registered, that fact, by itself, does not preclude a finding that the Heads of Agreement transaction was for the sale of shares. Why, it might be asked, if the transaction was for the sale of shares, did the purchaser never take steps to register the transfer? The answer is straightforward. There was evidence, which the Commission accepts, that

the Obeid family wanted to keep secret any investment in AWH or Australian Water.

Nor does a failure to register share transfers preclude the possibility that the Obeid family obtained a beneficial ownership of the shares through the Heads of Agreement and the delivery of the signed transfers.

A preliminary issue for consideration is whether, under the Heads of Agreement, the Obeid family could ever have obtained legal title to the shares.

The Commission notes the submission made on behalf of Mr Di Girolamo that legal title to shares only takes place when the share transfer is registered and the change in ownership is entered in the register of members. The share transfers signed by Mr Di Girolamo were never registered. That, however, does not preclude the possibility that the Obeids acquired beneficial ownership of the shares in AWH and Australian Water as of November 2010, even if legal ownership had not crystallised.

It was submitted on behalf of Mr Di Girolamo that the share transfers were not capable of registration because, under clause 20 of the AWH articles of association, the instrument of transfer to be lodged for registration had to be accompanied by the certificate of the shares to which it related before the transferee could be registered as a shareholder. That clause is consistent with s 1072F(a) of the *Corporations Act 2001*.

It was submitted that, as Edward Obeid Jr never took possession of any share certificates, the Obeid family had no right to register the share transfers. The Commission does not accept that that demonstrates the Obeid family could not have acquired any beneficial ownership of the shares or that they could never register the transfers. On that submission, provision of the share transfers as security for a loan would have been to no effect because the Obeid family would never have been able to exercise its security. The Commission is satisfied that, given the close connections between Mr Di Girolamo and

Edward Obeid Jr and Moses Obeid, if the Obeids had wanted share certificates in order to register a transfer of shares, the certificates would have been provided by Mr Di Girolamo at any time.

It was also submitted on behalf of Mr Di Girolamo that the Heads of Agreement could not provide a sufficient basis to find the necessary intention to create an equitable interest for the Obeid family in the shares. The submission noted five “points of construction” in support.

The first point was that the agreement was titled “Heads of Agreement” and was not a conventional share sale contract. The Commission does not regard that as significant. Mr Chalabian explained that the agreement was so titled because, apart from recording a share sale transaction, it was also intended to embody the consultancy arrangement.

The second point was that the “Purchaser” was described as “Obeid Family Trust” and no such entity existed. It was submitted that the Heads of Agreement therefore did not create any binding obligations on Mr Di Girolamo. The Commission does not accept that this negates an intention to create an equitable interest for an Obeid family entity in the shares. The Heads of Agreement was executed by Mr Di Girolamo and he provided signed share transfers in accordance with the terms of that agreement. That evidenced an intention on his part to comply with the terms of the agreement.

The third point was that clause 1.1 of the Heads of Agreement specified that Mr Di Girolamo must deliver the share certificates to the “Purchaser” on 8 November 2010 and the evidence shows that they were never delivered. For the reason given above, the Commission is satisfied that the certificates would have been forthcoming if and when requested.

The fourth point was that clause 3 provided for the payment of interest and a future consultancy and on its proper construction this provided for an alternative transaction to the sale of shares, namely a loan. This construction issue is dealt with in more detail below.

The fifth point was that the parties intended to further articulate their transaction. Clause 4.2 expressly contemplated that each of the Heads of Agreement arrangements would be further documented in a manner that would involve execution and exchange by 30 November 2010. The Commission does not regard the absence of further written agreements articulating the arrangements agreed upon in the Heads of Agreement as negating an intention to create an equitable interest for the Obeids in the shares.

The submissions made on behalf of Mr Di Girolamo noted that, in the absence of sufficient intention being

manifest in the Heads of Agreement, it was relevant to consider whether the conduct of the parties nevertheless evidenced an intention to transfer title. It was submitted that delivery of signed share transfers to a transferee does not necessarily operate as an effective equitable assignment of the right to those shares, particularly where there was a failure to also deliver the relevant share certificates. As set out above, the Commission is satisfied that the share certificates would have been provided by Mr Di Girolamo on request. The conduct of the parties is considered below.

It was also submitted that another problem with placing reliance upon the Heads of Agreement or the share transfers or both to establish beneficial ownership in the shares was that it left unanswered the actual identity of the person or the entity holding that interest. The Heads of Agreement only identified the “Purchaser” as “Obeid Family Trust”. It was submitted that the Obeid Family Trust could not have any equitable interest in shares, unless that interest was held by the trustee. The Commission does not consider that is determinative. As Paul Obeid told the Commission, it “would have been a nominee or possibly a company to go in”. Mr Chalabian explained that the reason he did not identify a specific entity as purchaser was because Edward Obeid Jr had not told him which Obeid family entity was to be the beneficiary of the transaction. The names of the transferees were left blank on the share transfers signed by Mr Di Girolamo. The Commission is satisfied that this was done so that the Obeid family could nominate the appropriate Obeid family entity as transferee.

Although not the subject of submissions, the Commission also considered why the Obeid family would want to acquire a beneficial interest in AWH and Australian Water as late as November 2010.

The understanding that a substantial profit from any investment in AWH would only come about in the event the AWH PPP proposal was approved by the government explains why members of the Obeid family took no steps in 2007, 2008 or 2009 to invest in AWH. It was not clear during those years that any PPP proposal would be approved. Indeed, it was not until July 2009 that a formal proposal was even made to the NSW Government. By not making any immediate investment, the Obeid family could keep their options open. If no PPP proposal eventuated or if it appeared that any PPP proposal had no prospect of being approved, then there would be no point in investing because the anticipated increase in value of AWH arising from acceptance of a PPP proposal would not happen. On the other hand, once a PPP proposal had been made and if it appeared there were good prospects that it would be approved by the NSW Government, that would be the time to invest.

As will be seen later in this report, by November 2010, it was apparent the NSW Government was not going to proceed with the AWH PPP proposal. That might have put paid to any interest in investing in AWH or Australian Water. There was, however, a general expectation that the Coalition would win the 2011 state election. As set out in chapter 30 of this report, Mr Di Girolamo had been in contact with the Hon Barry O'Farrell, leader of the opposition, about the AWH PPP proposal. On 28 September 2010, Mr O'Farrell wrote to Mr Di Girolamo advising that the NSW Liberal Party was committed to accelerating land release by introducing contestability in the provision of infrastructure and that could involve PPPs. The letter noted that the AWH PPP issue was one that, if elected, his government would seek to resolve. There was therefore a very real prospect that the AWH PPP proposal would proceed and that, consequently, investors in AWH would benefit through an increase in the value of that company.

By November 2010, Mr Di Girolamo needed money. If the Obeid family were going to invest in AWH, November 2010 was the time to do so. If no investment was made then, there was a risk that Mr Di Girolamo might sell his shares to someone else and the Obeids would be unable to acquire any shares.

In order to determine whether the transaction entered into under the Heads of Agreement was for a sale of shares or a loan, it is necessary to consider the terms of that agreement as well as the surrounding evidence.

Clause 3.1 was raised as evidence the transaction was a loan rather than a sale of shares. That clause made no reference to a loan, the period of any loan, schedule of repayments or time for repayment of the principal. Although Mr Chalabian ultimately accepted the possibility that the Heads of Agreement was intended to contain two alternative transactions – one being a share sale and the other a loan and consultancy – that is not clearly established by clause 3.1. One possibility is that clause 3.1 was meant to record the return the Obeids expected to receive on the investment in the shares. Ultimately, the Commission does not consider it necessary to determine whether clause 3.1 was intended to provide for the option of a loan because there is other evidence militating against the \$3 million that was paid from being characterised as a loan and supporting the inference that the transaction was for the purchase of shares by an Obeid family entity. This includes the following:

- From about 2007, Mr Di Girolamo and Edward Obeid Jr had discussed the latter acquiring shares in AWH.
- There was an understanding between Mr Di Girolamo and Moses Obeid from at

least about mid-2008 that Moses Obeid was interested in an Obeid family entity acquiring shares in AWH.

- Moses Obeid anticipated that, if AWH succeeded in getting acceptance of a PPP proposal for the privatisation of water supply, an investment in AWH by an Obeid family entity would be highly profitable to the Obeid family.
- Moses Obeid told Mr Brook that his family had ownership in, and influence over AWH (although that conversation occurred in 2008, it is consistent with an interest in acquiring an ownership investment in AWH).
- Mr Jabour understood, from a discussion with Edward Obeid Jr, that the Obeid family was considering investing in AWH.
- By about July 2009, Edward Obeid Jr knew, from the confidential PricewaterhouseCoopers report, that the value of AWH could exceed \$156 million in the event it succeeded in obtaining a PPP and appreciated this would provide a substantial increase in the value of any shareholding in AWH.
- Mr Chalabian had “no doubt” from the instructions he received from Edward Obeid Jr that the transaction for which he drew up the Heads of Agreement was for the sale of shares and drew up that document to reflect those instructions.
- Clause 1 of the Heads of Agreement provided for the sale of shares in Australian Water and AWH to an Obeid family entity for \$3 million.
- The Heads of Agreement did not use words consistent with a loan agreement such as “loan”, “lend”, “borrow”, “principal”, “security” or “repay”.
- The Heads of Agreement used the terms “Purchaser” and “Vendor”, which were consistent with it being an agreement for sale.
- On 4 November 2010, Mr Di Girolamo signed the Heads of Agreement on the understanding that it provided for the sale of his shares in Australian Water and AWH to an Obeid family entity, and he accepted a payment of \$1 million from Obeid Corporation on that basis.
- In November 2010, Mr Di Girolamo signed two share transfer forms – one for 100 shares in Australian Water and the other for 30 shares in AWH – and gave them to Edward Obeid Jr. That was consistent with clause 1.1 of the Heads of Agreement, which provided for the transfer of shares in consideration of the payment of \$3 million.

- The only provision in the Heads of Agreement requiring the execution of share transfers related to the sale of shares, not the provision of security for a loan.
- An Obeid family company, Obeid Corporation, rather than Edward Obeid Jr, paid the \$3 million to Mr Di Girolamo. That militates against the payments being loans from Edward Obeid Jr.
- The minutes of the AWH management meeting of 24 November 2010, which Mr Jabour told the Commission he prepared based on information provided at that meeting, reflect an Obeid family investment in AWH as a “New Shareholder”, with the first payment for shares having already been made. That is consistent with the first payment of \$1 million under the Heads of Agreement having been made on 4 November 2010.
- Mr Rippon’s evidence that he knew from what he was told by Mr Di Girolamo that an Obeid entity was involved in the purchase of a shareholding in AWH and that a share transfer had been signed.
- Mr Rippon’s evidence that the Obeid family involvement in AWH was to be kept secret because it did not want its involvement publicised.
- The draft agreement Mr Di Girolamo prepared and sent to Mr Rippon on 23 March 2011 recorded the sale of shares in AWH for \$3 million. Mr Di Girolamo agreed that the \$3 million related to payments made by the Obeids and Mr Rippon understood, from what he was told by Mr Di Girolamo, that the sale referred to was to the Obeids.
- The MOU of 6 April 2011, signed by Mr Di Girolamo, provided that he had facilitated the sale of shares in AWH for \$3 million. That was consistent with the \$3 million Heads of Agreement transaction being one for the sale of shares.
- Michael Costa’s evidence that, in about November 2011, Edward Obeid Jr told him he had an arrangement with Mr Di Girolamo to purchase shares in AWH.
- Between 4 November 2010 and April 2014, when he gave evidence at the public inquiry, Mr Di Girolamo never paid any interest on the \$3 million he received and did not make any repayments because, as he told the Commission, he did not have the capacity to repay the \$3 million or interest on that sum. The absence of any payments of interest or repayment of principal over an extended period was inconsistent with the \$3 million being a loan.
- No steps were taken by any member of the Obeid family or any Obeid family entity to legally enforce payment by Mr Di Girolamo of any interest or any part of the principal on any loan.
- The terms of the November 2011 loan agreement between Mr Craparotta, Mr Di Girolamo and Edward Obeid Jr were consistent with Edward Obeid Jr having access to shares in AWH that he could provide to Mr Craparotta in lieu of repaying the loan.
- Edward Obeid Jr was included in Mr Di Girolamo’s email of 20 January 2012 setting out the key principles of the proposed deal with BG&E. The Commission infers that he was included as a recipient because he represented an investor in AWH.
- Edward Obeid Jr’s involvement in management decisions affecting Australian Water and access to confidential information about AWH’s profitability is consistent with an interest in acquiring an ownership role in those companies.
- The fact that Edward Obeid Jr worked for an AWH-related company from at least mid-2007 without payment and incurred expenses for which he was only partly reimbursed, is consistent with an intention that the Obeid family would acquire an ownership role in AWH.

The Commission is satisfied that the \$3 million paid under the Heads of Agreement was for the purchase of shares in AWH and Australian Water and that, as of November 2010, the Obeid family acquired a beneficial interest in those companies as a result of that agreement.

## The \$486,000

As discussed in chapter 16, three payments, totalling \$486,000, were made to AWH between September and December 2011. The money came from an Obeid family company, Calvin Holdings. The Commission is satisfied that the payments were not provided to purchase equity in AWH. The purpose of the payments was to provide funds to AWH to address its funding needs as it was in urgent need of cash.

There was dispute on the evidence as to whether the loans were from Edward Obeid Jr or an Obeid family company and whether the loans were to AWH or Mr Di Girolamo.

The Commission is satisfied that the loans were made by Calvin Holdings, an Obeid family company, and that they were made to AWH. The relevant banking and accounting records referred to in chapter 16 support these conclusions. The Commission rejects the evidence

of Edward Obeid Jr and Mr Di Girolamo that the loans came from Edward Obeid Jr and were loans to Mr Di Girolamo. There was no documentary evidence supporting those assertions. On the contrary, all the documentary evidence supports the conclusion that the money came from an Obeid family company and was paid to AWH.

## The 2012 and 2013 agreements

As discussed in chapter 17, two agreements were prepared in 2012 and a further agreement in early 2013. The thrust of these agreements was that any funds provided to Mr Di Girolamo or AWH by Edward Obeid Jr or any Obeid family entity were loans. For the reasons given above, the Commission is satisfied that the \$3 million paid to Mr Di Girolamo under the Heads of Agreement was not a loan but the purchase price of shares held by him in AWH and Australian Water.

The Commission is satisfied that any representations in those documents that the \$3 million payment was advanced as a loan were false and were known to be false by Mr Di Girolamo and Edward Obeid Jr. One reason the representations were made was to be able to deny that the Obeid family ever had any legal or beneficial ownership in AWH and Australian Water because, as Mr Di Girolamo told the Commission, there was concern that the Obeid name might tarnish AWH. By extension, that concern would also apply to Australian Water. That was in the context of “intense” media scrutiny of the Obeid family, much of which was adverse. Edward Obeid Jr agreed that Mr Di Girolamo was concerned about any publicity involving the Obeids and the need to protect AWH.

Another reason was that, by 2012, BG&E was considering making a substantial investment in AWH. There was evidence, which the Commission accepts, that BG&E did not want any Obeid involvement in AWH, even to the extent of Edward Obeid Jr working there. There is also another reason. By early 2012, AWH and SWC had settled their differences and entered into agreements to terminate the Other Stages Deed and for AWH to provide project management services for the package 2 works. These agreements are discussed in chapter 33. By that time, the PPP proposal was dead. This meant that, although AWH would continue to operate and had the potential to generate a profit from the package 1 works, any prospect of it substantially increasing shareholder value through the more lucrative PPP no longer existed. The rationale for the Obeid family investing in AWH, namely that it could make a substantial profit, was gone. These factors, taken together, meant that, by November 2012, the Obeid family was less likely to want to convert the equitable interest in AWH and Australian Water into legal ownership and more likely to be content

with treating the \$3 million as a loan that would be repaid with interest.

## **PART 5 – EDWARD OBEID SR AND AWH**

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## Chapter 19: What did Edward Obeid Sr know?

There was evidence that, while a member of Parliament, Edward Obeid Sr assisted in promoting AWH's interests by arranging for Mr Di Girolamo to meet with other parliamentarians so that Mr Di Girolamo could put forward AWH's case. One of the issues examined during the course of the public inquiry was whether Edward Obeid Sr misused his public office as a member of Parliament by promoting AWH's interests, at a time when he knew that members of his family were interested in an Obeid family entity investing in AWH and that a successful outcome for AWH would increase the value of any such investment.

Edward Obeid Sr was an unsatisfactory witness. As will be seen below, he generally denied knowing when Edward Obeid Jr first became involved with AWH, was evasive concerning his level of contact with Mr Di Girolamo and denied knowing much about AWH's aims.

### Edward Obeid Jr and AWH

Edward Obeid Jr was working at Australian Water from at least about July 2007. He had shown an interest in acquiring shares in AWH and Australian Water from about May 2007. Edward Obeid Sr knew that Edward Obeid Jr was good friends with Mr Di Girolamo. He knew Mr Di Girolamo was the CEO of Australian Water from the time Mr Di Girolamo came to see him "about organising meetings". That was about November 2007. Edward Obeid Sr told the Commission that he did not know his son was working for Australian Water until he found out through the family "grapevine" "some years" before the public inquiry. Later in his evidence, he said that he may have known by 3 January 2009 that his son was working for an AWH company.

Michael Costa was treasurer between February 2006 and 5 September 2008. He gave evidence, which is dealt with below, that, when he was treasurer, Edward Obeid Sr organised a meeting in his office with Mr Di Girolamo and Edward Obeid Jr. That meeting occurred sometime

prior to 8 November 2007. Edward Obeid Sr told the Commission he was not aware at that time of the meeting that Edward Obeid Jr was working with an AWH company. The Commission does not accept that evidence.

Edward Obeid Jr told the Commission that he did not hide his involvement with AWH from his father. He had taken Mr Di Girolamo to his father's parliamentary office to arrange for Mr Di Girolamo to speak with Michael Costa concerning the AWH disputes with SWC. He said he believed his father "could have" known at that time that he was involved with AWH.

Edward Obeid Jr told the Commission that he spoke with his father "all the time". It was clear from his evidence that he was excited about working with the AWH group of companies. He told the Commission that he found the AWH "model" "very interesting" and that it had "a direct synergy with my company, with my [property development] industry". He saw the prospect of private provision of water infrastructure as an "opportunity". He was so excited, that he spent between \$85,000 and \$110,000 of his own money to promote AWH's interests and did so without payment. This was because, in his words, "I believed in myself, I could back myself to create an opportunity and in doing that I would prosper handsomely". The work also involved him working with Mr Di Girolamo, who was not only his close friend but, according to Edward Obeid Sr, also a friend of Edward Obeid Sr and the Obeid family.

Edward Obeid Sr agreed that the Obeids were a close family. Given the closeness of the Obeid family, Edward Obeid Jr's level of involvement with AWH, his evident interest and excitement in its work, and the fact that he was working with someone who was his and his father's mutual friend, the Commission is satisfied that he informed his father about his work with Mr Di Girolamo probably about the time he started working at Australian Water in around July 2007. The Commission is also satisfied that Edward Obeid Sr knew by then that his son was interested in acquiring shares in AWH and Australian Water. The fact

that Edward Obeid Jr attended his father's office with Mr Di Girolamo for the purpose of arranging a meeting with the treasurer to discuss matters in issue between AWH and SVC supports the finding that Edward Obeid Sr knew, by that time, that his son was working with Mr Di Girolamo and an AWH-associated company.

By July 2009, Edward Obeid Jr had seen the PricewaterhouseCoopers valuation of AWH in the event that a PPP proposal was approved. That valuation estimated an increase of almost \$110 million in the value of AWH if a PPP proposal was approved. Given Edward Obeid Jr's interest in AWH, his interest in acquiring shares in that company and the closeness of the Obeid family, the Commission is satisfied that he shared his knowledge about the valuation with other members of his family, including his father.

## Edward Obeid Sr and Mr Di Girolamo

Edward Obeid Sr's evidence about the extent of his contact with Mr Di Girolamo was evasive. He told the Commission he could not recall how often he spoke with Mr Di Girolamo or whether they spoke once a week, once month or once a year. He said that Mr Di Girolamo contacted him when Mr Di Girolamo found it necessary to ask him to arrange meetings "but otherwise there's no call, there's no need to call me".

There was evidence of more frequent contact between Edward Obeid Sr and Mr Di Girolamo than Edward Obeid Sr first claimed. The Commission obtained records of telephone contact between the two. Between 21 April 2006 and 4 April 2012, there were 106 telephone contacts between them. Of those, the records show that 69 were initiated by Edward Obeid Sr. Initially, he said that he was unable to explain why most of the calls were made by him. He then gave the following evidence, which demonstrates the generally unsatisfactory nature of his evidence:

*[Sr Counsel Assisting]: Well, are you going to try and explain it?*

*[Edward Obeid Sr]: Well, there's no need, he's a friend of the family.*

*[Q]: So you were ringing him because he's a friend of the family?*

*[A]: I'm not suggesting that, but he's a friend of the family, people make calls to each other.*

*[Q]: So you're saying that the reason you were ringing him was to catch up with him because he was a friend of the family?*

*[A]:*

*No, I'm not saying that at all.*

...

*[Q]:*

*The only connection between you and Nick Di Girolamo would be in respect of Australian Water Holdings. Isn't that right?*

*[A]:*

*No, he was a friend of the family.*

*[Q]:*

*So you were ringing him about family matters?*

*[A]:*

*He attended many of our functions.*

*[Q]:*

*So you were ringing him to invite him to family functions. Is that what you're saying?*

*[A]:*

*No, not necessarily, Edward [Obeid Jr] would do that.*

He then said that the calls were "predominantly" about making appointments for Mr Di Girolamo with "whoever he wanted", while some were social chats because "he's a friend of mine".

Mr Di Girolamo told the Commission that their telephone conversations included discussions concerning AWH matters, including the dispute with SVC over costs, as well as other matters. The only other matters he could recall involved a couple of calls concerning a referral to some lawyers about a traffic incident in which Edward Obeid Sr was involved.

The Commission is satisfied that there was reasonably frequent telephone contact between Edward Obeid Sr and Mr Di Girolamo and that the contact was predominantly concerned with AWH.

## Edward Obeid Sr's knowledge of AWH's aims

Although he admitted to organising meetings for Mr Di Girolamo to speak with various ministers concerning a dispute between AWH and SVC, Edward Obeid Sr told the Commission that he was not sure what the dispute was about. He said that he was only told "much later on" at a meeting at Narellan in early January 2009 involving Mr Di Girolamo and Phillip Costa that the dispute concerned money. He denied knowing, until sometime after he left Parliament in May 2011, that one of AWH's aims was to obtain NSW Government approval for a PPP or that it had a dispute with SVC over a PPP proposal.

Mr Di Girolamo gave different evidence. He told the Commission that, in order to get access to relevant ministers, he asked Edward Obeid Jr to enlist his father's assistance. When he first went to see Edward Obeid Sr, sometime before 8 November 2007, he outlined the matters in contention between AWH and SWC and also asked:

*...whether the PPP was within the confines of that Government's policy ... I told him about the company, I told him about the various long-term funding proposals that the company, as I understood it, had previously provided to [SWC].*

Edward Obeid Sr told him that the PPP was within the government's policy and suggested he talk with Michael Costa. Mr Di Girolamo also said that Edward Obeid Sr was present in early January 2009 when he briefed Phillip Costa on the advantages of AWH's PPP proposal.

The Commission accepts Mr Di Girolamo's evidence on this issue. It is logical that, given he needed Edward Obeid Sr's assistance to get access to relevant ministers, he would have at least outlined to him the nature of AWH's position with regard to SWC and the purpose for which he required that access.

## Edward Obeid Sr's awareness of Obeid family interest in AWH

The Commission has found above that, by about July 2007, Edward Obeid Sr knew that Edward Obeid Jr was interested in acquiring shares in AWH and Australian Water.

It will be recalled that Mr Brook gave evidence concerning a meeting at Moses Obeid's Elizabeth Bay house on 22 August 2008. During that meeting, AWH was discussed in general terms. Although Mr Brook gave evidence that Edward Obeid Sr attended part of the meeting, it was clear from his evidence that Edward Obeid Sr was not present during that part of the meeting when AWH was discussed.

In chapter 18 of this report, the Commission found that the Heads of Agreement dated 4 November 2010 was a transaction for the sale of shares in AWH and Australian Water to an Obeid family entity in return for the payment of \$3 million. In addition, between September and December 2011, an Obeid family company loaned a total of \$486,000 to AWH.

During his compulsory examination by the Commission in September 2013, Edward Obeid Sr was asked whether his family had any direct or indirect investment in AWH. He told the Commission that he believed Edward Obeid Jr had arranged for a \$3 million loan to be made to Mr Di Girolamo. The money came from "Obeid family accounts".

At the public inquiry, Edward Obeid Sr told the Commission that he first became aware that his sons had agreed to use an Obeid family entity to provide \$3 million to Mr Di Girolamo in about January or February 2011. He said he was not aware of any suggestion that they had agreed to buy shares in AWH and denied that he knew from November 2010 that the Obeid family had purchased shares in AWH. He maintained that the transaction was a loan to Mr Di Girolamo.

Edward Obeid Jr was reticent about what he told his father concerning his desire to invest in AWH and Australian Water. While he acknowledged that his desire was not a secret, he said that he could not recall discussing it with his father. He said that his father first became aware of the \$3 million payment in late 2010 or early 2011. He did, however, say that he may have told his father the prospects of getting any return were highly dependent on Mr Di Girolamo and AWH doing well. He claimed that, although he discussed the \$3 million payment with his father, his father had no control over the family finances.

The Commission does not accept that Edward Obeid Sr only became aware of the \$3 million transaction in early 2011. Edward Obeid Sr agreed that the Obeid family was "a close family". He agreed that he was regarded as the head of the Obeid family, although he said that was "like all other fathers are regarded". He also agreed that family business decisions were made for the benefit of the whole family, although he denied that he was involved in those decisions or in the family business. The closeness of the family was also demonstrated by Edward Obeid Jr's decision, in 2007, not to exercise any rights under the deed of option because his brothers were not supportive of the idea.

During the Operation Jasper public inquiry, the Commission examined Edward Obeid Sr's role and involvement in the family businesses. Although, in that investigation, he tried to play down his role, the Commission found that he was active in the family's business activities and retained considerable control over the family businesses and finances. The Commission found that he used his wide range of contacts to initiate business opportunities for the family. The evidence in that investigation revealed that the Obeid family was a closely connected unit that accorded Edward Obeid Sr great respect that carried over to business decisions, particularly those that were important. In that investigation, Moses Obeid accepted that Edward Obeid Sr was "consulted where decisions are made that could benefit the family enormously or harm the family". The Commission found that, in 2008 and thereafter, Edward Obeid Sr remained in his position as head of the family unit and could and did exercise a final say in respect of important decisions.

The Commission was satisfied, in particular, that no important family business decisions would be taken without reference to Edward Obeid Sr and due deference to his views.

There was no evidence in the present inquiry that has led the Commission to modify those findings.

## Conclusion

The Commission is satisfied that Edward Obeid Sr knew, by at least July 2007, that his son, Edward Obeid Jr, was involved with AWH but was not being paid for his work. Sometime prior to 8 November 2007, Mr Di Girolamo briefed Edward Obeid Sr with an outline of AWH's position with regard to SWC and the AWH proposal for a PPP. There was telephone contact between Edward Obeid Sr and Mr Di Girolamo during which they discussed AWH. Edward Obeid Sr was, at the latest, aware of the AWH PPP proposal from his discussions with Mr Di Girolamo in early November 2007.

The Commission is also satisfied that Edward Obeid Sr knew that his sons, Edward Obeid Jr and Moses Obeid, were interested in acquiring shares in AWH, most likely through an Obeid family entity, and that such an investment, in the event AWH was able to get approval for its PPP proposal, would provide a substantial profit to the Obeid family. He knew by July 2007 that Edward Obeid Jr was interested in acquiring shares in AWH. Although it was Moses Obeid who, sometime before July 2008, told Mr Brook about the Obeid family making a fortune out of AWH, given the closeness of the Obeid family, the Commission is satisfied that Edward Obeid Sr was aware, by then, of Moses Obeid's interest in an Obeid family entity acquiring shares in AWH. The Commission is satisfied that he was consulted about the \$3 million transaction before the Heads of Agreement was signed in November 2010 and was likewise consulted about the loans made to AWH in early 2011. He knew that the

purpose of the \$3 million transaction was to acquire a beneficial interest in AWH and Australian Water and that would lead to the Obeid family making a substantial profit on its investment in the event that the PPP proposal was approved by the NSW Government.

## Chapter 20: Edward Obeid Sr's actions

This chapter examines the evidence concerning Edward Obeid Sr's interaction with other parliamentarians and a ministerial member of staff in relation to AWH.

### Michael Costa

Michael Costa became treasurer in February 2006. In that capacity, he was one of the two shareholders of SWC. As shareholder minister he could, subject to Cabinet approval, issue directions to SWC.

During the latter half of 2007, AWH was in discussions with SWC for a BOOT-type scheme in the North West Growth Centre and a BOO scheme in what was known as the South West Growth Centre.

As previously noted, by early December 2007, SWC had proposed that AWH provide project management services for the design and construction of package 1 works in the North West Growth Centre. SWC proposed directly engaging a contractor to undertake the design and construction work. AWH considered SWC was in breach of the Other Stages Deed, which, it believed, obliged SWC to contract with it for the provision of all future work in the North West Growth Centre.

Edward Obeid Jr told the Commission that Mr Di Girolamo wanted to meet the treasurer because the dispute with SWC "was getting progressively worse", AWH was "under duress" and that he needed to see the treasurer immediately to put his point of view across and seek the treasurer's intervention in support of AWH. Sometime in the latter quarter of 2007, they went to Edward Obeid Sr's parliamentary office to ask his assistance in arranging a meeting. Edward Obeid Jr told the Commission that his father rang Michael Costa and asked him to come to his office.

Michael Costa recalled Edward Obeid Sr telephoning him and asking him to come to his office. Edward Obeid Sr did not explain why he wanted to meet. When

Michael Costa arrived at Edward Obeid Sr's office, he saw that, apart from Edward Obeid Sr, Mr Di Girolamo and Edward Obeid Jr were there. Edward Obeid Sr introduced Mr Di Girolamo as "a friend of the family" who was having "some problems". Mr Di Girolamo told him about the problems that AWH was having with SWC. Michael Costa told the Commission that he was "surprised" that he had been asked to meet with someone to discuss issues about SWC and, had he known that was the purpose of the meeting, he would have taken an adviser with him. He told the Commission that he kept the discussion short and that he "tried to get out of the room as soon as I could and get myself an advisor". Nothing was said to him about any Obeid family involvement with AWH or that Edward Obeid Jr was working for an AWH company.

The Commission finds that the meeting in Edward Obeid Sr's office occurred prior to 8 November 2007. This is because AWH records show that there was a meeting between Mr Di Girolamo and Michael Costa on that date. That meeting came about as a result of the meeting in Edward Obeid Sr's office.

Mr Di Girolamo said that he asked Edward Obeid Jr to enlist his father's help in getting access to ministers. He agreed that he only got to meet with Michael Costa because of Edward Obeid Sr's introduction. He said that Edward Obeid Sr acted to facilitate meetings with relevant ministers but did not lobby them at those meetings.

Edward Obeid Sr told the Commission that he "often" asked ministers to come to his office if someone who had a problem wanted to see them. He did so in order to demonstrate to the person with a problem that he was taking positive action.

Edward Obeid Sr could have contacted a member of Michael Costa's staff to arrange a private meeting between Mr Di Girolamo and Michael Costa. That would have demonstrated he was taking positive action.

The fact that, instead, he chose to ring the treasurer and asked him to come to his office indicates that he wanted to be present at the meeting. He would have been aware that his presence at such a meeting, even without engaging in any active lobbying, would have lent it an additional degree of gravity because it indicated that what was being put by Mr Di Girolamo had at least his tacit support and endorsement. His presence at the meeting indicated more than mere interest in arranging for someone with a grievance to have an opportunity to voice that grievance to an appropriate minister. It indicated a level of concern consistent with knowledge that the outcome of the dispute between AWH and SWC could affect his family's interests.

There was a second meeting on 21 February 2008. According to Mr Di Girolamo's notes of that meeting, he, Edward Obeid Sr, Michael Costa, and Michael Cominos (one of Michael Costa's policy advisers), were present. Mr Di Girolamo told the Commission that Edward Obeid Sr was present to provide "support".

At that meeting, Mr Di Girolamo handed Michael Costa two documents. One was a typed one-page document headed "ISSUES". It contained 12 paragraphs, setting out AWH's position with respect to the work dispute with SWC and included the claim that SWC was attempting to commercially frustrate AWH. The other document was a summary of discussions and correspondence between AWH and SWC between October 2007 and 18 February 2008. Mr Di Girolamo told the Commission he spoke about both documents at the meeting.

Michael Costa told the Commission that he could not recall much about the meeting other than that complaints were raised about the conduct of SWC. He did recall that there were two issues; one involved the merits of an existing contract and the other a PPP. He did not know why Edward Obeid Sr was present. He told the Commission that, at both meetings where Edward Obeid Sr was present, he did not participate in the discussions but left it to Mr Di Girolamo to put AWH's case. He told the Commission that the matters under discussion concerned policy and policy was not one of Edward Obeid Sr's strong points.

Edward Obeid Sr told the Commission he could not recall what happened at the meeting. He said that he attended because he was asked by Mr Di Girolamo. He said he would have done the same for "every constituent that wants my help". He denied he arranged the meeting because he knew his son was working with AWH.

The Commission accepts Mr Di Girolamo's evidence that the purpose of Edward Obeid Sr attending the meeting was to provide support. It was not necessary for him to say anything at the meeting. His presence alone was

sufficient to provide support because it demonstrated that he was interested in the issues raised by Mr Di Girolamo and the outcome of those issues. Once again, his presence indicated a level of concern consistent with knowledge that the outcome of the dispute between AWH and SWC could affect Obeid family interests.

Michael Costa understood Mr Di Girolamo wanted him to direct SWC to comply with AWH's interpretation of the Other Stages Deed. He told the Commission that he had no intention of issuing such a direction, but he did consult with SWC. He also understood that AWH had a PPP proposal it wanted to have adopted. He obtained copies of two legal advices – one from AWH and the other from SWC. As those were conflicting, he obtained advice from the solicitor general. He had regular discussions with Dr Schott and Dr Tom Parry, SWC chairman, about AWH. He took the view that a new agreement should be reached between SWC and AWH to replace the Other Stages Deed and asked SWC to enter into mediation with AWH for the purpose of reaching a new agreement. That mediation was undertaken in 2008, but failed to resolve the disputes.

Dr Parry told the Commission that he understood Michael Costa wanted the matter sorted out but had not asked SWC to do anything it would not otherwise do and had not asked for any favours for AWH. The Commission is satisfied that was the case.

## Mr Rees

Mr Rees was minister for water from 27 February to 5 September 2008.

Mr Rees recalled that Edward Obeid Sr asked him to speak with Mr Di Girolamo about an issue that Mr Di Girolamo had with SWC. No mention was made by Edward Obeid Sr of his son working with AWH or any Obeid family interest in AWH.

Edward Obeid Sr told the Commission that, at Mr Di Girolamo's request, he asked Mr Rees, as the minister responsible for SWC, to see Mr Di Girolamo so that Mr Di Girolamo could put his case to him. Edward Obeid Sr denied speaking with Mr Rees with a view to obtaining a favourable outcome for AWH.

It does not appear from the evidence that any meeting occurred. In any event, Mr Rees did not take any action on behalf of AWH.

## Mr Iemma

The Hon Morris Iemma was NSW premier between 3 August 2005 and 5 September 2008.

He told the Commission about a telephone conversation

he had with Edward Obeid Sr in about February or March 2008 concerning AWH. Edward Obeid Sr expressed concern about a dispute between AWH and SWC that involved SWC threatening or proposing to no longer deal with AWH “that could lead to a testing of the market for provision of services which would disadvantage [AWH]”. Edward Obeid Sr asked him to “intervene” to ensure that SWC continued to work with AWH. He told Mr lemma that AWH was a reputable company and that he knew some of the people who worked there. Nothing was said about any member of the Obeid family working for an AWH company. Mr lemma told Edward Obeid Sr that he would discuss the matter with Michael Costa, the treasurer, to find out the background. After speaking with the treasurer, Mr lemma told Edward Obeid Sr that the treasurer had told him there was no basis to the claims. Edward Obeid Sr disagreed and said that he would talk with the treasurer.

Edward Obeid Sr agreed that he spoke to Mr lemma about AWH. He did so because Mr Di Girolamo “wanted someone to look at his case”. He spoke with Mr lemma, because he was the premier, in order to inform him there was a disagreement between SWC and AWH that, if not settled, “could be a problem” for the government.

It is clear that, by February or March 2008, Edward Obeid Sr knew enough about AWH to be able to speak directly with the premier about the work dispute between AWH and SWC. At the time that he spoke with Mr lemma, no steps had been taken by Michael Costa to direct SWC to act in accordance with AWH’s interpretation of the Other Stages Deed. Asking the premier to “intervene” in favour of AWH was an attempt to bypass the treasurer in order to achieve AWH’s aim. By this stage, Edward Obeid Sr was not asking the premier to merely meet with Mr Di Girolamo to discuss the issue – he wanted actual intervention to ensure AWH continued to receive work from SWC. That is consistent with an understanding on the part of Edward Obeid Sr that the success or otherwise of AWH could affect his family’s interests.

## Phillip Costa

Phillip Costa replaced Mr Rees as minister for water. He held that position from 8 September 2008 to 28 March 2011.

He told the Commission that, within four weeks of him becoming minister, Edward Obeid Sr asked him to speak with Mr Di Girolamo about AWH. He met with Mr Di Girolamo on 30 October 2008. Mr Di Girolamo outlined his concerns about SWC. Phillip Costa told him to put them in writing.

Edward Obeid Sr agreed that he organised for Mr Di Girolamo to meet Phillip Costa. He did so because Mr Di Girolamo “had issues” with SWC he wanted to

discuss with the minister. He told the Commission that he did not ask what the issues were and he never asked Phillip Costa to make a decision favourable to AWH.

The meeting with Phillip Costa was an important opportunity for Mr Di Girolamo. As Edward Obeid Jr explained to the Commission, by that time AWH was being “stonewalled” by SWC and Mr Di Girolamo was “progressively getting more desperate” and needed to see the minister to put forward the AWH case so that “the Government could formally intervene to at least get an outcome”.

Phillip Costa also recalled a second meeting with Mr Di Girolamo at Narellan on Saturday, 3 January 2009. Edward Obeid Sr also attended. Phillip Costa told the Commission that he was on leave at the time. At that meeting he was given a briefing paper seeking his “urgent assistance” in relation to AWH funding and a PPP proposal. The briefing paper contained a number of paragraphs on the PPP proposal and sought Phillip Costa’s “input in forming a Steering Committee to formulate the structure of the PPP Proposal so that it is consistent with the outcomes sought by Government to benefit the NSW community”.

Edward Obeid Jr told the Commission that a meeting was arranged by his father so that Mr Di Girolamo could “put his case forward” to the minister. He, his father and Mr Di Girolamo travelled together to Narellan. Edward Obeid Sr agreed that he arranged the meeting and attended the meeting. He said that he accompanied his son and Mr Di Girolamo so that he could show them where to go and because he had not seen Phillip Costa for a while. He understood the purpose of the meeting was for Mr Di Girolamo to discuss with the minister his problems with SWC. He did recall that Mr Di Girolamo complained about SWC not paying AWH. He denied any PPP proposal was discussed at the meeting or that he knew anything about a PPP at that time. Although he “may” have known by then that his son was working for an AWH company, he did not mention that to Phillip Costa.

Mr Di Girolamo followed up that meeting with a letter to Phillip Costa on 6 January 2009 reiterating the request to form a steering committee “so that we can formulate the structure of the PPP Proposal...”. That led to a further meeting with Phillip Costa on 19 January 2009. The meeting was also attended by Dr Schott. According to Mr Di Girolamo’s note of the meeting, the discussion concerned funding reallocations for AWH, a PPP proposal and SWC’s intention to audit RH3.

The Commission obtained Mr Di Girolamo’s handwritten note of a telephone conversation he had with Phillip Costa on 15 June 2009. According to the note, the conversation

concerned AWH's dispute with SWC about reallocation of funding and the basis on which AWH was prepared to settle the dispute. Phillip Costa could not recall the telephone conversation.

The Commission also obtained a two-page typed briefing paper prepared by Mr Di Girolamo for Phillip Costa concerning the funding dispute between AWH and SWC arising from SWC's refusal to reallocate funding. The paper was dated 1 September 2009. Handwritten entries referred to a meeting of that date between Phillip Costa, Mr Di Girolamo and Edward Obeid Sr at Parliament House.

Phillip Costa told the Commission that he did not recall much about the meeting and did not know why Edward Obeid Sr was present. He did not recall him saying much. Edward Obeid Sr could not recall that meeting.

On 2 November 2009, Mr Di Girolamo wrote to Phillip Costa requesting a further meeting. Phillip Costa told the Commission he did not accede to that request because by then:

*I had an understanding of the situation and what the matter was in relation to the conflict between [SWC] and AWH and I was not going to interfere with that process and I was attempting not to participate in any conversation that would jeopardise where [Dr Schott] was heading.*

The fact that Edward Obeid Sr accompanied his son and Mr Di Girolamo all the way to Narellan to meet with Phillip Costa and attended another meeting between Mr Di Girolamo and Phillip Costa to discuss AWH issues indicates more than a passing concern that Mr Di Girolamo get to present AWH's case to the relevant minister. Edward Obeid Sr's attendances were intended to demonstrate that the position being put forward by Mr Di Girolamo had his support and that he was interested in the outcome. Once again, his attendance at those meetings demonstrated a level of concern consistent with knowledge that the outcome of the dispute between AWH and SWC could affect his family's interests.

Phillip Costa also recalled that, sometime in 2009, Edward Obeid Sr spoke to him about Dr Schott while they were in an elevator in Parliament House. Edward Obeid Sr told him that he needed to sack "the bitch". Edward Obeid Sr also made comments to him on approximately two other occasions about getting rid of Dr Schott. He told the Commission that Edward Obeid Sr told him that Dr Schott was frustrating progress and stopping development in the North West Growth Centre. Phillip Costa took no action because he considered that Dr Schott's performance was "nothing short of excellent" and he had no intention of getting rid of her.

At his compulsory examination on 18 September 2013, Edward Obeid Sr told the Commission he knew that Dr Schott was head of SWC but he had never spoken to her and could not recall having any discussion with anyone about her. He knew, however, from Mr Di Girolamo that "...she was the problem that wouldn't allow their agreement to progress" and that Mr Di Girolamo probably blamed her "for all his problems".

At the public inquiry, Edward Obeid Sr said that he knew Mr Di Girolamo had fallen out with Dr Schott but, contrary to what he had previously said in his compulsory examination, claimed that Mr Di Girolamo had never told him that Dr Schott was being obstructive towards AWH. When his compulsory examination evidence was put to him, he said that Mr Di Girolamo had blamed Dr Schott for his problems and had complained to him that he was unable to talk to her. Edward Obeid Sr also recalled a conversation with Phillip Costa in which he told Phillip Costa to "sack" Dr Schott. He said that his comment had nothing to do with AWH but arose from his observation at the time that Dr Schott had failed to adequately assist Phillip Costa at a budget committee meeting. He denied that he made the remark in the context of conversation in which he complained about Dr Schott frustrating progress on work in the North West Growth Centre.

The Commission prefers Phillip Costa's evidence on this issue. He was clear that there were three conversations in which Edward Obeid Sr advised him to sack or get rid of Dr Schott and that they occurred in the context of claims that Dr Schott was frustrating progress on work in the North West Growth Centre. That, of course, was precisely the line being taken by AWH. The Commission is satisfied that the comments were made by Edward Obeid Sr because he understood that Dr Schott was resisting AWH's position that it had an effective monopoly on the provision of water-related infrastructure in the North West Growth Centre. If SWC maintained that position, it would have had a negative financial impact on AWH. Edward Obeid Sr's repeated calls for Dr Schott's dismissal are consistent with an understanding on his part that the outcome of the dispute between AWH and SWC could affect his family's interests in the event an Obeid family entity acquired shares in AWH and one way of resolving that dispute, so as to favour his family's interests, was for her removal.

## Mr Tripodi

Mr Tripodi was minister for infrastructure between 8 September 2008 and 17 November 2009.

He told the Commission that, on several occasions during his time as minister in that portfolio, Edward Obeid Sr spoke with him about AWH and asked how the PPP

was progressing. The Commission is satisfied that level of contact indicated to Mr Tripodi Edward Obeid Sr's interest in, and support for, AWH. On one occasion, Mr Tripodi asked him whether he had any financial involvement in AWH and was told "no". Edward Obeid Sr did, however, tell him that Edward Obeid Jr was giving AWH "a hand up in Queensland". It was Mr Tripodi's evidence that he did not ask Edward Obeid Sr what he meant by that. He told the Commission that he did not get the impression that Edward Obeid Jr was an employee of AWH.

Although Mr Tripodi had contact with Mr Di Girolamo about the AWH PPP proposal on a number of occasions while minister for infrastructure, he told the Commission he could not recall Edward Obeid Sr ever asking him to meet Mr Di Girolamo.

In his evidence to the Commission, Edward Obeid Sr denied ever advocating the AWH position to Mr Tripodi. He confirmed that he had told Mr Tripodi that his son worked with an AWH company in Queensland. He did so because Mr Tripodi asked him.

There was other evidence of contact between Mr Tripodi and Mr Di Girolamo concerning the AWH PPP proposal. That evidence is dealt with in the next part of the report.

## Mr Kelly

Mr Kelly was minister for infrastructure between 8 December 2009 and 28 March 2011.

Mr Kelly recalled that, within days of him becoming minister of that portfolio, Edward Obeid Sr asked him to meet with AWH. Mr Kelly was told the purpose of the meeting was to discuss the provision of water services to western Sydney. Although he could not recall Edward Obeid Sr mentioning Mr Di Girolamo, he told the Commission that he did meet with Mr Di Girolamo on one occasion as a result of his conversation with Edward Obeid Sr. Edward Obeid Sr did not tell him how he knew about AWH or that his son was involved with AWH. Nothing was said about the Obeid family having an interest in AWH.

Mr Di Girolamo told the Commission he attended one meeting with Mr Kelly.

Edward Obeid Sr told the Commission that he had never spoken with Mr Kelly about AWH. In light of Mr Kelly's evidence on this issue, which the Commission accepts, the Commission is satisfied that Edward Obeid Sr asked him to meet with Mr Di Girolamo to discuss the provision of water services to western Sydney.

Mr Kelly's involvement with respect to the PPP proposal is dealt with in the next part of the report.

## Mr Brown

Gilbert (Laurie) Brown was Mr Kelly's chief of staff.

Mr Brown was a long-term friend of Edward Obeid Sr's. At the public inquiry, he told the Commission that, when he was working for Mr Kelly, Edward Obeid Sr was in telephone contact with him about every couple of weeks. The matters Edward Obeid Sr spoke to him about included Mr Di Girolamo and AWH, and AWH's issues with SWC. The issues were that SWC was being obstructionist or uncooperative. Mr Brown recalled Edward Obeid Sr told him that AWH "should be granted some opportunity, more opportunity to [do] what they were doing in the North West Growth Centre". He did not recall any discussion about SWC holding up payments to AWH.

Mr Brown had previously provided more details of a discussion with Edward Obeid Sr concerning AWH when he gave evidence to the Commission in a compulsory examination on 18 June 2013. He then recalled Edward Obeid Sr telling him, during a telephone conversation, that AWH should be given an opportunity to apply for a contract or to tender to privatise water and sewerage services in the North West Growth Centre. He said he was told that AWH wanted to talk to, and directly negotiate with, the Department of Premier and Cabinet. Edward Obeid Sr told him that Mr Di Girolamo was "a good bloke" and gave him Mr Di Girolamo's home telephone number. Mr Brown related the conversation to Mr Kelly.

When that evidence was put to him at the public inquiry, Mr Brown confirmed it was correct. He said that he had asked Edward Obeid Sr for Mr Di Girolamo's telephone number because Mr Tripodi had told him there was "an issue" with AWH and Mr Di Girolamo wanted to talk to Mr Kelly. He telephoned Mr Di Girolamo to find out further information about AWH's concerns and arranged for him to meet Mr Kelly so that Mr Di Girolamo could brief Mr Kelly on the provision of water services in the North West Growth Centre.

Mr Brown was not sure whether he had spoken with Edward Obeid Sr on a second occasion concerning AWH.

Edward Obeid Sr told the Commission that he could not recall speaking with Mr Brown about AWH. He did not believe he told Mr Brown his son was working for an AWH company. He denied that he spoke to anyone about AWH getting an opportunity to enter into direct negotiations with the government for a PPP.

The Commission accepts Mr Brown's evidence that Edward Obeid Sr spoke to him about AWH being able to negotiate with the Department of Premier and Cabinet for the privatisation of water and sewerage services in the North West Growth Centre.

In his evidence to the Commission, Mr Brown agreed that, if a minister were going to put forward a Cabinet minute favourable to AWH's PPP proposal, it would be Mr Kelly as minister for infrastructure. That was one reason why Edward Obeid Sr would want to discuss AWH with Mr Brown. As it happened, a Cabinet minute favourable to AWH was prepared in Mr Kelly's office. Mr Brown's involvement with that Cabinet minute is dealt with in the next part of the report.

## Ms Keneally

Ms Keneally was premier between 4 December 2009 and 28 March 2011.

Ms Keneally participated in a recorded interview with Commission officers that was tendered as an exhibit at the public inquiry. In her interview, she recalled that Edward Obeid Sr telephoned her and spoke about the AWH proposal for a PPP. She placed this call as occurring sometime prior to Mr Kelly submitting a Cabinet minute on that subject in August 2010. She recalled that Edward Obeid Sr told her that AWH had successfully provided water infrastructure services, had provided value for the taxpayer, but had been frustrated by SWC. He told her that a PPP with AWH was something that should be explored by the government. At the time of that conversation, Ms Keneally was aware, through another conversation with Mr Tripodi, that one of Edward Obeid Sr's sons "...had some form of relationship with the company", although she did not know which son, other than it was not Moses Obeid. She expressed her concern to Edward Obeid Sr about a pecuniary relationship. She recalled that his response was that "there were Liberals who were involved as well..." and the proposal should not be dismissed just because the company had links to elected politicians. Her response to his approach was that any proposal would be considered on its merits.

She confirmed that evidence at the public inquiry. She told the Commission she did not have a detailed discussion with Edward Obeid Sr about AWH because she knew he had a son who worked for AWH and did not consider it was appropriate to have a discussion with him on the merits of a proposal that might come before the government. She said that Edward Obeid Sr did not deny that his son was involved with AWH. Although she did not keep notes of the conversation, she was able to recall it because it was one of the few occasions she spoke to Edward Obeid Sr on the telephone.

When he gave evidence to the Commission at a compulsory examination in September 2013, Edward Obeid Sr said that he had never spoken to Ms Keneally about AWH or on the subject of a PPP with AWH.

Edward Obeid Sr gave different evidence at the public inquiry. That was some days after Ms Keneally gave her evidence. He told the Commission that he had telephoned Ms Keneally on one occasion while she was premier to speak to her about AWH. He said he told her "it should be treated on its merit" because "at that stage there was a lot of rumours that my son was working for Australian Water and I didn't want that to interfere with deciding on the issues of Australian Water and [SWC]. It should be decided on its merit not because my son happened to work for them in Queensland". He denied, however, that he advocated a positive outcome for AWH.

He told the Commission that, at his compulsory examination, he had forgotten speaking with Ms Keneally but her evidence at the public inquiry had "jolted" his mind. He denied, however, that he told her that AWH had provided value for the taxpayer or spoke to her about a PPP. He said he could have told her that SWC was frustrating AWH because that was what Mr Di Girolamo had told him.

The Commission accepts the evidence of Ms Keneally as to the content of the conversation she had with Edward Obeid Sr. Her evidence at the public inquiry was consistent with that she gave at her interview. She impressed as a credible and conscientious witness, who was at all times careful to give accurate evidence.

## Conclusion

In his evidence to the Commission, Edward Obeid Sr denied that, in contacting any of the above persons, he was motivated by personal greed with a view to obtaining an outcome that would benefit his family. The Commission does not accept that evidence.

For the reasons given above, by July 2007, Edward Obeid Sr was aware that his son, Edward Obeid Jr, was involved with AWH. He also knew that there was at least one dispute between SWC and AWH involving the allocation of work. Either then or, in any event, no later than his conversation with Mr Di Girolamo in November 2007, he also knew that AWH wanted to proceed with a PPP proposal. He knew by July 2007 that Edward Obeid Jr was interested in acquiring shares in AWH and was aware, by July 2008, that there was interest in an Obeid family entity acquiring shares in AWH. He knew that, in the event AWH's PPP proposal was approved, any such investment would be extremely profitable for the Obeid family.

The Commission is satisfied that Edward Obeid Sr used his position as a member of Parliament to promote AWH's interests to each of Michael Costa, Mr Rees, Mr Lemma, Phillip Costa and Ms Keneally at a time when he knew that successful outcomes for the AWH

PPP proposal could affect his family's interests, and approval of the AWH PPP proposal in particular, would financially benefit the Obeid family in the event a member of the Obeid family or an Obeid family entity acquired shares in AWH.

His conduct in relation to his contacts with Mr Tripodi, Mr Brown and Mr Kelly is dealt with in part 6 of this report.

## **PART 6 – THE CABINET MINUTES**

# Chapter 21: The McGlynn draft Cabinet minute

This chapter sets out how the AWH PPP proposal was assessed and the steps taken to bring the matter before the Budget Committee of Cabinet.

## Assessing the AWH PPP proposal

As set out in chapter 11, on 6 July 2009, Mr Di Girolamo sent the AWH PPP proposal to Mr McGlynn at the Department of Premier and Cabinet. A detailed proposal was submitted on 5 February 2010. At that time, Mr McGlynn had responsibility for the assessment of unsolicited proposals and their viability. He told the Commission he was “surprised” at “how light” the AWH PPP proposal was.

The assessment process was independent of SWC. As explained in chapter 11, an Initial Review Panel was established within the Department of Premier and Cabinet to consider the proposal. The purpose of the Initial Review Panel was to consider whether the AWH PPP proposal should proceed to direct negotiations. Given the conflicting legal opinions over the rights of AWH, the Initial Review Panel concentrated on assessing the value for money for NSW, SWC and the community.

The Initial Review Panel was made up of Paul Gilbertson from the Nation Building Taskforce as independent chair, Con Kargas, the manager of investment and economic development from the Department of Premier and Cabinet, Joseph Yasay, a senior financial analyst from NSW Treasury, and Mr McGlynn. There was no SWC representative on the panel.

Mr Gilbertson had worked on a number of PPP projects, including as project director for the Stadium Australia PPP project. Mr McGlynn was eminently qualified to be a member. He had an engineering background with 20 years of experience directing 13 companies, including four as chairman. He had substantial experience with the governance and delivery of significant infrastructure projects.

The Initial Review Panel dealt with the PPP proposal as an unsolicited proposal in accordance with the Guidelines.

It is convenient to deal with an objection AWH subsequently took to the assessment process. After being informed of the result of the Initial Review Panel assessment, AWH claimed that the Department of Premier and Cabinet should have recognised that the AWH PPP proposal was a solicited proposal and that, as such, s 2.4 of the Guidelines, which required the Department of Premier and Cabinet to assess the merits of an unsolicited proposal, did not apply. For the reasons given above, the Commission is not satisfied that the AWH PPP proposal was a solicited proposal. The Department of Premier and Cabinet also took the view that it was not a solicited proposal. In any event, even if it was regarded as a solicited proposal, that would not mean that the process undertaken by the Department of Premier and Cabinet was inconsistent with the Guidelines.

Section 3.3 of the Guidelines dealt with proposals for direct negotiations. It provided that the agency proposing direct negotiations must “fully demonstrate to the [Budget Committee of Cabinet] the reasons for, and net benefits of, not undertaking a competitive tender process”. That section of the Guidelines also required the agency to research the proposal and obtain independent evaluations confirming all of the following:

- *Only the proponent, because it owns real property, intellectual property, or some other unique element, can deliver the proposal's essential outcomes*
- *Direct negotiation would preserve considerable benefits for the agency, the Government and the community*
- *That direct negotiations would provide better value for money than a competitive tender process*
- *That the proponent has the expertise, experience and financial capacity to successfully*

*deliver the project*

- *The monetary value of any intellectual property*

Those were the matters that the Initial Review Panel evaluated and reported on. As will be seen below, that evaluation concluded that the AWH PPP proposal did not meet the requirements of the Guidelines to progress to direct negotiations. The Commission does not consider that, even if the AWH PPP proposal were categorised as a solicited proposal, that meant that, as a matter of course, it had to proceed to the Budget Committee of Cabinet. Under the Guidelines, it was necessary for an assessment to be made of the proposal in order to first determine whether it was appropriate it proceed to consideration by the Budget Committee of Cabinet. That is what occurred.

That process did not come as any surprise to AWH. In her letter of 23 December 2009 to Mr Di Girolamo, Ms Leeson had made it clear that there would be an assessment process to determine whether a minute to the Budget Committee of Cabinet would be prepared to recommend direct negotiations or rejection of the proposal. No objection was raised by AWH at that time.

The assessment process involved the panel meeting with AWH representatives to clarify issues and obtain further information from AWH. KPMG was engaged to prepare a Public Sector Comparator, which is used to make decisions by testing whether a private investment proposal offers value for money in comparison with the most efficient form of public procurement.

## Mr McGlynn's draft Cabinet minute

In April 2010, Mr McGlynn prepared a comprehensive draft Cabinet minute based on the detailed assessment of the Initial Review Panel ("the McGlynn draft Cabinet minute"). That draft minute, which incorporated salient findings from the Initial Review Panel's report, recommended rejection of the AWH PPP proposal. A copy of the McGlynn draft Cabinet minute is at Appendix 5.

The reasons for rejection were compelling. The "key reasons" Mr McGlynn set out for rejecting the proposal were that:

- direct negotiations would not provide value for money for the state, SWC or the community
- the proposal would not transfer sufficient risk to AWH
- there was no prospect that direct negotiations would lead to an acceptable outcome for the NSW Government.

Mr McGlynn told the Commission that the AWH PPP proposal was predicated on AWH getting a 15%

return but "given the risk transfer, which wasn't high, I would have expected somewhere around 10 or 11 at the maximum".

One of AWH's claims was that adoption of its PPP proposal would speed up the release of land for residential development. The McGlynn draft Cabinet minute cast doubt on the validity of that claim. The minute noted that entering into an exclusive arrangement with AWH could potentially risk delaying the release of land for house construction. The point was also made that AWH had no experience operating water networks or in water retail supply. In addition, the McGlynn draft Cabinet minute noted that the release of land for development was dependent on factors beside the development of water infrastructure. Those factors included the provision of roads and power that, being NSW Government responsibilities, had implications for the NSW budget and road and power programs.

In relation to AWH's proposal to purchase existing water infrastructure for between \$160 million and \$190 million, Mr McGlynn noted that KPMG had considered the valuation of those assets from two perspectives and, under either, the offer from AWH was "...considerably below the assessed value of the assets and would result in a loss on sale of assets of between \$127m to \$289m on the SWC balance sheet". In addition, SWC would lose millions of dollars in revenue from those assets. That would not only reduce SWC's profitability, but would also reduce its ability to pay dividends to the state.

In relation to the proposal for AWH to build and operate new water infrastructure, Mr McGlynn noted that the conclusion of the Initial Review Panel was that there was "...no clear value advantage to the delivery of the capital assets by AWH" and that acceptance of the proposal would result in SWC losing future income.

In relation to risk, Mr McGlynn noted that, as a result of the risk analysis undertaken by the Initial Review Panel, "[w]hile ostensibly the proponent is taking full commercial risk, the structure, timing and quantum of the availability charge [of between \$25m and \$35m per year] transfers the commercial risk to government". Paragraph 12.4 of the McGlynn draft Cabinet minute noted that there was no competitive risk for AWH and, if the AWH proposal were adopted, AWH would own a monopoly for which there was no alternative provider. It noted that private ownership of part of the water infrastructure network "does not provide competition in the sector as it simply creates another monopoly provider, bound geographically, which uses the same contractors to build similar assets and operate in a similar way".

Other issues set out in the McGlynn draft Cabinet minute included:

- a KPMG assessment, based on accounts provided by AWH, that, at the end of the 2008–09 financial year, AWH had net assets of only \$36
- AWH had no financial capacity to deliver the project and would have to rely on third-party funding and the state would be best served by dealing directly with those third parties rather than a financially weak intermediary
- SWC would lose income from existing assets of \$15 million per year, and loss of future income from new assets in the North West Growth Centre
- a potential for minor increases in water pricing across Sydney because of the higher cost of capital for AWH as compared to SWC
- the establishment of an alternative water supply infrastructure owner would require the establishment of an independent regulator
- that, unlike SWC, AWH did not have any right to enter land to provide water services
- a number of other organisations existed that were able to deliver a competitive bid and a competitive tender would likely draw a better overall proposal from the market.

Importantly, in his draft minute, Mr McGlynn noted that the analysis undertaken by the Initial Review Panel “shows that all the criteria that must be satisfied to justify a direct negotiation have not been met”.

As minister for infrastructure, Mr Kelly had responsibility for submitting any Cabinet minute on the AWH PPP proposal to the Budget Committee of Cabinet. Accordingly, on 12 April 2010 Ms Leeson emailed a copy of the McGlynn draft Cabinet minute to Mr Brown, Mr Kelly’s chief of staff. As will be seen in the following chapters, after arriving at Mr Kelly’s office, a new minute was created to convert a recommendation that was unfavourable to AWH to one that was favourable and could potentially lead to the transfer of control over water infrastructure in the North West Growth Centre to that company.

## Chapter 22: The Kelly Cabinet minute

An extensively redrafted Cabinet minute was prepared in Mr Kelly's office ("the Kelly Cabinet minute"). The Kelly Cabinet minute was significantly different from the McGlynn draft Cabinet minute and, rather than recommending rejection of the AWH proposal, sought approval from the Budget Committee of Cabinet to "proceed with direct negotiations" with AWH. The Guidelines provided that Budget Committee of Cabinet approval had to be obtained in order to enter into direct negotiations.

Ms Keneally told the Commission that, although the Budget Committee of Cabinet was not the full Cabinet, its decisions had the effect of binding the NSW Government.

As set out in the previous chapter of this report, before any proposal was made for direct negotiations, it was necessary, under the Guidelines, for an assessment of the proposal to be undertaken to determine whether it should proceed to consideration by the Budget Committee of Cabinet. One of the purposes of the Kelly Cabinet minute was to "commence assessment of the merit of the AWH Proposal". That assessment, however, had been undertaken by the Initial Review Panel. The conclusion reached, as set out in the McGlynn draft Cabinet minute, was that direct negotiations would not provide value for money for the state. The Kelly Cabinet minute ignored that conclusion and sought to proceed directly to the direct negotiation stage.

In the event direct negotiations were authorised by the Budget Committee of Cabinet, the Guidelines set out a number of steps to be followed. The first involved the issuing of a public statement outlining the reasons for adopting direct negotiations. The next involved inviting the proponent to provide a detailed proposal for assessment. The next stage involved assessment of the proposal. Assuming the assessment was positive, approval of the Budget Committee of Cabinet was then required in order to enter into contract negotiations. It can be appreciated

that, by recommending the Budget Committee of Cabinet approve direct negotiations with AWH, that company would have a second opportunity to submit its proposal and could potentially benefit from that opportunity by modifying its proposal, either at the time of submission or during the course of negotiations, to improve its chances of success.

A copy of the Kelly Cabinet minute is at Appendix 6. It is worthwhile to highlight some of the more troubling contents of that minute.

The Kelly Cabinet minute noted that the priority of the matter was "High". That contrasted with the McGlynn draft Cabinet minute in which priority was classified as "Normal". There was nothing in the Kelly Cabinet minute to indicate why the matter should be classified as being of high, as opposed to normal, importance.

The Kelly Cabinet minute referred to the AWH proposal as being a "solicited" proposal rather than an unsolicited proposal. This was done by claiming Dr Schott's letter to AWH of 8 August 2008 solicited a proposal from AWH. As seen earlier in this report, that was, at the very least, a matter of contention. The Kelly Cabinet minute did not identify that claim as being contentious.

The Kelly Cabinet minute sought approval for direct negotiations with a view to commencing an assessment of the AWH PPP proposal and, once assessment was completed, providing a further recommendation to the Budget Committee of Cabinet. The AWH proposal had, of course, already been assessed by the Initial Review Panel. The results of that review were set out in the McGlynn draft Cabinet minute. As seen in the previous chapter, that assessment was distinctly unfavourable to AWH.

While the Kelly Cabinet minute acknowledged that an assessment had been conducted by the Initial Review Panel, it provided few details of that assessment and sought to downplay its effect. The work of the Initial



Review Panel was also misrepresented. At page 14 of the Kelly Cabinet minute, it was claimed that the Initial Review Panel gave no consideration to the benefit SWC and the state would derive from having water infrastructure delivered through private funding. As set out in the previous chapter, the Initial Review Panel did consider that issue in detail and clearly came to the view that the proposal did not provide value for money.

There was also a claim, at page 14 of the Kelly Cabinet minute, that the approach undertaken by the Initial Review Panel in concluding that a competitive tender would likely draw a better outcome was inconsistent with the Guidelines and Dr Schott's letter of 8 August 2008. That claim was based on the assertion that AWH had "the exclusive right" for the financing and provision of water infrastructure in the North West Growth Centre and therefore any issue of a competitive tender could not arise. That, of course, was AWH's position. The Kelly Cabinet minute made no mention of the fact that position was hotly disputed by SWC.

Paragraph 3.5 of the Kelly Cabinet minute cited the solicitor general's opinion that AWH had a legal agreement to submit the proposal without requiring a competitive tender. The date of that advice was incorrectly referred to in paragraph 3.5 as 16 October 2009 (the advice was actually dated 15 October 2009). In any event, the solicitor general did not advise that AWH had a legal entitlement to proceed without a competitive tender. In his advice, the solicitor general examined the relevant provisions of the Guidelines as well as the contractual arrangements between AWH and SWC. He noted that the AWH proposal to acquire existing infrastructure was not covered by the Other Stages Deed or Dr Schott's letter of 8 August 2008 and therefore the requirement in the Guidelines to demonstrate the net benefits of not undertaking a competitive tender process would apply. With respect to that part of the proposal dealing with the provision of future infrastructure, the solicitor general advised

that it would still be necessary for SWC to demonstrate the reasons for, and net benefits of, not undertaking a competitive tender process.

Paragraph 3.5 of the Kelly Cabinet minute also asserted that the solicitor general was of the opinion that a decision to proceed with direct negotiations could be made without taking the Guidelines into account. That failed to reflect the full extent of the solicitor general's advice. In his advice of 15 October 2009, the solicitor general had merely noted that the Guidelines were not legally binding on the government, and that the Guidelines provided that a departure from their requirements could be countenanced by the Budget Committee of Cabinet. In his conclusion, the solicitor general advised that the Guidelines required an assessment as to whether a proposed PPP would result in the delivery of improved public services more cost effectively. He noted that, under the Guidelines, SWC was required to demonstrate the reasons for, and net benefits of, the AWH proposal proceeding by way of direct negotiation rather than a competitive tender process being undertaken. The assertion in paragraph 12.3 of the Kelly Cabinet minute, that the solicitor general had expressed an opinion that the Guidelines did not apply, was wrong.

Paragraph 4.9 of the Kelly Cabinet minute referred to the legal advice AWH had obtained from Mr Walker and Mr Lockhart to the effect that the "no viable competition" test was satisfied because the state was contractually bound to deal with AWH, thereby rendering competition from any other firm not viable. Once again, the minute was silent on the SWC position. No mention was made of the solicitor general's advice of 19 May 2008, which is dealt with in chapter 10. That noted that the position was far from clear.

Paragraph 5.2 also misrepresented the solicitor general's advice. The solicitor general did not advise that the Guidelines did not apply nor did he advise that not

proceeding to direct negotiations could expose the state to significant damages. The solicitor general did not advise whether, in his opinion, the AWH proposal was a solicited proposal.

Paragraph 6.10 of the Kelly Cabinet minute asserted as a fact that AWH had an exclusive right to procure water infrastructure in the North West Growth Centre. Once again, that was AWH's position but it was not the position taken by SWC, and no mention was made that such a claim was disputed.

Paragraph 7.6 of the Kelly Cabinet minute was also misleading. Although it referred to the fact that the NSW Government would receive cash for the transfer of SWC assets to AWH, no mention was made of the Initial Review Panel's assessment that the proposed transfer would result in losses to the state. There was no substantiation for the claim that approval of the AWH proposal would improve housing affordability. The claim that the AWH proposal would stimulate water industry competition in NSW was debunked by the Initial Review Panel assessment set out in the McGlynn draft Cabinet minute.

The statement in paragraph 8.3, that the solicitor general preferred the view of AWH in relation to the interpretation of the Other Stages Deed, was wrong. So was the statement in paragraph 12.2 to the effect that the solicitor general considered AWH had the legal right to have the proposal dealt with in the absence of competition because only AWH had the right to provide water infrastructure in the North West Growth Centre. The solicitor general never gave such advice.

The entire "Risk Allocation" section of the McGlynn draft Cabinet minute was deleted and replaced with contents favourable to AWH. The "Financial Impact" of Mr McGlynn's document section also underwent drastic alteration.

## The view of others on the Kelly Cabinet minute

On 6 May 2010, copies of the Kelly Cabinet minute were sent to Ms Leeson, the premier's office and NSW Treasury.

Neither the Department of Premier and Cabinet or the NSW Treasury supported the Kelly Cabinet minute recommendations.

Ms Leeson told the Commission that no one within Mr Kelly's office had discussed altering the McGlynn draft Cabinet minute with her or offered her any explanation for the changes. She said it was "unusual" for a minister's office to alter a Cabinet minute without referring back to the office that had drafted the minute,

and that she had never before or since experienced any other occasion on which a minute had been so radically altered without discussion. She said that the Department of Premier and Cabinet had the expertise to assess PPP proposals and she knew of no one in Mr Kelly's office with any comparable skills. She regarded the Kelly Cabinet minute as "very poor Government" and said that it would "certainly mislead the Cabinet".

On 6 May 2010, Ms Leeson sent a copy of the Kelly Cabinet minute to Mr McGlynn. Mr McGlynn read it. He emailed Ms Leeson later that day that there were "several untrue statements" in the Kelly Cabinet minute and that he disagreed that the AWH proposal was a solicited proposal. He noted the claim in paragraph 10.3 of the Kelly Cabinet minute, that a 15% return was normal, was "manifestly untrue". Although those were strong terms, he told the Commission he thought his response was "rather restrained".

One of the first things that Mr McGlynn did was to attempt to discover who was responsible for the changes. He told the Commission that, "I started to look at the properties of the [electronic version of the] document ... which are recorded with that document to see who wrote it". He could not find anything so he then used a metadata analyser. That indicated the metadata had been erased. In his experience, that meant that someone had deliberately erased the metadata.

As noted above, the Kelly Cabinet minute cited the advice of the solicitor general in support of its recommendations. Ms Leeson, therefore, sought advice from Paul Miller, the acting deputy director general (general counsel) of the Department of Premier and Cabinet, as to whether the Kelly Cabinet minute accurately conveyed the legal advice received from the solicitor general on the AWH proposal. Mr Miller's written advice of 7 May 2010 was that it did not. He noted, in particular, that contrary to what was claimed in clause 5.2 of the Kelly Cabinet minute, the solicitor general had not advised that the AWH proposal was a solicited proposal, had not advised that the Guidelines did not apply and had not advised that the state could be exposed to significant damages if it did not proceed with direct negotiations with AWH.

A copy of the Kelly Cabinet minute was also provided to SWC. SWC's position was that the Kelly Cabinet minute contained a number of incorrect and inaccurate statements.

Dr Schott told the Commission that she was "shocked" when she saw the Kelly Cabinet minute and thought it was a "dreadful" document because it contained falsehoods, including that the PPP proposal represented value for money for the government.

Other SWC officers gave similar evidence.

The following chapters examine the conduct of those involved in the drafting of the Kelly Cabinet minute.

## Chapter 23: Ms Certoma's involvement

Claudia Certoma was a lawyer by training who worked as a policy adviser to Mr Tripodi between April and November 2009, when he ceased being minister for infrastructure. She then briefly worked with the Department of Premier and Cabinet before transferring to Mr Kelly's office in late 2009 as a policy adviser, principally in the area of infrastructure. She left his office in mid-April 2010.

At the public inquiry, Ms Certoma told the Commission that she first became aware of AWH through correspondence that came to Mr Tripodi's office. She recalled speaking to Mr Tripodi about AWH on a number of occasions. When asked at the public inquiry whether Mr Tripodi ever spoke to her about other private companies providing infrastructure in competition with SWC, she claimed she could not recall.

During her earlier compulsory examination on 18 June 2013, she had told the Commission Mr Tripodi had not mentioned any other company to her. When that evidence was put to her in the public inquiry, she said she stood by it. She could not recall Mr Tripodi ever suggesting any enquiries should be made to ascertain whether companies other than AWH could compete with SWC to provide water infrastructure. She agreed that, if Mr Tripodi wanted to open the provision of water infrastructure up to competition, she could have found out the names of potential competitors.

In her compulsory examination, Ms Certoma said that she knew that the solicitor general had provided an opinion that cast doubt on whether AWH was entitled to the benefit of any contract. She told Mr Tripodi about that opinion because he had presented the position as being one where AWH was the beneficiary under a contract. She recalled that his response was "we should seek another opinion through the Department of Premier and Cabinet". He did not explain to her why he did not accept the solicitor general's opinion. She did not know what basis he had for disagreeing with that opinion. She agreed that, by seeking further advice, Mr Tripodi was assisting

AWH. At the public inquiry, she agreed that evidence was truthful. She said she did not know why Mr Tripodi was assisting AWH.

Mr Tripodi did request further advice as to whether, under the Guidelines, there was any impediment to the Budget Committee of Cabinet approving direct negotiations between SWC and AWH. That resulted in the solicitor general's advice of 15 October 2009 referred to in the previous chapter. The solicitor general's advice was that it was necessary, under the Guidelines, to demonstrate the reasons for, and the benefits of, the proposal proceeding by way of direct negotiation rather than by way of a competitive tender process. Ms Certoma told the Commission that she discussed that advice with Mr Tripodi. He told her he did not consider the position was clear and remained concerned that there was a risk of litigation.

On 15 December 2009, after she commenced working in Mr Kelly's office, Ms Certoma sent an email to Ms Leeson concerning the AWH PPP proposal. In her email, she advised that the "Minister has decided he wants the timetable brought forward so that the minute recommending negotiation or rejection be ready by end of February", and asked if there was a draft minute "we can review". Ms Certoma told the Commission she could not recall why Mr Kelly wanted the timetable brought forward. She confirmed, however, that Mr Kelly did not show any interest in companies other than AWH being able to compete with SWC for the provision of water infrastructure.

During her compulsory examination, Ms Certoma told the Commission that she prepared a Cabinet minute in relation to AWH on Mr Brown's instructions. The information to draw the minute came from Mr Brown, who gave her a document from a computer disc he had. She said that both Mr Brown and Mr Kelly told her the minute should recommend the "contract ... should be upheld". She understood the reason for reversing the recommendation in the McGlynn draft

Cabinet minute was to allow AWH “to put forward their proposal … so that it could be assessed”.

On 14 April 2010, Ms Certoma sent an email to Mr Brown with an attached early draft version of the Kelly Cabinet minute. The email noted that amendments had been marked up on the attachment. She agreed that she had prepared the attached document but said she could not recall what changes she had made. She said she made changes that she was asked to make but claimed not to recall who asked her to make the changes. When taken to her earlier compulsory examination evidence that Mr Brown and Mr Kelly gave her instructions about what to put in the Kelly Cabinet minute, she said she stood by that evidence. She said neither Mr Brown nor Mr Kelly told her their reasons for the changes they instructed her to make. Under cross-examination by counsel for Mr Kelly, she again changed her evidence and said she could not recall if Mr Kelly gave her any instructions about what to put in the Kelly Cabinet minute but said she may have been at a meeting with Mr Kelly where it was discussed.

She said she understood Mr Kelly wanted to reverse the recommendation in the McGlynn draft Cabinet minute because he “thought there was a legal entitlement that AWH, there was a risk of litigation, because of that entitlement”. She was not asked on what basis Mr Kelly believed there was a risk of litigation.

It is clear that some of the contents of the Kelly Cabinet minute were the result of Ms Certoma’s work. However, she left Mr Kelly’s office in mid-April 2010 and was not responsible for making all the changes that resulted in the final version of the Kelly Cabinet minute.

Ms Certoma denied removing the metadata to disguise who was responsible for preparing the Kelly Cabinet minute.

The Commission is satisfied that Ms Certoma’s contribution to the Kelly Cabinet minute was based on instructions she received from Mr Kelly and Mr Brown and information she received from Mr Brown. It is improbable

that she was acting on her own initiative when she worked on the document that became the Kelly Cabinet minute. She did not have the level of knowledge required for many of the changes. As will be seen in the next chapter, Mr Brown generally accepted that he instructed her on what to put into the draft minute she was preparing.

The Commission accepts the submissions made on her behalf that she was, in effect, acting as a functionary following instructions from those senior to her and that, from her perspective, the minute was drafted to accord with Mr Kelly’s view as to what should be presented to the Budget Committee of Cabinet.

# Chapter 24: Mr Brown's involvement

Mr Brown was Mr Kelly's chief of staff between February and July 2009. He was also a longstanding friend of Edward Obeid Sr's and knew that Edward Obeid Sr and Mr Kelly were also longstanding friends. As set out in chapter 20, while Mr Brown was Mr Kelly's chief of staff, Edward Obeid Sr had spoken with him about AWH being able to get a contract to privatise water and sewerage services in the North West Growth Centre. Mr Brown told the Commission that he told Mr Kelly that Edward Obeid Sr had spoken to him about AWH.

## Mr Brown's contact with Mr Tripodi and Mr Di Girolamo

Mr Brown also knew Mr Tripodi. Mr Brown agreed that there was "plenty of contact" between him and Mr Tripodi, and said there were "frequent meetings on this particular issue and the privatisation of provision of services". He explained that Mr Tripodi was interested in the AWH proposal because "[h]e believed it was an avenue to introduce privatisation and competition into the supply of water and sewerage", and had expressed the view that Dr Schott's letter of 8 August 2008 had solicited the PPP proposal. He described Mr Tripodi as being "pretty passionate" about AWH being able to put forward its PPP proposal.

Mr Brown recalled that Mr Tripodi had told him "there was an issue with AWH, they wanted to talk to [Mr Kelly about]". Mr Tripodi suggested that he telephone Mr Di Girolamo. Mr Brown asked him for Mr Di Girolamo's telephone number. Mr Tripodi told him that Edward Obeid Sr had his number. Mr Brown then contacted Edward Obeid Sr, who gave him Mr Di Girolamo's mobile telephone number. Mr Brown told the Commission that he rang the number and spoke to Mr Di Girolamo's secretary. He told the Commission that Mr Di Girolamo rang him back and, "I had a talk with him about, for about half an hour". Mr Brown placed that conversation sometime in February 2010.

At the public inquiry, Mr Brown initially told the Commission that he did not contact Mr Di Girolamo with the intention of arranging a meeting with Mr Kelly but rather "to try to get some information on the issue they were complaining about". That was different from the evidence he had previously given in his compulsory examination of 18 June 2013. After being referred to that evidence, he agreed that he contacted Mr Di Girolamo to arrange for him to meet Mr Kelly, but said that he did so for the purpose of gathering information about the provision of infrastructure in the North West Growth Centre. He gave the following evidence:

*There had obviously been a discussion with the Minister, I have had previous discussions with Joe Tripodi about that, who was the previous Infrastructure Minister, and I understand I would have had discussions with some people in Planning about particular issues to do with the North West Growth Centre.*

He said he asked Mr Di Girolamo to meet with Mr Kelly because AWH was doing work in the North West Growth Centre. He denied that he contacted AWH because Mr Tripodi or Edward Obeid Sr asked him. He said that other "people in Planning" spoke to him about AWH but he could not recall who they were.

Although Mr Brown initially maintained that he had only spoken to Mr Di Girolamo once on the telephone, there was other evidence suggesting a greater degree of direct or indirect contact with Mr Di Girolamo.

Mr Brown's personal planner listed two telephone numbers for Mr Di Girolamo; one was a mobile number that Mr Brown said Edward Obeid Sr gave him, and the other was a landline number, which he told the Commission he got from Mr Di Girolamo. There was a record in Mr Brown's notebook of a telephone conversation he had with Mr Di Girolamo on 5 March 2010. On the next page, there was a reference to

another telephone conversation with Mr Di Girolamo at 6.45 pm on that day. Mr Brown told the Commission that that conversation concerned Mr Di Girolamo's claim that AWH was entitled to directly negotiate on its PPP proposal. The notebook also recorded a telephone conversation with Mr Di Girolamo at 1.40 pm on 22 March 2010. Mr Brown told the Commission that he could not recall that conversation.

Telephone records obtained by the Commission showed that there were six calls between Mr Di Girolamo and Mr Brown in March 2010. Some of those were relatively long in duration. A call on 5 March lasted for over eight minutes. A call on 22 March went for over seven minutes. After seeing those records, Mr Brown conceded that his earlier evidence, about the extent of his contact with Mr Di Girolamo, was wrong, but claimed that, at the time he gave his earlier evidence, he had not recalled the extent of their telephone contact.

Mr Di Girolamo also had Mr Brown's email address. The Commission located one email that Mr Di Girolamo sent to Mr Brown on 7 June 2010 in which he requested a meeting with Mr Kelly. That was prior to the Kelly Cabinet minute being placed on the Budget Committee of Cabinet agenda for consideration. Mr Brown told the Commission he did not know how Mr Di Girolamo obtained his email address.

The report that Mr Di Girolamo prepared for the AWH board meeting on 25 February 2010 referred to the timeline for Budget Committee of Cabinet approval of direct negotiations for the PPP and that AWH's concerns about a letter from the Department of Premier and Cabinet had been expressed to Mr Brown. It also noted that Mr Di Girolamo had been informed that "the Minister is satisfied with the information provided to date, and is prepared to enter into the direct negotiation phase". Mr Brown told the Commission that Mr Di Girolamo had expressed his concerns about SWC and told him that "there should be a negotiation of the proposal that they

had submitted to [SWC]". He said that he did not know where Mr Di Girolamo obtained the information that Mr Kelly was satisfied with the information provided, but said it did not come from him.

Mr Brown knew that Kerry Sibraa, of Jackson Wells, was a lobbyist for AWH. Mr Sibraa told the Commission that he had known Mr Brown since 1990. A Department of Premier and Cabinet memorandum of 10 February 2010 recorded that Mr Brown was present at a meeting with Mr Sibraa to discuss AWH. The minute recorded that "DPC was asked to attend a meeting in [Mr Kelly's] office with the Hon Kerry Sibraa on behalf of his client, [AWH]". A message was left by Mr Sibraa on 5 May 2010 for Mr Brown to call him. Mr Sibraa sent him a meeting request on 1 June 2010.

In his evidence to the Commission, Mr Di Girolamo agreed that he was in contact with Mr Brown. He said that Mr Brown was "supportive" of the AWH PPP proposal. He also obtained information through Mr Sibraa. That included the information in his February 2010 report to the AWH board.

Mr Sibraa told the Commission that he telephoned Mr Brown "every now and then" to find out how the matter was progressing. He recalled he met with Mr Brown on 9 February 2010 and provided him with a document from AWH, but he could not recall the contents of that document.

The Commission is satisfied that the information contained in Mr Di Girolamo's 25 February 2010 report to the AWH board came from Mr Brown, either directly or through Mr Sibraa.

By February 2010, Mr Brown was chasing up the Department of Premier and Cabinet for information on the progress of preparation of a Cabinet minute. That department had anticipated that a draft minute would be available by the end of February 2010 but, given the complexity in devising the Public Sector Comparator, the

department advised Mr Brown in late February 2010 that the timeline had slipped to 12 March 2010. Mr Brown was asked at the public inquiry why he was pursuing progress with the Cabinet minute. He gave the following evidence: "I was pursuing this and the issue because I had, as I said before, I talked with Joe Tripodi, I talk [sic] with Eddie Obeid, I talk with various other people about the issue of AWH....".

Later, he said he chased the matter up following a discussion with Mr Kelly. He said he understood that conversation flowed on from a discussion between Mr Kelly and Mr Tripodi and "possibly" Edward Obeid Sr.

As explained in the next chapter, Mr Kelly was interested in pursuing the AWH PPP proposal. It is likely that Mr Brown chased up the matter after speaking with Mr Kelly. That could have been either because Mr Kelly asked him to do so or because Mr Brown suggested he do so and sought Mr Kelly's consent. What is clear is that Mr Brown understood, directly from Mr Tripodi or through Mr Kelly, or both, that Mr Tripodi was interested in the progress of the matter. The Commission is also satisfied that Mr Brown knew, from his discussions with Edward Obeid Sr, that he too was interested in the matter.

Mr Brown denied that the reason behind him pursuing the PPP proposal was because he wanted to do a favour for his friend and Labor Party colleague, Edward Obeid Sr. He denied knowing that the Obeid family had any interest in AWH or that Edward Obeid Jr worked for an AWH-associated company.

## Mr Brown's action after receiving the McGlynn draft Cabinet minute

Mr Brown received a copy of the McGlynn draft Cabinet minute on 12 April 2010.

He told the Commission that, before the McGlynn draft Cabinet minute was received in Mr Kelly's office, both he and Mr Kelly believed that it would recommend rejection of the AWH proposal. He told the Commission that Mr Kelly had already made up his mind that, despite what might be in the McGlynn draft Cabinet minute, he wanted to put forward a recommendation in a Cabinet minute that would lead to negotiation with AWH.

Mr Brown knew that Mr McGlynn was a highly qualified specialist in the area of assessing long-term infrastructure projects and had worked with a highly qualified team of people in coming to the conclusions set out in his draft Cabinet minute. He agreed that neither he nor Mr Kelly had those skills. Despite this, the McGlynn draft Cabinet minute was set aside.

Mr Brown agreed that, any time prior to emailing the Kelly

Cabinet minute to Ms Leeson on 6 May 2010, he had done nothing to warn anyone within the Department of Premier and Cabinet that Mr Kelly wanted to change the McGlynn draft Cabinet minute recommendation. He said that he did not involve that department in making any alterations because "I knew what their position was and it was steadfast".

Mr Brown said that, in about January 2010, Mr Tripodi contacted him and told him that he had some notes and had prepared a draft Cabinet minute. Mr Brown told Mr Kelly. Mr Kelly agreed that they should obtain a copy of Mr Tripodi's draft Cabinet minute and "have a look at it". Mr Brown then went to Mr Tripodi's office and collected a copy of Mr Tripodi's draft Cabinet minute. He was also given an electronic copy on a computer disc or USB. He showed Mr Tripodi's draft Cabinet minute to Mr Kelly.

Mr Brown also gave a copy of Mr Tripodi's draft Cabinet minute and the computer disc to Ms Certoma and asked her to draft a new Cabinet minute.

As explained in the preceding chapter, Ms Certoma prepared an early draft of what became the Kelly Cabinet minute and sent it to Mr Brown just prior to her leaving Mr Kelly's office. Her draft was based on the McGlynn draft Cabinet minute but with changes taken from Mr Tripodi's draft Cabinet minute. Some of the changes involved factual assertions. Mr Brown said that, apart from talking with Mr Tripodi, nothing was done to ascertain whether any of the assertions set out in Mr Tripodi's draft Cabinet minute were correct. He acknowledged that incorporating unverified factual assertions into a Cabinet minute was "bad Government".

Ms Certoma's version of the Kelly Cabinet minute underwent subsequent significant change before the final version was produced. Mr Brown told the Commission he was not sure who made the changes to Ms Certoma's draft but thought he "may have made some". He said that he received further information from Mr Tripodi on what to put in the minute because Mr Tripodi was "... the only person that I would have accepted information from in relation to this matter". In his earlier compulsory examination, he told the Commission that some of the information in the Kelly Cabinet minute came from AWH. When reminded of that evidence at the public inquiry, he agreed that some information had come from AWH.

It was Mr Brown's evidence that, although Mr Kelly was involved in discussions about the contents of the minute, including the recommendation, Mr Kelly did not physically draft any of the content.

While Mr Brown may have made some changes to the draft minute prepared by Ms Certoma, the Commission is not satisfied that he was responsible for all of the

changes. So far as the final version of the Kelly Cabinet minute contained representations of fact, Mr Brown was unable to explain that material. He did not set out to verify factual assertions and he agreed that it contained a good deal of technical information he did not understand. He agreed that the final version of the Kelly Cabinet minute included references to matters, such as the Rosehill Community Recycled Water Project, of which he was unaware. He was unable to explain why some information, detrimental to the AWH position, set out in the McGlynn draft Cabinet minute, did not appear in the Kelly Cabinet minute.

Mr Brown told the Commission that once the redrafting was finished, he gave the minute to Mr Kelly, who read it and then signed it.

Mr Brown denied removing the metadata to disguise who was responsible for preparing the Kelly Cabinet minute and did not know who was responsible for that.

In his evidence to the Commission, Mr Brown acknowledged that the Kelly Cabinet minute “very substantially” misrepresented the truth and would have been “highly deceptive” to a recipient. He agreed that he was prepared to put forward a Cabinet minute that was deceptive in order to achieve an outcome that he and Mr Kelly wanted. In his compulsory examination, he agreed that the Kelly Cabinet minute was prepared for submission to Cabinet without Mr Kelly or him knowing whether all the information in it was accurate. Although he knew that AWH wanted to enter into direct negotiations for its PPP proposal, he denied the minute was prepared for the purpose of providing a benefit to AWH. He agreed that Mr Kelly, Mr Tripodi and Edward Obeid Sr wanted AWH to be able to directly negotiate a PPP proposal. He told the Commission, “we agreed on the same objective that [AWH] should be able to sit down, we didn’t know or indicate what the outcome should be, they should be able to negotiate and finalise the issue”.

Mr Brown told the Commission that he knew the background of some of the members of the Budget Committee of Cabinet and that they were members of Edward Obeid Sr’s “Terrigal” faction. He agreed with senior Counsel Assisting that, in those circumstances, it was thought that the numbers in the Budget Committee of Cabinet might be mustered to support the recommendation at a political level, even if the bureaucrats were opposed.

Later, under cross-examination, Mr Brown told the Commission that he expected the Budget Committee of Cabinet would not accept the Kelly Cabinet minute “in the form we put it” but “they would come to a compromise, as government does, and there would be a limited negotiation between [AWH] and [SWC]”.

He ultimately accepted that the Kelly Cabinet minute was a strategy to achieve that objective. Even such a relatively modest objective would have, of course, provided a distinct advantage to AWH, as it would give it the opportunity to negotiate a more favourable outcome than it would have obtained if the McGlynn draft Cabinet minute had gone forward.

## Chapter 25: Mr Kelly's involvement

As the minister responsible for submitting the Kelly Cabinet minute to the Budget Committee of Cabinet, Mr Kelly was centrally involved in attempting to obtain a favourable outcome for AWH.

Mr Kelly was an experienced minister, having served in a number of portfolios before becoming minister for infrastructure on 8 December 2009.

On 9 December 2009, Mr Di Girolamo wrote to Mr Kelly about the AWH PPP proposal. On 10 December 2009, Mr Di Girolamo sent an email to Anthony Pooley, who was then Premier Keneally's deputy chief of staff. In his email, Mr Di Girolamo enquired about what was happening with approval for direct negotiations. Mr Pooley responded that no Cabinet minute had been completed and directed him to Mr Kelly as any Cabinet minute would have to be sponsored by him as minister for infrastructure.

Within days of Mr Kelly's appointment as minister for infrastructure, he was approached by Edward Obeid Sr, who asked him to meet with AWH to discuss the provision of water services to western Sydney. Mr Kelly said he told Edward Obeid Sr to talk to Mr Brown. Mr Kelly said he met with Mr Di Girolamo; although, it is not clear on the evidence when that meeting occurred. There was evidence of a meeting between Mr Kelly and Mr Di Girolamo on 23 September 2010, after the Kelly Cabinet minute was finally withdrawn. It is not clear from the evidence whether there was any earlier meeting between them.

Mr Kelly told the Commission that he was interested in the AWH PPP proposal because he understood western Sydney needed development and the delivery of water infrastructure was holding up that development. That interest did not explain his actions in favouring the AWH PPP proposal. Dr Schott told the Commission that she met with Mr Kelly about the pace of development in the North West Growth Centre. She told him that the relatively slow pace of development was a market factor that had nothing to do with any lack of power or water

infrastructure. Ms Certoma also recalled advice that there was no need to rush ahead with the provision of water infrastructure because there was a lack of demand.

Although Mr Kelly told the Commission that he wanted to move forward with the provision of infrastructure for western Sydney, as will be seen, his actions in achieving this were limited to one company; that is, AWH.

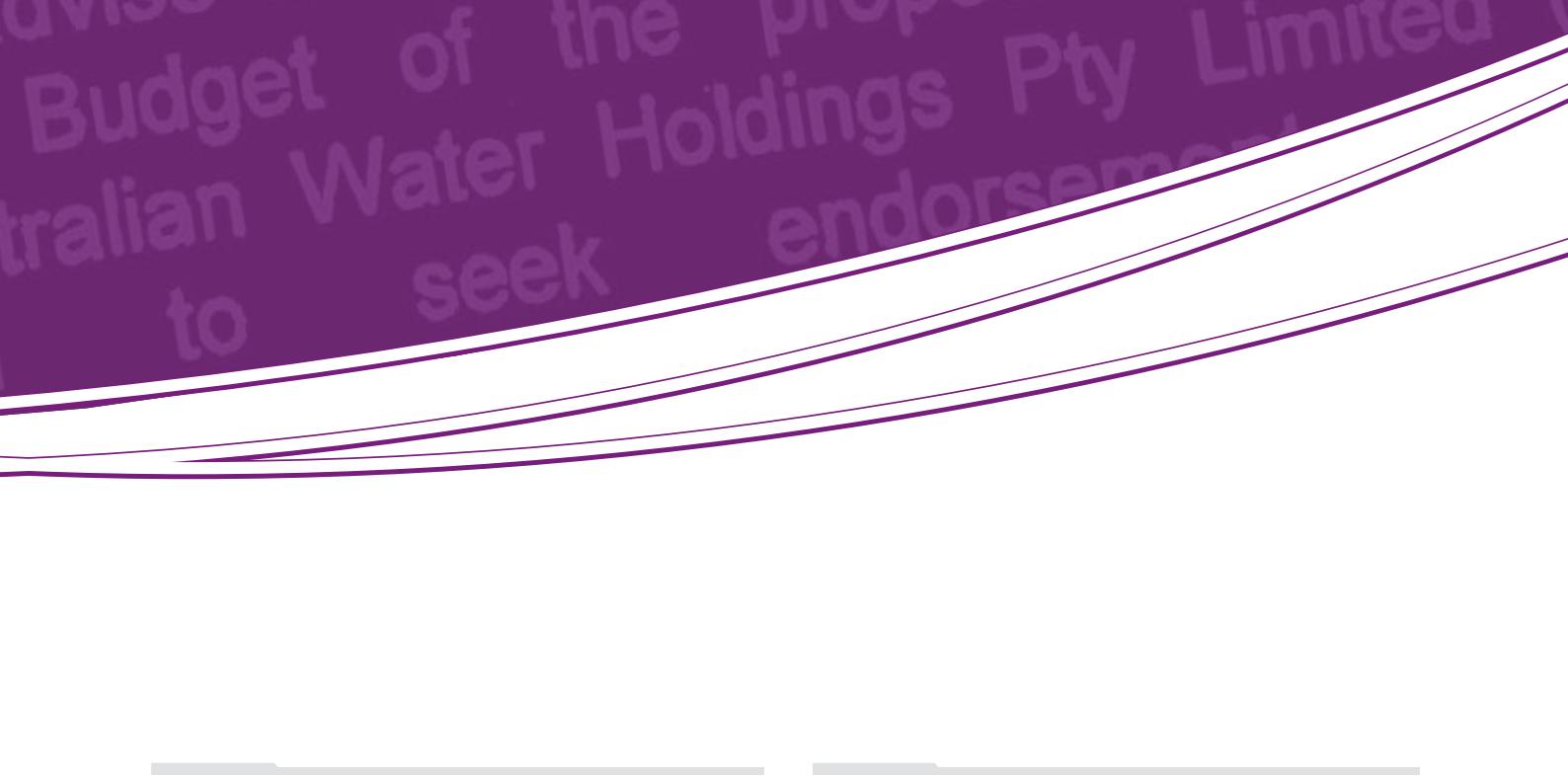
On 14 December 2009, Ms Certoma, who was by then working for Mr Kelly, sent an email to organise a meeting between Mr Kelly, Mr Brown, Ms Leeson and another officer of the Department of Premier and Cabinet. The email specified the agenda of the meeting as:

- (a) *a general infrastructure/Major Projects briefing; and*
- (b) *briefing on AWH and moving forward as discussed with the previous Minister for Infrastructure.*

As the recently appointed minister for infrastructure, there was nothing unusual about the request for Mr Kelly to be briefed on major infrastructure projects. Why only one specific project was singled out for discussion was less understandable. Mr Kelly told the Commission that he wanted a briefing from the Department of Premier and Cabinet because that department "had carriage of infrastructure". He said that he assumed the request for a briefing on AWH was added by Ms Certoma because she had carriage of that matter when she worked for Mr Tripodi. He agreed with senior Counsel Assisting that it was also likely that the briefing on AWH was requested because of the likelihood Mr Kelly would be meeting with someone from AWH and he needed to be prepared for that meeting.

The briefing occurred on the morning of 15 December 2009. Ms Leeson told the Commission that Mr Kelly was briefed on infrastructure in general, but the only specific project in which he was interested was the AWH PPP proposal.

At 12.45 pm that day, Ms Certoma sent an email to Ms Leeson in which she advised that:



*The Minister has decided he wants the timetable brought forward so that the minute recommending negotiation or rejection be ready by the end of February.*

*Also, is there a draft minute (as discussed with the previous Minister) we can review? Was the original plan to submit a minute informing the BCC [Budget Committee of Cabinet] of the process being undertaken?*

*Di – we received another letter this week from AWH to the Minister and the Premier. I have sent the corre up to you by internal mail for a response for signing by the Minister. The Minister will be on leave after Friday, so could I have a letter response by Friday please (along with the summary and timetable we discussed at the meeting)?*

Ms Certoma told the Commission that she could not remember the reason why Mr Kelly wanted to bring forward the timetable for submission of a Cabinet minute dealing with the AWH PPP proposal. Mr Kelly told the Commission he did not know how the email came about and did not agree that he had decided to bring the timetable forward. He suggested that the request was made by Ms Certoma on her own initiative. The Commission rejects any such suggestion. Her email made it clear that it was the minister who wanted the timetable brought forward. Ms Certoma was Mr Kelly's policy adviser and, as such, acted under his direction. She would not have made such a significant request unless acting under Mr Kelly's instructions.

On 18 December 2009, Mr Kelly wrote to Mr Di Girolamo about the AWH PPP proposal. That was the letter Ms Certoma had asked Ms Leeson to prepare. In the letter, Mr Kelly informed Mr Di Girolamo that he had carriage of the matter, that he had received a briefing from the Department of Premier and Cabinet, that the assessment of the PPP proposal had commenced, and that a meeting had been arranged for Mr Di Girolamo with that department "next week" to outline the assessment

process and detail what further information was needed from AWH. The letter also advised that Mr Kelly had requested a "full briefing on the project" be forwarded to him and that Mr Kelly would be kept updated on the progress of the assessment.

On 10 February 2010, officers of the Department of Premier and Cabinet were asked to attend Mr Kelly's office to meet with Mr Sibraa to discuss progress with the AWH PPP proposal. Mr Kelly told the Commission he did not know about the meeting. The Commission does not accept that he did not know about the meeting. The AWH PPP proposal was a significant matter and one in which Mr Kelly was clearly interested and one in which he wanted to be kept updated. The meeting was held in his office and was attended by his chief of staff. While the Commission accepts that Mr Kelly was not present at the meeting, it is satisfied that he knew about the meeting and would have been briefed, at least in general terms, on what occurred at the meeting.

Mr Sibraa made a written report on the meeting to Mr Di Girolamo. According to that report, Ms Leeson had advised that the Department of Premier and Cabinet had received all the information it required from AWH and that NSW Treasury was assisting with the assessment of the AWH PPP proposal.

Mr McGlynn recalled that there was "fairly continuous contact" from Mr Kelly's office concerning the progress of the assessment of the AWH PPP proposal. He said that no enquiries came from that office seeking information as to what other companies might be able to provide water infrastructure.

In his 25 February 2010 report to the AWH board, Mr Di Girolamo had noted that he was informed that Mr Kelly "is satisfied with the information provided to date, and is prepared to enter into the direct negotiation phase". Mr Kelly told the Commission that, as at February, he was not prepared to enter into the direct negotiation phase

because the Department of Premier and Cabinet had not completed its assessment of the AWH PPP proposal. There was other evidence, dealt with below, that Mr Kelly had decided to recommend direct negotiations with AWH irrespective of the outcome of the assessment.

## Mr Kelly and the McGlynn draft Cabinet minute

A copy of Mr McGlynn's draft Cabinet minute was sent to Mr Kelly's office on 12 April 2010.

Mr Kelly told the Commission that, although he was aware of a draft Cabinet minute recommending rejection of the AWH proposal, he had not seen it. He said that Mr Brown told him about the McGlynn draft Cabinet minute and that the recommendation was to reject negotiation with AWH. Mr Brown told the Commission that he did show the McGlynn draft Cabinet minute to Mr Kelly. Given that it concerned a significant infrastructure project in which Mr Kelly was clearly interested, it is more likely that Mr Brown did give Mr Kelly a copy of the McGlynn draft Cabinet minute.

Mr Kelly said he told Mr Brown, "Well, that's the end of it", but Mr Brown said, "We can prepare our own Cabinet minute". Mr Kelly agreed that a new Cabinet minute should be prepared recommending that negotiations proceed.

In his evidence to the Commission, Mr Kelly agreed that he did not have the requisite specialist or technical skills to determine whether the AWH PPP proposal represented good value for NSW. The fact that he did not even bother to read the McGlynn draft Cabinet minute to ascertain the basis on which the recommendation was made or whether the PPP proposal was of any real benefit to NSW, is consistent with Mr Kelly having a closed mind to any recommendation other than one to proceed with consideration of the AWH PPP proposal. The Commission accepts Mr Brown's evidence, referred to in the previous chapter, that, before the McGlynn draft Cabinet was received, Mr Kelly had already made up his mind that, despite what might be in that document, he wanted to put forward a recommendation in a Cabinet minute that would lead to negotiation with AWH.

Mr Kelly claimed that one of the issues that drove him to direct a new minute be prepared was that there was competing legal advice as to whether SWC had solicited a PPP proposal. It is not clear, however, that Mr Kelly actually saw any legal advice on that issue. Although he initially claimed that he had seen parts of the opinions of Mr Walker and the solicitor general, he later said he had not seen them at all. He was unable to offer any satisfactory explanation for the competing advices not being set out in the Kelly Cabinet minute.

Mr Kelly also claimed that there was no point in putting up a Cabinet minute "that says do nothing". That, however, was not what the McGlynn draft Cabinet minute did. It carefully assessed and balanced the relevant factors with the aim of providing advice as to whether it was in the public interest to proceed with the PPP proposal. It provided reasoned and considered advice, prepared by those with relevant expertise, to the Budget Committee of Cabinet to reject the proposal.

## Mr Kelly and the redrafted Cabinet minute

Mr Kelly said a new Cabinet minute was prepared by Mr Brown, Ms Certoma and Mr Tripodi. Mr Tripodi was involved because he was a previous minister for infrastructure and Mr Brown suggested that he be involved because he had previously looked at the matter. Mr Kelly said that, as a former minister for infrastructure, he believed Mr Tripodi was suitably qualified to assist with drafting a new minute. Although he knew Mr Tripodi was working on the new minute, Mr Kelly told the Commission he only spoke to Mr Tripodi on one occasion concerning that minute. He explained that that, "was just a general thing as to where it was up to ... not to do with the content". He said he had no knowledge of what changes Mr Tripodi made.

Although he accepted ministerial and personal responsibility for the Kelly Cabinet minute, Mr Kelly was adamant that he did not work on it. He repeatedly attempted to downplay his role.

The Commission does not accept Mr Kelly's evidence as to his limited involvement in the preparation of the Kelly Cabinet minute. Mr Brown told the Commission that he showed Mr Kelly the material Mr Tripodi gave him and "we had a quick run through it" and they agreed to use Mr Tripodi's material to prepare a new minute. The Commission is satisfied that Mr Kelly and Mr Brown discussed the nature of the changes to be made, beyond merely what recommendation would be made. Such discussions would have been necessary to ensure that the contents of the new minute were consistent with Mr Kelly's views and that, once prepared, it would be a document that Mr Kelly was prepared to sign and support in any discussion in the Budget Committee of Cabinet meeting that considered his recommendation.

Mr Kelly told the Commission that he read the Kelly Cabinet minute carefully before signing it. At the time he signed it, he did nothing to verify the accuracy of any of the information in the minute or to compare its contents with those of the McGlynn draft Cabinet minute. The only thing he said he did was to ask Mr Brown if the figures in the minute were accurate. He did not, however, ask Mr Brown where the figures came from.

It is clear from the evidence that Mr Kelly had no interest in ensuring that the minute contained accurate information. Two examples will suffice to demonstrate that point.

Paragraph 4.15 of the Kelly Cabinet minute referred to SWC having accepted that AWH had delivered the stage I work for \$290 million “which was 50 per cent less than the cost estimates of SWC”. That was a significant claim and one that was highly favourable to the AWH position that it could deliver water infrastructure for better value than SWC. The claim was incorrect. Yet, Mr Kelly did nothing to ascertain from SWC whether that information was correct.

Paragraph 10.3 of the Kelly Cabinet minute referred to Mr Kelly having noted that, “the 15 per cent blended return sought by AWH is within the normal range of return for infrastructure investments and in fact could be higher given the recent financial market”. Once again, that was a statement favourable to AWH. Yet, Mr Kelly admitted to the Commission that the range of return for infrastructure investment was not something he knew about. It will be recalled that Mr McGlynn considered the claim a 15% return was normal was “manifestly untrue”.

Although there was an evident lack of expertise within Mr Kelly’s office with respect to the ability to properly assess a PPP proposal, no steps were taken to draw on the expertise of the Department of Premier and Cabinet, the members of the Initial Review Panel, SWC, any other government agency or any suitably qualified private consultant. No one in Mr Kelly’s office even took up Ms Leeson’s offer to brief them on the McGlynn draft Cabinet minute. Those failures to seek expert advice demonstrated a determination not to consider any views contrary to Mr Kelly’s position that direct negotiations with AWH should proceed.

Mr Kelly told the Commission that, despite the Department of Premier and Cabinet not being supportive of the AWH PPP proposal, he believed “there was a chance” a Cabinet minute recommending direct negotiations would get Cabinet approval because “as far as I was aware, there was not a predetermined view of the Budget Committee”. Ms Keneally also told the Commission that many Cabinet minutes try to get onto the Cabinet agenda that are disagreed with by NSW Treasury and the Department of Premier and Cabinet. Mr Kelly was certainly prepared to argue in favour of the recommendation for direct negotiations at any Cabinet meeting.

Mr Kelly told the Commission that the Kelly Cabinet minute was submitted to Cabinet in May 2010, but then withdrawn by Mr Brown because of what Mr Brown told him was SWC’s opposition. There was evidence of a meeting on 13 May 2010 attended by Mr Brown,

Ms Leeson, Mr McGlynn and Dr Schott, among others. Mr Brown told the Commission he arranged the meeting at Mr Kelly’s request. The purpose of the meeting was to ascertain what reasons the others had for not wanting the PPP proposal to proceed. Arranging such a meeting was something that should have been done much earlier in order to properly inform the drafting of the Kelly Cabinet minute. Mr Brown was aware from the meeting that the weight of opinion was against the AWH PPP proposal. He said the Kelly Cabinet minute was withdrawn that day.

That was not the end of the matter. The Kelly Cabinet minute was resubmitted in August 2010. There is evidence from which it can be inferred that the Kelly Cabinet minute was temporarily withdrawn in May 2010, with a view to enlisting the premier’s support. As set out in chapter 20 of this report, Edward Obeid Sr rang Ms Keneally sometime prior to the Kelly Cabinet minute being resubmitted in August 2010 and told her that the AWH PPP proposal should be explored.

There is also evidence, as set out in chapter 26 of this report, that Mr Tripodi contacted Ms Keneally and argued that the AWH PPP proposal was being frustrated by the public service and asked her to consider the AWH PPP proposal with an open mind.

Mr Kelly initially claimed he was unable to recall why he resubmitted his Cabinet minute in August 2010, but later said that, after a discussion with the premier, Ms Keneally, about water infrastructure in western Sydney, she invited him to resubmit it.

Ms Keneally told the Commission that Mr Kelly came to see her about the AWH PPP proposal. She recalled discussing with him her concerns that a member of the Obeid family worked for AWH and that, if the matter were considered by the Budget Committee of Cabinet, it would have to have merit. She told the Commission that Mr Kelly felt frustrated by the public service and wanted to bring the minute forward. She told the Commission that he said he had legal advice that the government had an obligation to enter into direct negotiations with AWH. She told the Commission, “it was the Cabinet minute that simply wouldn’t die”. She suggested Mr Kelly resubmit it so that she could get written advice on it from her department, NSW Treasury, SWC and the minister for water, with a view of being able to effectively quash it before it was considered by the Budget Committee of Cabinet.

Mr Kelly did not deny that Ms Keneally raised a concern that a member of the Obeid family was involved in AWH. He said that he could not recall if she raised that concern with him, but if such a concern were raised, it would have been later, when she told him the minute had to be withdrawn.

Given Mr Kelly's lack of recall, the Commission accepts Ms Keneally's evidence that, at the time they spoke about resubmitting the minute, she discussed with Mr Kelly her concern that a member of the Obeid family worked for AWH.

That Mr Kelly was insistent on resubmitting the minute was supported by an entry in Mr Di Girolamo's 30 June 2010 report to the AWH board on the PPP proposal. In that report, Mr Di Girolamo noted that the position of the Department of Premier and Cabinet was at odds with Mr Kelly's office, "namely that the Minister was recommending to the BCC that AWH enter into direct negotiations with the State". Mr Di Girolamo told the Commission that that information came to him from Mr Kelly's office. In his 26 August 2010 report, Mr Di Girolamo advised the AWH board that Mr Kelly was seeking Cabinet approval to enter into direct negotiations with AWH. That information was correct. The Kelly Cabinet minute was resubmitted in August 2010.

Mr Kelly denied knowing anything about the removal of the metadata from the Kelly Cabinet minute.

## Chapter 26: Mr Tripodi's involvement

Mr Tripodi became directly involved with the AWH PPP proposal when he was minister for infrastructure between 8 September 2008 and 17 November 2009. It is convenient to deal with his involvement at that time and then examine his involvement after he moved to the backbench.

### Mr Tripodi's initial involvement

Mr Tripodi was a close personal friend and factional colleague of Edward Obeid Sr's.

As set out in chapter 14, Mr Tripodi was present at Moses Obeid's Elizabeth Bay home on 22 August 2008, when there was a general discussion about AWH. The most that can be said concerning his presence at that meeting was that he would have been aware from the conversation that Moses Obeid was interested in AWH and the privatisation of water infrastructure assets.

As discussed in chapter 20, after Mr Tripodi became minister for infrastructure, Edward Obeid Sr spoke to him on several occasions about AWH and asked how the PPP proposal was progressing. He, therefore, knew that Edward Obeid Sr was interested in what the government was doing about progressing consideration of the AWH PPP proposal.

Mr Tripodi was also in contact with Mr Di Girolamo about the AWH PPP proposal. He described himself as being on "friendly terms" with Mr Di Girolamo. Telephone records obtained by the Commission identified a number of SMS and telephone conversations between them during the period from August 2009 to October 2012. The records show that Mr Di Girolamo and Mr Tripodi had each other's mobile telephone numbers. Mr Di Girolamo had Mr Tripodi's home facsimile number. Mr Di Girolamo initially accepted that he talked "constantly" to Mr Tripodi about the merits of the AWH PPP proposal. That included after Mr Tripodi had ceased to be minister for infrastructure. Under cross-examination, Mr Di Girolamo retreated from that position and said that they were not in

constant contact and agreed that, when Mr Tripodi was minister for infrastructure, their contact was minimal. It is unlikely there was any necessity for Mr Di Girolamo and Mr Tripodi to be "constantly" in contact about the AWH PPP proposal. Only minimal contact would have been necessary in the event that Mr Di Girolamo established that Mr Tripodi would support the AWH proposal. As will be seen below, Mr Di Girolamo did come to such an understanding.

Mr Tripodi told the Commission that Mr Di Girolamo told him AWH wanted direct negotiations for its PPP proposal. Mr Tripodi understood that direct negotiations would confer a considerable benefit upon AWH.

Mr Tripodi met with Mr Di Girolamo on 29 May 2009. According to Mr Di Girolamo's note of that meeting, he sought confirmation that the government was committed to a PPP and advised that the Guidelines did not cater for the AWH situation. There was a reference in Mr Di Girolamo's note to the establishment of a steering committee. Mr Tripodi told the Commission that, although Mr Di Girolamo wanted a steering committee to be established, he did not agree to do so. That was because, under the Guidelines, the establishment of a steering committee came much later in the process, after successful negotiation and a decision to proceed with the implementation of a PPP proposal.

Mr Di Girolamo wrote to Mr Tripodi on 14 August 2009 about the AWH disputes with SWC and the AWH PPP proposal. He included a copy of that proposal and a copy of his letter of 6 July 2009 to Mr McGlynn. In his letter, he noted that, "[t]he central issue now relates to the approval by the Budget Committee of Cabinet ... for direct negotiations between the State and our company".

Although Mr Tripodi agreed with the proposition that it was critical to know whether AWH was capable of carrying out the PPP project, he had little knowledge about AWH. In his evidence to the Commission, he

agreed that he did not investigate its background, he did not know how many employees it had or its capital structure. He only knew of the nature of its relationship with SWC from what he had read in material provided to him by Mr Di Girolamo. He said that he had no discussions with SWC because, not being minister for water, SWC did not report to him. He did not seek information on that subject from the minister for water. He told the Commission that he did not make those enquiries because, as minister for infrastructure, his only interest was the PPP proposal and it "wasn't [in] my interest to be involved [in] the other parts of the relationship". He said that the issue of AWH's capacity to deliver the PPP project was a matter for the assessment process undertaken by Mr McGlynn.

While the Commission agrees that the issue of AWH's capacity to deliver its PPP project was primarily a matter for the assessment process undertaken by Mr McGlynn and the Initial Review Panel, given Mr Tripodi's interest in, and ultimate support for, the AWH proposal, it is, to say the least, strange that he did not seek other available sources of information to test what he was told by Mr Di Girolamo. It would have been relatively easy for him to speak with a fellow minister about AWH and its work with SWC.

There was other evidence of Mr Tripodi's interest in, and commitment to, the AWH PPP proposal.

Ms Leeson recalled a meeting with Mr Tripodi in his office on 10 July 2009. The meeting concerned major projects. She told the Commission that Mr Tripodi was interested in infrastructure projects generally but the AWH PPP proposal "was the one he referenced the most".

The minutes of the AWH board meeting of 30 July 2009, dealing with the AWH PPP proposal, recorded Mr Di Girolamo's advice that he believed Mr Tripodi "is a strong and committed supporter of our cause". Mr Di Girolamo told the Commission he got that impression from talking with Mr Tripodi. Mr Tripodi told the Commission that he did not know how Mr Di Girolamo could have drawn that conclusion because, as of 30 July 2009, he was relatively uninformed about the AWH PPP proposal, although he was an "enthusiastic supporter of PPPs in the private provision of infrastructure".

Mr McGlynn told the Commission that, when minister for infrastructure, Mr Tripodi was "very interested" in progress with the AWH PPP proposal. He said he attended at least two, perhaps more, meetings with Mr Tripodi or staff from his office. He said that Mr Tripodi commented about the need for SWC to have competition and that the availability of land was prejudiced by lack of progress in providing infrastructure in the North West Growth Centre. He also mentioned the prospect of

litigation if the AWH PPP proposal were knocked back and that the potential liability could be in the region of between \$100 million and \$200 million. They were the amounts asserted by AWH and were not based on any independent legal advice or assessment of potential damages that Mr Tripodi had received. Mr Tripodi's comment could be regarded as evidence of an intention on his part to attempt to influence Mr McGlynn to look favourably on the AWH proposal in order to avoid the government being sued for substantial damages. Mr McGlynn, however, was not adversely influenced. He told the Commission, "it wasn't something that bothered me because I didn't think it was an issue".

Mr McGlynn gave the following evidence of what he told Mr Tripodi at their first meeting which, it appears from an electronic meeting invitation, occurred on 10 July 2009:

*I pointed out to him ... that it was my view that the construction, for example, of the works in the North West Growth Centre, by [AWH] was available to [SWC] under the Other Stages Deed and so they didn't need to enter into a PPP to get that, they could have it already so if there was any benefit that benefit was already available and that, it's unlikely given the size of capital cost and the rest of the costs associated with water, that there was going to be much available elsewhere. I also pointed [out] to him that the cost of water in Sydney is not such that it's able to support a private investment in water because the price is too low.*

While that may have cast some doubt on the advantages of pursuing the PPP, Mr McGlynn had not reached any concluded view at that time. That was borne out by a December 2009 briefing note he authored in which he noted that, depending on the terms of the financial offer, the PPP had the potential to bring significant benefit to the state. Although the briefing note was addressed to the minister for infrastructure, it was dated after Mr Tripodi had ceased to be the minister of that portfolio. In any event, despite what he had been told by Mr McGlynn at their meeting, Mr Tripodi continued to pursue the AWH PPP proposal after July 2009.

Mr Pooley was Ms Keneally's chief of staff when she was minister for planning and her deputy chief of staff when she became premier in December 2009.

He told the Commission that he first became aware of AWH sometime in the second half of 2009, prior to Ms Keneally becoming premier. The subject arose in a meeting in Mr Tripodi's office. Part of the discussion involved the provision of water-related infrastructure. Mr Pooley recalled that Mr Tripodi criticised SWC's slow pace of rolling out new infrastructure and said private sector involvement was required. Mr Tripodi suggested speaking with AWH.

Mr Tripodi told the Commission that he had no recollection of mentioning AWH at the meeting.

The Commission accepts Mr Pooley's evidence that Mr Tripodi suggested he contact AWH. That Mr Tripodi only mentioned AWH in the general context of private sector involvement in infrastructure, to the exclusion of other potential private sector providers, is consistent with a desire on his part to advance the interests of AWH. In that respect, it is also relevant to note Ms Certoma's evidence that Mr Tripodi's interest in private sector provision of water infrastructure was limited to AWH and that he never asked her to research which other companies might be able to provide such services.

Sometime after his meeting with Mr Tripodi, Mr Pooley received a telephone call from Mr Di Girolamo. Mr Di Girolamo's note of his conversation with Mr Pooley was dated 23 November 2009. By that stage, Ms Keneally had become minister for infrastructure.

Mr Pooley recounted that Mr Di Girolamo told him he had been dealing with Mr Tripodi and there was a minute coming up to Cabinet, "and that I should look out for it and it was very important and would speed up delivery of water infrastructure". Mr Pooley's recollection of the discussion generally accorded with Mr Di Girolamo's note.

There was evidence that Mr Tripodi attended another meeting on 9 November 2009 with Mr McGlynn concerning the AWH PPP proposal; that was just a few days before he ceased to be minister for infrastructure. Mr Tripodi told the Commission that it was at that meeting he asked for a Cabinet minute so that the Budget Committee of Cabinet could decide whether to approve direct negotiations. It is clear that, by this stage, Mr Tripodi was a proponent of progressing the matter through Budget Committee of Cabinet approval to enter into direct negotiations with AWH without first undertaking the evaluation exercise required by s 3.3 of the Guidelines.

On 16 November 2009, Mr Di Girolamo sent an email to other AWH directors in which he advised that:

*...the Minister [Mr Tripodi] had directed DPC [the Department of Premier and Cabinet] to prepare a Minute for BCC to approve direct negotiations. The current advice I have received is that this means there is a process which will be progressed, ie it doesn't stop just because the Minister has been replaced.*

In his 23 November 2009 report to the AWH board, Mr Di Girolamo also advised that the "Minister informed us (informally) that he had directed DPC to draft a Minute for BCC approval. It was our understanding that the BCC would consider the Minute in early December 2009".

Mr Di Girolamo told the Commission the information came from Mr Sibraa. Mr Tripodi said he could not recall telling Mr Di Girolamo that he had asked for a minute to be prepared and that it was possible that the information had come from Ms Certoma, who worked in his office.

By 23 November 2009, Mr Tripodi was no longer minister for infrastructure. Ms Keneally had become the new minister and occupied that office until 4 December 2009. Thereafter, Mr Kelly was the minister. Mr Tripodi was, therefore, no longer in a position to bring a minute before the Budget Committee of Cabinet.

Also in his 23 November 2009 report to the AWH board, Mr Di Girolamo had advised that Mr Tripodi had received advice from the solicitor general that there was no legal impediment to the Budget Committee of Cabinet approving direct negotiations. That was confidential legal advice that should not have been provided to Mr Di Girolamo or anyone associated with AWH. Mr Di Girolamo told the Commission that he either received that information about the contents of the solicitor general's advice through a lobbyist employed by AWH or directly from Mr Tripodi's office. Ms Certoma denied providing the information. The Commission is not satisfied that anyone in Mr Tripodi's office would have provided AWH with confidential legal advice prepared for the minister without Mr Tripodi's knowledge. The most likely explanation is that the information came directly from Mr Tripodi.

Mr Tripodi told the Commission that he came to the view that the AWH PPP proposal was "potentially a small 's' solicited proposal because of the effect of [Dr Schott's letter of 8 August 2008]". He considered the government was bound by that letter. He told the Commission he became "more solid" in that view after reading the advice from the solicitor general.

Putting aside the fact that the Guidelines make no provision for a "small 's'" solicited proposal, it is difficult to see on what basis his view, that the matter was a solicited proposal, could have been strengthened by the solicitor general's advice.

The solicitor general's advice was sought by the Department of Premier and Cabinet, acting on behalf of Mr Tripodi as minister for infrastructure. The solicitor general was asked to advise whether the government could approve direct negotiations with AWH "in relation to an unsolicited proposal" for a PPP. The resulting advice of 15 October 2009 set out the relevant background to the AWH PPP proposal, examined the relevant sections of the Guidelines, referred to the 6 August 2009 legal opinion provided to AWH by Mr Walker and Mr Lockhart, and considered the contractual arrangements between SWC and AWH.

The advice noted that Mr Walker and Mr Lockhart had been of the opinion that there was a benefit of not undertaking a competitive tender process because of AWH's contractual rights under the Other Stages Deed, as varied by Dr Schott's letter of 8 August 2008. The solicitor general noted that the AWH PPP proposal sought the purchase or long-term lease of already delivered infrastructure and that there was nothing in the Other Stages Deed or the letter of 8 August 2008 that could constitute an invitation to AWH to make such a proposal. That should have put paid to any suggestion that the PPP proposal, at least with respect to the purchase or long-term lease of already delivered infrastructure, was a solicited proposal.

There was evidence that Mr Tripodi sought to enlist Ms Keneally's support.

Ms Keneally recalled that Mr Tripodi spoke to her about the AWH PPP proposal at Parliament House. The discussion was about the same time as her discussion with Edward Obeid Sr, which was prior to Mr Kelly resubmitting his Cabinet minute. She said that Mr Tripodi pushed for the matter to go to Cabinet. He argued that the AWH PPP proposal was being frustrated by the public service and asked her to consider the AWH PPP proposal with an open mind. He also asked her to talk with him about it further before she made a decision. She told the Commission that, despite this request, she did not get back to him. She considered that Mr Tripodi was an enthusiastic supporter of the AWH PPP proposal but that his support was consistent with his generally held philosophical view that private enterprise could often deliver infrastructure services more efficiently than the public sector, particularly in growth areas. Given his philosophical view, she did not consider his support for the AWH PPP proposal as surprising.

Ms Keneally told the Commission that, in her discussion with Mr Tripodi, she told him she had concerns that a member of the Obeid family worked for AWH. She understood that Mr Tripodi knew that a member of the Obeid family worked for AWH because he did not deny that was the case. She recollects that Mr Tripodi told her the "Libs" were also involved and therefore she did not need to worry about the opposition raising a fuss if the Budget Committee of Cabinet approved the minute. He did not tell her who the "Libs" were.

Mr Tripodi said he had a discussion with Ms Keneally in either December 2009 or early February 2010. He told the Commission he did not go into any details about the AWH PPP proposal but asked Ms Keneally to speak with him if it came before her. He told the Commission he made this request because he was "very concerned" about the negative attitude of the public service towards the AWH proposal and wanted to give her the benefit of

his knowledge. He said that he did not say anything about one of Edward Obeid Sr's sons being involved in AWH or that members of the Liberal Party were also involved in AWH.

Ms Keneally also recalled a second discussion with Mr Tripodi, most likely in August 2010 and before the Kelly Cabinet minute was withdrawn. That was over the telephone, while she was at her home. He rang her and asked if she had made a decision with respect to the AWH PPP proposal. She told him she had not made a decision. He asked her to come back to him before she made a decision. She told the Commission she did not do so because Mr Tripodi had no formal role in the process.

Mr Tripodi disputed that he had a telephone discussion with Ms Keneally on that subject. He agreed that he did have another discussion with her, but that was after she had asked Mr Kelly to withdraw the Kelly Cabinet minute. He said the conversation occurred in her parliamentary office, while she was in her private bathroom. He asked her what had happened and she told him she had decided to not progress the matter because Edward Obeid Jr was involved in AWH. Mr Tripodi told her it was "a shame" because "the Libs would have come out and supported this announcement [for direct negotiations with AWH]". Ms Keneally was adamant that she had never had any conversation with Mr Tripodi while she was in her parliamentary office bathroom.

The Commission accepts Ms Keneally's evidence as to her conversations with Mr Tripodi.

It was Mr Tripodi's position that he understood it was necessary to obtain Budget Committee of Cabinet approval for direct negotiations before there could be an assessment of any PPP proposal. He even told the Commission that, when he found out that the Department of Premier and Cabinet was undertaking an assessment, he asked Ms Leeson to stop it.

In cross-examination by counsel for Mr Tripodi, it was put to Mr McGlynn that, at a meeting on 24 August 2009, Mr Tripodi made it clear he did not want the PPP proposal assessed until the Budget Committee of Cabinet had agreed to proceed. Mr McGlynn denied that was the case and gave the following evidence:

*My recollection is that he was very keen for this estimate to proceed all the time that we spoke to him, in fact I was getting phone calls from our friend Claudia [Certoma] frequently asking where are we up to on the assessment so that completely is in conflict with my recollection of what happened.*

The Commission accepts Mr McGlynn's evidence on this point. There is no other evidence of Mr Tripodi contacting anyone in the Department of Premier and Cabinet to

object to that department undertaking the assessment of the AWH PPP proposal.

Mr Tripodi told the Commission that he believed there were two options open to the government with respect to the AWH PPP proposal; one involved going to competitive tender and the other involved engaging in direct negotiations. He said that he considered that, in light of Dr Schott's letter of 8 August 2008, which advised that SWC would consider a proposal from AWH if it "equals or betters a Public Sector Comparator", the government was bound "to go all the way to assessment and using the Public Sector Comparator". That position, however, was undermined by his evidence that an assessment process, using the Public Sector Comparator, was "actually the process [Mr McGlynn] deployed when he did his assessment".

Indeed, the process undertaken by the Initial Review Panel involved KPMG undertaking a Public Sector Comparator. That concluded there was no clear value advantage to the AWH proposal. The Initial Review Panel had not, of course, concluded its assessment by the time Mr Tripodi ceased to be minister for infrastructure. What is striking is that, as demonstrated below, Mr Tripodi persisted with pushing for direct negotiations in a draft Cabinet minute he prepared for Mr Kelly to use, despite knowing that the assessment process established by the Department of Premier and Cabinet had rejected the PPP proposal. He did not make any enquiry as to whether that assessment process had included a Public Sector Comparator and, if so, the outcome of that exercise.

## Mr Tripodi's draft Cabinet minute

Mr Tripodi agreed that he used his laptop computer to prepare a 16-page draft Cabinet minute seeking approval for direct negotiations with AWH in relation to its PPP proposal. That was done after he ceased to be minister for infrastructure. A copy of that draft minute is at Appendix 7.

Some of the information in Mr Tripodi's draft Cabinet minute came from Mr Di Girolamo. There were assertions of fact in the draft minute. Mr Tripodi said that Mr Di Girolamo was his source of information for facts and numbers. Mr Di Girolamo also provided him with documents.

Mr Tripodi told the Commission that he prepared the minute in April 2010 entirely from notes he had made in October and November 2009, while minister for infrastructure. He said he wrote down what he believed "should have been the way forward in terms of progressing a minute for a direct negotiation" with AWH. That was despite the fact that, by November 2009, the Initial Review Panel had not completed its assessment of the PPP proposal. That suggested that he had pre-judged the matter should proceed by way of direct negotiation

and was not interested in any contrary view. Mr Tripodi said that although, by the time he made his notes, he was coming to the view there should be direct negotiations, he had not finally come to that view.

Mr Tripodi said he had a discussion with Mr Kelly in which Mr Kelly told him that the Department of Premier and Cabinet had rejected the AWH proposal. Mr Tripodi knew that Mr McGlynn had been engaged in the assessment of the AWH PPP proposal and agreed, in his evidence to the Commission, that Mr McGlynn was better qualified than him when it came to the assessment of large infrastructure projects. Nevertheless, Mr Tripodi told the Commission that he did not ask to see Mr McGlynn's assessment in order to consider whether the decision of the Department of Premier and Cabinet to reject the AWH PPP proposal was justified. Instead, in April 2010, he typed up his notes into the form of a draft Cabinet minute for Mr Kelly's benefit.

Mr Tripodi told Mr Kelly that he believed Budget Committee of Cabinet approval was needed for direct negotiations before there could be an assessment. He offered to provide his "thoughts" to Mr Kelly, who accepted the offer. He subsequently provided his draft Cabinet minute to Mr Brown. He knew that his draft would be used as the basis for Mr Kelly's minute.

It was Mr Tripodi's evidence that he told Mr Brown that everything in the material he provided needed to be checked. Mr Brown was not asked at the public inquiry whether Mr Tripodi told him anything needed to be checked. Mr Brown told the Commission he "probably" asked Mr Tripodi where he got the information in Mr Tripodi's draft Cabinet minute. He did recall that Mr Tripodi had told him on one occasion that the information came from AWH and his contacts at the Department of Premier and Cabinet and SWC. Mr Brown told the Commission nothing was done by him to independently check the accuracy of the information in Mr Tripodi's draft Cabinet minute.

In any event, even if Mr Tripodi did tell Mr Brown that the information needed to be checked, that would not absolve him from responsibility for inaccurate or wrong information contained in his draft Cabinet minute. The Commission is satisfied that Mr Tripodi knew that his document would be relied on by Mr Brown and Mr Kelly and that it would either be adopted for use as a Cabinet minute to be put forward by Mr Kelly or that significant parts of it would be used in such a minute.

Mr Tripodi's draft Cabinet minute recorded the priority of the matter as "High" and named Mr Kelly as the responsible minister. It recommended the Budget Committee of Cabinet approve direct negotiations between the Department of Premier and Cabinet

and AWH "for the exclusive provision of new water infrastructure and the sale and/or long-term lease of [SWC] water infrastructure in the North West Growth Centre". The minute recommended that occur on the basis that the Department of Premier and Cabinet would report to the Budget Committee of Cabinet before any agreements were made with AWH.

Mr Tripodi's draft Cabinet minute referred to the AWH PPP proposal for the provision of new water infrastructure as being a "solicited" proposal. That was based on the claim that Dr Schott's letter of 8 August 2008 had solicited a PPP proposal from AWH. Mr Tripodi's draft Cabinet minute claimed there was "no viable alternative to [AWH] in progressing a PPP because of the effect of [Dr Schott's letter of] 8 August, 2008" and the Other Stages Deed. That was important because, as noted in Mr Tripodi's draft Cabinet minute, it satisfied the prerequisite in the Guidelines for direct negotiations that there be no viable competition for the delivery of the proposed service.

The second AWH proposal, relating to the sale or lease of SWC water infrastructure, was clearly an unsolicited proposal. The Guidelines provided that unsolicited proposals would be subject to an assessment process and market testing through competitive tendering. Mr Tripodi's draft Cabinet minute did not directly address those requirements and merely noted, at paragraph 4.44, that that proposal "must be considered by direct negotiations if such negotiations for the first part of the proposal are approved by the Budget Committee and succeed".

Paragraph 4.20 of Mr Tripodi's draft Cabinet minute falsely represented that the Department of Premier and Cabinet had formed a view supportive of direct negotiations. Mr Tripodi knew from his discussion with Mr Kelly that the Department of Premier and Cabinet had recommended rejection of the entire AWH PPP proposal.

Although Mr Tripodi's draft Cabinet minute made reference to the assessment process undertaken by the Department of Premier and Cabinet's Initial Review Panel (see, for example, paragraph 4.34), it did not note that the Initial Review Panel had recommended rejection of the AWH PPP proposal. No reference was made to the position taken by SWC with respect to the AWH PPP proposal or that SWC disputed that it had solicited such a proposal.

There was no reference in Mr Tripodi's draft Cabinet minute that SWC disputed the claims made by AWH that it had an effective legal monopoly when it came to the provision of water infrastructure in the North West Growth Centre and therefore there could be no viable competition to it when it came to the provision of such services. Although the legal advice obtained by AWH was cited in support of AWH's contention that it had an effective monopoly, the solicitor general's advice of

19 May 2008 that cast doubt on that claim was not set out.

Paragraph 4.25 of Mr Tripodi's draft Cabinet minute wrongly asserted that Dr Schott's letter of 8 August 2008 recognised "the exclusive rights of [AWH] to procure water infrastructure for [SWC] in the North West Sector". That assertion was false. Dr Schott's letter made no such concession to AWH.

Paragraph 4.37 of the Mr Tripodi's draft Cabinet minute asserted that direct negotiations with AWH would provide better value for money than a competitive tender process because there was "no doubt a decision to progress a [PPP] with a party other than [AWH] would lead to legal dispute and probable significant damages payable to [AWH] (see the legal opinion of the Solicitor General, M G Sexton SC dated 19th May 2008...)" . That suggested that the solicitor general had provided advice on 19 May 2008 that a decision to progress a PPP by way of open tender would inevitably lead to AWH taking legal action that could result in "significant" damages. That was not the advice provided by the solicitor general.

The solicitor general's advice was concerned with whether SWC could call for tenders for the delivery of water infrastructure in the North West Growth Centre. He advised that the provisions of the Other Stages Deed were far from clear "and it is impossible to say with any confidence how they would be construed by a court". Although he noted that one option available to AWH was to seek a court's ruling to prevent SWC from seeking competitive tenders, he did not express any views that such a course was inevitable or what quantum of damages might be involved in the event AWH succeeded. It will be recalled that Mr Tripodi had previously told Mr McGlynn that, if the AWH PPP proposal were knocked back, the potential liability could be in the region of between \$100 million and \$200 million. That estimate came from AWH.

Also in support of the contention that direct negotiations would provide better value for money than a competitive tender process was the assertion, in paragraph 4.37, that AWH had delivered the stage 1 work at a cost of \$290 million when SWC had estimated the cost at \$600 million. That statement was highly favourable to AWH because it suggested that AWH could deliver infrastructure considerably more efficiently than SWC. Mr Tripodi told the Commission he obtained that information from Mr Di Girolamo, had not checked it with SWC, and had assumed it was correct. He agreed that the statement was subsequently proven incorrect.

At paragraph 4.63, it was claimed that the estimated value of the SWC assets to be acquired by AWH was \$200 million. Mr Tripodi told the Commission that

information came from Mr Di Girolamo. The McGlynn draft Cabinet minute noted the value of those assets had been estimated by KPMG as between \$317 million and \$449 million.

Mr Tripodi's draft Cabinet minute was clearly a work-in-progress as some of the sections had headings without any content and the content of some sections had not been completed. An example is at paragraph 4.55, where the last sentence was left uncompleted. Interestingly, that paragraph was copied into the Kelly Cabinet minute as it was (paragraph 14.11) and left incomplete.

Sections of Mr Tripodi's draft Cabinet minute were included in the Kelly Cabinet minute. They included (with some minor alterations) paragraphs from:

- 4.1 to 4.12
- 4.14 to 4.19
- 4.21 to 4.31
- 4.45 to 4.62
- 4.64 to 4.68
- 4.70 to 4.72.

Mr Tripodi agreed that the Kelly Cabinet minute used a lot of the material from his draft document, including several paragraphs taken word-for-word from his document. Other changes were subsequently made to the Kelly Cabinet minute before it emerged in its final form.

## Mr Tripodi and the Kelly Cabinet minute

Mr Tripodi said that his involvement in the creation of the Kelly Cabinet minute ended when he handed over his draft Cabinet minute to Mr Brown; although he had, on one occasion, asked how preparation of the minute was going and was told "it's fine". Although Mr Tripodi acknowledged that, knowing Mr Brown, some of the additional material in the Kelly Cabinet minute did not appear to emanate from Mr Brown, he denied that he was involved in the drafting of that document. He also denied seeing the final version. Although Mr Brown had told the Commission that he received further information from Mr Tripodi on what to put in the minute, Mr Tripodi denied that that was the case.

Mr Brown agreed there was a lot of contact between him and Mr Tripodi. Telephone records bore out that evidence. They established that there were 41 telephone calls or SMS messages between them during the period 8 December 2009 to 20 September 2010. A number of those contacts occurred in the period from 27 April to early May 2010, during the time when the Kelly Cabinet minute was under preparation. Mr Tripodi explained these

contacts on the basis that he had issues in his electorate about which he needed to contact Mr Brown. He claimed there was no discussion about the Kelly Cabinet minute.

The Commission accepts Mr Brown's evidence that Mr Tripodi provided him with some assistance after the handover of the material. There was no reason for Mr Brown to falsely implicate Mr Tripodi. The Commission also notes that Mr Kelly understood that Mr Tripodi was "assisting" with drawing up the Kelly Cabinet minute, although he did not know what in fact he did. It is not possible, however, to assess the extent of Mr Tripodi's subsequent involvement with the preparation of the Kelly Cabinet minute. This is because, although there is information in that document that Mr Brown could only have obtained from someone else, the fact that he also had input from AWH means that not all that information can be attributed to Mr Tripodi.

Mr Tripodi denied knowing anything about the removal of the metadata from the Kelly Cabinet minute.

# Chapter 27: Were Mr Di Girolamo and Edward Obeid Sr involved in drafting the Kelly Cabinet minute?

The purpose of this chapter is to examine whether Mr Di Girolamo and Edward Obeid Sr were involved in the decision to prevent the McGlynn draft Cabinet minute from being presented to Cabinet and to prepare the Kelly Cabinet minute.

## Mr Di Girolamo

It was clearly in Mr Di Girolamo's interests that the McGlynn draft Cabinet minute not proceed to the Budget Committee of Cabinet for consideration and that it be superseded by another Cabinet minute favourable to his position. His position was that the Budget Committee of Cabinet should approve direct negotiations with AWH. He was motivated to do what he could to progress the AWH PPP proposal by the knowledge that, if that proposal were ultimately approved, he would gain financially through the increase in value of his shares in AWH.

There is evidence that Mr Di Girolamo provided material to Mr Tripodi and that Mr Brown had access to some AWH material. Some information from that material found its way into Mr Tripodi's draft Cabinet minute and the Kelly Cabinet minute.

The Commission, however, is not satisfied that the evidence establishes that Mr Di Girolamo directly assisted in drafting the Kelly Cabinet minute.

## Edward Obeid Sr

Edward Obeid Sr told the Commission that he only became aware that AWH wanted a PPP after it was "knocked back" by the government. He said no one consulted him about the AWH PPP and when he found out about it he thought it was a "stupid" idea because it was not warranted. For the reasons previously given, the Commission rejects his evidence that he only became aware of the PPP after it had been rejected.

Edward Obeid Sr knew that members of his family were interested in obtaining shares in AWH and that the value of those shares would increase in the event the AWH PPP proposal was approved. He had a clear motivation to ensure that the McGlynn draft Cabinet minute did not proceed. As Mr Brown told the Commission, Edward Obeid Sr's objective was to enable AWH to enter into direct negotiations with the NSW Government for its PPP proposal.

While Edward Obeid Sr had a strong motive to see a minute submitted to the Budget Committee of Cabinet seeking approval for direct negotiations as the next step in the PPP process, there is no evidence that he directly assisted in the drafting of the Kelly Cabinet minute.

## Chapter 28: What happened to the Kelly Cabinet minute?

As discussed above, the Kelly Cabinet minute was initially submitted to the Budget Cabinet Committee in May 2010 but withdrawn by Mr Brown before it could be considered. It was then resubmitted, unaltered, in August 2010.

In early May 2010, a copy of the Kelly Cabinet minute was sent to the Department of Premier and Cabinet, NSW Treasury, the premier's office and SWC.

On 1 June 2010, the director general of the Department of Premier and Cabinet sent a letter to Mr Di Girolamo advising that, based on the Initial Review Panel assessment of the AWH proposal, it had been decided not to proceed further with the proposal.

On 7 June 2010, Mr Di Girolamo wrote back to the director general disputing the conclusions reached by the Initial Review Panel. Another letter, expressing his concerns, was sent to Mr Kelly.

On 8 July 2010, the director general responded to Mr Di Girolamo's letter of 7 June 2010, advising that he was satisfied the process undertaken by the Department of Premier and Cabinet was appropriate and that the decision taken with respect to the AWH proposal was correct.

Shortly thereafter, Mr Di Girolamo sought a meeting with Mr Kelly. It appears from Mr Di Girolamo's CEO report to the AWH board of 29 July 2010, that Mr Sibraa met with Mr Brown on 12 July 2010. According to that report, Mr Brown told Mr Sibraa that Mr Kelly continued to support the AWH PPP proposal, the director general's letter of 8 July 2010 was sent without any input from Mr Kelly, the AWH proposal had the support of both the premier and the treasurer, and Mr Brown would "advance discussions with the Premier's office".

On 20 August 2010, Dr Schott sent the SWC response to the Kelly Cabinet minute to Phillip Costa, minister for water, and recommended he write to the premier asking her not to proceed with direct negotiations. Phillip Costa wrote to the premier on 30 August 2010.

The Kelly Cabinet minute was one of the items on the Budget Committee of Cabinet agenda for 25 August 2010. The record of that meeting indicated that the item was "deferred". The record of the Budget Committee of Cabinet on 6 September 2010 also indicated consideration of the Kelly Cabinet minute was deferred.

Ms Keneally told the Commission that the Kelly Cabinet minute was "a bad Cabinet minute. It was bad public policy. It would have resulted in a bad outcome for the people of New South Wales".

On 7 September 2010, Ms Keneally wrote to Mr Kelly advising that she had received correspondence from Phillip Costa and advice from the Department of Premier and Cabinet and NSW Treasury and that the substance of those communications was that SWC had not solicited a proposal from AWH and the AWH proposal did not represent value for money. Ms Keneally also noted that there was no evidence direct negotiations would provide a benefit over competitive tendering and that the solicitor general had advised that AWH did not have an exclusive right to a proposal under the Other Stages Deed. On these bases, the premier advised that she did not support the Kelly Cabinet minute and requested Mr Kelly to withdraw it. Ms Keneally told the Commission that she was also concerned about potential pecuniary interest conflicts arising from her understanding that one of Edward Obeid Sr's sons was involved with AWH. In any event, that was the end of the Kelly Cabinet minute.

In her letter to Mr Kelly, Ms Keneally noted that she shared his view that the government continue to ensure the availability of serviced lots and requested that, in order to address that issue, "...you bring forward a minute, jointly with Minister [Phillip] Costa, to outline how the Government should act to meet the requirements of Water Infrastructure in the North West Growth Centre". Ms Keneally told the Commission that Mr Kelly never got back to her or attempted to talk to her about the matter, and she never received any further minute on this subject.

Phillip Costa told the Commission that Mr Kelly never contacted him about the matters raised in Ms Keneally's letter. Mr Kelly told the Commission that he never spoke with Phillip Costa about the matters raised in Ms Keneally's letter and gave no directions to any of his staff to raise the matters with Phillip Costa. He told the Commission, "I personally did nothing about the letter".

It was submitted on behalf of Mr Kelly that no inference could be drawn from his failure to take any steps in response to Ms Keneally's invitation. That was because he may not have read her letter, he did not know of any other water infrastructure providers, and the government's term was close to ending.

The Commission does not accept that submission. In his evidence to the Commission, Mr Kelly never claimed that he did not read Ms Keneally's letter. The Commission does not consider it is credible that a minister would ignore a letter from the premier dealing with a matter in which he professed such an interest, and which matter had resulted in an instruction from the premier to him to withdraw a minute that he had submitted to the Budget Committee of Cabinet. Mr Kelly claimed that he was concerned to roll out development in western Sydney. If that were a genuine concern there were clear steps, as outlined in Ms Keneally's letter, that he could have taken. If he were not aware of other potential water infrastructure providers, he could have made enquiries. As Ms Certoma told the Commission, it was possible to find out the names of other potential providers. The fact that the government's term was coming to an end and there would be an election were reasons to pursue the provision of water infrastructure in the North West Growth Centre in order to develop a policy that could be taken to the electorate.

The Commission is satisfied that Mr Kelly took no action with respect to Ms Keneally's invitation because his interest in pursuing negotiations for the provision of water infrastructure in the North West Growth Centre was limited to the AWH PPP proposal.

# Chapter 29: Assessment of conduct

The conduct of each of Ms Certoma, Mr Brown, Mr Kelly, Mr Tripodi, Edward Obeid Sr and Mr Di Girolamo has been set out in the preceding chapters. The purpose of this chapter is to examine the motivation for their actions.

## Assessing Ms Certoma's conduct

For the reasons given in chapter 24 of this report, the Commission is satisfied that Ms Certoma acted under instructions when drafting the Kelly Cabinet minute. Her motivation was to do as she was directed by those instructions.

## Assessing Mr Brown's conduct

Mr Brown was one of the central figures involved in the Kelly Cabinet minute. He and Edward Obeid Sr were long-term friends and, according to Mr Brown, were in regular telephone contact during the period that Mr Brown worked for Mr Kelly. Edward Obeid Sr spoke to him about AWH and its PPP proposal. Mr Brown told the Commission that he knew, from his discussions with Edward Obeid Sr, that Edward Obeid Sr wanted AWH to directly negotiate with the government with respect to its PPP proposal.

Mr Brown also knew Mr Tripodi and was in regular contact with him. Although it was Mr Tripodi who suggested he contact Mr Di Girolamo, it was Edward Obeid Sr who gave him Mr Di Girolamo's telephone number. Mr Brown found out more information about AWH from Mr Di Girolamo. They subsequently remained in contact, and Mr Brown informed Mr Di Girolamo what was happening in Mr Kelly's office with respect to the AWH PPP proposal. Mr Brown chased up the Department of Premier and Cabinet for information on what was happening with the AWH PPP proposal. He understood that each of Mr Kelly, Edward Obeid Sr and Mr Tripodi were interested in the progress of the matter.

Although Mr Brown knew that Mr McGlynn was a highly qualified expert when it came to assessing infrastructure proposals, he participated in the decision to supplant the McGlynn draft Cabinet minute with one favourable to AWH. He helped draft a new minute with material he obtained, in large part, from Mr Tripodi, knowing that the new minute substantially misrepresented the truth and was "highly" deceptive.

The Commission is satisfied that Mr Brown's actions went beyond merely doing what he was bid to do by Mr Kelly.

The Commission finds that, in preparing the Kelly Cabinet minute for submission to the Budget Committee of Cabinet, Mr Brown was improperly motivated by a desire to provide an outcome favourable to AWH because he understood that that was what Edward Obeid Sr wanted.

In reaching that conclusion, the Commission has taken into account the evidence and findings set out earlier in this report, including:

- that Mr Brown's conduct in relation to the preparation of the Kelly Cabinet minute was extraordinary
- that Mr Brown knew that the Kelly Cabinet minute he helped prepare contained falsehoods and was deceptive
- Mr Brown's long-term friendship with Edward Obeid Sr
- Mr Brown's knowledge that Edward Obeid Sr wanted AWH to be able to directly negotiate with the government with respect to its PPP proposal to provide private water and sewerage services in the North West Growth Centre
- that Mr Brown pursued the Department of Premier and Cabinet over progress with preparation of a Cabinet minute because he knew that Edward Obeid Sr was interested in progress of the matter

- that the Kelly Cabinet minute recommended what Edward Obeid Sr had sought in his discussion with Mr Brown; namely, direct negotiations
- that the above recommendation was made despite Mr Brown knowing that Mr McGlynn, who Mr Brown knew to be a highly qualified specialist in the assessment of infrastructure projects, had recommended the rejection of the AWH PPP proposal
- that Mr Brown took no steps to discourage Mr Kelly from having the Kelly Cabinet minute prepared but rather actively engaged in its preparation with a view to recommending the Budget Committee of Cabinet approve direct negotiations with AWH
- that Edward Obeid Sr knew that, as Mr Kelly's chief of staff, Mr Brown could assist in achieving his objective, and it was for that purpose that he contacted Mr Brown about AWH.

## Assessing Mr Kelly's conduct

For the reasons set out below, the Commission rejects the submission made on behalf of Mr Kelly that, by submitting the Kelly Cabinet minute, Mr Kelly "was advancing his portfolio in accordance with government policy, with the potential to benefit the State..." .

Mr Kelly knew from his discussion with Dr Schott that the position of SWC was that the relatively slow pace of development in the North West Growth Centre was due to market factors, not the pace of delivery of water infrastructure. That put him on notice that any claim that the private provision of water infrastructure would speed up development was contested. Yet, almost immediately after becoming minister for infrastructure, he wanted the timetable for consideration of the AWH PPP proposal brought forward.

At his briefing on 15 December 2009, the only specific project of interest to him was the AWH PPP proposal. He never showed any interest in whether other companies might be able to compete with SWC. He pushed for a draft Cabinet minute in relation to the AWH PPP proposal. Although he knew that the AWH proposal was being assessed by the Department of Premier and Cabinet, he made up his mind that, despite what might be the outcome of that assessment, he would recommend to the Budget Committee of Cabinet that approval be given for direct negotiations with AWH.

Although he was aware that the McGlynn draft Cabinet minute recommended rejection of the AWH proposal, he did not read it to ascertain whether that document

advanced compelling arguments relevant to a decision to recommend Budget Committee of Cabinet endorsement of direct negotiations. That indicates he was not interested in the reasons why the proposal for direct negotiations with AWH should be rejected. He then arranged for a new minute to be prepared. He did so without expert advice and without knowing anything of substance about AWH or the veracity of its claims or expertise in providing water infrastructure services. He signed it without taking any effective steps to satisfy himself that it contained accurate information.

The Commission is satisfied that Mr Kelly had no objective basis for believing that the recommendation in the Kelly Cabinet minute would, if accepted by the Budget Committee of Cabinet, benefit the state. Indeed, Mr McGlynn's advice was that there was no prospect that direct negotiations would lead to an acceptable outcome for the state. Although Mr Kelly had not read the McGlynn draft Cabinet minute, he knew its effect from what he was told by Mr Brown. Everything in the Kelly Cabinet minute favoured AWH. His minute advanced the proposition that AWH had a legal right to advance its PPP proposal without AWH being subjected to market-place competition. That Mr Kelly was prepared to support that proposition is a strong indicator that he was not interested in whether, in the event private sector provision of water infrastructure was to occur, best value for public money should be obtained through a competitive tendering process. That Mr Kelly's interest in pursuing the private provision of water infrastructure was not really about benefitting the state, is borne out by his failure to take any action with respect to Ms Keneally's invitation to, jointly with Phillip Costa, bring forward another minute on the subject.

The Commission is satisfied that Mr Kelly's interest in pursuing negotiations for the provision of water infrastructure in the North West Growth Centre was limited to the AWH PPP proposal.

The recommendation in the Kelly Cabinet minute that the government proceed with direct negotiations with AWH conferred a distinct advantage on AWH. While the recommendation in the Kelly Cabinet minute did not equate with a recommendation that the AWH PPP proposal be accepted, it nevertheless represented a significant advantage for AWH. If the recommendation in the Kelly Cabinet minute were accepted, the door would be open to AWH to negotiate a deal that could lead to the transfer of control over water infrastructure in the North West Growth Centre to that company and result in significant financial advantage for that company and its shareholders. No such opportunity would exist if the McGlynn draft Cabinet minute were allowed to go forward to the Budget Committee of Cabinet, at least while the NSW Labor Party was in government.

If not motivated by a desire to benefit the state, what was Mr Kelly's motivation?

Mr Kelly denied that he acted to assist Edward Obeid Sr. It was submitted on behalf of Mr Kelly that he had no reason to act in accordance with the desires of Edward Obeid Sr because he was not a member of the "Terrigal" faction of the NSW Labor Party to which Edward Obeid Sr belonged, and had no close political relationship with Edward Obeid Sr. Mr Kelly told the Commission that he was in an opposing group to the Terrigals. He said, however, that he had "a lot" of discussions with Edward Obeid Sr just prior to his appointment as minister for infrastructure "about the new ministry and other positions that would have been held in Parliament". They were, of course, members of the same party and government and Edward Obeid Sr was known to be very influential within the NSW Labor Party and the parliamentary party.

In the evidence before the Commission, there was no suggestion that there was any enmity between them. On the contrary, Mr Brown told the Commission that Mr Kelly and Edward Obeid Sr were longstanding friends. There is no reason to disbelieve Mr Brown's evidence on that subject.

There is evidence from which the Commission infers that, in arranging to have the Kelly Cabinet minute prepared and submitted to the Budget Committee of Cabinet, Mr Kelly was knowingly and improperly acting in accordance with what he understood to be the wishes of Edward Obeid Sr.

Within days of his appointment as minister for infrastructure, Mr Kelly was contacted by Edward Obeid Sr about AWH. Thereafter, he showed significant interest in the AWH proposal and was driving for an early response to that proposal. That was despite knowing very little about AWH, including how many people it employed, what resources it had, its capital structure or the likely value of the PPP. He did not even speak with anyone from SWC to ascertain whether AWH had provided satisfactory services. He did not show any interest in other potential private providers of water infrastructure or other companies that might compete with AWH and, during his briefing by the Department of Premier and Cabinet, the only specific project in which he showed interest was the AWH PPP proposal. Although he knew that Mr McGlynn had assessed the AWH PPP proposal, he not only showed no interest in understanding and giving consideration to that assessment, he had decided to recommend that the Budget Committee of Cabinet approve direct negotiations without even waiting for that assessment to be completed.

It was submitted on behalf of Mr Kelly that there was insufficient evidence to demonstrate that Mr Kelly knew

direct negotiations would benefit Edward Obeid Sr. In doing Edward Obeid Sr's bidding, Mr Kelly would have understood that he was conferring some benefit on Edward Obeid Sr even if he did not know the precise nature of that benefit. The evidence does not establish that he understood the nature of that benefit or that the Obeid family hoped to benefit financially if the AWH PPP proposal were adopted.

## Assessing Mr Tripodi's conduct

It was submitted on behalf of Mr Tripodi that the fact he sought advice from the solicitor general, rather than rely on the legal advice provided by AWH, was inconsistent with an intention on his part to improperly favour AWH. It was submitted that seeking the advice of the solicitor general ran the risk that advice might be received that AWH was not entitled to propose a PPP or negotiate directly with government, in which case AWH's position would have collapsed.

The Commission does not accept that submission for two reasons.

First, the advice sought from the solicitor general was limited to the question of whether there was any impediment under the Guidelines to the Budget Committee of Cabinet approving direct negotiations with AWH. The conclusions reached by the solicitor general, with respect to whether it was necessary to demonstrate the reasons for, and net benefits of, not undertaking a competitive tender process, were contrary to the views expressed in the AWH legal advice.

Secondly, the solicitor general advised that SWC should obtain an independent assessment of whether the reasons for, and net benefits of, not undertaking a competitive tender process had been demonstrated and, if such an assessment answered the question in the affirmative, then there would be no impediment under the Guidelines to the Budget Committee of Cabinet approving direct negotiations. That advice was ignored by Mr Tripodi. The Initial Review Panel had undertaken an assessment, independent of SWC, and had concluded that there were no benefits to engaging in direct negotiations. On the basis of the solicitor general's advice, that should have been the end of the matter. The fact that Mr Tripodi was prepared to ignore the clear advice of the solicitor general is consistent with an intention to improperly favour AWH.

It was submitted on behalf of Mr Tripodi that the fact that Ms Certoma only sought a background briefing from NSW Treasury about the AWH PPP proposal on 8 May 2009, some months after Mr Tripodi had become minister for infrastructure, was inconsistent with any impropriety or desire on his part to deal urgently with the AWH matter. Mr Tripodi's evidence was that he did not know

why Ms Certoma requested such a briefing and he could not recall asking her to seek such a briefing. In any event, AWH only submitted its PPP proposal to Mr McGlynn on 6 July 2009. There was little Mr Tripodi could do before then to progress a proposal that had not been formally made to the government.

It was noted in the submissions made on behalf of Mr Tripodi that there was no evidence of telephone contact between him and Mr Di Girolamo during April or May 2010. That was the period during which the Kelly Cabinet minute was created. While the Commission accepts there was no evidence of telephone contact between them at that time, it does not follow that the absence of telephone contact precludes a finding that Mr Tripodi was acting, during that period, to advance the interests of AWH or Edward Obeid Sr. By then, he well knew what AWH wanted and he had already formed the view that the government should commit to direct negotiations. There was no need for him to have telephone contact with Mr Di Girolamo to discuss the matter further.

It was submitted on behalf of Mr Tripodi that Mr McGlynn's evidence that Mr Tripodi was at all times, in his dealings with Mr McGlynn, "clear" that he wanted "a proper assessment" of the AWH PPP proposal, was evidence that Mr Tripodi had no intention of improperly favouring AWH. While the Commission accepts that was what Mr Tripodi told Mr McGlynn, it does not follow that such a statement conclusively establishes that Mr Tripodi had no intention of favouring AWH. He was hardly likely to tell Mr McGlynn that he did not want a proper assessment process. Mr Tripodi's conduct must be assessed overall and, while what he said to Mr McGlynn has been taken into account, the Commission does not accept that that comment, of itself, indicates Mr Tripodi never had any intention of favouring AWH.

It was submitted on behalf of Mr Tripodi that there was no deception in Mr Tripodi's draft Cabinet minute and that, in any event, he warned Mr Brown that its contents needed to be checked. It was submitted that that demonstrated there was no dishonesty on the part of Mr Tripodi. The Commission does not accept that submission. Mr Tripodi understood that the contents of his draft Cabinet minute would be used to prepare a Cabinet minute that Mr Kelly would submit to the Budget Committee of Cabinet and that both Mr Kelly and Mr Brown would place reliance on his document. That was Mr Tripodi's purpose in preparing the document. Although Mr Tripodi's draft Cabinet minute was certainly more carefully drafted than the Kelly Cabinet minute, as demonstrated in chapter 26, it nevertheless contained inaccurate and wrong information. It also failed to note that the Initial Review Panel had recommended rejection of the AWH PPP proposal and

failed to set out the position of SWC that was contrary to the AWH position. The Commission finds that Mr Tripodi's draft Cabinet minute was deceptive.

It was also submitted on behalf of Mr Tripodi that there was never any scope for deception because it was inevitable that, under the Cabinet processes known by those involved to be in place, representatives of the Department of Premier and Cabinet, NSW Treasury and SWC would get to see the Kelly Cabinet minute, comment on it and provide their own assessments. That process would identify any mistakes in the Kelly Cabinet minute. It was submitted that that was what happened and was always going to happen. Those involved in preparing the Kelly Cabinet minute must have known that would occur and such knowledge negated any intention to deceive.

The Commission does not accept that submission. Both Mr Tripodi's draft Cabinet minute and the Kelly Cabinet minute were deceptive. While there was always a risk deceptive information might be picked up, there was always a possibility it would not be identified or, if identified, could be successfully countered by argument at the Budget Committee of Cabinet meeting when the minute came up for discussion. Another possibility was that suggested by Mr Brown in his evidence to the Commission. That was that the mere fact such a Cabinet minute was submitted might force SWC to compromise and negotiate some settlement with AWH.

It was submitted on behalf of Mr Tripodi that the mere recommendation that government proceed to direct negotiations with AWH could not result in AWH achieving any unmeritorious outcome. That was because, under the Guidelines, the AWH proposal would still be subject to an assessment process.

Based on that argument, there was no point to the Kelly Cabinet minute or Mr Tripodi's draft Cabinet minute because the assessment process undertaken by the Initial Review Panel would simply be repeated with the same result. Clearly, neither Mr Tripodi nor Mr Kelly would have taken the trouble they did if they knew that the outcome was inevitable. It is true that acceptance of a recommendation for direct negotiation would not inevitably lead to acceptance of the AWH PPP proposal and that there was always a risk that further assessment would lead to rejection. The alternative, however, was to accept the Initial Review Panel assessment. That effectively killed off the AWH PPP proposal all together; at least while the NSW Labor Party still held government. Under the proposal in Mr Tripodi's draft Cabinet minute and the Kelly Cabinet minute, AWH was given a second chance. Under the Guidelines, that could also potentially involve AWH submitting a further detailed proposal for assessment or modifying its original proposal during the course of the negotiation process; thereby, further improving its chances.

It was submitted on behalf of Mr Tripodi that he had no motive for improperly favouring AWH. There was evidence that Mr Tripodi had a longstanding and genuine interest in private sector involvement in the provision of infrastructure. It was submitted on his behalf that that explained his interest in the AWH PPP proposal. Certainly, as minister for infrastructure, it was appropriate that he concern himself with the matter. However, as the evidence set out in chapter 26 of this report demonstrates, Mr Tripodi's support for the AWH PPP proposal cannot be solely explained on the basis of an interest in private sector provision of infrastructure.

What, then, was Mr Tripodi's motivation?

There was no suggestion that Mr Tripodi was motivated by any prospect of personal financial gain.

Mr Tripodi also knew that Mr Di Girolamo was part of AWH and that any benefit conferred on AWH would also benefit Mr Di Girolamo. Although Mr Tripodi and Mr Di Girolamo came to be on friendly terms, the Commission is not satisfied that their relationship was such that Mr Tripodi's purpose in acting the way he did was to financially benefit Mr Di Girolamo.

Although Mr Tripodi denied that he drove the PPP proposal on behalf of the Obeids, the Commission rejects that denial. The Commission finds that, in preparing his draft Cabinet minute and providing it to Mr Brown with the intention that it would be used as the basis for a minute to be submitted to the Budget Committee of Cabinet recommending direct negotiations with AWH, Mr Tripodi was improperly motivated by a desire to provide an outcome favourable to AWH because he understood that was what Edward Obeid Sr wanted.

In coming to this conclusion, the Commission has taken into account the evidence and findings set out earlier in this report, including the following:

- Mr Tripodi and Edward Obeid Sr were close personal friends, factional colleagues and members of the same government
- Mr Tripodi knew, as early as August 2008, that at least one member of the Obeid family was interested in AWH and the privatisation of water infrastructure
- when Mr Tripodi became minister for infrastructure, Edward Obeid Sr spoke to him on several occasions about the AWH PPP proposal and its progress, and he therefore knew that that was a matter in which Edward Obeid Sr was interested
- Mr Tripodi also knew that one of Edward Obeid Sr's sons, Edward Obeid Jr, worked for an AWH company in Queensland

- Mr Tripodi knew that AWH wanted direct negotiations and that direct negotiations would confer a considerable financial benefit on AWH
- Mr Tripodi supported direct negotiations with AWH despite having little knowledge about that company or its capacity to successfully implement a PPP
- Mr Tripodi did not seek the views of SWC or the minister for water concerning the AWH proposal or whether the claims made by AWH were contested
- Mr Tripodi never showed any interest in whether companies other than AWH might be interested in competing with SWC to provide water infrastructure
- although he had ceased to have any role in the process, Mr Tripodi went to the trouble of preparing a draft Cabinet minute that could be used by Mr Kelly for the purpose of obtaining Budget Committee of Cabinet approval for direct negotiations
- the draft Cabinet minute Mr Tripodi prepared to support a direct negotiation process contained inaccurate and wrong information, and was deceptive
- although he knew that Mr McGlynn, a person well qualified to conduct an assessment of PPP proposals, had assessed the AWH PPP proposal and recommended against it, Mr Tripodi did nothing to ascertain the basis for Mr McGlynn's recommendation
- Mr Tripodi ignored the advice of the solicitor general
- Mr Tripodi involved himself in the preparation of the Kelly Cabinet minute by providing assistance to Mr Brown
- Mr Brown's evidence that he, Mr Kelly, Mr Tripodi and Edward Obeid Sr agreed on the same objective, namely that AWH should be able to enter into negotiations with the NSW Government
- after the Kelly Cabinet minute had been withdrawn in May 2010, Mr Tripodi continued to push for direct negotiations by soliciting the support of the premier for the AWH PPP proposal.

In doing Edward Obeid Sr's bidding, Mr Tripodi understood that he was conferring some benefit on Edward Obeid Sr or the Obeid family. Given the closeness of their relationship, it is likely that Mr Tripodi knew that the Obeid family was interested in investing in AWH. He knew that approval of the AWH PPP

proposal would increase the value of that company and therefore knew that anyone investing in the company stood to benefit financially in the event the PPP proposal was approved. That would have explained why Edward Obeid Sr was interested in the progress of the AWH PPP proposal. Mr Tripodi also knew that an Obeid family member worked for an AWH company and, from that, would have concluded that any decision to approve the AWH PPP proposal had, at least, the potential to financially benefit that member of the Obeid family.

## Assessing Mr Di Girolamo's conduct

Mr Di Girolamo wanted a favourable outcome for the AWH PPP proposal. He knew that such an outcome would financially benefit himself. He also knew that such an outcome would benefit the Obeid family in the event members of that family or an Obeid family entity acquired shares in AWH.

Mr Di Girolamo was able to use his political connections with Edward Obeid Sr, in particular, to get access to others, including Mr Brown, Mr Tripodi and, at least indirectly, Mr Kelly. He used those contacts to further his interests. Those contacts enabled him to ascertain what was happening with the AWH PPP proposal at any given time and what was being done within the government to progress that proposal. Mr Di Girolamo was able to provide information to Mr Tripodi that Mr Tripodi used to prepare his draft Cabinet minute. There was also Mr Brown's evidence, which the Commission accepts, that some of the information in the Kelly Cabinet minute came from AWH.

The Commission, however, is not satisfied that the evidence establishes that Mr Di Girolamo was a party to any agreement that Mr Kelly, Edward Obeid Sr or others would misuse their public offices for the purpose of advancing the financial interests of Edward Obeid Sr or the Obeid family.

## Assessing Edward Obeid Sr's conduct

The Commission has found that Edward Obeid Sr was, at the latest, aware of the AWH PPP proposal from his discussions with Mr Di Girolamo in early November 2007. He was present at the meeting between Mr Di Girolamo and Michael Costa in February 2008, where one of the matters raised by Mr Di Girolamo concerned the PPP proposal. He was also present at the Narellan meeting between Mr Di Girolamo and Phillip Costa on 3 January 2009, when Mr Di Girolamo sought Phillip Costa's assistance with respect to the PPP proposal. The Commission is satisfied that, by the time the

Kelly Cabinet minute was being prepared, Edward Obeid Sr was well aware of the AWH PPP proposal and that, if it eventuated, it would increase the value of AWH.

Edward Obeid Sr knew that there were connections between AWH and his family. The Commission has found that Edward Obeid Jr informed his father about his work with Mr Di Girolamo in about July 2007. The Commission has also found that Edward Obeid Sr knew by then that his son was interested in acquiring shares in AWH and Australian Water. By at least July 2008, Edward Obeid Sr was aware there was interest in an Obeid family entity acquiring shares in AWH. He knew that, in the event AWH's PPP proposal was approved, any such investment would be extremely profitable for the Obeid family.

In chapter 20 of this report, the Commission found that Edward Obeid Sr misused his position as a member of Parliament to promote AWH's interests at a time when he knew that approval of the AWH PPP proposal would financially benefit the Obeid family in the event the intention to acquire an interest in AWH was acted on.

Mr Tripodi recalled that, when minister for infrastructure, Edward Obeid Sr spoke to him on several occasions about AWH and asked how the PPP proposal was progressing.

Mr Brown recalled Edward Obeid Sr told him that AWH should have the opportunity to contract or tender to privatise water and sewerage services in the North West Growth Centre and should be able to negotiate with the Department of Premier and Cabinet to achieve that end. That, of course, was what the PPP proposal was about, and also demonstrates knowledge on the part of Edward Obeid Sr that direct negotiations was the way to achieve AWH's goal.

Ms Keneally recalled that, sometime before the Kelly Cabinet minute was submitted, Edward Obeid Sr spoke to her about the AWH PPP proposal and told her it was something that should be explored by the government.

Within days of Mr Kelly becoming minister for infrastructure, Edward Obeid Sr had contacted him and asked him to meet with AWH to discuss the provision of water services to western Sydney. As an experienced member of Parliament and a former minister, Edward Obeid Sr appreciated that, if any minute were going to be submitted to the Budget Committee of Cabinet seeking approval for direct negotiations with AWH, it would have to come from Mr Kelly.

The Commission is satisfied that the purpose of the Kelly Cabinet minute was to favour Edward Obeid Sr's interests and that Edward Obeid Sr knew it was prepared for that improper purpose. Edward Obeid Sr used his position as a member of Parliament to bring about a result that would favour his family's interests by influencing Mr Kelly, Mr Brown and Mr Tripodi to advance those interests.

In coming to these findings, the Commission has taken into account the evidence and findings set out earlier in this report, including:

- Edward Obeid Sr's early knowledge of the involvement of his son, Edward Obeid Jr, in AWH
- Edward Obeid Sr's knowledge of the interest of members of his family acquiring shares in AWH
- Edward Obeid Sr's knowledge of the AWH PPP proposal
- Edward Obeid Sr's knowledge that any investment in AWH would result in a significant financial gain in the event the AWH PPP proposal was successful
- Edward Obeid Sr's consistent working towards promoting AWH's interests by arranging, and in some cases attending, meetings with relevant ministers who were in a position to further the interests of the AWH PPP proposal
- Edward Obeid Sr's contact with Mr Brown about AWH being given an opportunity to advance its PPP proposal and that it wanted direct negotiations
- Edward Obeid Sr's knowledge that Mr Brown, as Mr Kelly's chief of staff, was in a position to further the interests of AWH
- Edward Obeid Sr's contact with Mr Tripodi on several occasions when he sought information on the progress of the AWH PPP proposal
- Edward Obeid Sr's contact with Mr Kelly within days of Mr Kelly becoming minister for infrastructure, and asking Mr Kelly to meet with AWH
- Edward Obeid Sr's understanding that any Cabinet minute recommending the NSW Government enter into direct negotiations with AWH had to come from Mr Kelly as minister for infrastructure
- the closeness of the personal and political relationships between Edward Obeid Sr and each of Mr Kelly, Mr Brown and Mr Tripodi
- the telephone contact between Edward Obeid Sr and Mr Brown in late April and early May 2010, when the Kelly Cabinet minute was being prepared (telephone records show there were four telephone calls between them on 28 April 2010, a further three calls on 30 April 2010 and four calls on 5 May 2010)
- the unusual conduct of each of Mr Kelly, Mr Brown and Mr Tripodi, who acted in a way that favoured the interests of Edward Obeid Sr
- Mr Brown's evidence that he, Mr Kelly, Mr Tripodi and Edward Obeid Sr agreed on the same objective, namely that AWH should be able to enter into negotiations with the NSW Government

## **PART 7 – AWH AND THE NSW LIBERAL PARTY**

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## Chapter 30: Approaches to the NSW Liberal Party

Although AWH was seeking support from the NSW Labor Government for its PPP proposal, it did not neglect the NSW Liberal Party, even though that party was not in government. This was because the AWH executives believed that support from the opposition might help to sway the government to favour the PPP proposal. When it later became clear that AWH had failed in its efforts with the NSW Labor government to obtain a PPP, the support of the NSW Liberal Party became crucial, particularly given the likelihood that it would win the March 2011 NSW election and therefore be in a position to approve AWH's PPP proposal.

Mr Di Girolamo agreed that he had "plenty" of contact with Mr O'Farrell, both before and after he became premier. He told the Commission that they had each other's mobile telephone numbers and he probably contacted Mr O'Farrell once every month or couple of weeks.

Mr O'Farrell's evidence to the Commission was that, while in opposition, he learnt that there was a dispute between SWC and AWH. He said that he was open to PPPs "but only on the basis that they represented value for money for taxpayers and they delivered services at a better standard". He was interested in AWH because, from what he was told by Mr Di Girolamo, he understood it was trying to increase the release of land for housing through the delivery of water infrastructure, and the increase in the availability of land for new housing to address the housing affordability crisis in Sydney was one of Mr O'Farrell's priorities.

On 22 September 2010, Mr Di Girolamo wrote to Mr O'Farrell who, at that time, was leader of the opposition. In his letter, Mr Di Girolamo advised that "our discussions with the State Government in relation to our PPP Proposal have stalled. Whilst we have reservations and concerns with the process undertaken by the bureaucracy we want to avoid the commercial disadvantages associated with challenging the decision making process". The letter went on to outline the

PPP proposal and expressed the hope that "our PPP Proposal can be advanced with priority with a Coalition Government post March 2011".

On 28 September 2010, Mr O'Farrell wrote to Mr Di Girolamo noting that AWH's discussions with the NSW Government with respect to a PPP for the North West Growth Centre had stalled. Mr O'Farrell wrote that the NSW Liberal Party and National Party were:

*...committed to resolving Sydney's housing affordability crisis by accelerating land release by introducing the option of contestability in the provision of infrastructure [and that] this may involve public private partnerships to ensure infrastructure is delivered in a timely way, especially in areas such as water infrastructure.*

He advised that, if elected in March 2011, the issue of the PPP was one his government would seek to resolve "quickly and appropriately".

Michael Photios had been a NSW Liberal Party member of Parliament between March 1988 and March 1999. He became a corporate affairs government relations adviser. In February 2011, he was engaged by AWH, through Mr Di Girolamo, to provide strategic advice on furthering AWH's objective to obtain a PPP and undertake lobbying. He was paid \$5,000 per month for that work. He told the Commission that, once the NSW Liberal Party formed government, he spoke to the Hon Greg Pearce, the minister for finance and services, about AWH and SWC, and suggested that AWH and SWC "should sit down and mediate". As minister for finance and services, Mr Pearce had responsibility for SWC. Although Mr Photios did not speak to Mr O'Farrell, he told the Commission that he made the same point to Peter McConnell, Mr O'Farrell's chief of staff.

On 18 April 2011, shortly after the NSW election, Mr Di Girolamo wrote to Mr O'Farrell, who was by now premier. The letter set out background

information, including the contested claims that AWH had an “exclusive mandate to finance and deliver water infrastructure” in the North West Growth Centre and that, on 8 August 2008, SWC and AWH had agreed that AWH could proceed with a PPP proposal. In his letter, Mr Di Girolamo noted that the PPP proposal had stalled due to the previous government, referred to Mr O’Farrell’s letter of 28 September 2010, and requested an opportunity to meet with Mr O’Farrell and relevant officials “at your earliest convenience to discuss the way forward”. A similar letter was also sent to Mr Pearce.

The letter to Mr Pearce was provided to SWC for comment. On 3 May 2011, SWC prepared a detailed briefing paper for Mr Pearce in which it noted that a number of assertions made by AWH were “false and misleading”. It also referred to the work previously done by the Department of Premier and Cabinet concerning the PPP proposal and the conclusion that had been reached that it did not provide value for money. At Mr Pearce’s request, SWC prepared an additional briefing paper on 17 May 2011.

Mr Pearce told the Commission that he also received verbal briefings about AWH from Dr Parry and Dr Schott. He believed that, from what he was told, a number of assertions made by AWH were false. He took the view that the disputes between AWH and SWC were of a commercial nature that either had to be resolved by way of a commercial settlement or “litigated out”. He told the Commission that he was aware of AWH’s PPP proposal but “it didn’t get onto my radar because it was just completely outside of my expectations of what we would be doing with [SWC]”.

Matters were not progressing as expeditiously as Mr DiGirolamo desired. He wanted to put the PPP proposal on Mr Pearce’s “radar”. On 21 May 2011, he sent an email to Mr Sinodinos, then the chairman of AWH, advising that the matter was “urgent” because AWH had until 25 May 2011 to agree with SWC’s proposal that AWH only project manage the package 2 works, which, Mr Di Girolamo believed, “severely” diminished AWH’s role. He noted that:

*...the way forward is a ministerial direction that directs [SWC] to enter into direct negotiations with [AWH] for a PPP in the [North West Growth Centre] via a transparent process undertaken by either the Premier’s Dept or Infrastructure NSW that ensures value for money, and in parallel the current Package 2 Proposal is abandoned and [SWC] is directed to engage us to undertake all the design and planning work ... for the next stage.*

He ended the email by asking Mr Sinodinos to call Mr O’Farrell.

In his evidence to the Commission, Mr Di Girolamo agreed that one of the uses to which Mr Sinodinos was put as chairman of AWH was “opening doors” to ministers. He denied that that was the sole purpose for having engaged Mr Sinodinos as chairman; although, he said that Mr Sinodinos having access to senior politicians in the NSW Liberal Party “had to be part of his skill set” as AWH chairman.

Mr Sinodinos told the Commission that he did not think it was appropriate for him to call Mr O’Farrell. Instead, he telephoned Mr Pearce. Mr Sinodinos told the Commission that he discussed the matter with Mr Pearce and suggested he obtain independent advice from the Department of Premier and Cabinet. He recalled that Mr Pearce told him not to worry about the 25 May deadline and that he would get back to Mr Sinodinos.

Mr Di Girolamo made a handwritten note of a telephone conversation with Mr Sinodinos on 21 May 2011. In his note, Mr Di Girolamo recorded that Mr Sinodinos had spoken with Mr Pearce, that Mr Pearce had told him not to worry about the 25 May deadline and that he would “direct” SWC to “undertake a negotiation process with us re: Package 2 & the PPP”.

The Commission is not satisfied that Mr Di Girolamo’s handwritten note accurately records what Mr Pearce said to Mr Sinodinos. Mr Sinodinos told the Commission that he could not recall whether he spoke to Mr Pearce about the government issuing a direction to SWC. Mr Pearce was clear in his evidence to the Commission that he never considered issuing a direction to SWC. In any event, no direction was made.

Mr Sinodinos told the Commission that he did not believe he ever spoke to Mr O’Farrell about the AWH disputes with SWC after Mr O’Farrell became premier. He recalled that, in total, he spoke with Mr Pearce about two or three times about the AWH disputes with SWC and a similar number of times with Mr McConnell.

It will be recalled that, in January 2011, the AWH board resolved to give Mr Sinodinos a 5% equity share in AWH and a 2.5% equity share bonus should AWH successfully negotiate a PPP with the NSW Government. In his discussions with Mr Pearce, Mr Sinodinos did not reveal that he stood to make a substantial gain in the event that AWH got its PPP. He told the Commission that it never occurred to him that he needed to make such a disclosure because such a disclosure was not relevant to whether the PPP proposal had merit. When speaking with Mr Pearce and Mr McConnell, Mr Sinodinos was acting in his capacity as chairman of AWH. He was not a public official and was under no legal obligation to disclose to them that he stood to gain financially from a favourable decision.

Mr Di Girolamo had a telephone discussion with Mr O'Farrell in May 2011. According to Mr Di Girolamo's note of the discussion, it was agreed they would meet with Mr Pearce. Mr O'Farrell told the Commission that he had no recollection of that telephone discussion but agreed that he arranged a meeting in his parliamentary office with Mr Pearce and Mr Di Girolamo.

The meeting between Mr O'Farrell, Mr Pearce, Mr Di Girolamo and others occurred on 27 May 2011. Mr Pearce was absent for part of the meeting as he was required to speak in the Legislative Assembly.

According to Mr Di Girolamo's handwritten notes of the meeting, he raised the prospect of the government issuing a direction to SWC. Mr Pearce was recorded as saying that he felt "over lobbied", that the government could not issue a direction to give AWH a monopoly and that, while the government wanted "contestability", AWH did not want competition. According to Mr Di Girolamo's notes, the discussion ended on the basis that Mr Pearce would arrange for Kevin Young, the incoming SWC managing director, to negotiate the package 2 works and review the PPP position.

Mr O'Farrell told the Commission that he had a general recollection that Mr Di Girolamo expressed a strong view that AWH had an agreement with SWC to provide water infrastructure for the package 2 works and that AWH had been set up for the purpose of competing with SWC. He recalled that Mr Di Girolamo wanted him and Mr Pearce to issue a direction to SWC.

Mr Pearce gave evidence to the Commission about the 27 May 2011 meeting. He did not accept the overall accuracy of Mr Di Girolamo's notes. He said that he made clear at the meeting that he did not appreciate being lobbied on the PPP issue and he was not of a mind to assist AWH with that matter. He explained that he did not entertain "for a second" issuing a direction to SWC. He said that his view was that the matters should be left to the incoming SWC managing director to deal with.

As will be seen in chapter 33, that is precisely what happened. No direction was issued by the NSW Government and the PPP proposal did not progress. Instead, negotiations were entered into between AWH and SWC with a view to settling outstanding issues by replacing the various existing agreements with a new agreement.

On 25 August 2011, Mr Di Girolamo wrote to Mr O'Farrell and Mr Pearce about the ongoing negotiations between AWH and SWC for the termination of the Other Stages Deed and what he referred to as the "8 August 2008 Agreement", being the PPP proposal. He noted that the negotiations had stalled and that SWC had indicated it would go out to public tender on 1 September 2011 for the

package 2 works. He claimed that such a step was contrary to advice given by the solicitor general to the NSW state government and asked "the Shareholding Ministers to request that [SWC] refrain from acting in such a manner" to avoid "immediate litigation".

Mr O'Farrell received a Department of Premier and Cabinet briefing note concerning Mr Di Girolamo's letter, together with a draft response. Advice was given in the briefing note that the solicitor general's advice was not definitive and he had expressly indicated that one of the options available to SWC was to proceed with a call for tender. It noted the dispute between SWC and AWH was of a commercial nature and it would generally be inappropriate for the government to intervene.

The briefing note also outlined a convention that treated the opinion of the solicitor general as conclusive, subject only to any contrary opinion of the attorney-general for Australia as first law officer or any final decision of a court. Mr O'Farrell told the Commission that, given that convention, he asked the attorney general to review the matter and provide an opinion.

On 30 August 2011, the Hon Terence Cole AO RFD QC had delivered his evaluation of the dispute between AWH and SWC (dealt with in more detail in the next part of the report). The attorney general had access to Mr Cole's report and considered that it reinforced his view that the draft response to Mr Di Girolamo's letter was appropriate.

Mr O'Farrell told the Commission that he agreed with the comments of the attorney general that the issue was one that should be dealt with by SWC and it would be inappropriate for the government to intervene.

Consequently, the letter was sent to Mr Di Girolamo on 27 September 2011. It was signed by the director general of the Department of Premier and Cabinet and advised that it was inappropriate for the NSW Government to intervene in a commercial dispute between SWC and AWH.

The Commission is satisfied that the actions of Mr Pearce and Mr O'Farrell in relation to these matters were appropriate and, at all times, consistent with their duties and obligations as ministers of the Crown.

# Chapter 31: How Mr O'Farrell came to resign as premier

The most dramatic event arising from the Commission's public inquiry was the decision of Mr O'Farrell to resign as premier. This chapter explains how that came about.

## Mr Di Girolamo's evidence

The AWH account transaction accruals obtained by the Commission recorded credit card expenditure of \$2,978.99 on "Gift to Barry O'Farrell & Wife". The date of purchase was 20 April 2011.

At the public inquiry, Mr Di Girolamo was asked whether he had ever given any gifts to Mr O'Farrell. He said that he had arranged for a "bottle of Grange" to be delivered to Mr O'Farrell "for becoming Premier". He selected a vintage to correspond with the year of Mr O'Farrell's birth.

There was evidence that the supplier of the bottle of wine had delivered it to the offices of AWH. Mr Di Girolamo agreed that it may have been delivered to AWH but said that he would have then had it wrapped, written a card to Mr O'Farrell, and arranged for the bottle and card to be couriered to Mr O'Farrell's home. He said that he thought he subsequently received a telephone call from Mr O'Farrell thanking him for the wine.

Mr Di Girolamo denied that the gift of wine was an attempt to persuade or influence Mr O'Farrell to make a decision favourable to AWH.

## Mr O'Farrell's evidence

When he gave evidence to the Commission on 15 April 2014, Mr O'Farrell was aware of the evidence that had been given by Mr Di Girolamo concerning the bottle of Grange. He was shown a courier invoice dated 22 April 2011, addressed to AWH, which recorded the delivery of an unspecified item from AWH's offices to "Roseville". Mr O'Farrell said that he lived at Roseville and was home on that date but said that he had not received a bottle of Grange from Mr Di Girolamo or AWH. He gave the

following evidence:

*...I'm not a wine connoisseur, I'm certain that I would remember receiving a bottle of Penfolds Grange particularly one that was of my birth year. I have no idea how much the current vintage Grange costs but I would understand that a vintage dated in the 1950s would require me to declare it both to [sic] my ministerial declaration, my parliamentary declaration, so having checked this with my wife as recently as today when I heard the latest iteration of what this gift was alleged to be we are both certain that it was, it was not received.*

Call charge records showed a call from Mr O'Farrell's telephone to Mr Di Girolamo's telephone at about 9.30 pm on 20 April 2011. The duration of the call was 28 seconds. That record was shown to Mr O'Farrell. He said that he had no knowledge of the call and that he had never called Mr Di Girolamo to thank him for a bottle of wine.

After giving his evidence, Mr O'Farrell was excused as a witness. That meant that the Commission had no intention of taking further evidence from him.

## New evidence comes to light

On the morning of 16 April 2014, prior to the commencement of that day's public inquiry evidence, senior counsel for Mr Di Girolamo sent senior Counsel Assisting two documents that had been located overnight by Mr Di Girolamo. One was an envelope addressed to Mr and Mrs Di Girolamo. The second was a NSW Parliament card with a note from Mr O'Farrell thanking Mr and Mrs Di Girolamo for "the wonderful wine".

The Commission had not previously been aware of the existence of these documents. They were immediately brought to the attention of Mr O'Farrell's legal representatives and subsequently tendered in the public inquiry.



The Commission also contacted the courier company that had delivered an item from AWH's offices to Roseville. The company went through its records and found that an item had been delivered from AWH's offices to Mr O'Farrell's home at Roseville on 20 April 2011 and left at the front door.

In these circumstances, it was necessary to recall Mr O'Farrell.

## Mr O'Farrell's further evidence

Mr O'Farrell gave further evidence on the afternoon of 16 April 2014.

He confirmed that the address on the envelope addressed to Mr and Mrs Di Girolamo and the note were in his handwriting. He acknowledged that the evidence he had previously given, that he had not received a bottle of wine from Mr Di Girolamo, was "clearly mistaken". He said that, having seen the envelope and note, he still had no recollection of having received the wine. He noted that the time the wine was given was a particularly busy time for him, having just won the election, putting together a ministry, dealing with the administrative matters of government and the death of his father-in-law.

When he gave evidence on 16 April 2014, Mr O'Farrell had no recollection of receiving the wine. There is no evidence to the contrary. The Commission is satisfied that there was no intention on Mr O'Farrell's part to mislead the Commission on either occasion that he gave evidence.

Mr O'Farrell gave further evidence, which other evidence bears out and the Commission accepts, that he never acceded to any request from Mr Di Girolamo or anyone else to give AWH special assistance.

Mr O'Farrell announced his intention to resign as premier and minister for western Sydney. He formally resigned on 17 April 2014 as NSW Liberal Party leader.

In advising his colleagues of his decision to resign, he noted that he had no recollection of receiving a bottle of wine from Mr Di Girolamo and had given an honest recollection of events in his evidence to the Commission on 15 April 2014. He went on to note that "[a]s someone who respects the role of the ICAC and the importance of transparency and accountability, I accept the consequences of what I can only describe as a massive failure of memory".

## **PART 8 – OTHER MATTERS**

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## Chapter 32: The false complaint about SWC officers

This chapter examines how, in 2010, Timothy Koelma arranged for his brother, Eric Koelma, to make an anonymous complaint to the Commission that falsely alleged that SWC officers, including Dr Schott and Mr Quill, were engaging in corrupt conduct.

### The complaint

On 10 September 2010, the Commission received an anonymous complaint by way of a typed letter from a person claiming to be a “long-term employee of SWC”. The complaint alleged that various SWC officers had engaged in corrupt conduct. Some allegations concerned senior managers abusing their positions.

It was alleged that Dr Schott had a corrupt arrangement with Veolia, by which, in return for using her position as CEO of SWC to look after that company’s interests, she would obtain employment with that company when she left SWC. In particular, it was alleged that, as part of that arrangement, she had attempted to persuade the NSW Government to sell the desalination plant to Veolia for less than its value. It was also alleged that she went on overseas trips paid for by Veolia.

It was alleged that Mr Quill had been allowed to retire from SWC so that he could be paid his “retirement allowances” but actually continued in employment in the same position but as a consultant. It was also alleged that SWC had paid for various trips undertaken by Mr Quill even though those trips had nothing to do with his employment by SWC.

The allegations were serious. After examination by the Commission, however, they were found to be entirely false.

### Who was responsible for making the complaint?

Although the complaint was made anonymously, the Commission was able to trace its source to Eric Koelma.

Eric Koelma told the Commission that he had sent the complaint to the Commission. It was his evidence that he had received the original complaint from his brother, Timothy Koelma. As noted earlier, Timothy Koelma was the proprietor of a business called Eightbyfive. Timothy Koelma told the Commission that he had typed the complaint and given it to his brother to send to the Commission.

In acting as he did, Eric Koelma was not simply a conduit. The Commission is satisfied that he was aware at the time that he was involved in something underhanded. The email that Timothy Koelma sent to Eric Koelma attaching the typed complaint also advised Eric Koelma “No need to add anything, subtract anything or even read it (though you can if you want a laugh)” and went on to proclaim “Yay black-ops!”. The Commission is satisfied that Timothy Koelma’s reference to “black-ops” was a clear reference to the fact that the delivery of the complaint was a clandestine act. Eric Koelma’s response acknowledged this by using the cipher “000000”, which the evidence indicated is used to mean “black”.

In his evidence to the Commission, Timothy Koelma acknowledged that the allegations in the complaint were extremely serious and could damage Dr Schott and Mr Quill. He also acknowledged that he did not know if the allegations were true. He claimed the information in the complaint came from a man named “Robert”, who said that he worked at SWC. Although Timothy Koelma claimed to have spoken to “Robert”, he did not know his surname and had not asked him what his position was at SWC. Timothy Koelma was not able to explain why he took it upon himself to arrange for the complaint to be made to the Commission rather than telling “Robert” to do so.

Timothy Koelma told the Commission that Mr Di Girolamo had either given him “Robert’s” contact details or given his contact details to “Robert”.

At the time the false complaint was made to the Commission, there was a financial arrangement in place between Eightbyfive and AWH. Between 21 April 2009 and 20 May 2011, Eightbyfive received \$183,342.50 from AWH. That arrangement was dealt with in the Commission's August 2016 Operation Spicer report. In that report, the Commission found that Mr Di Girolamo was party to an arrangement with Timothy Koelma whereby Mr Di Girolamo made regular payments through AWH to Eightbyfive and that, while the payments were ostensibly for the provision of services by Eightbyfive to AWH, they were in fact political donations made to assist Christopher Hartcher by providing funds to Timothy Koelma so that he could work for Mr Hartcher in the lead up to the 2011 NSW election.

In addition to having a pre-existing relationship with Timothy Koelma, Mr Di Girolamo had an interest in undermining the reputations of SWC senior management, including Dr Schott. There was evidence that he and others at AWH had become frustrated in their relationship with SWC, and principally blamed Dr Schott and Mr Quill for the SWC refusal to reallocate funds so that RH3 could pay its management and administration costs, and the SWC's opposition to the AWH PPP proposal.

There was evidence (set out in chapter 18 of the Operation Spicer report) that Timothy Koelma had acted to assist AWH to obtain information about SWC and had worked with Mr Di Girolamo to pass information on to a journalist in an effort to undermine the authority of SWC management.

Other evidence of Mr Di Girolamo's involvement in efforts to undermine Dr Schott's position came from a letter Mr Nicolaou sent in February 2010 to the radio announcer, Alan Jones. At the time, Mr Nicolaou, through his business Solutions R Us, was on a retainer to AWH to provide "business connections", political insight and "media advice". In his letter, Mr Nicolaou advised Mr Jones that, "there needs to be a serious investigation into Sydney Water" and described "cover-ups and buck passing which stems from the ineptitude of ... Dr Kerry Schott and her executive team".

Some of the matters raised by Mr Nicolaou were similar to those made in the anonymous complaint to the Commission. For example, Mr Nicolaou referred to Dr Schott's "very cosy relationship with ... Veolia. Apparently she has an annual visit to Paris". The letter suggested "it may be worthwhile you asking some questions of Sydney Water". A draft of Mr Nicolaou's letter to Mr Jones was sent to Mr Di Girolamo before it was sent to Mr Jones.

In his evidence to the Commission, Mr Di Girolamo denied having any role in the making of the complaint to

the Commission or having any discussion with Timothy Koelma about the complaint or putting him in contact with anyone called "Robert". The Commission is not satisfied to the relevant standard that Mr Di Girolamo was involved in the making of the false complaint.

As discussed in chapter 20, when Phillip Costa was minister for water between September 2008 and March 2011, Edward Obeid Sr spoke to him on a number of occasions about Dr Schott and urged him to terminate her employment with SWC. The Commission is satisfied that he made those comments because he knew that continuation of her employment at SWC was detrimental to the interests of AWH and could impact on his family's financial interests.

Phillip Costa also recalled an occasion when Edward Obeid Sr told him to keep away from Dr Schott because "they're coming after her" and mentioned that the person coming after her was "somebody from the Central Coast". Nothing further was said to identify the person or what was involved in "coming after" Dr Schott. Edward Obeid Sr denied he had such a conversation with Phillip Costa. The Commission, however, accepts the evidence of Phillip Costa. He had a clear recollection of the conversation and there was no reason for him to fabricate it.

The reference to someone from the Central Coast coming after Dr Schott tied in with the fact that the complaint to the Commission came from Timothy Koelma. He operated from the Central Coast and, between 2009 and the NSW election in March 2011, worked on a voluntary basis with Mr Hartcher, who was the member of Parliament for the Central Coast seat of Gosford between 1988 and March 2015. It is likely that, at the time he spoke with Phillip Costa, Edward Obeid Sr knew that a complaint concerning Dr Schott was to be made to the Commission. There is insufficient evidence to establish how he learnt of the complaint, whether he knew the details of the complaint or that it was a false complaint.

While the Commission is satisfied that it was in Edward Obeid Sr's interest to undermine Dr Schott, with a view to having her employment at SWC terminated, the Commission is not satisfied that he was involved in the making of the false complaint to the Commission.

The Commission does not accept that "Robert" existed. The Commission is satisfied that Timothy Koelma created the complaint and arranged for it to be provided to the Commission knowing that the complaint contained false allegations.

It is an offence under s 81 of the ICAC Act for a person to make a complaint to the Commission that the person knows to be false or misleading. Proceedings for such an offence, however, must be commenced within three years of the commission of the offence. In these circumstances,

the Commission is not of the opinion that consideration should be given to obtaining the advice of the DPP with respect to the prosecution of any person for an offence under s 81 of the ICAC Act.

# Chapter 33: The 2012 SWC and AWH contract

One of the matters investigated by the Commission concerned the circumstances that led to the signing of the current contract between SWC and AWH. This chapter deals with that matter.

## The 2012 agreements

On 18 January 2012, SWC, AWH, RHI, RH3 and AW1 entered into a deed of settlement ("the Deed of Settlement"). The Deed of Settlement terminated the Other Stages Deed and various other agreements, including the Stage 2 Deed, the Stage 3 Deed and the Package 1 Deed. The Deed of Settlement provided that the parties would enter into a new agreement relating to water infrastructure in the North West Growth Centre and a separate agreement for works known as "the Package 2 Works".

Accordingly, on 18 January 2012, SWC and AWH entered into the North West Growth Centre Delivery of Water Infrastructure Deed ("the 2012 Deed"). The 2012 Deed replaced the Other Stages Deed and regulated the future arrangements between SWC and AWH under which AWH could provide project management services for the provision of water infrastructure to the North West Growth Centre.

Under the 2012 Deed, SWC was, subject to certain specified exceptions, required to put a proposal to AWH for the performance of project management services whenever SWC was ready to commence procurement for the design and construction of new works. AWH was then required to submit an offer to SWC. Any offer was required to adhere to certain requirements set out in the 2012 Deed. These included that AWH would undertake project management for a set fee of 8% of the initial design and construction contract price and that such a fee was inclusive of all costs incurred by AWH in connection with its project management performance. That return represented the market rate.

The 2012 Deed provided that SWC could reject an offer made by AWH, in which case AWH could make a modified offer to SWC. In the event SWC rejected any modified offer, SWC could then proceed to seek open tenders or conduct a select tender process for the required project management services. In such circumstances, AWH could participate in the open tender or be included in the select tender process but there was no obligation on SWC to award any contract to AWH. Provision was also made for the keeping by AWH of accounts and records and for SWC to have access to such information upon request.

Also on 18 January 2012, SWC and AWH entered into a separate contract for AWH to project manage the package 2 works.

## How the agreements came about

On 30 June 2011, SWC wrote to AWH advising that it wished to reach agreement with AWH for the mutual termination of the Other Stages Deed. As discussions failed to lead to any agreement, both parties agreed to mediate the matters of disagreement. To this end, in August 2011, Mr Cole was appointed mediator.

During the mediation, AWH contended that it was entitled to substantial damages for SWC's alleged breaches of the Other Stages Deed, as amended by the terms of Dr Schott's letter of 8 August 2008. It also contended that the Other Stages Deed conferred upon it an exclusive mandate to procure the design, construction and commissioning of water infrastructure in the North West Growth Centre and to provide or arrange finance for that purpose. It argued that these were valuable rights and if it were deprived of them, either by way of negotiated agreement or breach of agreement by SWC, it was entitled to compensation by way of payment of an amount equating to the value of those rights.

Mr Cole delivered his report on 30 August 2011. His view was that the provision in the Other Services

Deed for the provision of work on other stages was “an agreement to agree”. A significant consequence of this was that an agreement to agree was not enforceable at law so that no party could force the other to enter into a future agreement.

Mr Cole also dealt with AWH’s contention that, under the Other Stages Deed, it (or its nominee) would be responsible for providing all water infrastructure work. He considered that the right to perform such work depended on the parties reaching agreement to perform each of the work stages. While the Other Stages Deed required SWC to put a proposal for future work to AWH, SWC could proceed without the involvement of AWH if AWH failed to agree to implement the proposal or agreed but failed to implement it within the time prescribed by SWC or on terms and conditions acceptable to SWC.

Mr Cole also came to the view that neither the Other Stages Deed nor the Stage 3 Deed entitled AWH to receive a margin or profit. In reaching this view, he noted that each deed contained a recital concerning AWH operating on a not-for-profit basis. The effect of AWH not being entitled to receive any profit was that, if there were any breach by SWC of a relevant deed, any damages would be nominal.

That represented a devastating setback for AWH.

By this time, Michael Costa had become chairman of AWH and Mr Young had become managing director of SWC. Both considered it was in their interests to reach an agreement. By mid-November 2011, the key commercial principles for an ongoing relationship had been established. They primarily involved AWH releasing SWC from all claims with respect to previous agreements, conduct and proposals, including any claims that arose from Dr Schott’s letter of 8 August 2008, and entering into a new commercial agreement under which AWH would be able to contract with SWC for the provision of project management services for the delivery of water

infrastructure in the North West Growth Centre. Those principles found their expression in the January 2012 agreements.

Michael Costa gave the following evidence of how the new agreements came about:

*I put down a set of points that I thought would be the basis of settlement. I mean, I obviously had knowledge, I don’t know if you’re aware, I was also on the board of [SWC] prior to going into Parliament, for three or four years and I knew Kerry Schott. I understood the business and I understood broadly where they were going to go. I put a series of points down that I thought would be a settlement, [Mr Young] also put down a series of points and I think we were probably 90 per cent of the way there. Fundamental to that was of course the removal of this PPP which I had already got [Mr Di Girolamo] and his board to agree to.*

Mr Young told the Commission that the new contract was “one of the best things I’ve ever done”. He explained that the AWH profit margin under the new agreement was less than had been previously offered by SWC to terminate the contractual arrangements between SWC and AWH. Although litigation had also been an option, he told the Commission that SWC could not be certain of the outcome and he believed that, even if SWC won the case, it would at least have to pay the shut down costs of AWH.

Dr Parry told the Commission that the SWC board “formed the view that this was the sort of commercial arrangement with AWH which we could live with and ... it seemed like a very sensible commercial resolution of a long standing problem”. He said that, in deciding to approve the agreements, the SWC board weighed up the agreement’s commercial merits and considered the 8% return to AWH was good from the SWC perspective. He said that, on several occasions, the board was advised by SWC officers that AWH had



provided “good competent work as a project manager” and its work was “absolutely fine”. The new agreements removed “a commercial albatross” from around the neck of SWC. He explained that the alternative to reaching the new agreement was litigation; the outcome of which was uncertain.

There was no NSW Government involvement in the negotiations for the new agreements.

The Commission is satisfied that there was no evidence that any person engaged in any wrongdoing in relation to the decision to enter into the new contractual arrangements.

## **PART 9 – CORRUPT CONDUCT AND S 74A(2) STATEMENTS**

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# Chapter 34: Corrupt conduct

The Commission's principal functions as set out in the ICAC Act include the power to make factual findings (see in general s 13(3)(a), s 13(5)(c) and s 74A(l) of the ICAC Act). The Commission is also able to make findings that particular persons have engaged, are engaged or are about to engage in corrupt conduct (see s 13(5)(a) of the ICAC Act) but only if the conduct is serious corrupt conduct (see s 74BA of the ICAC Act). In order for conduct to be categorised as corrupt conduct it must come within the definition of "corrupt conduct" in s 8 of the ICAC Act and not be excluded by s 9 of the ICAC Act.

The Commission's approach to making findings of corrupt conduct is set out in Appendix 2 to this report.

First, the Commission makes findings of relevant facts on the balance of probabilities. The Commission then determines whether those facts come within the terms of s 8(1), s 8(2) or s 8(2A) of the ICAC Act. If they do, the Commission then considers s 9 and the jurisdictional requirements of s 13(3A) of the ICAC Act. In the case of subsection 9(1)(a) of the ICAC Act, the Commission considers whether, if the facts as found were to be proved on admissible evidence to the appropriate criminal standard of beyond reasonable doubt and accepted by an appropriate tribunal, there would be grounds on which such a tribunal would find the person had committed a particular criminal offence.

The Commission then considers whether, for the purpose of s 74BA of the ICAC Act, the conduct is sufficiently serious to warrant a finding of corrupt conduct.

## Gilbert (Laurie) Brown

In 2010, Mr Brown misused his public office through his involvement in the preparation of a minute for submission to the Budget Committee of Cabinet with the intention of improperly favouring Edward Obeid Sr by enabling AWH to proceed to direct negotiation with the NSW Government concerning its PPP proposal for the

purchase, supply and operation of water infrastructure in the North West Growth Centre.

Mr Brown used his position to advance the interests of Edward Obeid Sr rather than to advance the interests of the people of NSW and, in doing so, breached his fiduciary duty as a public officer. In preparing the Cabinet minute to be used by Mr Kelly, which he knew to be deceptive and to contain misrepresentations, Mr Brown also sought to influence Mr Kelly in the exercise of his public duty. His conduct was inconsistent with his responsibilities as a public official to act in the public interest.

Mr Brown's conduct was corrupt conduct for the purpose of s 8 of the ICAC Act. This is because his conduct could adversely affect, either directly or indirectly, the honest or impartial exercise of official functions by Mr Kelly and therefore comes within s 8(1)(a) of the ICAC Act. His conduct also constituted or involved the dishonest or 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 considering subsection 9(1)(a) of the ICAC Act, it is relevant to have regard to the common law offence of misconduct in public office. The elements of this offence have been considered in *R v Quach* (2010) 201 A Crim R 522. Redlich JA (with whom Ashley JA and Hansen AJA agreed) said at 535 that the elements were as follows:

- 1) *a public official;*
- 2) *in the course of or connected to his public office;*
- 3) *wilfully misconducts himself, by act or omission, for example, by wilfully neglecting or failing to perform his or her duty;*
- 4) *without reasonable excuse or justification; and*

5) *where such conduct is serious and meriting criminal punishment having regard to the responsibilities of the office and the officeholder, the importance of the public objects which they serve and the nature and extent of the departure from those objects.*

The essence of the offence is the abuse of public trust by a public official.

The offence is made out if the public official is reckless as to whether their conduct was a breach of their duties as a public official or where the public official knows their conduct was such a breach (see *R v Obeid* (No.11) [2016] NSWSC 974).

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 Kelly committed an offence of misconduct in public office. His conduct was wilful and deliberate, there was no reasonable excuse or justification for improperly favouring the interests of Edward Obeid Sr and the conduct 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.

The Commission is also satisfied for the purpose of s 74BA of the ICAC Act that this is serious corrupt conduct. This is because the conduct involved an attempted perversion of the Cabinet decision-making process, involved a substantial breach of public trust by putting the interests of an individual before the public interest, and could constitute a serious criminal offence. The conduct could also substantially impair public confidence in public administration.

## Anthony Kelly

In 2010, Mr Kelly misused his office as a minister of the Crown by arranging for the preparation and submission of a minute to the Budget Committee of Cabinet, with the intention of improperly favouring Edward Obeid Sr by enabling AWH to proceed to direct negotiation with the NSW Government concerning its PPP proposal for the purchase, supply and operation of water infrastructure in the North West Growth Centre.

In doing so, Mr Kelly failed to act with fidelity for the welfare of the community and breached his fiduciary duty as a public officer. His conduct was inconsistent with his responsibilities as a minister of the Crown to act in the public interest.

Mr Kelly's conduct was corrupt conduct for the purpose of s 8 of the ICAC Act. This is because his conduct constituted or involved the dishonest or 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.

It is the law in NSW that a member of Parliament is a public official to whom the common law offence of misconduct in public office extends (see *Obeid v R* [2015] NSWCCA 309).

The 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 Kelly committed an offence of misconduct in public office. His conduct was wilful and deliberate, there was no reasonable excuse or justification for improperly favouring the interests of Edward Obeid Sr, and the conduct 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.

The Commission is also satisfied for the purpose of s 74BA of the ICAC Act that this is serious corrupt conduct. This is because the conduct involved an attempted perversion of the Cabinet decision-making process, involved a substantial breach of public trust by putting the interests of an individual before the public interest, and could constitute a serious criminal offence. The conduct could also substantially impair public confidence in public administration.

## Edward Obeid Sr

Two findings of corrupt conduct are made against Edward Obeid Sr.

Between late 2007 and 2010, Edward Obeid Sr misused his position as a member of Parliament to promote AWH's interests to each of Michael Costa, Mr Rees, Mr Lemma, Phillip Costa and Ms Keneally, at a time when he knew that the advancement of those interests would financially benefit the Obeid family in the event a member of the Obeid family or an Obeid family entity acquired shares in AWH.

In doing so, Edward Obeid Sr failed to act for the welfare of the community and breached his fiduciary duty as a member of Parliament.

Edward Obeid Sr's conduct was corrupt conduct for the purpose of s 8 of the ICAC Act. This is because his conduct constituted or involved the dishonest or 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.

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 Edward Obeid Sr committed an offence of misconduct in public office. His conduct was wilful and deliberate, there was no reasonable excuse or justification for improperly favouring the interests of his family and the conduct 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.

The Commission is also satisfied for the purpose of s 74BA of the ICAC Act that this is serious corrupt conduct. This is because the conduct was that of a

member of Parliament who used his position to further the interests of his family rather than the public interest, was carried out over a long period, could constitute a serious criminal offence and also substantially impair public confidence in public administration.

In 2010, Edward Obeid Sr misused his position as a member of Parliament to influence Mr Kelly, Mr Brown and Mr Tripodi to advance Obeid family interests by working towards the submission of a minute to the Budget Committee of Cabinet recommending the NSW Government enter into direct negotiations with AWH with respect to the AWH PPP proposal at a time when he knew that a successful outcome for that proposal would financially benefit the Obeid family in the event a member of the Obeid family or an Obeid family entity acquired shares in AWH.

In doing so, Edward Obeid Sr failed to act for the welfare of the community, breached his fiduciary duty as a member of Parliament and sought to improperly influence the exercise of public duty by each of Mr Kelly, Mr Brown and Mr Tripodi.

Edward Obeid Sr's conduct was corrupt conduct for the purpose of s 8 of the ICAC Act. This is because his conduct could adversely affect, either directly or indirectly, the honest or impartial exercise of official functions by Mr Kelly, Mr Brown and Mr Tripodi and therefore comes within s 8(1)(a) of the ICAC Act. His conduct also constituted or involved the dishonest or 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.

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 Edward Obeid Sr committed an offence of misconduct in public office. His conduct was wilful and deliberate, there was no reasonable excuse or justification for improperly favouring the interests of his family and the conduct 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.

The Commission is also satisfied for the purpose of s 74BA of the ICAC Act that this is serious corrupt conduct. This is because the conduct involved an attempted perversion of the Cabinet decision-making process, involved a substantial breach of public trust by putting his family interests before the public interest, and

could constitute a serious criminal offence. The conduct could also substantially impair public confidence in public administration.

## Joseph Tripodi

In 2010, Mr Tripodi misused his position as a member of Parliament to prepare a draft Cabinet minute with the intention that it would be used by Mr Brown and Mr Kelly as the basis for a minute to be submitted by Mr Kelly to the Budget Committee of Cabinet, with the intention of improperly favouring Edward Obeid Sr by enabling AWH to proceed to direct negotiation with the NSW Government concerning its PPP proposal for the purchase, supply and operation of water infrastructure in the North West Growth Centre.

In doing so, Mr Tripodi failed to act with fidelity for the welfare of the community, breached his fiduciary duty as a public officer and sought to improperly influence Mr Kelly's exercise of his public duty. His conduct was inconsistent with his responsibilities as a member of Parliament to act in the public interest.

Mr Tripodi's conduct was corrupt conduct for the purpose of s 8 of the ICAC Act. This is because his conduct could adversely affect, either directly or indirectly, the honest or impartial exercise of official functions by Mr Kelly and therefore comes within s 8(1)(a) of the ICAC Act. His conduct also constituted or involved the dishonest or 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.

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 Tripodi committed an offence of misconduct in public office. His conduct was wilful and deliberate, there was no reasonable excuse or justification for improperly favouring the interests of Edward Obeid Sr and the conduct 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.

The Commission is also satisfied for the purpose of s 74BA of the ICAC Act that this is serious corrupt conduct. This is because the conduct involved an attempted perversion of the Cabinet decision-making process, involved a substantial breach of public trust by putting the interests of an individual before the public

interest, and could constitute a serious criminal offence. The conduct could also substantially impair public confidence in public administration.

## Chapter 35: Section 74A(2) statements

In making a public report, the Commission is required by s 74A(2) of the ICAC Act to include, in respect of each “affected” person, a statement as to whether or not in all the circumstances, the Commission is of the opinion that consideration should be given to the following:

- a. obtaining the advice of the DPP with respect to the prosecution of the person for a specified criminal offence
- b. the taking of action against the person for a specified disciplinary offence
- c. the taking of action against the person as a public official on specified grounds, with a view to dismissing, dispensing with the services of or otherwise terminating the services of the public official.

An “affected” person is defined in s 74A(3) of the ICAC Act as a person against whom, in the Commission’s opinion, substantial allegations have been made in the course of, or in connection with, an investigation.

The Commission is satisfied that the following are affected persons:

- Mr Brown
- Ms Certoma
- Mr Di Girolamo
- Mr Kelly
- Eric Koelma
- Timothy Koelma
- Mr MacGregor-Fraser
- Edward Obeid Jr
- Edward Obeid Sr
- Moses Obeid
- Mr Rippon

- Mr Tripodi.

In determining what statement to make under s 74A(2) of the ICAC Act, the Commission takes into account whether there is sufficient admissible evidence to support a prosecution. In this regard, it is important to take into account that each of the witnesses who gave evidence to the Commission did so under a declaration made pursuant to s 38 of the ICAC Act. The effect of such a declaration is that their evidence is not admissible against them in any criminal proceedings, other than proceedings for an offence under the ICAC Act. Accordingly, with respect to offences other than those under the ICAC Act, the Commission first considers whether there is other evidence that would be admissible in criminal proceedings and, if so, whether such evidence is sufficient to support criminal charges.

The Commission is of the opinion that consideration should be given to obtaining the advice of the DPP with respect to the prosecution of the following persons for the following specified criminal offences.

### Mr Brown

The Commission is of the opinion that consideration should be given to obtaining the advice of the DPP with respect to the prosecution of Mr Brown for the criminal offence of misconduct in public office in relation to his misuse of his public office in preparing the Kelly Cabinet minute for submission to the Budget Committee of Cabinet with the intention of improperly favouring Edward Obeid Sr.

### Mr Kelly

The Commission is of the opinion that consideration should be given to obtaining the advice of the DPP with respect to the prosecution of Mr Kelly for the criminal offence of misconduct in public office in relation to his

misuse of his public office by arranging for the preparation of the Kelly Cabinet minute and its submission to the Budget Committee of Cabinet with the intention of improperly favouring Edward Obeid Sr.

## **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:

- misusing his public office to promote AWH's interests to each of Michael Costa, Mr Rees, Mr lemma, Phillip Costa and Ms Keneally at a time when he knew that the advancement of those interests would financially benefit the Obeid family in the event a member of the Obeid family or an Obeid family entity acquired shares in AWH
- misusing his public office to influence Mr Kelly, Mr Brown and Mr Tripodi to advance Obeid family interests by working towards the submission of a minute to the Budget Committee of Cabinet recommending the NSW Government enter into direct negotiations with AWH with respect to the AWH PPP proposal at a time when he knew that a successful outcome for that proposal would financially benefit the Obeid family in the event a member of the Obeid family or an Obeid family entity acquired shares in AWH.

## **Mr Tripodi**

The Commission is of the opinion that consideration should be given to obtaining the advice of the DPP with respect to the prosecution of Mr Tripodi for the criminal offence of misconduct in public office in relation to his misuse of his public office to prepare a draft Cabinet minute and providing it for use by Mr Brown and Mr Kelly

as the basis for a minute to be submitted by Mr Kelly to the Budget Committee of Cabinet with the intention of improperly favouring Edward Obeid Sr.

## **Other affected persons**

The Commission is not of the opinion that consideration should be given to obtaining the advice of the DPP with respect to the prosecution of any of the other affected person for any criminal offence.

# Appendix 1: The role of the Commission

The Commission was created in response to community and Parliamentary concerns about corruption that had been revealed in, *inter alia*, various parts of the public sector, causing a consequent downturn in community confidence in the integrity of the public sector. It is recognised that corruption in the public sector not only undermines confidence in the bureaucracy but also has a detrimental effect on the confidence of the community in the processes of democratic government, at least at the level of government in which that corruption occurs. It is also recognised that corruption commonly indicates and promotes inefficiency, produces waste and could lead to loss of revenue.

The Commission's functions are set out in s 13, s 13A and s 14 of the ICAC Act. One of the Commission's principal functions is to investigate any allegation or complaint that, or any circumstances which in the Commission's opinion imply that:

- i. corrupt conduct (as defined by the ICAC Act), or
- ii. conduct liable to allow, encourage or cause the occurrence of corrupt conduct, or
- iii. conduct connected with corrupt conduct,

may have occurred, may be occurring or may be about to occur.

The Commission may also investigate conduct that may possibly involve certain criminal offences under the *Parliamentary Electorates and Elections Act 1912*, the *Election Funding, Expenditure and Disclosures Act 1981* or the *Lobbying of Government Officials Act 2011*, where such conduct has been referred by the NSW Electoral Commission to the Commission for investigation.

The Commission may report on its investigations and, where appropriate, make recommendations as to any action it believes should be taken or considered.

The Commission may make findings of fact and form opinions based on those facts as to whether any particular person has engaged in serious corrupt conduct.

The role of the Commission is to act as an agent for changing the situation that has been revealed. Through its work, the Commission can prompt the relevant public authority to recognise the need for reform or change, and then assist that public authority (and others with similar vulnerabilities) to bring about the necessary changes or reforms in procedures and systems, and, importantly, promote an ethical culture, an ethos of probity.

The Commission may form and express an opinion as to whether consideration should or should not be given to obtaining the advice of the Director of Public Prosecutions with respect to the prosecution of a person for a specified criminal offence. It may also state whether it is of the opinion that consideration should be given to the taking of action against a person for a specified disciplinary offence or the taking of action against a public official on specified grounds with a view to dismissing, dispensing with the services of, or otherwise terminating the services of the public official.

## Appendix 2: Making corrupt conduct findings

Corrupt conduct is defined in s 7 of the ICAC Act as any conduct which falls within the description of corrupt conduct in s 8 of the ICAC Act and which is not excluded by s 9 of the ICAC Act.

Section 8 defines the general nature of corrupt conduct. Subsection 8(1) provides that corrupt conduct is:

- (a) *any conduct of any person (whether or not a public official) that adversely affects, or that could adversely affect, either directly or indirectly, the honest or impartial exercise of official functions by any public official, any group or body of public officials or any public authority, or*
- (b) *any conduct of a public official that constitutes or involves the dishonest or partial exercise of any of his or her official functions, or*
- (c) *any conduct of a public official or former public official that constitutes or involves a breach of public trust, or*
- (d) *any conduct of a public official or former public official that involves the misuse of information or material that he or she has acquired in the course of his or her official functions, whether or not for his or her benefit or for the benefit of any other person.*

Subsection 8(2) specifies conduct, including the conduct of any person (whether or not a public official), that adversely affects, or that could adversely affect, either directly or indirectly, the exercise of official functions by any public official, any group or body of public officials or any public authority, and which, in addition, could involve a number of specific offences which are set out in that subsection.

Subsection 8(2A) provides that corrupt conduct is also any conduct of any person (whether or not a public official) that impairs, or that could impair, public confidence in public administration and which could involve any of the following matters:

- (a) *collusive tendering,*
- (b) *fraud in relation to applications for licences, permits or other authorities under legislation designed to protect health and safety or the environment or designed to facilitate the management and commercial exploitation of resources,*
- (c) *dishonestly obtaining or assisting in obtaining, or dishonestly benefitting from, the payment or application of public funds for private advantage or the disposition of public assets for private advantage,*
- (d) *defrauding the public revenue,*
- (e) *fraudulently obtaining or retaining employment or appointment as a public official.*

Subsection 9(1) provides that, despite s 8, conduct does not amount to corrupt conduct unless it could constitute or involve:

- (a) *a criminal offence, or*
- (b) *a disciplinary offence, or*
- (c) *reasonable grounds for dismissing, dispensing with the services of or otherwise terminating the services of a public official, or*
- (d) *in the case of conduct of a Minister of the Crown or a Member of a House of Parliament – a substantial breach of an applicable code of conduct.*

Section 13(3A) of the ICAC Act provides that the Commission may make a finding that a person has engaged or is engaged in corrupt conduct of a kind described in paragraphs (a), (b), (c), or (d) of s 9(1) only if satisfied that a person has engaged or is engaging in conduct that constitutes or involves an offence or thing of the kind described in that paragraph.

Subsection 9(4) of the ICAC Act provides that, subject to subsection 9(5), the conduct of a Minister of the Crown or a member of a House of Parliament which falls within the description of corrupt conduct in s 8 is not excluded

by s 9 from being corrupt if it is conduct that would cause a reasonable person to believe that it would bring the integrity of the office concerned or of Parliament into serious disrepute.

Subsection 9(5) of the ICAC Act provides that the Commission is not authorised to include in a report a finding or opinion that a specified person has, by engaging in conduct of a kind referred to in subsection 9(4), engaged in corrupt conduct, unless the Commission is satisfied that the conduct constitutes a breach of a law (apart from the ICAC Act) and the Commission identifies that law in the report.

Section 74BA of the ICAC Act provides that the Commission is not authorised to include in a report under s 74 a finding or opinion that any conduct of a specified person is corrupt conduct unless the conduct is serious corrupt conduct.

The Commission adopts the following approach in determining findings of corrupt conduct.

First, the Commission makes findings of relevant facts on the balance of probabilities. The Commission then determines whether those facts come within the terms of subsections 8(1), 8(2) or 8(2A) of the ICAC Act. If they do, the Commission then considers s 9 and the jurisdictional requirement of s 13(3A) and, in the case of a Minister of the Crown or a member of a House of Parliament, the jurisdictional requirements of subsection 9(5). In the case of subsection 9(1)(a) and subsection 9(5) the Commission considers whether, if the facts as found were to be proved on admissible evidence to the criminal standard of beyond reasonable doubt and accepted by an appropriate tribunal, they would be grounds on which such a tribunal would find that the person has committed a particular criminal offence. In the case of subsections 9(1)(b), 9(1)(c) and 9(1)(d) the Commission considers whether, if the facts as found were to be proved on admissible evidence to the requisite

standard of on the balance of probabilities and accepted by an appropriate tribunal, they would be grounds on which such a tribunal would find that the person has engaged in conduct that constitutes or involves a thing of the kind described in those sections.

The Commission then considers whether, for the purpose of s 74BA of the ICAC Act, the conduct is sufficiently serious to warrant a finding of corrupt conduct.

A finding of corrupt conduct against an individual is a serious matter. It may affect the individual personally, professionally or in employment, as well as in family and social relationships. In addition, there are limited instances where judicial review will be available. These are generally limited to grounds for prerogative relief based upon jurisdictional error, denial of procedural fairness, failing to take into account a relevant consideration or taking into account an irrelevant consideration and acting in breach of the ordinary principles governing the exercise of discretion. This situation highlights the need to exercise care in making findings of corrupt conduct.

In Australia there are only two standards of proof: one relating to criminal matters, the other to civil matters. Commission investigations, including hearings, are not criminal in their nature. Hearings are neither trials nor committals. Rather, the Commission is similar in standing to a Royal Commission and its investigations and hearings have most of the characteristics associated with a Royal Commission. The standard of proof in Royal Commissions is the civil standard, that is, on the balance of probabilities. This requires only reasonable satisfaction as opposed to satisfaction beyond reasonable doubt, as is required in criminal matters. The civil standard is the standard which has been applied consistently in the Commission when making factual findings. However, because of the seriousness of the findings which may be made, it is important to bear in mind what was said by Dixon J in *Briginshaw v Briginshaw* (1938) 60 CLR 336 at 362:

*...reasonable satisfaction is not a state of mind that is attained or established independently of the nature and consequence of the fact or fact to be proved. The seriousness of an allegation made, the inherent unlikelihood of an occurrence of a given description, or the gravity of the consequences flowing from a particular finding are considerations which must affect the answer to the question whether the issue has been proved to the reasonable satisfaction of the tribunal. In such matters 'reasonable satisfaction' should not be produced by inexact proofs, indefinite testimony, or indirect inferences.*

This formulation is, as the High Court pointed out in *Neat Holdings Pty Ltd v Karajan Holdings Pty Ltd* (1992) 67 ALJR 170 at 171, to be understood:

*...as merely reflecting a conventional perception that members of our society do not ordinarily engage in fraudulent or criminal conduct and a judicial approach that a court should not lightly make a finding that, on the balance of probabilities, a party to civil litigation has been guilty of such conduct.*

See also *Rejzek 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.

## Appendix 3: Summary of responses to adverse findings

Counsel Assisting the Commission made written submissions setting out, *inter alia*, what adverse findings it was contended were open to the Commission to make against various parties. These were provided to relevant parties on 13 June 2014. Written submissions in response were received by 7 July 2014. Counsel Assisting provided supplementary submissions on 18 December 2015. Submissions in response were received by 25 February 2016. On 21 June 2017, the Commission wrote to one party to provide an opportunity for that party to make further submissions on whether it was open to the Commission to make a particular adverse finding against that party. A submission in response was received on 17 July 2017.

The Commission considers that, in the circumstances, all affected parties had a reasonable opportunity to respond to the proposed adverse findings.

Mr Di Girolamo, Mr Kelly, Mr Tripodi, Edward Obeid Jr, Moses Obeid and Edward Obeid Sr requested the Commission include in this report a summary of the substance of their responses. The Commission did not accept all of the adverse findings contended for by counsel assisting. It is not necessary to summarise the substance of responses in relation to those adverse findings not made by the Commission.

### Mr Di Girolamo

#### Part 4 – AWH and the Obeids

It was submitted on behalf of Mr Di Girolamo that no proposed transfer of shares in AWH or Australian Water was ever performed and there was nothing to prove that Mr Di Girolamo gave false evidence as to any Obeid family interest in those companies. It was submitted that any assertion by Moses Obeid to Mr Brook that the Obeid family had “ownership” in AWH did not prove the fact of ownership.

The principal submissions relating to the construction of the Heads of Agreement are set out and dealt with in chapter 18 of the report.

It was submitted that representations in the 2012 and 2013 agreements that the \$3 million was a loan were not false. The Commission’s assessment of the evidence relating to those agreements is set out in chapter 18 of the report.

### Mr Kelly

Mr Kelly denied being involved in any wrongdoing or corrupt conduct.

### Chapters 22, 25 and 29: Mr Kelly and the Kelly Cabinet minute

It was submitted on behalf of Mr Kelly that the evidence did not support a finding that he was centrally involved in attempting to achieve a favourable outcome for AWH. It was submitted that, in putting forward the Kelly Cabinet minute, he was advancing his portfolio in accordance with government policy with the potential to benefit the state. That submission is addressed in detail in chapter 29 of this report.

It was submitted that there was no evidential basis for finding that he acted to advance the interests of Edward Obeid Sr, Mr Di Girolamo and AWH, and that no inference should be drawn from his failure to take any steps with respect to Ms Keneally’s letter of 7 September 2010. Those submissions are addressed in chapters 28 and 29 of this report.

It was submitted on behalf of Mr Kelly that his conduct could not constitute or involve an offence of misconduct in public office because there was no evidence of wilful misconduct that a properly instructed jury could be reasonably satisfied about in order to conclude that he was guilty of such an offence. In support of that submission, it was noted that Mr Kelly read the Kelly

Cabinet minute and “properly submitted it for the scrutiny he (and the Premier) knew it would receive” and that such conduct could not be so far below acceptable standards as to amount to an abuse of the public’s trust in the office holder. The Commission has found that Mr Kelly misused his public office with the intention of improperly favouring Edward Obeid Sr. The Commission is satisfied that his conduct was wilful and was an abuse of public trust.

### Mr Tripodi

Mr Tripodi denied being involved in any wrongdoing or corrupt conduct.

### Chapter 14: The meeting with Mr Brook

It was submitted on behalf of Mr Tripodi that he was not present at Moses Obeid’s house when Mr Brook was there and that Mr Brook’s evidence should not be believed. It was submitted that Mr Brook’s evidence was based on his knowledge that there was an entry in Edward Obeid Sr’s diary showing a meeting with Moses Obeid and Mr Tripodi in August 2008 and his likely awareness, as of 20 August 2013 when he gave a statement to the Commission, from a newspaper report that the Commission was investigating Edward Obeid Sr and Mr Tripodi in regards to AWH. The submission noted that Mr Brook had memory problems and, given that he did not make a record of the meeting, it was “unusual” that he was able, in 2013, to place the meeting as having occurred in August 2008.

It was also submitted that the telephone records for 22 August 2008 disproved that each of Moses Obeid, Edward Obeid Sr, Mr Tripodi and Mr Brook were present at Moses Obeid’s house at the same time. It was submitted that those records showed that the maximum amount of time for which Mr Brook and Mr Tripodi were in the inner city/inner eastern suburbs of Sydney

was only four minutes, between 4.45 pm and 4.49 pm. That submission was based on the times that their telecommunications connected with the Potts Point mobile telephone tower.

The submission misunderstood the records. The records showed the location of the mobile telephone towers that connected with each telecommunication. Telecommunications sent from the same area often connect with different towers. Therefore, a telecommunication emanating from Elizabeth Bay may connect with any one of a number of mobile telephone towers in that general area. The telephone records show that Mr Tripodi was in the eastern suburbs of Sydney from about 3.22 pm, Moses Obeid from about 2.40 pm and Edward Obeid Sr from about the same time. They indicate that Mr Brook arrived in the area from sometime between 3.54 pm (when he sent an SMS to Moses Obeid through the Neutral Bay mobile telephone tower) and 4.45 pm (when there was a voicemail message recorded through the Potts Point mobile telephone tower). The last record for Mr Tripodi’s use of his mobile phone was at 4.49 pm, but that does not prove that he left the eastern suburbs area at that time. Indeed, there are no records of any calls from his mobile telephone between then and 5.01 pm (the latest time shown on the records tendered at the public inquiry), which means he could have still been in that area at that time.

For the reasons set out in chapter 14 of this report, the Commission has found that Mr Tripodi was present at the 22 August 2008 meeting attended by Mr Brook.

### Chapters 26 and 29: Mr Tripodi’s involvement with the AWH PPP proposal

The principal submissions made by Mr Tripodi are set out and addressed in chapter 29.

## Edward Obeid Jr

### Part 4 – AWH and the Obeids

It was submitted on behalf of Edward Obeid Jr that neither he nor any Obeid family entity ever owned or controlled any part of AWH and that, at best, through his family's resources, he "loaned an amount of \$3.45 million" to Mr Di Girolamo on the basis that interest would be paid on those loans. It was submitted that no inferences could be drawn from the 2007 deed of option because it was rejected by Edward Obeid Jr's family and was never executed. With respect to the November 2010 Heads of Agreement, it was submitted it was poorly drafted but contained two alternative primary transactions being either a sale of shares or a loan, and the executed share transfers provided for those alternative transactions. It was submitted that the transaction entered into was one for a loan, not the purchase of shares because the Obeid family had rejected the latter option.

It was submitted that representations in the 2012 and 2013 agreements, that the \$3 million was a loan, was not false and the point of the signed 2012 agreement was to sever any security Edward Obeid Jr may have had over the AWH shares.

The reasons for rejecting these submissions are set out in part 4 of the report.

## Moses Obeid

### Chapter 14: Mr Brook's evidence

It was submitted on behalf of Moses Obeid that Mr Brook was a poor witness and the Commission should not rely on his testimony. It was submitted that, given Mr Brook's evidence that he was regularly in the eastern suburbs, the possibility that, on 22 August 2008, he was in that area for purposes other than visiting Moses Obeid was highly probable.

The Commission's reasons for accepting Mr Brook's evidence that he met with Moses Obeid on 22 August 2008 are set out in chapter 14 of this report.

## Edward Obeid Sr

Edward Obeid Sr denied being involved in any wrongdoing or corrupt conduct.

### Obeid family involvement in AWH

It was submitted on behalf of Edward Obeid Sr that the Obeid family never owned or controlled shares in AWH and that the evidence did not establish that Edward Obeid Sr knew or had any belief that his family owned or controlled shares in that company. It was submitted that his evidence, that he did not involve himself in the Obeid family businesses, should be accepted.

The Commission's reasons for rejecting those submissions are set out in chapter 19 of this report.

### Chapter 14: Mr Brook's evidence

It was submitted that, although Edward Obeid Sr had met Mr Brook at Moses Obeid's house, Mr Tripodi was not there and, at the time, Mr Brook was intoxicated and Moses Obeid did not speak openly about any Obeid family interest in AWH. Although the Commission accepted Mr Brook's evidence of the meeting on 22 August 2008, it was not his evidence that Moses Obeid spoke about AWH or water privatisation in Edward Obeid Sr's presence, and no findings were made to that effect.

### Chapters 20, 27 and 29: Edward Obeid Sr's actions and the Kelly Cabinet minute

It was submitted that Edward Obeid Sr did not use his position to seek a favourable outcome for the AWH

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PPP proposal or that he acted improperly in relation to the Kelly Cabinet minute. It was submitted that the evidence established nothing more than that he sought opportunities for Mr Di Cirolamo to meet ministers to put his case and that, as far as Edward Obeid Sr was concerned, that case did not involve the PPP proposal because he only came to know about it sometime later.

It was submitted that Edward Obeid Sr knew nothing about the preparation of the Kelly Cabinet minute and, although he spoke with Mr Brown, they did not discuss the AWH PPP proposal. Even if it were accepted that Edward Obeid Sr spoke with Mr Kelly, that would establish nothing more than that the subject of AWH was raised by Edward Obeid Sr, not the AWH PPP proposal. There were no overt acts on the part of Edward Obeid Sr in pursuance of any alleged agreement to provide an outcome favourable to AWH and Obeid family interests.

The reasons for rejecting these submissions are set out in chapters 21, 27 and 29 of the report.

It was submitted that, were a prosecution for misconduct in public office even possible, there would be no such case fit to go to a jury because none of the critical elements of the offence could be proved to the requisite standard.

The Commission did not accept that submission.

## Appendix 4: Heads of Agreement

### Heads of Agreement – Australian Water

Dated 4 November 2010

Lands Legal  
Level 8  
131 York Street  
Sydney NSW 2000  
Australia  
T +61 2 8281 6600  
F +61 2 8281 6699  
schalablan@landslegal.com.au

{00089116 v2 12080317 \SYC}

## Heads of Agreement

### Details

Interpretation – definitions are at the end of the General terms

#### Parties

Purchaser	Name	[Obeid Family Trust]
	Address	
Vendor	Names	Nicholas Anthony Di Girolamo
	Address	15 Sherwin Street, Henley NSW 2111

#### Background

The Vendor is the legal and beneficial owner of the Shares and has agreed to transfer the Shares to the Purchaser in accordance with this agreement.

**Definitions**

In this agreement:

**Australian Water** means Australian Water Pty Limited  
ACN 122 590 836

**Australian Water Holdings** means Australian Water Holdings Pty Limited ACN 003 702 832

**Companies** means Australian Water and Australian Water Holdings

**Shares** means:

- 100 out of the 200 shares owned by the Vendor in Australian Water; and
- 30 out of the 60 shares owned by the Vendor in Australian Water Holdings.

**Purchase Price** means \$3,000,000

## General terms

---

### 1 Sale of Shares

#### 1.1 Sale

In consideration of payment by the Purchaser to the Vendor of the Purchase Price in accordance with clause 1.2, the Vendor agrees to transfer the Shares to the Purchaser on Monday 8 November 2010. On that date the Vendor must deliver to the Purchaser share certificates for the Shares.

#### 1.2 Purchase Price

The Purchase Price is payable as follows:

1. On Monday 8 November 2010 - \$1,000,000
2. No later than 31 March 2011 - \$2,000,000

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### 2 Warranties

#### 2.1 Assets

The Vendor warrants as follows:

- (a) The Australian Water Business is owned by the Companies.
- (b) The Companies are not trustees of any trusts.
- (c) There does not exist a shareholders' agreement in relation to the Companies.
- (d) The Constitution of the Companies does not prohibit the Vendor from entering into this agreement and the agreements contemplated by it.
- (e) The Vendor has obtained all necessary consents from the other shareholders of the Companies as required prior to entering into this agreement.
- (f) There are no options over shares in the Companies or options to be issued shares in the Companies.
- (g) The ASIC records of the Companies are current and accurately reflect the capital structure of the Companies.

### 3 Interest and Consultancy

#### 3.1 Interest

The Vendor shall pay to the Purchaser a return of no less than \$300,000 per annum payable monthly in advance on the first day of each month as interest on the investment made by the Purchaser pursuant to this agreement. This payment shall commence at the time the payment referred to in clause 3.22 is made. If these payments are not made on the due date, the payment shall increase to \$360,000 per annum as a genuine loss suffered by the Purchaser for the payment being late.

#### 3.2 Consultancy

The Vendor shall procure that the Companies enter into a consultancy agreement with an entity nominated by the Purchaser on the following terms:

- (a) Ten (10) years with two subsequent options of ten (10) years each *or as mutually agreed* *✓*
- (b) \$350,000 per annum plus GST payable monthly in advance *✓*
- (c) Commencing at the time the payment referred to in clause 3.22 is made. *✓*
- (d) Other such terms as are appropriate for such agreements.

### 4 Other matters

#### 4.1 Basis of arrangements

The parties have agreed to structure their arrangements upon the basis that:

- (a) This agreement sets out the arrangements between the parties and their legally binding intentions.
- (b) The parties will no later than 30 November 2010 enter or procure the relevant parties to enter into formal shareholders agreement in respect of the Companies incorporating those provisions in this agreement as applicable.
- (c) The parties will no later than 30 November 2010 enter or procure the relevant parties to enter into formal consultancy agreement as outlined in clause 3.
- (d) The shareholders agreement and consultancy agreement shall be on normal terms and conditions for such agreements.
- (e) each party will bear its own legal costs.

#### 4.2 Transaction timing

It is currently contemplated that each of the above arrangements will be documented in a manner which will involve execution and exchange by 30 November 2010. The parties must use their best endeavours to achieve these objectives.

**4.3 Status of arrangements**

The parties intend for this agreement to be legally enforceable but may replace them with formal legal documents as contemplated in clause 4.1.

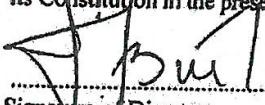
**4.4 GST**

The parties acknowledge that all of the amounts expressed in this agreement are inclusive of GST (if applicable).

## Executed as an Agreement

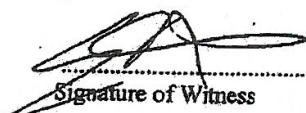
DATED: \_\_\_\_\_

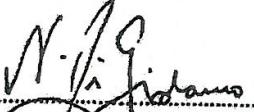
EXECUTED by [OBEID ENTITY]  
PTY LIMITED in accordance with  
its Constitution in the presence of:

  
Signature of Director  
PAUL OBEID  
Name of Director (block letters)

  
Signature of Director  
MOSES E. OBEID  
Name of Director (block letters)

EXECUTED by NICHOLAS  
ANTHONY DIGIRLAMO in the  
presence of:

  
Signature of Witness  
EDWARD OBEID, Jr.  
Name of Witness (block letters)

  
Signature of NICHOLAS  
ANTHONY DIGIRLAMO

**STANDARD TRANSFER FORM**

For Non-Market Transactions

Affix Stamp Duty Here		Marking Stamp	
<b>FULL NAME OF COMPANY OR CORPORATION</b>	<b>AUSTRALIAN WATER HOLDINGS PTY LTD</b> ABN 47 003 702 832		
<b>DESCRIPTION OF SECURITIES</b>	Class	If not fully paid, paid to	Register
<b>QUANTITY</b>	THIRTY	Words	Figures 30
<b>FULL NAME(S) OF TRANSFEROR(S) (SELLER(S))</b>	Surname <b>Nicholas Anthony Di Girolamo</b> Christian Name(s) <b>PLEASE USE BLOCK LETTERS</b>		
<b>SECURITY REFERENCE NUMBER</b>	SRN:		
<b>CONSIDERATION</b>	\$ <b>5</b>	Date of Purchase <b>5 / 5 / 2010</b>	
<b>FULL NAME(S) OF TRANSFeree(S) (BUYER(S))</b>	Surname <b>ACN 5</b> Christian Name(s) <b>PLEASE USE BLOCK LETTERS</b>		
<b>FULL ADDRESS OF TRANSFeree(S) (BUYER(S))</b>	State <b>NSW</b>		
<b>SECURITY REFERENCE NUMBER (if known)</b>	SRN:		
<b>REMOVAL REQUEST</b>	Please enter the above securities on the		REGISTER

I/We the registered holder(s) and undersigned seller(s) for the above consideration do hereby transfer to the above name(s) hereinafter called the Buyer(s) the securities as specified above standing in my/our name(s) in the books of the abovenamed Company, subject to the several conditions on which I/We held the same at the time of signing hereof and I/We the Buyer(s) do hereby agree to accept the said securities to the same conditions.  
I/We have not received any notice of revocation of the Power of Attorney by death of the grantor or otherwise, under which this transfer is signed.

<b>TRANSFEROR(S) (SELLER(S)) SIGN HERE →</b>	Signed by <b>Nicholas Anthony Di Girolamo</b> accordance with the provisions of s.127(1) of the <b>Corporations Act 2001</b>		<b>FOR REGISTRAR USE</b>
	Director	Secretary	
<b>DATE SIGNED</b>	/ / 2010		
<b>TRANSFeree(S) (BUYER(S)) SIGN HERE →</b>	Signed by <b>N</b> in accordance with the provisions of s.127(1) of the <b>Corporations Act 2001</b>		
	Director	Secretary	
<b>DATE SIGNED</b>	/ / 2010		

TSIVXGILWON



## Appendix 5: The McGlynn draft Cabinet minute

Cabinet-in-Confidence	
<b>Title</b>	Unsolicited Proposal from Australian Water Holdings Pty Limited
<b>Minister</b>	Minister for Infrastructure
<b>Date of Minute</b>	
<b>Main Purpose</b>	To advise the Cabinet Standing Committee on the Budget of the unsolicited proposal received from Australian Water Holdings Pty Limited (AWH) and to seek endorsement of the recommendation to reject the proposal
<b>Resources Required for Implementation</b>	Nil
<b>Previous Cabinet Decisions</b>	None
<b>Departure from Previous Cabinet Decision</b>	N/A
<b>Relation to Existing Policy</b>	
<b>Priority</b>	Normal
<b>Legislative Programming</b>	Nil
<b>Announcement of Decision</b>	N/A

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## 2 PURPOSE OF THE PROPOSAL

- 2.1 To advise the Cabinet Standing Committee on the Budget of the unsolicited proposal received from Australian Water Holdings Pty Limited (AWH) and to seek endorsement of the recommendation to reject the proposal.

## 3 RECOMMENDATIONS

- 3.1 That the Cabinet Standing Committee on the Budget (BCC) endorse the recommendation to reject AWH's proposal. The key reasons for this recommendation are:-
  - That direct negotiations would not provide value for money for the State, Sydney Water Corporation (SWC) or the community.
  - That the proposal would not transfer sufficient risk to the Proponent
  - That, in the opinion of the Initial Review Panel, there is no prospect that direct negotiations would lead to an acceptable outcome to the Government.
- 3.2 Note the findings of the Initial Review Panel which was established to assess the proposal.
- 3.3 Note that entering into an exclusive arrangement with AWH on the basis of the proposal would risk interfering with the Precinct Acceleration Protocol and, consequently, potentially risk delaying the release of land.
- 3.4 Note the legislative and policy development required to support future increased private sector participation in the water industry.

## 4 BACKGROUND

- 4.1 In July, 2009, AWH submitted an unsolicited proposal to the Government for the purchase or long term lease of existing water and wastewater assets it has already constructed in the North West Growth Centre (NWGC); and the private development, finance and operation of all further water supply and wastewater assets in the NWGC.
- 4.2 AWH, formerly known as the Rouse Hill Infrastructure Consortium Pty Limited (RHIC), was a joint venture of landholders, which was established in 1989 to project manage and finance water infrastructure in the Rouse Hill Development Area for Sydney Water Corporation (SWC).
- 4.3 AWH has constructed approximately \$630 million of water and wastewater infrastructure in the NWGC under a project delivery agreement with SWC. The works have been funded by bank debt which was repaid by direct application of developer charges and payments by SWC. The majority of the debt was underwritten by SWC. The infrastructure includes a sewage and recycled water treatment plant, 155km of pipes for sewage/potable water/recycled water, 6 reservoirs, 13 pumping stations, 15 dry detention basins, 3

wet detention basins and rehabilitated 33 hectares of native vegetation.

## 5 INITIAL REVIEW

- 5.1 An Initial Review Panel, under Independent Chairman, Paul Gilbertson and comprising senior officers from Department of Premier and Cabinet (DPC) and NSW Treasury, was established to undertake an initial assessment of the proposal in accordance with the Working with Government Guidelines. SWC was not represented on the Panel. Legal advice was sourced from the Crown Solicitor and KPMG was commissioned to prepare a Public Sector Comparator. The panel considered the legal position, the value for money of the proposal, the risk allocation implicit in the offer and the administrative issues which are raised by the proposal. The Panel considered the question of whether the proposal should proceed to direct negotiations.
- 5.2 A probity plan was prepared and a probity advisor (Warwick Smith, Procure Group) was appointed whose responsibility was to observe and advise on the governance arrangements, probity procedures and transparency of the process.

## 6 PROPOSAL BY AWH

- 6.1 AWH proposes to purchase (or acquire via a long term lease) all the existing water assets in the NWGC for between \$160m and \$190m and to build all future water supply, waste water and recycled water assets in the NWGC. In addition it would operate, maintain and provide retail services for the whole NWGC for a concession period of at least 35 years.
- 6.2 In return, AWH requires an availability payment of between \$25m and \$35m per year, and the right to collect all retail payments which would accrue to the assets it controls. The proposal is based on current IPART pricing determinations and would require renegotiation should any future pricing determination deliver an adverse outcome.
- 6.3 In addition, AWH is seeking the following explicit support:
  1. Development uptake guarantee
    - Government would compensate the AWH for revenue shortfall if agreed profile of sale and development of lots is not achieved.
  2. Bank requirements
    - No explicit information on Guarantees or underwriting required by the banks is available. No formal approach has been made to the banks at this stage. AWH expects that the government will be required to enter into a tripartite agreement with lenders and the Special Purpose Vehicle (SPV) to guarantee the payment market of value of debt and equity on any termination by government. The original banking facility for RHIC required a guarantee and top up by Sydney Water.

3. Social obligations

- Full cost reimbursement by NSW Government for Pensioner concessions, exempt property concession scheme, financial assistance scheme and climate change fund contributions.

6.4 The proposal is based on estimated operating costs starting at \$3.5m in 2010 to \$8.6m in 2020, all in real terms, with inflation to be added. These costs are estimated using industry figures for operation and maintenance of water and waste water services averaged across blocks serviced.

6.5 AWH has no experience in operation of water networks or in retail supply, but expects to outsource these functions to an experienced third party supplier. In order to operate the water/waste water services, AWH must obtain a network operator's licence and a retail supplier's licence.

6.6 AWH cites the following potential benefits of the proposal to the NSW Government:

- NSW Government to receive cash for existing NWGC assets
- AWH organises private sector finance for new water assets in the NWGC
- Timely delivery of water assets in the NWGC therefore allowing accelerated land release
- Improved housing affordability from the delivery of more cost effective water assets
- Employment creation
- The project would stimulate water industry competition in NSW
- AWH will provide best practice and fully closed effluent/pollution control system to protect the Hawkesbury Nepean river system
- AWH will continue its extensive works in native vegetation rehabilitation.

## 7 RELATIONSHIP BETWEEN AWH AND SYDNEY WATER

7.1 In 1991 the NSW Government passed the Water Board (Amendment) Act that enabled AWH to enter into a deal with SWC to finance and deliver water infrastructure in the NWGC.

7.2 By way of a deed dated 24 May, 1992, the Water Board (predecessor of SWC) and RHIC together with various owners of land in the Rouse Hill area agreed that RHIC would finance and project manage the provision of water infrastructure in various stages to the NWGC for SWC and to meet SWC's program.

7.3 On 16 October 1992, the above deed was supplemented by a document described as the Infrastructure Deed (Other Stages) referred

to as the Other Stages Deed (OSD). AWH believes the deed provides it with an exclusive right to project manage the construction of all water and wastewater infrastructure in the NWGC for a fee of 4.5% of construction costs. SWC takes the view that this deed is an agreement to negotiate,

7.4 Following a dispute on the interpretation of the OSD between SWC and AWH, which was the subject of mediation, SWC wrote to AWH on 8 August 2008 setting out a number of matters on which agreement was reached. One paragraph of the letter stated the following:

"On 7 August 2008 it was also agreed that RHIC could put a proposal to Sydney Water that involved the private finance for further works and that such a proposal may be structured like a public private partnership or a BOO/BOOT [build, own, operate/build, own, operate and transfer]. Sydney Water will consider such a proposal and if it equals or betters a Public Sector Comparator, compiled in line with NSW Working with Government Guidelines, then Sydney Water and RHIC will seek approvals needed for such a proposal from Government. Both parties agree that the scope of the proposal from RHIC should be one that Sydney Water agrees with."

## 8 LEGAL ISSUES

8.1 In recent years AWH and SWC have each obtained legal opinions as to the rights or otherwise of both parties regarding the provision of further water assets in the NWGC based on the OSD. These opinions differ in their interpretation. The OSD is poorly drafted and unclear. The AWH interpretation is that the State is contractually bound to deal with AWH and thus competition from any other organisation is not viable.

8.2 In relation to the proposal submitted by AWH, the Solicitor General advised that the proposal should be assessed in accordance with the letter from SWC to AWH which followed the mediation on the OSD in July 2008. The panel has followed the process set out in that letter.

8.3 The advice from Solicitor General provides that even if there were a negative right to prevent others from delivering future assets, this does not extend to the purchase and operation of the existing assets or retail operations of water supply and wastewater services. This position would remove any grounds for exclusive direct dealing on the proposal by AWH.

8.4 The Initial Review Panel noted that the various opinions around the rights conferred by the OSD reflected doubt over those rights. The Panel therefore concentrated the initial assessment on the value for money for the State, Agency and community, before considering the legal position.

8.5 Under the existing Precinct Acceleration Protocol policy, land releases within the South West and North West Growth Centres may be

accelerated by landholders earlier than proposed by the Growth Centres Commission. (Note: SWC procures infrastructure delivery to accord with the GCC release program.) Precinct releases can be accelerated by landholders if they deliver the necessary infrastructure requirements at no cost to Government. DPC Legal Branch advises that there is a risk that claims in estoppel could be made by landholders who have made expenditures relying on that protocol. This risk applies to a considerable portion of the land under consideration in the NWGC.

## 9 EXISTING ASSET PURCHASE – VALUE FOR MONEY

9.1 KPMG considered the valuation of the existing assets from two different perspectives. Firstly, an assessment was made using the concept of Impaired Depreciated Replacement Cost (IDRC), which is the value at which the assets are held on Sydney Water's balance sheet. The second approach was based on a consideration of the value of the net customer revenues to be earned from the assets, discounted to present at a 7.5% discount rate. The two values are compared with the offer range provided by AWH for these assets in the table below. In addition, the AWH offer includes the transfer of assets which are currently under construction. The value of these assets has been included as a separate line in Table 1 at current cost of construction.

9.2 Under either valuation alternative, the offer from AWH is considerably below the assessed value of the assets and would result in a loss on sale of assets of between \$127m to \$289m on the SWC balance sheet.

**Table 1 Comparison of PSC Value Estimates with AWH Offer**

KPMG PSC		AWH Offer
1.a	Existing RHPA assets IDRC Value	
	Impaired B/S value	\$343m
	New Works	\$106m
	Total	\$449m
1.b	Existing RHPA assets NPV Revenues Valuation	
	MEERA <sup>1</sup> value	\$211m
	New Works	\$106m
	Total	\$317m
		\$160m to \$190m

<sup>1</sup> Modern Engineering Equivalent Replacement Asset

## 10 NEW ASSET PROVISION – VALUE FOR MONEY

10.1 KPMG assessed the likely construction cost by SWC of the new assets proposed by AWH for the North West Growth Centre. The comparison of the SWC estimate with the AWH estimate is set out in Table 2. Given the basis of the estimates the figures are statistically equal. However, there are a number of exclusions of risks in the AWH pricing which would require clarification. The excluded items in the AWH pricing, other than GST, finance and land cost, are not likely to be significant and have not been explicitly taken into account in the SWC estimate for KPMG. From this comparison, there is no direct benefit of a lower cost of delivery of the new assets by AWH.

**Table 2 New Asset Construction**

KPMG PSC	AWH Offer
Sydney Water Estimate = \$1.4bn	\$1.2bn +25% Design and Project management = \$1.5bn
<b>Estimate Includes:-</b> <ul style="list-style-type: none"><li>• GST</li><li>• Land Costs</li><li>• Design</li><li>• Project Management costs</li></ul>	<b>Estimate Excludes:-</b> <ul style="list-style-type: none"><li>• GST</li><li>• Escalation beyond Jan 2010</li><li>• Contaminated material</li><li>• Archaeological remains</li><li>• Land costs</li><li>• Advertising Costs</li><li>• Legal Costs</li><li>• Finance Cost</li><li>• Service diversions</li><li>• Includes contractor design at 4%</li></ul>

## 11 PUBLIC SECTOR COMPARATOR

11.1 In relation to AWH's proposal to develop and operate *further* water supply and wastewater assets in the NWGC, KPMG noted in its Public Sector Comparator (PSC) report that since the revenue under any ownership scenario would be determined by IPART based on capital recovery and operations and maintenance cost, the comparison reduces to a consideration of the capital and operating costs of the two parties. KPMG assessed the capital costs as noted in the Table 2 above. The conclusion of the Initial Review Panel based on comparison with the proposal is that there is no clear value advantage to the delivery of the capital assets by AWH.

11.2 The only comparator available from the AWH proposal for operating and maintenance costs is a high level estimate of the costs for the existing assets. This estimate as noted above starts at \$3.5m and

rises to \$8.6m in 2020 based on an assumed uptake of released blocks will full take up reached by 2020. The current SWC estimate for the operation and maintenance cost for the full block take up is \$7.21m. It should be noted that AWH estimates are based on industry averages and would be refined after due diligence, whereas the SWC costs are based on existing cost structures in SWC. Whilst, it is likely that the two costs would converge to the lower SWC costs with further AWH due diligence, the Initial Review Panel could see no advantage arising from the operation of the assets by AWH.

## 12 RISK ALLOCATION

- 12.1 Based on the proposal received from AWH, the Initial Review Panel compiled a risk analysis in accordance with the Working with Government Guidelines. The risk analysis is contained in Appendix A.
- 12.2 While ostensibly the proponent is taking full commercial risk, the structure, timing and quantum of the availability charge transfers the commercial risk to government. The availability charge is structured to cover all debt and equity returns, and the timing of the fixing of the charge is set after the receipt of final construction and operating contract offers of other parties. In addition, the proposal assumes that any changes in the income flowing from an IPART determination would be reflected in a modified availability charge. The proposal to reset the availability charge at the beginning of each stage, based on construction cost, ruling financial conditions and assumed lot release profiles, transfers all commercial risk to the State.
- 12.3 The proposal for Government underwriting of the block uptake risk eliminates much of the ongoing commercial risk to the proponent.
- 12.4 It should also be noted that there is no competitive risk for the proponent. The proponent, if successful, would own monopoly infrastructure for which there is no alternative provider. This proposal does not generate competition in the water sector. Private ownership of part of the network does not provide competition in the sector as it simply creates another monopoly provider, bound geographically, which uses the same contractors to build similar assets and operate in a similar way. Innovation and competition would develop at a closed network level, but not at a network component level.
- 12.5 Given the low level of risk accepted by the proponent, it is difficult to justify the 15% return on equity which is priced into the proposal. This the risk profile of this proposal is akin to that of social infrastructure, and would normally attract a much lower return rate than 15%.

## 13 INITIAL REVIEW ASSESSMENT FINDINGS

- 13.1 The Initial Review Panel's assessment was based on NSW Treasury's "Working with Government – Guidelines for Privately Financed Projects" (December 2006) and the Independent Commission Against Corruption's "Direct Negotiations – Guidelines for Managing Risks in

"Direct Negotiations" (May 2006). A number of criteria must be met prior to recommending direct negotiations with a proponent.

WwG Guidelines Criterion	Initial Review Panel Conclusion
Only the proponent, because it owns real property, intellectual property, or some other unique element, can deliver the proposal's essential outcomes	There is doubt about the legal claim of AWH to provide further/future infrastructure given conflicting advice. The Solicitor General advises any rights AWH might have regarding future infrastructure delivery does not directly provide a right to AWH to purchase existing assets, or to operate the water and waste water supply system nor to run a water retail operation.
Direct negotiation would preserve considerable benefits for the agency, the Government and the community	No benefits were identified that would be preserved by direct negotiation.
That direct negotiations would provide better value for money than a competitive tender process	Value for money by comparison to the PSC was not demonstrated. There exist many organisations able to deliver a competitive bid on the construction, operation, maintenance and financing of these works, and a competitive tender would likely draw a better overall proposal from the market.
That the proponent has the expertise, experience and financial capacity to successfully deliver the project	The proponent has the expertise to project manage the delivery of the assets.  The proponent has no expertise or experience in the operation, maintenance and retail management of water supply systems. AWH would have to contract these services through third parties.  The proponent has no financial capacity to deliver the project. AWH would be relying on the financial strength of a range of third parties and the State would be best served by dealing with those third parties rather than a financially weak intermediary.
The monetary value of any intellectual property.	There is no unique intellectual property associated with this proposal.

13.2 The analysis shows that all the criteria that must be satisfied to justify a direct negotiation have not been met. In particular, it would be difficult to prove that direct negotiations would provide better value for money than a competitive tender process.

#### 14 SUMMARY OF REQUIREMENTS OF GOVERNMENT

14.1 The proposal would require the following support and action by Government:-

- Availability charge of between \$25m and \$35m per year
- Government underwriting of uptake risk
- SWC loss of net income from existing assets of \$15m per year, and loss of future income from new assets in NWGC.
- SWC loss on sale of assets of up to \$289m
- Potential minor increase in water pricing across Sydney
- Requirement to establish regulatory framework including independent regulator, legislated rights for access to land to AWH and agreements between all water companies and the regulator.
- Underwriting of social obligations
- Provision of infrastructure other than water in any accelerated program of land release.

## 15 ASSESSMENT OF CLAIMED BENEFITS

15.1 In its proposal, AWH set out a range of benefits which would flow from the proposal. The Initial Review Panel considered the claimed benefits and made the following assessment.

AWH Nominated Benefit	Initial Review Panel Assessment
NSW Government to receive cash for existing NWGC assets	The proposed cash payment is considerably less than the value of the assets should they remain in the control of SWC.
AWH organises private sector finance for new assets in the NWGC	<ul style="list-style-type: none"> <li>• This benefit is already available under current arrangements.</li> <li>• The Government would be required to underwrite the finance with a \$25m to \$35m availability charge.</li> <li>• The Government could borrow at a lower rate and has a lower cost of equity than AWH.</li> </ul>
Timely delivery of assets in the NSGC therefore allowing accelerated land release	<ul style="list-style-type: none"> <li>• Accelerated land release is available under the Precinct Acceleration Protocol.</li> <li>• AWH is only providing water and wastewater assets, leaving all other infrastructure to be provided by Government.</li> <li>• Commitment to this proposal would remove Government discretion to determine timing of land release, but create a liability for accelerated availability costs.</li> </ul>
Improved housing affordability from the delivery of more cost effective water assets	AWH present no information which demonstrated lower cost asset delivery or operation. Estimated costs are close to SWC estimates, and where different, they are higher.

AWH Nominated Benefit	Initial Review Panel Assessment
Employment Creation	The delivery process will support the same number of jobs, whoever builds the assets
The project would stimulate water industry competition in NSW	The proposal is to create a monopoly asset owner in a specific region. This does not bring any competition to the water industry in NSW.
AWH will provide best practice and fully closed effluent / pollution control system to protect the Hawkesbury Nepean river system	This technology is available to SWC at the same price. The design proposed by AWH implements existing SWC standards which would be followed by any provider, including SWC.
AWH will continue its extensive works in native vegetation rehabilitation	These works would continue under the existing arrangement and are part of the SWC standards which would be followed by any provider including SWC.

## 16 OTHER ISSUES:

- 16.1 An assessment of the financial strength of AWH by KPMG, based on the accounts provided by AWH, show that at the end of the 2008-09 financial year, AWH had net assets of \$36. The financial capability behind any bid would be provided by a third party contractor, a third party operator and the financers.
- 16.2 An operator has not been selected or included in the preparation of the proposal. Any operator would be required to obtain an operating licence prior to the Government entering into any agreement.
- 16.3 The establishment of an alternative water supply infrastructure owner would require the establishment of an independent regulator to handle matters standards, operating rules, service levels and the ongoing development of the system through capital works and maintenance. It would then be necessary to establish agreements between SWC and the regulator covering these matters. These agreements would become the standard operating agreements for system participants..
- 16.4 SWC holds a right, under its governing legislation, to enter land for the provision of water supply services. AWH does not have that right. Any agreement would require the transfer of that right to AWH for the NWGA, possibly by legislative action or formal direction to Sydney Water.
- 16.5 AWH proposes to deliver and operate water infrastructure only. If the purpose of the proposal is to release land faster, it will also require delivery of other infrastructure such as roads and power by Government with potential implications for their programs and budgets. The Initial Review Panel has not assessed the potential impact.

## 17 FINANCIAL IMPACT

- 17.1 The proposal requires an annual payment of between \$25m and \$35m by government to AWH as an availability charge for the assets.
- 17.2 The proposal requires underwriting of the uptake risk for properties in the NWGC.
- 17.3 The proposal requires that assets currently on the SWC balance sheet at a value of up to \$449m be transferred to AWH for a payment of between \$160m and \$190m. This would cause a loss of up to \$289m to SWC, impairing its ability to pay dividends to the State in the year of the transaction.
- 17.4 The proposal would transfer net revenue of at least \$9.1m per annum from SWC to AWH, arising from the existing assets, with a consequent result of reducing the profitability of SWC and reducing its ability to pay dividends to the state in the future.
- 17.5 Further revenue from SWC may be transferred to AWH as part of the postage stamp pricing policy for water pricing.

## 18 RURAL IMPACT

- 18.1 Nil

## 19 IMPACT ON FAMILIES

- 19.1 The higher cost of capital of AWH when compared with SWC may be reflected in minor water charge increases across Sydney under the IPART considerations of water pricing.

## 20 REGULATORY IMPACT

- 20.1 SWC, as a direct competitor of AWH, would not be in a position to enter into an agreement with AWH, nor regulate the performance of AWH. Accordingly, a new Water Regulation Body would be required to regulate the delivery of water supply by both SWC and AWH.

## 21 LEGISLATION REVIEW COMMITTEE REQUIREMENTS

- 21.1 Legislation would be required for the establishment of the regulatory body and to provide AWH with the right to deliver water supply assets on third party property.

## 22 ATTACHMENTS

- A Risk Matrix
- B Financial Impact Statement

**Tony Kelly MP**  
**Minister for Infrastructure**

## ATTACHMENT A Risk Matrix

This risk matrix is premised on the available information from the AWH Proposal and abstracted from the Appendix 3, Working with Government Guidelines.

RISK	ALLOCATION	
	Government	Proponent
<b>Site Risks</b>		
Existing structure (refurbishment/extensions)	NA	
Site conditions	✓	
Approvals	✓	
Environmental	✓	
Clean-up and rehabilitation		✓
Native title	✓	
Cultural heritage	✓	
Availability of site	✓	
<b>Design, construction and commissioning risk</b>		
Design		
Construction		✓
Commissioning		✓
<b>Sponsor risk</b>		
Probity	✓	
Financial	✓	
Technical		
Operational	✓	
Change in ownership	✓	✓
<b>Financial risk</b>		
Interest rates pre-completion	✓	
Financing unavailable	✓	
Further finance	✓	
Refinancing benefit		✓
Tax changes	✓	
<b>Operating risk</b>		
Inputs		✓
Maintenance and Refurbishment		✓
Changes in output (Specification outside agreed specification range)	✓	
Operator failure	✓	
Technical obsolescence or innovation		✓
<b>Market risk</b>		
General economic downturn	✓	
Competition	NA	
Demographic change	✓	
Inflation risk	✓	✓
<b>Network and Interface risk</b>		
Withdrawal of support network	✓	
Changes in competitive network	✓	
Interface	✓	

RISK	ALLOCATION	
	Government	Proponent
<b>Industrial relations risk</b>		
Industrial relations and civil commotion		✓
<b>Legislative and Government</b>		
Approvals	✓	
Changes in law	✓	
Regulation	✓	
<b>Force majeure</b>		
Force Majeure	✓	
<b>Asset ownership risk</b>		
Technical obsolescence		✓
Default and termination	✓	
Residual value on transfer to Government	NA	NA

**ATTACHMENT B**  
**FINANCIAL IMPACT STATEMENT**

**Schedule 1: Financial Impact of Proposal**

	2008/09 (\$'000)	FORWARD ESTIMATES			
		2009/10 (\$'000)	2010/11 (\$'000)	2011/12 (\$'000)	2012/13 (\$'000)
<b>RECURRENT</b>		\$0	\$0	\$0	\$0
<b>Expenses:</b>					
Employee related					
Non employee related (incl. depreciation)		35,000 15,000	35,000 15,000	35,000 15,000	35,000 15,000
<b>Total Expenses</b>					
<i>less</i> agency offset savings					
<b>Net Expenses</b>					
<i>less</i> Agency revenue					
<b>Agency Net Cost Of Services</b>					
Net on-costs to other budget sector agencies (as per schedule 3)					
<b>Total Net Cost of Services (NCS)</b>		50,000	50,000	50,000	50,000
<b>CONSOLIDATED FUND REVENUES</b>					
Taxes					
Commonwealth Funding					
Other (please specify)					
<b>Total Consolidated Fund Revenues</b>					
<b>CAPITAL</b>					
Loss on sale of assets:		289,000			
Capital Expenditure					
<i>less</i> Agency offset savings (incl. asset sales)					
<b>Net Capital Expenditure</b>					
Net on-costs to other budget sector agencies (as per schedule 3)					
<b>Total Net Capital Expenditure</b>		289,000			
<b>TOTAL FINANCIAL IMPACT</b>		339,000	50,000	50,000	50,000
<b>(NCS less Depreciation) + Net Capital Expenditure less Consolidated Fund Revenues)</b>					
<b>Funded by:</b>					
Existing Cash Balances/Loans/Advances					
Consolidated Fund					
Other (please specify)					
<b>Total</b>					

<b>Schedule 2: Budget Sector Staffing</b>					
	2007/08	FORWARD ESTIMATES			
		2008/09	2009/10	2010/11	2011/12
Staffing (FTE) – lead agency		0	0	0	0
Other Budget sector agencies					
<b>TOTAL</b>					0

Employee numbers for forward estimates are cumulative. For example; if one additional FTE is required in the current year and another in year 1 the columns should read "1, 2, 2, 2" respectively.

<b>Schedule 3: Net on-costs to Other Budget Sector Agencies</b>					
	2007/08 (\$'000)	FORWARD ESTIMATES			
		2008/09 (\$'000)	2009/10 (\$'000)	2010/11 (\$'000)	2011/12 (\$'000)
<b>RECURRENT:</b>	0	0	0	0	0
Agency 1 (insert agency name)					
Agency 2 (insert agency name)					
Agency 3 (insert agency name)					
<b>Impact on Net Cost of Services (Transfer to Schedule 1)</b>					
<b>CAPITAL: (including asset sales)</b>					
Agency 1 (insert agency name)					
Agency 2 (insert agency name)					
Agency 3 (insert agency name)					
<b>Impact on Net Capital Position (Transfer to Schedule 1)</b>					0

<b>Schedule 4: Net on-costs to Non-Budget Sector Agencies</b>					
	2007/08 (\$'000)	FORWARD ESTIMATES			
		2008/09 (\$'000)	2009/10 (\$'000)	2010/11 (\$'000)	2011/12 (\$'000)
<b>RECURRENT:</b>	0	0	0	0	0
Agency 1 (insert agency name)					
Agency 2 (insert agency name)					
Agency 3 (insert agency name)					
<b>Impact on Net Cost of Services</b>					
<b>CAPITAL: (including asset sales)</b>					
Agency 1 (insert agency name)					
Agency 2 (insert agency name)					
Agency 3 (insert agency name)					
<b>Impact on Net Capital Position</b>					0

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## Appendix 6: The Kelly Cabinet minute

<b>Cabinet-in-Confidence</b>	
<b>Title</b>	Solicited Proposal from Australian Water Holdings Pty Limited
<b>Minister</b>	Minister for Infrastructure
<b>Date of Minute</b>	April 2010
<b>Main Purpose</b>	To advise the Cabinet Standing Committee on the Budget of the proposal received from Australian Water Holdings Pty Limited (AWH) and to seek endorsement of the recommendation to proceed with direct negotiations.
<b>Resources Required for Implementation</b>	Nil
<b>Previous Cabinet Decisions</b>	None
<b>Departure from Previous Cabinet Decision</b>	N/A
<b>Relation to Existing Policy</b>	State Plan – maintain and invest in infrastructure, increase the supply of affordable housing, increase the amount of water recycled to 70 billion litres a year by 2015.  Metropolitan Strategy and Sub regional strategies – supporting land release and dwelling targets.  Competition in the water industry as per the <i>Water Industry Competition Act 2006</i> (NSW).
<b>Priority</b>	High
<b>Legislative Programming</b>	N/A
<b>Announcement of Decision</b>	Minister for Infrastructure.  <i>Working with Government: Guidelines for Privately Financed Projects</i> require direct negotiations be announced.

## 2 PURPOSE OF PROPOSAL

- 2.1 To advise the Cabinet Standing Committee on the Budget of the proposal received from Australian Water Holdings Pty Limited (AWH) (hereafter the "AWH Proposal") and to seek approval for direct negotiation with AWH.
- 2.2 To commence assessment of the merit of the AWH Proposal.
- 2.3 To provide a fair and objective process and to assess the AWH Proposal ensuring AWH's potential competitor Sydney Water is at arm's length through the process and information provided by Sydney Water is independently verified.

## 3 RECOMMENDATIONS

- 3.1 Recommend that Government proceed to engage in a negotiation process with AWH in relation to the AWH Proposal, as intended by the letter agreement between AWH and Sydney Water dated 8 August 2008. The negotiation process should proceed with clear parameters provided to AWH on the commercial terms and risk allocation acceptable to Government, as is usual for Government procurement processes and as per previous practice for other water projects such as the Rosehill-Camellia Recycled Water Project.
- 3.2 Note that given the exclusive legal right of AWH for the financing and provision of water infrastructure in the North West Growth Centre (NWGC), and the protracted and contentious history of SWC and AWH dealings in the NWGC, it is prudent to ensure procedural fairness by giving AWH the opportunity to negotiate in relation to the AWH Proposal which was put to Government pursuant to a letter of agreement between AWH and Sydney Water dated 8 August 2008.
- 3.3 Note that should direct negotiation generate an acceptable outcome to Government there will be benefits to the community and to Government in a proposal like the AWH Proposal and in any regulatory reform associated with such a proposal which would encourage the objectives of the *Water Industry Competition Act 2006* (NSW). The Government's policy objectives of meeting dwelling targets set in the Metropolitan Strategy and facilitating rapid land release would be assisted by the AWH Proposal.
- 3.4 Note that any new proposal submitted by AWH through the negotiation will be assessed and a recommendation provided to Budget Committee for consideration.
- 3.5 Note the legal opinion of the Solicitor General dated 16 October 2009 that AWH has a legal agreement to submit a Proposal without requiring AWH to be selected through a competitive tender, the ultimate discretion on the question of direct negotiation resides with the Budget

Committee, and a decision to proceed with direct negotiations can be made without taking into account the *Working with Government Guidelines*.

3.6 Note direct negotiation will require an assessment involving a Public Sector Comparator (PSC) developed independently of Sydney Water and having regard to the principles and process involved in developing the PSC in the Rosehill-Camellia Recycled Water Project.

#### 4 BACKGROUND

4.1 Since 1992, AWH (formerly Rouse Hill Infrastructure Consortium) has financed and delivered water-related infrastructure in the North West Growth Centre pursuant to various deeds entered into with Sydney Water and its predecessor, the Water Board.

4.2 On 21 April 2008, Sydney Water issued a public invitation to tender in respect of further work in the North West Growth Centre.

4.3 AWH obtained advice from Mr Bret Walker, SC which indicated AWH has a first right of refusal in relation to the procurement of further works in the area, and Sydney Water may have been in breach of its obligations under the deeds (see Joint Opinions attached).

4.4 On 8 August 2008, Sydney Water and AWH agreed:

"(AWH) could put a proposal directly to Sydney Water that involved private finance for further works and that such a proposal may be structured like a public private partnership . . . Sydney Water will consider such a proposal and if it equals or betters a Public Sector Comparator, complied in line with the *Working with Government: Guidelines for Privately Financed Projects*, then Sydney Water and (AWH) will seek approvals needed for such a proposal from Government."

4.5 On 6 July 2009, AWH submitted the solicited proposal to the Department of Premier and Cabinet for the procurement of further works by way of a Public Private Partnership and the purchase of existing water-supply assets of Sydney Water in the North West Growth Centre area.

4.6 While Sydney Water invited AWH to submit a proposal "structured like a public private partnership" the circumstances and characteristics of the proposal are also similar in respects to a Privately Financed Project managed in most part in its consideration and assessment by DPC rather than Sydney Water (see Guidelines section 1.6.2)

4.7 The Minister for Infrastructure was instructed by the former Premier Nathan Rees and the Water Minister Phil Costa to manage the

proposal with the support of DPC. This is consistent with the function prescribed for DPC under the Guidelines generally and more specifically Section 2.4 Unsolicited Proposals, and consistent with the spirit of the WICA as Sydney Water is a potential competitor to AWH.

4.8 The *Working with Government: Guidelines for Privately Financed Projects* details how unsolicited proposals are to be dealt with by the Government with clause 2.4 providing

"Requests to bypass the competitive tendering process and negotiate directly with the Government must be approved by (the Budget Committee). Approval will only be granted where the proponent can show that there would be no viable competition for the delivery of the proposal's essential outcomes."

4.9 AWH provided legal advice from Bret Walker SC and Mr James Lockhart expressing the view that the 'no viable competition' test is satisfied in relation to AWH's proposal as the State is contractually bound to deal with AWH, thus rendering competition from any other firm "not viable." Counsel also proffered (at paragraph 27) that AWH's proposal would satisfy the other applicable criteria for direct negotiations as set out in clause 3.3 of the Guidelines.

4.10 The former Minister for Infrastructure, the Hon Joe Tripodi MP, requested advice from the Solicitor General on whether there was any impediment to Budget Committee approving direct negotiations between DPC and AWH.

4.11 The Crown Solicitor furnished the Opinion of the Solicitor General, MG Sexton SC, on the 16<sup>th</sup> October 2009 that the Guidelines were not legally binding on the Government, the Guidelines contained no "impediment" to entering direct negotiations and direct negotiation could proceed once reasons for and the net benefits of direct negotiations as opposed to competitive tender are provided.

"If such an assessment answers the question in the affirmative, there would be no impediment under the Guidelines to the Budget Committee of Cabinet approving direct negotiations with AWH, subject to the remaining requirements of the Guidelines being satisfied."

4.12 The Solicitor General stated with respect to the requirements of the Guidelines on the question of whether direct negotiations can proceed, the issues were "policy questions" and not legal questions.

4.13 In July 2009, AWH submitted a solicited proposal to the Government for the purchase or long term lease of existing water and wastewater assets it has already constructed in the North West Growth Centre (NWGC); and the private development, finance and operation of all further water supply and wastewater assets in the NWGC.

4.14 AWH has constructed approximately \$630 million of water and wastewater infrastructure in the NWGC under a project delivery agreement with SWC. The works have been funded by AWH via bank debt which was repaid by direct application of developer charges and payments by SWC. The majority of the debt was underwritten by SWC. The infrastructure includes a sewage and recycled water treatment plant, 155km of pipes for sewage/potable water/recycled water, 6 reservoirs, 13 pumping stations, 15 dry detention basins, 3 wet detention basins and rehabilitated 33 hectares of native vegetation.

4.15 SWC accepts AWH has successfully and cost efficiently delivered water infrastructure. AWH delivered Stage 1 infrastructure in the sum of \$290 million which was 50 per cent less than the cost estimates of SWC.

4.16 AWH provided a value for money private sector solution to the delivery of water infrastructure critical to the release of land in the NWGC.

## 5 INITIAL REVIEW

5.1 An Initial Review Panel (IRP), under Chairman Paul Gilbertson and comprising senior officers from Department of Premier and Cabinet (DPC) and NSW Treasury, was established to clarify the key inputs of the AWH Proposal.

5.2 The role of the IRP must have regard to the legal advice of the Solicitor-General. Relevantly, the opinion of the Solicitor-General dated 16 October 2009 concluded that:

- the AWH Proposal is submitted in accordance with an agreement reached with SWC in a letter co-signed dated 8 August 2008. The AWH Proposal is therefore a solicited proposal;
- the Working with Government Guidelines do not apply;
- not proceeding to direct negotiations could expose the State to significant damages;
- the discretion to approve direct negotiations rests with the Budget Committee.

5.3 IRP has undertaken an initial assessment of the AWH proposal and advised against proceeding to negotiations.

5.4 However, a prudent approach is to undertake a complete assessment of the AWH proposal through a direct negotiation.

Reliance on the partial assessment by the IRP potentially exposes the Government to a breach of the agreement reached by AWH and SWC on the

8<sup>th</sup> August 2008 and would be inconsistent with the Working with Government Guidelines (if they were to apply).

## 6 DIRECT NEGOTIATION PROCESS

### 6.1 The Introduction to the Guidelines state (p7):

"Direct negotiations with a single proponent will not be undertaken unless approved by the Budget Committee of Cabinet, whose decision will be made public."

and details the features of a Privately Financed Project (*PFP*) are:

A service normally provided to the public by Government involving the creation of an asset through private sector financing and ownership control

A contribution by Government through land, capital works, risk sharing, revenue diversion or other supporting mechanisms

6.2 Australia Water's proposal meets the definition of a Privately Financed Project which is a class of Public Private Partnership and comparable in parts with the Rosehill-Camellia Recycled Water Project. The proposal must also be considered within the regulatory framework established by WICA. With respect to Unsolicited proposals the proposal may "bypass" the competitive tendering process and directly negotiate with the approval of the Budget Committee which will be granted

".. where the proponent can show that there would be no viable competition for the delivery of the proposal's essential outcomes. . . ." (Working with Government Guidelines)

6.3 The AWH proposal is a **solicited** proposal and therefore is not required to meet the requisite elements of the Guidelines.

6.4 The Solicitor-General advised the ultimate discretion resides with the Budget Committee, and a decision to proceed through direct negotiations can be made without taking into account the Working with Government Guidelines.

6.5 AWH was invited to progress to assessment a public private partnership proposal without requirement or reference to a competitive tender process.

6.6 This invitation formed part of an agreement settling a commercial dispute between Sydney Water and AWH following a discontinued process by Sydney Water to procure water infrastructure through a

third party (to be selected by competitive tender). The tender process for Package 1 of the First Release Precinct in the North West Sector was discontinued and Sydney Water's contractual obligations to AWH recognized.

6.7 This agreement between Sydney Water and AWH in correspondence dated 8th August, 2008 (the *agreement*) requires the Government to progress a public private partnership

*" . . . if it equals or betters a Public Sector Comparator, compiled in line with NSW Working with Government Guidelines, . . ."*

and if these conditions are met

*" . . . then Sydney Water and RHIC (AWH) will seek approvals needed for such a proposal from Government . . ."*

6.8 The Public Sector Comparator is not to be undertaken to determine approval for direct negotiations. The Public Sector Comparator is undertaken during the direct negotiation phase.

6.9 The 8 August 2008 agreement makes no reference to a competitive tender to select AWH but rather specifically selects and invites AWH to propose a public private partnership and that such a proposal will be agreed to if it meets the milestones and processes detailed in the agreement of the 8<sup>th</sup> August, 2008.

6.10 The agreement recognises the exclusive right of AWH to procure water infrastructure for Sydney Water in the North West Sector as detailed in a document known as the Infrastructure Deed (Other Stages) (*OSD*) dated 16 October, 1992.

6.11 The contractual obligations of Sydney Water to AWH gave rise to the commercial dispute concluded by an agreement that a public private partnership proposed by AWH (specifically) would progress to assessment.

6.12 The effect of the Infrastructure Deed (Other Stages) makes it extremely difficult for Sydney Water to procure water infrastructure through a party other than AWH. The aborted tender process of Sydney Water is evidence of this.

6.13 The procurement difficulties and contractual complications involved with proceeding to procurement with a third party while meeting contractual obligations to AWH are such that there may be little interest from third parties and if there was, the legal and commercial arrangements would be of such complexity the benefit to be obtained through a competitive tender would be minimal and in all likelihood

negative.

6.14 The agreement of the 8<sup>th</sup> August, 2008 between Sydney Water and AWH requires the NSW Government to progress to assessment a PPP proposal received from AWH and the Infrastructure Deed (Other Stages) between Sydney Water and AWH would substantially and in all likelihood negate the benefits of selecting a proponent other than AWH.

6.15 It is reasonable to conclude there is no "viable" alternative to AWH in progressing a PPP because of the effect of the 8<sup>th</sup> August, 2008 agreement and the OSD of 16<sup>th</sup> October, 1992.

6.16 This means the prerequisite for direct negotiation in section 2.4 of the Guidelines is satisfied; namely,

" . . . there would be no viable competition for the delivery of the proposal's essential outcomes."

6.17 The agreement of the 8<sup>th</sup> August requires an assessment of the AWH proposal in accordance with the Guidelines which should involve more than the partial PSC work and Initial Review undertaken by the IRP.

6.18 A decision by Government not to undertake the processes and commitments consistent with the spirit and intent of the agreement with Sydney Water exposes the Government to potential claims of breach of agreement. It is prudent to engage in direct negotiations and complete a thorough and comprehensive assessment in a fair, transparent and inclusive manner.

6.19 It is prudent to engage in direct negotiations and complete a thorough and comprehensive assessment in a fair, transparent and inclusive manner.

## 7 PROPOSAL BY AWH

7.1 AWH proposes to purchase (or acquire via a long term lease) all the existing water assets in the NWGC for an estimated value of between \$160m and \$190m and to build all future water supply, waste water and recycled water assets in the NWGC. In addition it would operate, maintain and provide retail services for the whole NWGC for a concession period of at least 35 years.

7.2 In return, AWH requires an availability payment estimated at between \$25m and \$35m per year, and the right to collect all retail payments which would accrue to the assets it controls. The AWH Proposal is based on current IPART pricing determinations and would require renegotiation should any future pricing determination deliver an adverse outcome.

7.3 In addition, AWH is seeking the following explicit support:

1. Development uptake guarantee

- Government would compensate AWH for revenue shortfall if agreed profile of sale and development of lots is not achieved.

## 2. Bank requirements

- AWH expects that the government will be required to enter into a tripartite agreement with lenders and the Special Purpose Vehicle (SPV) to guarantee the payment market of value of debt and equity on any termination by government.

## 3. Social obligations

- Full cost reimbursement by NSW Government for Pensioner concessions, exempt property concession scheme, financial assistance scheme and climate change fund contributions.

Government support is not unusual and it is explicitly recognised in the Working with Government Guidelines.

7.4 The AWH proposal is based on estimated operating costs starting at \$3.5m in 2010 to \$8.6m in 2020, all in real terms, with inflation to be added. These costs are estimated using industry figures for operation and maintenance of water and waste water services averaged across blocks serviced.

7.5 AWH expects to outsource the operation and retail supply role. In order to operate the water/waste water services, AWH must obtain a network operator's licence and a retail supplier's licence.

7.6 AWH cites the following potential benefits of the AWH proposal to the NSW Government:

- NSW Government to receive cash for existing NWGC assets
- AWH organises private sector finance for new water assets in the NWGC
- Timely delivery of water assets in the NWGC therefore allowing accelerated land release
- Improved housing affordability from the delivery of more cost effective water assets
- Employment creation
- The project would stimulate water industry competition in NSW
- AWH will provide best practice and fully closed effluent/pollution control system to protect the Hawkesbury Nepean river system
- AWH will continue its extensive works in native vegetation rehabilitation.

## 8 RELATIONSHIP BETWEEN AWH AND SYDNEY WATER

- 8.1 In 1991 the NSW Government passed the Water Board (Amendment) Act that enabled AWH to enter into a deal with SWC to finance and deliver water infrastructure in the NWGC.
- 8.2 By way of a deed dated 24 May, 1992, the Water Board (predecessor of SWC) and RHIC together with various owners of land in the Rouse Hill area agreed that RHIC would finance and project manage the provision of water infrastructure in various stages to the NWGC for SWC and to meet SWC's program.
- 8.3 On 16 October 1992, the above deed was supplemented by a document described as the Infrastructure Deed (Other Stages) referred to as the Other Stages Deed (OSD). AWH believes the deed provides it with an exclusive right to finance and project manage the construction of all water and wastewater infrastructure in the NWGC. SWC has sought to argue that this deed is an agreement to negotiate. The opinion of the Solicitor-General is that on balance he prefers the view of AWH.
- 8.4 Following a dispute on the interpretation of the OSD between SWC and AWH, which was the subject of mediation, SWC wrote to AWH on 8 August 2008 setting out a number of matters on which agreement was reached. One paragraph of the letter stated the following:

"On 7 August 2008 it was also agreed that AWH could put a proposal to Sydney Water that involved the private finance for further works and that such a proposal may be structured like a public private partnership or a BOO/BOOT [build, own, operate/build, own, operate and transfer]. Sydney Water will consider such a proposal and if it equals or betters a Public Sector Comparator, compiled in the line with NSW Working with Government Guidelines, then Sydney Water and AWH will seek approvals needed for such a proposal from Government. Both parties agree that the scope of the proposal from AWH should be one that Sydney Water agrees with."

- 8.5 In his opinion, the Solicitor-General concluded that this constitutes a legal agreement void of any competitive process.

## 9 EXISTING ASSET PURCHASE – VALUE FOR MONEY

- 9.1 The IRP engaged KPMG to undertake a preliminary assessment of the AWH Proposal. KPMG considered the valuation of the existing assets from two different perspectives. Firstly, an assessment was made using the concept of Impaired Depreciated Replacement Cost (IDRC), which is the value at which the assets are held on Sydney Water's balance sheet. The second approach was based on a consideration of the value of the net customer revenues to be earned

from the assets, discounted to present at a 7.5% discount rate. The two values are compared with the valuation range provided by AWH for these assets in the table below. In addition, the AWH Proposal includes the transfer of assets which are currently under construction for a price to be agreed.

9.2 No offer has been made by AWH as the negotiation phase has not commenced. The AWH high end estimated value of existing assets is \$21 million less than the KPMG valuation as set out in 1b of Table 1.

**Table 1 Comparison of KPMG and AWH Value Estimates**

	KPMG Valuation		AWH Valuation
1.a	Existing RHPA assets IDRC Value		\$160m to \$190m
	Impaired B/S value	\$343m	
1.b	Existing RHPA assets NPV Revenues Valuation		\$160m to \$190m
	MEERA <sup>1</sup> value	\$211m	

9.3 The AWH valuation of existing assets is based on the second KPMG approach. During the direct negotiation phase the valuation methodology will need to be agreed upon. AWH is prepared to review and refine its valuation of the existing assets upon:

- agreement of the valuation methodology
- obtaining key revenue numbers from SWC
- completion of due diligence.

9.4 The confirmation sought by AWH will be undertaken during the direct negotiation phase, and ensure the State obtains the best possible price for the existing assets.

9.5 The KPMG valuation is incomplete and in order to make any assessment as against the AWH valuation the matters set out in the above paragraph 9.3 need to be agreed during the negotiation.

## 10 NEW ASSET PROVISION – VALUE FOR MONEY

10.1 KPMG assessed the likely construction cost by SWC of the new assets proposed by AWH for the North West Growth Centre. The

<sup>1</sup> Modern Engineering Equivalent Replacement Asset

comparison of the SWC estimate with the AWH estimate is set out in Table 2. Given the basis of the estimates the figures are statistically equal. However, there are a number of exclusions of risks in the AWH pricing which would require clarification. The excluded items in the AWH pricing, other than GST, finance and land cost, are not likely to be significant and have not been explicitly taken into account in the SWC estimate for KPMG.

**Table 2 New Asset Construction**

KPMG PSC	AWH Offer
Sydney Water Estimate = \$1.4bn	\$1.2bn +25% Design and Project management = \$1.5bn
<b>Estimate Includes:-</b>	<b>Estimate Excludes:-</b>
<ul style="list-style-type: none"> <li>• GST</li> <li>• Land Costs</li> <li>• Design</li> <li>• Project Management costs.</li> </ul>	<ul style="list-style-type: none"> <li>• GST</li> <li>• Escalation beyond Jan 2010</li> <li>• Contaminated material</li> <li>• Archaeological remains</li> <li>• Land costs</li> <li>• Advertising Costs</li> <li>• Legal Costs</li> <li>• Finance Cost</li> <li>• Service diversions</li> <li>• Includes contractor design at 4%</li> </ul>

10.2 KPMG has not been able at this time to assess the timing by SWC of the delivery of the new assets. SWC is not able to deliver infrastructure at the same rate proposed by AWH. This analysis will need to be undertaken during the direct negotiation phase, and it is expected the AWH delivery rate will provide a significant benefit to Government, and significant value for money given SWC's capital expenditure constraints.

10.3 The Minister also notes that the 15 per cent blended return sought by AWH is within the normal range of return for infrastructure investments and in fact could be higher given the recent financial market.

10.4 AWH does not have a network of water infrastructure that generates revenue that can assist in funding the required growth in water infrastructure. Like in many capital-intensive start-up PFP businesses, risk-sharing arrangements with Government are usually involved. This was clearly detailed in the Introduction to the Guidelines (see 4.15). For example, in a recent agreement Sydney Water will provide

payments to the Rosehill-Camellia Recycled Water Project through a take-or-pay arrangement for an agreed 'base volume' of recycled water.

10.5 In order to reduce the risk transfer necessary from AWH to Sydney Water during the ramp-up stages of AWH growing a water infrastructure network in the North West Sector, the sale at fair market value of the existing water infrastructure in the region would reduce the risk transfer and commercial payments necessary between Sydney Water and AWH. This will be advantageous to both Sydney Water and AWH.

## 11 TIMING OF PROVISION OF ASSETS

11.1 It is widely recognised that SWC timing for provision of water infrastructure frustrates development of new dwellings and new release areas. The Minister has been inundated by such complaints from both developers and Local Councils.

11.2 There are financial constraints on SWC procuring the assets directly at the rate required to service the NWGC. Further, the financial position of SWC has required it to break up the First Release Precinct of the North West Sector into three separate sequentially staged packages incurring ramp up, mobilisation and establishment costs for each stage. These costs could be avoided if a PFP were available for the works to be completed as one package as proposed by AWH.

## 12 INITIAL REVIEW ASSESSMENT FINDINGS

12.1 The IRP undertook an initial assessment based on NSW Treasury's "Working with Government – Guidelines for Privately Financed Projects" (December 2006) and the Independent Commission Against Corruption's "Direct Negotiations – Guidelines for Managing Risks in Direct Negotiations" (May 2006). A number of criteria must be met prior to recommending direct negotiations with a proponent.

12.2 The conclusions of the IRP are listed below with the following comments:

WwG Guidelines Criterion	Initial Review Panel Conclusion	Comments
Only the proponent, because it owns real property, intellectual property, or some other unique element, can deliver the proposal's essential outcomes	There is doubt about the legal claim of AWH to provide further/future infrastructure given conflicting advice	This is not the opinion of the Solicitor-General. AWH has a legal right to advance this Proposal void of competition following an agreement between SWC and AWH. Failure to recognise the legal

		agreement between SWC and AWH will expose the State to a claim for significant damages.
Direct negotiation would preserve considerable benefits for the agency, the Government and the community	No benefits were identified that would be preserved by direct negotiation.	The Government and the community will obtain considerable benefits from the accelerated delivery of water infrastructure by AWH. In particular, the release of land to address the current housing affordability crisis. IRP has given no consideration to the benefit SWC and the State would derive from having this infrastructure delivered through private funding and when the AWH business matures off-balance sheet. The region will benefit from these assets at a reduced risk to Government and at the end of the ramp-up stages, potentially very little or no risk to Government. This will be beneficial to the Government's credit rating if SWC was required to deliver infrastructure at a rate consistent with targets set by the Department of Planning.
That direct negotiations would provide better value for money than a competitive tender process	Value for money by comparison to the PSC was not demonstrated. There exist many organisations able to deliver a competitive bid on the construction, operation, maintenance and financing of these works, and a competitive tender would likely draw a better overall proposal from the market.	The use of a preliminary PSC assessment does not allow all the risks and issues to be fully and completely considered. Many of the fundamental risk allocation and project scale issues are unresolved and therefore any calculation of the PSC would be incomplete. The approach undertaken by IRP is inconsistent with both the Working with Government Guidelines and the agreement reached between SWC and AWH on 8 August 2008. The funding and procurement functions contracted to AWH are not available to be put to competitive tender. The practicalities of tendering the remaining functions would make it so difficult and complex it is not a viable option. Tendering the project would be a breach of the

		<p>agreement of 8 August 2008 between SWC and AWH on 8 August 2008.</p> <p>Many of the benefits to accrue from a tender process are already secured by SWC under the "procurement protocol" within the existing contract where construction and other works need to be put under to tender under the supervision of SWC.</p>
That the proponent has the expertise, experience and financial capacity to successfully deliver the project	<p>The proponent has the expertise to project manage the delivery of the assets.</p> <p>The proponent has no expertise or experience in the operation, maintenance and retail management of water supply systems. AWH would have to contract these services through third parties.</p> <p>The proponent has no financial capacity to deliver the project. AWH would be relying on the financial strength of a range of third parties and the State would be best served by dealing with those third parties rather than a financially weak intermediary.</p>	<p>AWH has a proven track record and has successfully financed, designed, and project managed the delivery of \$630 million of water infrastructure to date.</p> <p>AWH will secure a third party to provide the operation, maintenance and retail management of water supply systems and there are many established companies providing these services on an outsourced and contract basis.</p> <p>It is common practice for an organisation such as AWH to procure a SPV to finance the project.</p> <p>AWH has a track record of competently and successfully delivering on its contractual obligations and there is no reason to believe this will not occur for a larger economy of scale and scope.</p>
The monetary value of any intellectual property.	There is no unique intellectual property associated with this proposal.	This is not relevant to this project.

12.3 Notwithstanding the analysis of the IRP and the comments above, the Solicitor-General has expressed the opinion that the Working with Government Guidelines do not apply to the AWH Proposal in any event.

12.4 Nevertheless, regard has been had to the Guidelines and on balance the criteria is met to recommend direct negotiations.

12.5 In most cases where a proposal is invited, such as the Rosehill-Camellia Recycled Water Project, the proponents are offered a term sheet setting out the commercial terms and preferred risk allocation acceptable to SWC, and negotiations take place from this point with

clarity and agreed parameters. Given this has not occurred in this case, it is prudent to ensure procedural fairness to AWH that full and complete negotiations be conducted. Given this customary way of dealing with proponents, any departure could raise doubts about procedural fairness or give the perception procedural fairness was not afforded to AWH.

12.6 Further, this process would not adversely affect Government and it would assist to maintain the Government's reputation in commercial dealings. This is particularly relevant to the public acceptance of any future Government policy for encouraging further private sector participation in water and waste water provision in NSW.

### **13 SUMMARY OF REQUIREMENTS OF GOVERNMENT**

13.1 The AWH Proposal has requested the following from Government:-

- Availability charge of between \$25m and \$35m per year – to be assessed during the direct negotiation phase.
- Government underwriting of uptake risk with the level of this risk to be determined during negotiations. It may not be significant in light of the Metropolitan Strategy targets and needs.
- Requirement to establish regulatory framework including independent regulator, legislated rights for access to land to AWH and agreements between all water companies and the regulator.
- Underwriting of social obligations
- Provision of infrastructure other than water in any accelerated program of land release.

### **14 FAIR AND TRANSPARENT PROCESS FOR NEGOTIATIONS**

14.1 The Rosehill-Camellia Recycled Water Project was the first project to be delivered by the private sector in accordance with the WICA which has implemented the Government's policy of encouraging competition in relation to the supply of water and the provision of sewerage services and to facilitate the development of infrastructure for the production and reticulation of recycled water.

14.2 With the Rosehill-Camellia Recycled Water Project Sydney Water prepared and issued a Request for Detailed Submissions to the proponents on a common base case to finance, plan, design, construct and operate a scheme to provide a prescribed service. The proponents were provided with a Term sheet which set out the commercial terms that Sydney Water proposed to be included in the Project Agreement and a Risk Allocation table which set out Sydney Water's preferred risk allocation for the Project.

- 14.3 The Project Agreement had been negotiated with each of the proponents and clearly defined with certainty what was expected and required of the proponent.
- 14.4 A Project Agreement was signed between Sydney Water and the selected proponent AquaNet Sydney Pty Ltd (AquaNet) with a series of conditions precedent.
- 14.5 The proponents were asked to provide a 'base price' (escalated by CPI) they would charge Sydney Water for the supply of recycled water to the foundation Customers.
- 14.6 The use of a 'base price' to help select the proponent provided the simple and transparent criteria for selection and was part of the Public Sector Comparator (PSC). The PSC was revised to the project arrangement and used to evaluate the proposals offer for value for money.
- 14.7 A Reference Project was developed for the PSC assessment which reflected the mostly likely and efficient method of Sydney Water delivery of the Project and was designed to deliver the same outcomes as asked of the private sector under a PFP arrangement.
- 14.8 The PSC was developed based on Sydney Water meeting the requirements set out in the Request for Detailed Proposal, the additional cost and risks to those normally included in Sydney Water project budgets and other adjustments such as the additional commercial risks to produce a competitively neutral PSC that served as a benchmark for testing value for money in the private proposal.
- 14.9 The PSC was used to estimate the recycled water price the proponent was evaluated against. AquaNet's proposal presented value for money when compared with the PSC because AquaNet's average price was lower than an estimated PSC average price for the projected average demand, the capabilities of the consortium, its expansion strategy and because the project supported the NSW Government's objective for the private sector to invest and operate in the recycled water market.
- 14.10 In this case of AWH, this Project Agreement will be developed and provided by DPC in consultation with relevant government agencies such as the Department of Planning, the Department of Environment, Climate Change and Water and other government agencies including Sydney Water whose information will be independently verified for accuracy and completeness.
- 14.11 The Rosehill-Camellia Recycled Water Project needed to demonstrate value for money using a Public Sector Comparator. In the Rosehill-Camellia Recycled Water Project case, the public sector comparator was the

14.12 The commercial arrangement finalized between Sydney Water and AquaNet are detailed in section 1.2 of the Contract Summary:

"In return for the associated infrastructure and services, Sydney Water will obtain the recycled water under a 20 year agreement. Under the agreement, Sydney Water will pay for the volume of the recycled water taken with an obligation to pay for a minimum volume of 10.5 megalitres per day (90% of average daily demand) whether taken or not by Foundation Customers."

14.13 This requires Sydney Water to bear the demand risk for the duration of the project but it is anticipated customer demand will quickly grow beyond the 10.5 megalitres per day guaranteed to be purchased by Sydney Water under the commercial arrangement.

14.14 This risk-sharing and ramp-up support from Sydney Water is consistent with the principles espoused and detailed in the Introduction and body of the Guidelines, namely (p7):

A service normally provided to the public by Government involving the creation of an asset through private sector financing and ownership control

A contribution by Government through land, capital works, risk sharing, revenue diversion or other supporting mechanisms

## 15. PROCESS DEFINED IN THE GUIDELINES AND TO BE UNDERTAKEN FOR AWH

15.1 The AWH proposal has many similarities with the AquaNet project but involves a completely different series of risk, scope, scale and regulatory environment.

15.2 While this Minute will not detail the assessment process for the AWH proposal, it is anticipated the assessment process will follow elements of the process undertaken for the Rosehill-Camellia Recycled Water Project in order to provide the transparency and certainty experienced by the proponents.

15.3 AWH has two parts to its proposal. It is anticipated the parts need to be assessed together as the second part of the proposal has a significant bearing on the risk-sharing between Sydney Water and AWH and will therefore be material to risk-adjustments necessary to produce a competitively neutral PSC.

- 15.4 The purchase of Sydney Water's water infrastructure within the North West Sector will reduce the risk-transfer necessary to Sydney Water from AWH and thereby reducing the cost of the PFP to the NSW Government.
- 15.5 Sydney Water based the cost comparison between the PSC and the AquaNet proposal on a price per kilolitre of recycled including reference to a 'base price' which included all the costs to produce, build, finance, operate and maintain the project for 20 years.
- 15.6 The estimate of the whole-of-life cost to Sydney Water was developed using a Reference Project delivered using traditional government procurement methods and converted to a cost per kilolitre.
- 15.7 The assessment task to be undertaken by DPC has been assisted by the fact that such a 'base price' already exists in the North West Sector constituted by the IPART determined prices currently being charged by Sydney Water for the period 1 July 2008 to 30 June 2012 in its decision of 16 June 2008 plus charges specific to Rouse Hill users known as the recycled water and river management charges.
- 15.8 While this is a significant deviation from the process used in the Rosehill-Camellia Recycled Water Project through the use of a Reference Project, it is possible as the AWH proposal is one that places it in vertical competition with Sydney Water for practically the same services provided by Sydney Water. AWH proposes to be both a network provider and retailer of water services in the North West Sector.
- 15.9 The use of such a 'base price' concept as an input to the development of the PSC will assist in providing AWH with a transparent and fair reference price. The PSC can be adjusted further for the range of costs and risks unique to the AWH proposal for a value for money assessment.
- 15.10 The process for assessment of the AWH proposal will be orientated by the Guidelines to the degree they are relevant and informed by the experience of the Rosehill-Camellia Recycled Water Project. The use of Sydney Water's prices adjusted for the risk and cost profile of the AWH proposal will assist in developing a competitively neutral PSC and ensure transparency in the assessment.
- 15.11 It is important AWH is provided with and notified of a clear and fair assessment process and the certainty experienced by the proponents and finally AquaNet for the Rosehill-Camellia Recycled Water Project is provided as much as possible for AWH.
- 15.12 DPC will explore whether the use of a Request for Detailed Submission, a Term sheet with the commercial terms proposed, a Project Agreement and a Risk Allocation table with DPC's preferred risk allocation for the Project are tools that will assist in the assessment

task.

## **16 FINANCIAL IMPACT**

- 16.1 There is no financial impact to Government of engaging in a negotiation process with AWH which does not give AWH rights to cost recovery.
- 16.2 The AWH Proposal estimates an annual payment of between \$25m and \$35 million by Government to AWH as an availability charge for the assets. This will be assessed during the course of the negotiation phase.
- 16.3 The AWH Proposal requires underwriting of the uptake risk for properties in the NWGC. This would be required and involved if SWC undertook the same project. Given Government policy of dwelling targets to meet population projections, this may not be a significant risk. This aspect must be assessed during negotiations.
- 16.4 The State would receive a significant upfront payment from AWH for the existing assets. The price of the existing assets will be determined during the direct negotiation phase. The State will only proceed with the transaction if the price is acceptable.
- 16.5 The AWH Proposal would transfer net revenue of at least \$9.1m per annum from SWC to AWH, arising from the existing assets. This is likely to have a minimal impact on the profitability of SWC and a negligible impact on its ability to pay dividends to the State in the future particularly if the proceeds from the sale of assets are committed to reducing the debt of SWC.
- 16.6 Further revenue from SWC may be transferred to AWH as part of the postage stamp pricing policy for water pricing.
- 16.7 The capital expenditure pressure on SWC will significantly decrease. This will assist in supporting the State's current AAA credit rating.

## **17 RURAL IMPACT**

- 17.1 Nil

## **18 IMPACT ON FAMILIES**

- 18.1 The higher cost of capital of AWH when compared with SWC may be reflected in minor water charge increases across Sydney under the IPART considerations of water pricing.
- 18.2 The AWH Proposal will cause land release to occur faster than if it

water infrastructure were procured by SWC. This will assist in reducing the current under supply of new housing and therefore assist with housing affordability.

#### **19 REGULATORY IMPACT**

19.1 SWC, as a direct competitor of AWH, would not be in a position to enter into an agreement with AWH, nor regulate the performance of AWH. This will be undertaken by IPART in accordance with WICA.

**Tony Kelly MP  
Minister for Infrastructure**

## Appendix 7: Mr Tripodi's draft Cabinet minute

<u>Draft Minute of the DPC</u>	
<b>(1) COVER SHEET</b>	
<b>TITLE</b>	Direct negotiations between the Department of Premier and Cabinet (DPC) and Australian Water Holdings Pty Ltd ( <i>Australian Water</i> )
<b>MINISTER</b>	Tony Kelly, Minister for Infrastructure
<b>DATE OF MINUTE</b>	#####
<b>MAIN PURPOSE</b>	To seek approval for Direct Negotiations between the Department of Premier and Cabinet and Australian Water Holdings Pty Ltd for the exclusive provision of new water infrastructure and the sale and/or long-term lease of Sydney Water water infrastructure in the North West Growth Centre region
<b>RESOURCES REQUIRED FOR IMPLEMENTATION</b>	Nil
<b>PREVIOUS CABINET DECISIONS</b>	On the 33th of HHHH, 2009 Cabinet approved the preparation of a White Paper for the Provision of Private Infrastructure
<b>DEPARTURE FROM PREVIOUS CABINET DECISIONS</b>	Consistent with the purpose of the White Paper requested by the Cabinet decision of 33th of HHHH, 2009
<b>RELATIONSHIP TO EXISTING POLICY</b>	Consistent with key Government policies and the NSW State Plan, growing prosperity across NSW: P2, maintain and invest in infrastructure, E5 Jobs closer to home and the Metro Subregional Strategies.
	Government policies advanced include
	(i) supporting Government's Greenfield land release targets identified in the 2005 Metropolitan Growth Plan;
	(ii) implementing Government's objective of encouraging competition

		in the water industry as per the <i>Water Industry Competition Act 2006 (NSW)</i> ;
	(iii)	support the Government's commitment to increase the amount of water recycled in Sydney to 70 billion litres a year by 2015;
	(iv)	accelerate infrastructure provision in an innovative way through private ownership as encouraged under the <i>Working with Government: Guidelines for Privately Financed Projects</i> (the <i>Guidelines</i> )
	(v)	the creation of employment
<b>PRIORITY</b>		High
<b>LEGISLATIVE PROGRAMMING</b>		N/A
<b>ANNOUNCEMENT OF DECISION</b>		Minister for Infrastructure
<b>ACTION REQUIRED BEFORE ANNOUNCEMENT</b>		<i>Working with Government: Guidelines for Privately Financed Projects</i> require direct negotiations to be announced.

## (2) PURPOSE OF THE PROPOSAL

- 2.1.1 to seek approval of the Budget Committee of Cabinet (*Budget Committee*) for direct negotiations between DPC and Australian Water for an exclusive concession to Australian Water for the procurement, operation and ownership of private water infrastructure within the North West Growth Centre region (the *first proposal*) consistent with the purpose and regulatory regime of the *Water Industry Competition Act 2006 (NSW) (WICA)*;
- 2.1.2 to seek approval of the Budget Committee of Cabinet for direct negotiations between DPC and Australian Water for the sale and/or lease of water infrastructure financed and delivered by Australian Water now owned and operated by Sydney Water (the *second proposal*); and
- 2.1.3 to commence assessment of the merit of the proposals in 2.1.1 and 2.1.2 provided by Australian Water in response to an invitation

from Sydney Water Corporation (*Sydney Water*) in correspondence dated 8<sup>th</sup> August, 2009;

- 2.1.4 provide a fair and objective process and to assess the Australian Water proposals ensuring Australian Water's potential competitor Sydney Water is at arm's length through the process and information provided by Sydney Water is independently verified;
- 2.1.5 in recommending approval to the proposals to Budget Committee, recommend commercial terms and conditions of such an approval.

### **(3) RECOMMENDATIONS**

It is recommended that Budget Committee

- 3.1 Approve direct negotiations between DPC and Australian Water for both parts of the proposal;
  - 3.1.1 Agree DPC is to report to Budget Committee of Cabinet before any agreements, commitments or undertakings are made to Australian Water;
  - 3.1.2 Note DPC has appointed Warwick Smith as the Probity Auditor;
  - 3.1.3 Note the process for assessing the Australian Water proposals will be informed by those undertaken for the Rosehill-Camellia Recycled Water Project post Procurement and Tendering and these steps will be detailed to Australian Water;
  - 3.1.4 Note the assessment process will include use of a Public Sector Comparator (PSC) developed independently of Sydney Water and having regard to the principles and process involved in developing the PSC used for the Rosehill-Camellia Recycled Water Project;
  - 3.1.5 Note that in assessing the proposal for an exclusive concession for the provision of water infrastructure in the North West Growth Centre region regard shall be had to the operations of the WICA including its provisions relating to a scheduled area (in this case the North West Growth Centre region), coverage declaration and access undertakings.

### **(4) BACKGROUND AND SUPPORTING INFORMATION**

#### **Background**

- 4.1 Since 1992, Australian Water (formerly Rouse Hill Infrastructure Consortium) has financed and delivered water-related infrastructure in the North West Growth Centre pursuant to various deeds entered into with Sydney Water and its predecessor, the Water Board.
- 4.2 On 21 April 2008, Sydney Water issued a public invitation to tender in respect of further work in the North West Growth Centre.
- 4.3 Australian Water obtained advice from Senior Counsel which indicated Australian Water has a first right of refusal in relation to the procurement of further works in the area, and Sydney Water may have been in breach of its obligations under the deeds (see Joint Opinions attached)
- 4.4 On 8 August 2008, Sydney Water and Australian Water agreed:

“(Australian Water) could put a proposal directly to Sydney Water that involved private finance for further works and that such a proposal may be structured like a public private partnership . . . Sydney Water will consider such a proposal and if it equals or betters a Public Sector Comparator, complied in line with the *Working with Government: Guidelines for Privately Financed Projects*, then Sydney Water and (Australian Water) will seek approvals needed for such a proposal from Government.”
- 4.5 On 6<sup>th</sup> July 2009, Australian Water submitted a proposal to the Department of Premier and Cabinet for the procurement of further works by way of a Public Private Partnership and the purchase of existing water-supply assets of Sydney Water in the North West Growth Centre area.
- 4.6 While Sydney Water invited Australian Water to submit a proposal “structured like a public private partnership” the circumstances and characteristics of the proposal are also similar in respects to a Privately Financed Project managed in most part in its consideration and assessment by DPC rather than Sydney Water (see Guidelines section 1.6.2)
- 4.7 The Minister for Infrastructure was selected by the former Premier Nathan Rees and the Water Minister Phil Costa to manage the proposal with the support of DPC. This is consistent with the function prescribed for DPC under the Guidelines generally and more specifically Section 2.4 Unsolicited Proposals, and consistent

with the spirit of the WICA as Sydney Water is a potential competitor to Australian Water.

4.8 The *Working with Government: Guidelines for Privately Financed Projects* details how unsolicited proposals are to be dealt with by the Government with clause 2.4 providing

“Requests to bypass the competitive tendering process and negotiate directly with the Government must be approved by (the Budget Committee). Approval will only be granted where the proponent can show that there would be no viable competition for the delivery of the proposal’s essential outcomes.”

4.9 Australian Water provided legal advice from Bret Walker SC and Mr James Lockhart expressing the view that the ‘no viable competition’ test is satisfied in relation to Australian Water’s proposal as the State is contractually bound to deal with Australian Water, thus rendering competition from any other firm “not viable.” Counsel also proffered (at paragraph 27) that Australian Water’s proposal would satisfy the other applicable criteria for direct negotiations as set out in clause 3.3 of the Guidelines.

4.10 The former Minister for Infrastructure, the Hon Joe Tripodi MP, requested advice from the Solicitor General on whether there was any impediment to Budget Committee approving direct negotiations between DPC and Australian Water.

4.11 The Crown Solicitor furnished the Opinion of the Solicitor General, MG Sexton SC, on the 16<sup>th</sup> October 2009 that the Guidelines were not legally binding on the Government, the Guidelines contained no “impediment” to entering direct negotiations and direct negotiation could proceed once reasons for and the net benefits of direct negotiations as opposed to competitive tender are provided.

“If such an assessment answers the question in the affirmative, there would be no impediment under the Guidelines to the Budget Committee of Cabinet approving direct negotiations with Australian Water, subject to the remaining requirements of the Guidelines being satisfied.”

4.12 The Solicitor General stated with respect to the requirements of the Guidelines on the question of whether direct negotiations can proceed, the issues were “policy questions” and not legal questions to be evaluated by the agency involved, in this case DPC.

4.13 The Solicitor General also noted a distinction between the circumstances of the first and second proposal and concluded the test on whether to proceed by direct negotiation were the same under the Guidelines.

#### **Guidelines for Privately Financed Projects and Direct Negotiations**

4.14 The Introduction to the Guidelines state (p7):

“Direct negotiations with a single proponent will not be undertaken unless approved by the Budget Committee of Cabinet, whose decision will be made public.”

4.15 The Introduction also details the principle features of a Privately Financed Project (*PFP*) are:

A service normally provided to the public by Government involving the creation of an asset through private sector financing and ownership control

A contribution by Government through land, capital works, risk sharing, revenue diversion or other supporting mechanisms

#### **The first proposal**

#### **Section 2.4 and Direct Negotiations**

4.16 Australia Water’s first proposal meets the definition of a Privately Financed Project which is a class of Public Private Partnership and comparable in parts with the Rosehill-Camellia Recycled Water Project. The proposal must also be considered within the regulatory framework established by WICA.

4.17 With respect to Unsolicited proposals (see 4.7 above) the proposal may “bypass” the competitive tendering process and directly negotiate with the approval of the Budget Committee which will be granted

“... where the proponent can show that there would be no viable competition for the delivery of the proposal’s essential outcomes. . . .”

4.18 The Australian Water proposal is a **solicited** proposal and therefore is not required to meet the requisite elements of the Guidelines.

- 4.19 The Solicitor-General advised the ultimate discretion resides with the Budget Committee, and that a decision to proceed through direct negotiations can be made without taking into account the Working with Government Guidelines.
- 4.20 Nonetheless, DPC has had regard to the Guidelines in forming its view to support direct negotiations with Australian Water.
- 4.21 Australian Water was invited to progress to assessment a public private partnership proposal without requirement or reference to a competitive tender process.
- 4.22 This invitation formed part of an agreement settling a commercial dispute between Sydney Water and Australian Water following a discontinued process by Sydney Water to procure water infrastructure through a third party (to be selected by competitive tender). The tender process for Package 1 of the First Release Precinct in the North West Sector was discontinued and Sydney Water's contractual obligations to Australian Water recognized.
- 4.23 This agreement between Sydney Water and Australian Water in correspondence dated 8th August, 2008 (the *agreement*) requires the Government to progress a public private partnership

“ . . . if it equals or betters a Public Sector Comparator, compiled in line with *NSW Working with Government Guidelines*, . . . ”

and if these conditions are met

“ . . . then Sydney Water and RHIC (Australian Water) will seek approvals needed for such a proposal from Government . . . ”

- 4.24 This agreement makes no reference to a competitive tender to select Australian Water but rather specifically selects and invites Australian Water to propose a public private partnership and that such a proposal will be agreed to if it meets the milestones and processes detailed in the agreement of the 8<sup>th</sup> August, 2008.
- 4.25 The agreement recognizes the exclusive right of Australian Water to procure water infrastructure for Sydney Water in the North West Sector as detailed in a document known as the Infrastructure Deed (Other Stages) (*OSD*) dated 16 October, 1992.

- 4.26 The contractual obligations of Sydney Water to Australian Water gave rise to the commercial dispute that was concluded by an agreement that a public private partnership proposed by Australian Water (specifically) would progress to assessment.
- 4.27 The effect of the Infrastructure Deed (Other Stages) makes it extremely difficult for Sydney Water to procure water infrastructure through a party other than Australian Water. The aborted tender process of Sydney Water is evidence of this.
- 4.28 The procurement difficulties and contractual complications involved with proceeding to procurement with a third party while meeting contractual obligations to Australian Water are such that there may be little interest from third parties and if there was, the legal and commercial arrangements would be of such complexity the benefit to be obtained through a competitive tender would be minimal and in all likelihood negative.
- 4.29 The agreement of the 8<sup>th</sup> August, 2008 between Sydney Water and Australian Water requires the NSW Government to progress to assessment a PPP proposal received from Australian Water and the Infrastructure Deed (Other Stages) between Sydney Water and Australian Water would substantially and in all likelihood negate the benefits of selecting a proponent other than Australian Water.
- 4.30 It is reasonable to conclude there is no “viable” alternative to Australian Water in progressing a PPP because of the effect of the 8<sup>th</sup> August, 2008 agreement and the OSD of 16<sup>th</sup> October, 1992.
- 4.31 This means the prerequisite for direct negotiation in section 2.4 of the Guidelines is satisfied, namely,

“ . . . there would be no viable competition for the delivery of the proposal’s essential outcomes.”

### **Section 3.3 and Direct Negotiations**

- 4.32 Section 3.3 of the Guidelines also covers direct negotiations.
- 4.33 The section requires

“ . . . the agency to demonstrate the reasons for, and the net benefits of, not undertaking a competitive tender process.

4.34 DPC has independently evaluated the proposal having regard to the five bullet points in the Guidelines reproduced below providing the reasons and net benefits of proceeding by direct negotiations.

4.35 The first is:

- Only the proponent, because it owns real property, intellectual property, or some other unique element, can deliver the proposal's essential outcomes.

This question is a broader version of what was required by Section 2.4 comprehensively dealt with at 4.26 to 4.28. The contractual relations between Sydney Water and Australian Water and an agreement between the parties for Australian Water to progress a PPP proposal means there is no "viable" alternative to Australian Water. The reasons in 4.26 to 4.28 constitute the "unique element" part of this test leaving Australian Water as the only proponent able to deliver the proposal's essential outcomes.

4.36 The second is:

- Direct negotiations would preserve considerable benefits for the agency, the Government and the community.

There are several reasons considerable benefits of the PFP are preserved for the agency, the Government and the community when the procurement progresses through direct negotiations.

One is the highly regulated nature of the industry where consumer prices are determined by IPART and reflect regulated rates of return and only on recoverable assets and accepted operating costs. The IPART pricing principles apply to any owner of the business and in most determine the prices to consumers. A change in ownership will not lead to changes in the prices allowed by IPART as the recoverable assets and acceptable operating costs remain more or less the same. Given the minimal role changes in ownership can have in determining prices, ownership by Australian Water or another company providing the same water infrastructure and services means practically no changes in the benefits to consumers.

Secondly, the water infrastructure procured by Sydney Water through the OSD arrangement with Australian Water prescribes a "procurement protocol." This procurement process requires Australian Water to conduct a transparent tender process for the

design and construction of the water infrastructure. This is supervised by Sydney Water to ensure the least cost and the best value for money. The transparency and competitive nature of this procurement arrangement means most of the benefits of selecting a proponent through a competitive tender are captured through the processes required in the OSD. Australian Water accepts this “procurement protocol” should form part of the procurement process required under its PFP proposal to ensure value for money and that these contractual obligations will be transposed to any new contractual relation involved with the PFP.

When the effect of the “procurement protocol” is combined with the highly regulated revenues, costs and recoverable assets formula used by IPART, the direct negotiations will preserve considerable benefits to the agency, the Government and the community.

4.37 The third is:

- That direct negotiations would provide better value for money than a competitive tender process.

There is no doubt a decision to progress a PFP with a party other than Australian Water would lead to legal dispute and probable significant damages payable to Australian Water (see the legal opinion of the Solicitor-General, M G Sexton SC dated 19<sup>th</sup> May 2008 provided to the Secretary of Treasury to advise the then Treasurer, p6). For the reasons detailed in 4.34 many of the benefits attainable through a competitive tender have either already been secured through current contractual obligations between Sydney Water and Australian Water or do not exist because of the highly regulated nature of the water industry. Given there are minimal benefits to undertaking a competitive tender process and direct negotiations avoid a significant legal dispute which will lead to a significant claim of damages, direct negotiations present as a value for money proposition for the Government.

One alternative available to Government is for Sydney Water to proceed to procurement itself. There are severe financial constraints on Sydney Water which prevent this from occurring at a rate that could meet the service needs of the region. Sydney Water stated it will be spending only \$20 million this financial year, well below what is required. Further, the financial position of Sydney Water have required it to break up the First Release Precinct of the North West Sector into three separate sequentially staged packages incurring ramp up, mobilization and establishment

costs for each stage. These substantial costs would be avoided if a PFP were available for the works to be completed as one package.

Even if these financial constraints did not exist, the experience has been that procurement through Australian Water has delivered the Stage 1 infrastructure at a cost of \$290 million when Sydney Water estimated the cost of the same infrastructure at \$600 million – double the actual delivery cost of Australian Water.

In this case, Australian Water presents as a better value for money proposition than Sydney Water.

4.38 The fourth is:

- That the proponent has the expertise, experience and financial capacity to successfully deliver the project.

Since 1992 Australian Water has delivered the first and largest residential dual reticulation system in Australia and has delivered water infrastructure on time and on budget to service approximately 35,000 homes at a cost of \$630 million. This has included a state of the art sewage and recycled water treatment plant, 155 km of pipes for sewage/potable water/recycled water, 6 reservoirs, 13 pumping stations, 15 dry detention basins, 3 wet detention basins, and rehabilitated 33 hectares of native vegetation. Australian Water financed the cost of this water infrastructure.

4.39 The last point relates to payment for intellectual property and is not directly applicable.

**The second proposal**

4.40 Australian Water proposes the purchase (or long-term lease) of existing water infrastructure it (or its subsidiaries) have delivered to Sydney Water in the North West Growth Centre under its Stage 1, 2 and 3 and Package 1 delivery program.

4.41 This second proposal is part of the broader PFP proposal of Australian Water and pursues a commercial opportunity to assist Australian Water to reduce its risk-transfer to Sydney Water.

4.42 Australian Water does not have a network of water infrastructure that generates revenue that can assist in funding the required growth in water infrastructure. Like in many capital-intensive start-up PFP businesses, risk-sharing arrangements with Government are usually involved. This is foreseen in the Introduction to the

Guidelines (see 4.15). For example, in a recent agreement Sydney Water will provide payments to the Rosehill-Camellia Recycled Water Project through a take-or-pay arrangement for an agreed 'base volume' of recycled water.

- 4.43 In order to reduce the risk transfer necessary from Australian Water to Sydney Water during the ramp-up stages of Australian Water growing a water infrastructure network in the North West Sector, the sale at fair market value of the existing water infrastructure in the region would reduce the risk transfer and commercial payments necessary between Sydney Water and Australian Water. This will be advantageous to both Sydney Water and Australian Water.
- 4.44 This second part of the PFP proposal must be considered by direct negotiations if such negotiations for the first part of the proposal are approved by the Budget Committee and succeed.

#### **Process defined in the Guidelines and undertaken in the recent Rosehill-Camellia Recycled Water Project**

- 4.45 The Rosehill-Camellia Recycled Water Project was the first project to be delivered by the private sector in accordance with the WICA which has implemented the Government's policy of encouraging competition in relation to the supply of water and the provision of sewerage services and to facilitate the development of infrastructure for the production and reticulation of recycled water.
- 4.46 With the Rosehill-Camellia Recycled Water Project Sydney Water prepared and issued a Request for Detailed Submissions to the proponents on a common base case to finance, plan, design, construct and operate a scheme to provide a prescribed service. The proponents were provided with a Term sheet which set out the commercial terms that Sydney Water proposed to be included in the Project Agreement and a Risk Allocation table which set out Sydney Water's preferred risk allocation for the Project.
- 4.47 The Project Agreement had been negotiated with each of the proponents and clearly defined with certainty what was expected and required of the proponent.
- 4.48 A Project Agreement was signed between Sydney Water and the selected proponent AquaNet Sydney Pty Ltd (AquaNet) with a series of conditions precedent which were all satisfied on 26 June 2009.

- 4.49 The proponents were asked to provide a 'base price' (escalated by CPI) they would charge Sydney Water for the supply of recycled water to the foundation Customers.
- 4.50 The use of a 'base price' to help select the proponent provided the simple and transparent criteria for selection and was part of the Public Sector Comparator (PSC). The PSC was revised to the project arrangement and used to evaluate the proposals offer for value for money.
- 4.51 A Reference Project was developed for the PSC assessment which reflected the mostly likely and efficient method of Sydney Water delivery of the Project and was designed to deliver the same outcomes as asked of the private sector under a PFP arrangement.
- 4.52 The PSC was developed based on Sydney Water meeting the requirements set out in the Request for Detailed Proposal, the additional cost and risks to those normally included in Sydney Water project budgets and other adjustments such as the additional commercial risks to produce a competitively neutral PSC that served as a benchmark for testing value for money in the private proposal.
- 4.53 The PSC was used to estimate the recycled water price the proponent was evaluated against. AquaNet's proposal presented value for money when compared with the PSC because AquaNet's average price was lower than an estimated PSC average price for the projected average demand, the capabilities of the consortium, its expansion strategy and because the project supported the NSW Government's objective for the private sector to invest and operate in the recycled water market.
- 4.54 In this case of Australian Water, this Project Agreement will be developed and provided by DPC in consultation with relevant government agencies such as the Department of Planning, the Department of Environment, Climate Change and Water and other government agencies including Sydney Water whose information will be independently verified for accuracy and completeness.
- 4.55 The Rosehill-Camellia Recycled Water Project needed to demonstrate value for money using a Public Sector Comparator. In the Rosehill-Camellia Recycled Water Project case, the public sector comparator was the
- 4.56 The commercial arrangement finalized between Sydney Water and AquaNet are detailed in section 1.2 of the Contract Summary:

“In return for the associated infrastructure and services, Sydney Water will obtain the recycled water under a 20 year agreement. Under the agreement, Sydney Water will pay for the volume of the recycled water taken with an obligation to pay for a minimum volume of 10.5 megalitres per day (90% of average daily demand) whether taken or not by Foundation Customers.”

4.57 This requires Sydney Water to bear the demand risk for the duration of the project but it is anticipated customer demand will quickly grow beyond the 10.5 megalitres per day guaranteed to be purchased by Sydney Water under the commercial arrangement.

4.58 This risk-sharing and ramp-up support from Sydney Water is consistent with the principles espoused and detailed in the Introduction and body of the Guidelines, namely (p7):

A service normally provided to the public by Government involving the creation of an asset through private sector financing and ownership control

A contribution by Government through land, capital works, risk sharing, revenue diversion or other supporting mechanisms

#### **Process defined in the Guidelines and to be undertaken for Australian Water**

4.59 The Australian Water proposal has many similarities with the AquaNet project but involves a completely different series of risk, scope, scale and regulatory environment.

4.60 While this Minute will not detail the assessment process for the Australian Water proposal, it is anticipated the assessment process will follow elements of the process undertaken for the Rosehill-Camellia Recycled Water Project in order to provide the transparency and certainty experienced by the proponents.

4.61 Australian Water has two parts to its proposal. It is anticipated the parts need to be assessed together as the second part of the proposal has a significant bearing on the risk-sharing between Sydney Water and Australian Water and will therefore be material to risk-adjustments necessary to produce a competitively neutral PSC.

- 4.62 The purchase of Sydney Water's water infrastructure within the North West Sector will reduce the risk-transfer necessary to Sydney Water from Australian Water and thereby reducing the cost of the PFP to the NSW Government.
- 4.63 It is estimated these assets can be valued at \$200 million.
- 4.64 Sydney Water based the cost comparison between the PSC and the AquaNet proposal on a price per kilolitre of recycled including reference to a 'base price' which included all the costs to produce, build, finance, operate and maintain the project for 20 years.
- 4.65 The estimate of the whole-of-life cost to Sydney Water was developed using a Reference Project delivered using traditional government procurement methods and converted to a cost per kilolitre.
- 4.66 The assessment task to be undertaken by DPC has been assisted by the fact that such a 'base price' already exists in the North West Sector constituted by the IPART determined prices currently being charged by Sydney Water for the period 1 July 2008 to 30 June 2012 in its decision of 16 June 2008 plus charges specific to Rouse Hill users known as the recycled water and river management charges.
- 4.67 While this is a significant deviation from the process used in the Rosehill-Camellia Recycled Water Project through the use of a Reference Project, it is possible as the Australian Water proposal is one that places it in vertical competition with Sydney Water for practically the same services provided by Sydney Water. Australian Water proposes to be both a network provider and retailer of water services in the North West Sector.
- 4.68 The use of such a 'base price' concept as an input to the development of the PSC will assist in providing Australian Water with a transparent and fair reference price.
- 4.69 A PSC can be developed using following the processes detailed in 4.52 and adjusted further for the range of costs and risks unique to the Australian Water proposal for a value for money assessment.
- 4.70 The process for assessment of the Australian Water proposal will be orientated by the Guidelines to the degree they are relevant and informed by the experience of the Rosehill-Camellia Recycled Water Project. The use of Sydney Water's prices adjusted for the risk and cost profile of the Australian Water proposal will assist in

developing a competitively neutral PSC and ensure transparency in the assessment.

- 4.71 It is important Australian Water is provided with and notified of a clear and fair assessment process and that the certainty experienced by the proponents and finally AquaNet for the Rosehill-Camellia Recycled Water Project is provided as much as possible for Australian Water.
- 4.72 DPC will explore whether the use of a Request for Detailed Submission, a Term sheet with the commercial terms proposed, a Project Agreement and a Risk Allocation table with DPC's preferred risk allocation for the Project are tools that will assist in the assessment task.

- (5) **IMPLEMENTATION MECHANISM**
- (6) **IMPACT ON RURAL COMMUNITIES**
- (7) **IMPACT ON FAMILIES**
- (8) **IMPACT ON SALINITY**
- (9) **REGULATORY IMPACT**
- (10) **FINANCIAL IMPACTS**
- (11) **ATTACHMENTS**

**The Hon Tony Kelly**  
**Minister for Infrastructure**  
**Minister for Planning**





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INDEPENDENT COMMISSION  
AGAINST CORRUPTION

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