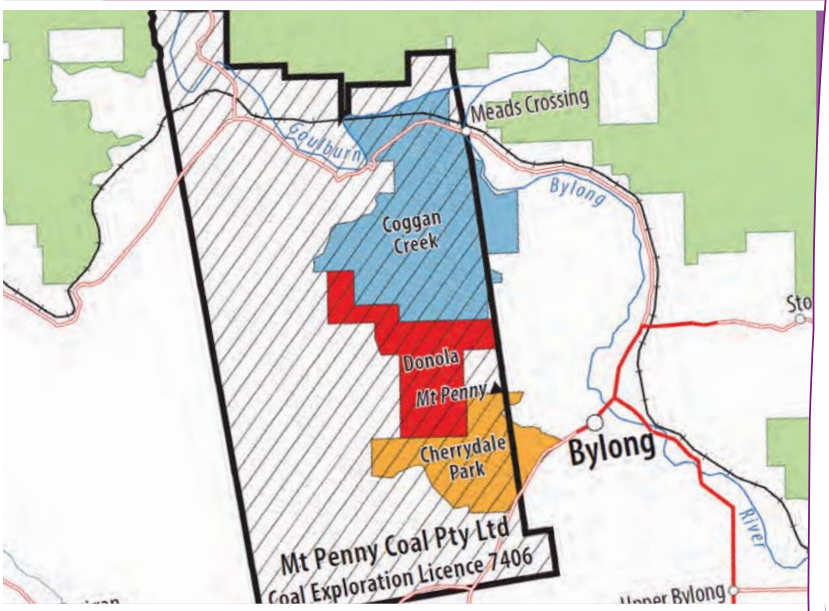

INVESTIGATION INTO THE CONDUCT OF IAN MACDONALD, EDWARD OBEID SENIOR, MOSES OBEID AND OTHERS

I·C·A·C

INDEPENDENT COMMISSION AGAINST CORRUPTION

NEW SOUTH WALES

ICAC REPORT
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In accordance with section 74 of the *Independent Commission Against Corruption Act 1988* I am pleased to present the Commission's report on its Operation Jasper investigation. This investigation concerned a number of matters including the circumstances surrounding a decision made in 2008 by the then Minister for Primary Industries and Minister for Mineral Resources, the Hon Ian Macdonald MLC, to grant a coal exploration licence, referred to as the Mount Penny tenement, in the Bylong Valley, including whether that decision was influenced by the Hon Edward Obeid MLC or members of his family. The Commission also examined a number of other matters arising from the decision to call for limited expressions of interest for the awarding of exploration licences in respect of certain coal mining allocation areas.

I presided at the public inquiry held in aid of this 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 section 78(2) of the *Independent Commission Against Corruption Act 1988*.

Yours sincerely

The Hon David Ipp AO QC
Commissioner

Contents

Chapter 1: Summary of investigation and results

The NSW Independent Commission Against Corruption ("the Commission") has conducted a composite investigation comprising three segments (Operation Indus, Operation Jasper and Operation Acacia). This report concerns the investigation into the Operation Jasper segment.

Operation Jasper concerned a range of matters, including:

1. The circumstances surrounding a decision made in 2008 by the then minister for primary industries and minister for mineral resources, the Hon Ian Macdonald MLC, to grant a coal exploration licence, referred to as the Mount Penny tenement, in the Bylong Valley. The circumstances in question include whether that decision was not impartially made and was influenced by the Hon Edward Obeid MLC ("Edward Obeid Sr") or members of his family (whether on Edward Obeid Sr's behalf or otherwise).

2. Mr Macdonald's role in the decision of the NSW Department of Primary Industries (DPI), in about September 2008, to call for limited expressions of interest (EOIs) for the awarding of exploration licences in respect of the coalmining allocation areas known as Mount Penny, Glendon Brook and Yarrawa.

3. The circumstances surrounding the tenders made by Monaro Mining NL ("Monaro Mining") for exploration licences in respect of the coalmining allocation areas known as Mount Penny, Glendon Brook and Yarrawa and the awarding of those licences.

4. The roles of Mr Macdonald and Travers Duncan in the decision in November 2008 to reopen the EOI process for the awarding of exploration licences in 11 coalmining areas and to extend further invitations to additional mining companies, including Cascade Coal Pty Ltd ("Cascade").

5. Whether Mr Macdonald, or any member of his personal staff, or any employee of the DPI, improperly provided confidential information relating to the EOI process in respect of the Mount Penny and Yarrawa tenements to members of the Obeid family or persons associated with Cascade.

6. Whether such confidential information was used by members of the Obeid family or persons associated with Cascade.

7. Whether Mr Macdonald, or any member of his personal staff, or any employee of the DPI, improperly provided confidential information relating to the reopening of the EOI process and other confidential information in respect of the Mount Penny exploration licence to Mr Duncan or any other person.

8. The circumstances under which Voope Pty Ltd ("Voope") acquired an interest in Monaro Coal Pty Ltd ("Monaro Coal"), and under which the Yarrawa exploration licence was awarded to Loyal Coal Pty Ltd ("Loyal Coal"). The name of Loyal Coal was formerly Monaro Coal.

9. The circumstances surrounding the bid made by Cascade for the Mount Penny exploration licence and the awarding of that exploration licence to Cascade.

10. The circumstances relating to the entering into of a joint venture involving Monaro Mining, the Obeid family, or any members of that family or entities associated with that family such as Buffalo Resources Pty Ltd ("Buffalo Resources"), and Cascade.

11. The circumstances relating to the extraction of the Obeid interests from the joint venture.

12. Whether any confidential information was provided improperly by Mr Macdonald, or any member of his personal staff, or any employee of the DPI, to any person for use in connection with any such joint venture or ventures or in selling or acquiring any interest in any such joint venture or ventures.

13. The circumstances relating to the intended sale of shares in Cascade to White Energy Company Ltd ("White Energy").

14. The roles played by Mr Macdonald, members of the Obeid family, Mr Duncan, Richard Poole, John McGuigan, James McGuigan, John Kinghorn, John Atkinson and Greg Jones in the transactions described in paragraphs 9 to 13 above.

15. Whether any deliberate misrepresentations were made by Mr Duncan, Mr Poole, John McGuigan, James McGuigan, Mr Kinghorn, Mr Atkinson and Mr Jones to White Energy's Independent Board Committee (IBC), or by any of those persons to the Australian Stock Exchange (ASX), in connection with the proposed acquisition by White Energy of the shares of Cascade, and whether any of those persons breached any fiduciary duty they owed to White Energy in connection with that proposed acquisition.

Corrupt conduct findings

Chapter 33 of the report contains corrupt conduct findings against Mr Macdonald, Edward Obeid Sr, Moses Obeid, Mr Duncan, John McGuigan, Mr Atkinson, Mr Kinghorn and Mr Poole.

The Commission found that Mr Macdonald engaged in corrupt conduct by:

a) entering into an agreement with Edward Obeid Sr and Moses Obeid whereby he acted contrary to his public duty as a minister of the Crown by arranging for the creation of the Mount Penny tenement for the purpose of benefiting Edward Obeid Sr, Moses Obeid and other members of the Obeid family

b) entering into an agreement with Edward Obeid Sr and Moses Obeid whereby he acted contrary to his public duty as a minister of the Crown by providing Moses Obeid or other members of the Obeid family with confidential information for the purpose of benefiting Edward Obeid Sr, Moses Obeid and other members of the Obeid family

c) deciding to reopen the EOIs process for exploration licences in order to favour Mr Duncan

d) providing Mr Duncan with confidential information, being the document titled "Proposed NSW Coal Allocations", and advice that the process for EOIs in coal release areas was to be reopened.

The Commission found that Edward Obeid Sr engaged in corrupt conduct by:

a) entering into an agreement with Mr Macdonald whereby Mr Macdonald acted contrary to his public duty as a minister of the Crown by arranging for the creation of the Mount Penny tenement for the purpose of benefiting Edward Obeid Sr, Moses Obeid and other members of the Obeid family

b) entering into an agreement with Mr Macdonald whereby Mr Macdonald acted contrary to his public duty as a minister of the Crown by providing Moses Obeid or other members of the Obeid family with confidential information for the purpose of benefiting Edward Obeid Sr, Moses Obeid and other members of the Obeid family.

The Commission found that Moses Obeid engaged in corrupt conduct by:

a) entering into an agreement with Mr Macdonald whereby Mr Macdonald acted contrary to his public duty as a minister of the Crown by arranging for the creation of the Mount Penny tenement for the purpose of benefiting Edward Obeid Sr, Moses Obeid and other members of the Obeid family

b) entering into an agreement with Mr Macdonald whereby Mr Macdonald acted contrary to his public duty as a minister of the Crown by providing Moses Obeid or other members of the Obeid family with

confidential information for the purpose of benefiting Edward Obeid Sr, Moses Obeid and other members of the Obeid family.

The Commission found that Mr Duncan engaged in corrupt conduct by:

a) deliberately misleading Graham Cubbin (the chairman of White Energy's IBC) as to the Obeid family involvement in the Mount Penny tenement by failing to disclose the involvement to Mr Cubbin when Mr Cubbin raised the issue with him,

b) deliberately failing to disclose to the IBC the fact of the Obeid family involvement despite knowing that the IBC was concerned with any such involvement,

c) telling Anthony Levi that John McGuigan would directly contact Mr Cubbin and thereby relieving Mr Levi from having to answer Mr Cubbin's request for information about the Obeid family involvement, and

d) authorising Mr Poole to arrange for the Obeids to be extracted from the Mount Penny joint venture through arrangements involving Coal & Minerals Group Pty Ltd ("Coal & Minerals Group") and Southeast Investments Group Pty Ltd ("Southeast Investments"),

with the intention, in each case, of deceiving relevant public officials or public authorities of the NSW Government as to the involvement of the Obeids in the Mount Penny tenement.

The Commission found that John McGuigan engaged in corrupt conduct by:

a) deliberately failing to disclose to the IBC the fact of the Obeid family involvement despite knowing that the IBC was concerned with any such involvement,

b) telling Mr Levi that he (John McGuigan) would directly contact Mr Cubbin and thereby relieving Mr Levi from having to answer Mr Cubbin's request for information about the Obeid family involvement, and

c) authorising Mr Poole to arrange for the Obeids to be extracted from the Mount Penny joint venture through arrangements involving Coal & Minerals Group and Southeast Investments,

with the intention, in each case, of deceiving relevant public officials or public authorities of the NSW Government as to the involvement of the Obeids in the Mount Penny tenement.

The Commission found that Mr Atkinson engaged in corrupt conduct by:

a) deliberately failing to disclose to the IBC the fact of the Obeid family involvement despite knowing that the IBC was concerned with any such involvement, and

b) authorising Mr Poole to arrange for the Obeids to be extracted from the Mount Penny joint venture through arrangements involving Coal & Minerals Group and Southeast Investments,

with the intention, in each case, of deceiving relevant public officials or public authorities of the NSW Government as to the involvement of the Obeids in the Mount Penny tenement.

The Commission found that Mr Kinghorn engaged in corrupt conduct by deliberately failing to disclose information to the IBC about the Obeid family involvement in the Mount Penny tenement, with the intention of deceiving relevant public officials or public authorities of the NSW Government as to the involvement of the Obeids in that tenement.

The Commission found that Mr Poole engaged in corrupt conduct by:

a) deliberately failing to disclose to the IBC the fact of the Obeid family involvement despite knowing that the IBC was concerned with any such involvement,

b) telling the IBC that he was not aware of any payments having been made to Edward Obeid Sr or any entities associated with him, and

c) arranging for the Obeids to be extracted from the Mount Penny joint venture through arrangements involving Coal & Minerals Group and Southeast Investments,

with the intention, in each case, of deceiving relevant public officials or public authorities of the NSW Government as to the involvement of the Obeids in the Mount Penny tenement.

Section 74A(2) statements

Chapter 33 of the report also contains statements pursuant to s 74A(2) of the *Independent Commission Against Corruption Act 1988* ("the ICAC Act") that the Commission is of the opinion that consideration should be given to obtaining the advice of the Director of Public Prosecutions (DPP) with respect to the prosecution of the following people:

- Mr Macdonald for the common law criminal offences of conspiracy to defraud or misconduct in public office in relation to his conduct in agreeing with Edward Obeid Sr and Moses Obeid to act contrary

to his public duty as a minister of the Crown by arranging for the creation of the Mount Penny tenement for the purpose of financially benefitting Edward Obeid Sr, Moses Obeid and other members of the Obeid family and his conduct in agreeing with Edward Obeid Sr and Moses Obeid to act contrary to his public duty as a minister of the Crown by providing Moses Obeid or other members of the Obeid family with confidential information for the purpose of financially benefiting Edward Obeid Sr, Moses Obeid and other members of the Obeid family.

- Edward Obeid Sr for the criminal offence of conspiracy to defraud in relation to the agreement that Mr Macdonald would create the Mount Penny tenement and criminal offences of conspiracy to defraud in relation to Mr Macdonald's provision of confidential information, or aiding and abetting or conspiracy to commit the offence of misconduct in public office in relation to Mr Macdonald's provision of confidential information.
- Moses Obeid for the criminal offence of conspiracy to defraud in relation to the agreement that Mr Macdonald would create the Mount Penny tenement and offences of conspiracy to defraud in relation to Mr Macdonald's provision of confidential information, or aiding and abetting or conspiracy to commit the offence of misconduct in public office in relation to Mr Macdonald's provision of confidential information.
- Mr Duncan, John McGuigan, Mr Atkinson and Mr Poole for offences under s 192E of the *Crimes Act 1900* in relation to their relevant conduct referred to in chapter 33 of this report.

The Commission will also furnish to the Commonwealth DPP evidence that may be admissible in the prosecution of Mr Duncan, John McGuigan, Mr Kinghorn and Mr Atkinson for offences under s 184(1) of the *Corporations Act 2001* in relation to their relevant conduct referred to in chapter 33 of this report.

Other matters

The *Criminal Assets Recovery Act 1990* provides that the NSW Crime Commission may apply to the Supreme Court of NSW for an assets forfeiture order. The Supreme Court of NSW may make such an order where it finds that a person has engaged in serious crime-related activity, even if the person has not been charged or convicted of any criminal offence.

There was evidence before the Commission of the financial benefits accrued to the Obeid family as a result of the corrupt conduct the Commission has found to have been engaged in by Edward Obeid Sr and Moses Obeid.

The Commission has provided relevant information to the NSW Crime Commission pursuant to s 16(3) of the ICAC Act for such action as the NSW Crime Commission considers appropriate.

The Commission also disseminated relevant information to the Australian Taxation Office pursuant to s 16(3) of the ICAC Act for such action as it considers appropriate.

During the course of the public inquiry, there was evidence of possible breaches of the *Corporations Act 2001*. The Commission will, pursuant to s 16(3) of the ICAC Act, disseminate relevant evidence to the Australian Securities and Investments Commission for such action as it considers appropriate.

There was evidence before the Commission of attempts by some directors of White Energy to evade a request from ASX for information concerning the calculation of Cascade's capitalised mining costs. There was other evidence that a false announcement was made to ASX concerning the reason for terminating the proposed arrangement between White Energy and Cascade.

The Commission will bring this evidence to the attention of ASX.

Corruption prevention

The Commission has not made corruption prevention recommendations in this report. The investigation does, however, raise the issue of inappropriate use of influence by a minister. This issue also arises in other investigations in respect of which reports are intended to be released at the same time and will be dealt with, along with other corruption prevention issues, in a separate report.

Recommendation that this report be made public

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

Chapter 2: Background

This chapter sets out some background information on how the investigation came about, how it was conducted and why the NSW Independent Commission Against Corruption ("the Commission") decided to conduct a public inquiry.

How the investigation came about

The investigation and exposure of corruption is an especially difficult task. Secrecy is at the core of corrupt conduct, and the parties to corruption have a common interest in maintaining that secrecy. Few paper trails are left and, occasionally, false paper trails are created. The persons likely to be involved are often experienced and astute in the avoidance of protocols designed to prevent corruption. Corrupt conduct is often the product of careful planning and considerable patience. Operation Jasper is a prime example of corruption of this kind. It was a difficult task to unravel the camouflage and obstacles that had been created to disguise what actually had occurred.

In February 2011, the Commission received an allegation by a private individual that confidential information regarding the 2008 public tender for the awarding of the Mount Penny mining tenement, in the Bylong Valley, had been "leaked" to members of the Obeid family.

The Commission initially examined decisions made by the Hon Ian Macdonald MLC to create a mining allocation area for coal exploration, known as Mount Penny, and to issue a coal exploration licence for that area.

The Mount Penny tenement, as granted, covered the vast majority of an Obeid property known as Cherrydale Park ("Cherrydale") as well as all of two other nearby properties, Donola and Coggan Creek. The southern boundary of Donola adjoins the northern boundary of Cherrydale and the southern boundary of Coggan Creek adjoins the northern boundary of Donola. Fifty per cent of Donola is owned beneficially by members of the Obeid family and the remaining 50% by two long-term friends and associates of the Obeid family, Rocco Triulcio and Rosario (Ross) Triulcio. Justin Lewis is a long-term friend of Moses Obeid. A company controlled by him owns Coggan Creek. That company became the owner of Coggan Creek through the introduction of Moses Obeid. Mr Lewis agreed, orally or tacitly, to pay the Obeid family 30% of the profits made from any sale by him (Mr Lewis) of that property. It is open to argument that a member or members of the Obeid family had an indirect right to any portion of any profits that might be made by Mr Lewis out of any dealings involving coalmining on Coggan Creek.

The grant of the Mount Penny exploration licence had the effect of substantially increasing the value of the three properties. The Commission's investigation initially focused on whether Mr Macdonald had acted improperly to benefit the Hon Edward Obeid MLC ("Edward Obeid Sr") and members of his family. Over a period of time, further facts emerged that led to new and different lines of investigation, and the identification of more issues and more potential witnesses. The investigation ultimately became known as Operation Jasper.

During the course of its investigation, the Commission obtained information that suggested that members of the Obeid family had organised the acquisition of Donola and Coggan Creek. The Commission examined whether Mr Macdonald had provided any member of the Obeid family with confidential information that led to the decision to acquire the two properties.

Further information obtained by the Commission indicated that Mr Macdonald had initially decided that the call for expressions of interest (EOIs) for the awarding of exploration licences should be confined to junior miners. There was evidence that Moses Obeid had come into possession of confidential information identifying the companies to be invited to lodge an EOI. There was evidence that Paul Gardner Brook, a merchant banker acting on behalf of Moses Obeid, had used this information to agree with Monaro Mining NL

("Monaro Mining"), one of the companies that was to be invited to lodge EOIs, that, in the event of Monaro Mining's bid for a Mount Penny exploration licence being successful, Voope Pty Ltd ("Voope"), a company associated with the Obeid family and Mr Brook, would acquire 80% of the shares of Monaro Coal Pty Ltd ("Monaro Coal"), Monaro Mining's subsidiary. The Obeid family beneficially owned 88% of Voope and Mr Brook owned 12%. The Commission broadened its investigation to examine whether Mr Macdonald was responsible for Moses Obeid receiving this confidential information.

Monaro Mining submitted six bids for exploration licences, including bids for an exploration licence over the Mount Penny and Yarrawa mining allocation areas.

The Commission discovered that the EOI process was reopened so that Cascade Coal Pty Ltd ("Cascade"), and other parties, could participate. The Commission then broadened its investigation to ascertain whether Mr Macdonald had directed the process to be reopened in order to improperly favour Travers Duncan. Mr Duncan had interests in a number of coalmining companies, including Cascade. The Commission examined whether Mr Macdonald or anyone else had provided Mr Duncan with confidential information concerning the decision to reopen the EOI process as well as confidential information concerning a NSW Department of Primary Industries (DPI) document on proposed coal allocations. The Commission also investigated whether Mr Duncan made that confidential information available to his co-investors in Cascade.

The Commission discovered that a series of complex transactions had occurred with respect to Monaro Mining's rights to the bids it had made. Monaro Mining first transferred the benefit of its bids to its subsidiary, Monaro Coal. Voope then acquired Monaro Coal's shares. Monaro Coal thereupon changed its name to Loyal Coal Pty Ltd ("Loyal Coal"). Thus, the Obeid family and Mr Brook, through Voope, held the rights to the bids that previously had been made by Monaro Mining.

The Commission learned that Loyal Coal (as the successor to Monaro Mining) had been determined by the tender EOI Evaluation Committee, set up to examine the bids, to be the successful tenderer in regard to the Mount Penny and Glendon Brook tenements, with Cascade being ranked second in both instances.

On 5 June 2009, Cascade entered into an agreement with Buffalo Resources Pty Ltd ("Buffalo Resources"). Cascade thereby undertook that, in the event it was successful in its bid for the Mount Penny exploration licence, it would enter into a joint venture agreement with Buffalo Resources. By that joint venture agreement, Cascade undertook to bear the expenses of exploration. Buffalo Resources, in return for contributing "intellectual property", became entitled to receive 25% of the profits earned by the joint venture.

Monaro Mining requested that all exploration licences to be issued to it, be issued instead to its nominee, Loyal Coal.

On 9 June 2009, Loyal Coal withdrew its bids for the Mount Penny and Glendon Brook exploration licences. On 19 June 2009, exploration licences for these areas were awarded to Cascade.

Loyal Coal was granted an exploration licence over Yarrawa. Voope acquired Loyal Coal. The circumstances under which Voope acquired an interest in Loyal Coal, and under which the Yarrawa exploration licence was awarded to Loyal Coal, were also investigated by the Commission.

The Commission broadened its investigation once more to examine whether Mr Macdonald or anyone else provided any member of the Obeid family, or persons associated with Cascade, with confidential information indicating the rankings of the respective tenderers for the Mount Penny tenement and, in particular, confidential information to the effect that Monaro Mining was ranked

first for the Mount Penny exploration licence, and Cascade was ranked second.

The Commission then discovered that there had been several complex transactions involving entities controlled by the Obeid family and Cascade (and the investors in Cascade). These transactions culminated in an agreement between two "cleanskin" companies; one beneficially owned by the Obeid family and the other by investors in Cascade. These agreements had the effect that the Obeid interest was removed from Buffalo Resources in consideration for $60 million, of which $30 million was paid to the Obeid interest. The Commission proceeded to investigate these matters.

Finally, the Commission obtained evidence that the investors in Cascade had commenced negotiations to sell their shares in Cascade to White Energy Company Ltd ("White Energy") for $500 million but they were concerned about the Obeid involvement in the creation of the Mount Penny tenement, or the joint venture relating to it, becoming public knowledge. There was evidence that the Cascade investors feared that, should the Obeid involvement become public knowledge, there was a risk of two things occurring. First, the independent shareholders in White Energy might not go through with the purchase and, secondly, the state government might investigate the creation of the Mount Penny tenement (and might set it aside) or might refuse to grant a mining lease. There was evidence that the Cascade investors, accordingly, took steps to ensure that the Obeid involvement remained hidden. The Commission proceeded to investigate these matters.

Conduct of the investigation

During the course of the investigation, the Commission:

- obtained many thousands of pages of documents, financial records and computer databases from a range of sources by issuing 191 notices under s 22 of the *Independent Commission Against Corruption Act 1988* ("the ICAC Act")
- interviewed and obtained statements from 56 witnesses
- conducted 95 compulsory examinations
- executed seven search warrants
- obtained two warrants under the *Surveillance Devices Act 2007* and four warrants under the *Telecommunications (Interception and Access) Act 1979*.

The public inquiry

The Commission reviewed the large amount of information, documents and financial records that it had obtained and also the evidence given at the compulsory examinations. Taking into account this material and each of the matters provided for in s 31(2) of the ICAC Act, the Commission determined that it was in the public interest to hold a public inquiry.

That decision was not taken lightly. Reputations can be harmed by a public inquiry and a considerable amount of public money has to be expended in conducting one. In this instance, the investigation had revealed an arguable case of corruption involving a minister of the Crown and others. The Commission was particularly aware that the allegations were of the most serious character, that they had already received considerable publicity in the media, and that questions about some of the issues had been asked in the NSW Parliament. The Commission concluded that the seriousness of the allegations, and the public interest in identifying the facts of what had occurred and exposing any corrupt conduct, outweighed the public interest in preserving the privacy of the persons concerned.

The Commission also took into account the very large sums of money involved. Cascade had entered into agreements with the owners of Cherrydale, Coggan Creek and Donola whereby, in effect, Cascade agreed – subject to a mining lease being granted – to purchase those properties at four times their market value. The Obeids had purchased Cherrydale for $3.65 million. Under the agreement with Cascade, they were due to receive $17 million. Coggan Creek had been purchased for $3.5 million and was to be sold for $14 million. Donola had been purchased for $600,000 and was to be sold for $2.4 million. Although the sales had not been completed at the time of the public inquiry, Cascade had entered into separate "access" agreements with the owners of the three properties under which it agreed to pay $14,875 per month for access to Cherrydale, about $14,000 per month for access to Coggan Creek and about $3,000 per month for access to Donola.

These financial benefits, however, pale in comparison to the $60 million that an Obeid associated company, Southeast Investments Group Pty Ltd ("Southeast Investments"), was due to obtain for the sale to the Cascade "cleanskin" company of its 25% interest in the Mount Penny tenement. At the time of the public inquiry, $30 million of the $60 million had been paid. It represented a significant profit for the Obeids.

In lieu of the other $30 million, the Obeid family took up a substantial part of the share capital of Cascade. There was

evidence that, in the event a mining lease is granted over the Mount Penny coal allocation area, their interest could be worth as much as between $50 million and $100 million.

The Obeid interest in the Yarrawa coal exploration licence was later reduced to 7.5%. In addition, share options to which the Obeids became entitled through negotiations relating to Yarrawa were sold for over $1.5 million.

There was another financial aspect that was relevant to the decision to hold a public inquiry. When it submitted an EOI for the Mount Penny exploration licence, Monaro Mining had agreed to pay an additional financial contribution of $25 million to the state of NSW, should it be awarded the exploration licence. It also offered to pay an additional financial contribution for the Glendon Brook exploration licence. Cascade did not offer to pay any additional financial contributions. Given the size of its additional financial contributions, Monaro Mining was likely to succeed in its bids. Indeed, the EOI Evaluation Committee had decided that Monaro Mining should be awarded these exploration licences. When Loyal Coal (which, as explained above, had succeeded to Monaro Mining's bid rights) withdrew from the EOI process for the Mount Penny and Glendon Brook exploration licences, and Cascade was awarded those licences, the state missed out on receiving any additional financial contributions. At the public inquiry, it was learned that Monaro Mining (or Loyal Coal) would not have been able to pay any part of the $25 million out of its own resources. It had planned on raising the money once it was awarded the Mount Penny tenement. Whether it would have been able to do so was not fully explored at the inquiry, but there was a possibility that it might have raised the necessary funds. It was relevant to investigate in the public inquiry whether any corrupt conduct on the part of Mr Macdonald or others was responsible for this loss of potential revenue.

As has been mentioned, corrupt conduct usually involves acts performed under conditions of great secrecy, and is often carefully concealed. There is seldom eyewitness evidence of corruption. Corruption is thus usually very difficult to detect and prove. It is for this reason that the NSW Parliament has given the Commission far-reaching powers to investigate possible corruption. These powers enable the Commission to adduce evidence that is not admissible in an ordinary criminal trial. It is not always understood that that fact does not render the evidence in question less probative – it merely means that it cannot be led in a criminal trial.

For this reason, and having regard to the nature of the evidence relating to the possible corruption investigated in Operation Jasper, it was realised, at the time the Commission decided to hold a public inquiry, that while it was reasonably possible that the inquiry might establish corrupt conduct of various kinds, it might be difficult to prove in a criminal court that offences had been committed.

Nevertheless, the Commission determined that in this instance the holding of a public inquiry would "promote the integrity and accountability of public administration", this being, according to s 2A of the ICAC Act, a principal object of the Commission. This object is by, s 2A, to be promoted by the Commission investigating and exposing corruption. The prospect of exposing corruption to the public, and making the public aware of the corruption, is – by s 31(2)(a) of the ICAC Act – a relevant factor in determining whether to hold a public inquiry (see also s 31(2)(d)). Thus, in the particular circumstances of Operation Jasper, the Commission decided that, irrespective of whether the inquiry was likely to produce evidence admissible at a criminal trial, it was in the public interest to hold a public inquiry. Details of the role of the Commission are set out in Appendix 1.

As there was some commonality between subject matter and persons involved in Operation Jasper and two other operations, the Commission determined that it was in the public interest to deal with all three operations in the same public inquiry. As mentioned in chapter 1, the two other operations were Operation Indus and Operation Acacia.

Operation Indus concerned the circumstances in which, in June 2007, Moses Obeid or the Obeid family provided the Hon Eric Roozendaal MLC with a benefit by way of a reduction of $10,800 in the purchase price of a Honda CR-V motor vehicle. As this matter concerned the conduct of Edward Obeid Sr, Moses Obeid and some other people also relevant to the Operation Jasper investigation, it was appropriate and convenient that both matters be dealt with together.

Operation Acacia was a referral from both Houses of Parliament requiring the Commission to investigate, among other matters, the circumstances surrounding the allocation of an exploration licence to Doyles Creek Pty Ltd. As this matter also involved an examination of the circumstances in which a mining exploration licence had been granted and the conduct of Mr Macdonald in exercising his ministerial responsibilities, it was also appropriate and convenient that it be dealt together with Operation Jasper.

The Hon David Ipp AO QC, Commissioner, presided at the public inquiry. Geoffrey Watson SC and Nicholas Chen acted as Counsel Assisting the Commission for the Operation Jasper segment of the public inquiry.

The Operation Jasper segment of the public inquiry commenced on 12 November 2012 and concluded on 20 May 2013. During that time, it ran for 45 days. The Commission heard oral evidence from 86 witnesses who were represented by 66 counsel, including 22 senior counsel. Over 100 solicitors were involved. There were more than 5,000 pages of transcript produced. Several thousand documents were provided to persons potentially affected and tendered in evidence.

In Operation Jarilo, the Commission investigated, amongst others, the conduct of Mr Macdonald and Ronald Medich. Mr Medich is currently awaiting a committal hearing in relation to a criminal matter. By s 18 of the ICAC Act, the Commission is precluded from publishing a report on Operation Jarilo once that committal hearing commences (it is due to commence on 5 August 2013). The Commission believed it to be desirable to complete the hearing of evidence and the receipt and consideration of submissions (and, if possible, the delivery of reports to the NSW Parliament) in all the other investigations in which Mr Macdonald was involved (that is, Operations Jasper and Acacia) before the commencement of the committal hearing of Mr Medich. Save for the delivery of the Operation Acacia report to the NSW Parliament, this has been done.

To this end, the Commission thought it desirable to conduct the hearings in Operations Jasper and Acacia as swiftly as was reasonably possible (within the requirements of fairness to all parties). Accordingly, the Commission sat, generally, each day from 10.00 am to 12.30 pm (without a break, save in exceptional circumstances) and from 1.30 pm to 4.15 pm, usually with a break of about 10 minutes. Often these sitting hours were extended.

Submissions

At the conclusion of the evidence in the Operation Jasper segment of the public inquiry, Counsel Assisting prepared written submissions that were made available to all relevant persons. Submissions in response were received from a number of persons. In addition, Counsel Assisting and persons adversely mentioned in the submissions in response were given the opportunity to reply to those submissions. In the preparation of this report, the Commission has considered each of the submissions it has received.

There is a disturbing feature to the submissions. Some criticised the conduct of Counsel Assisting; some of this criticism is extravagant, personal and pejorative. Some criticism seemed to be gratuitous, in the sense that it was not said that any consequence relating to the findings to be made by the Commission should flow from it. There appears to have been a concerted effort by certain parties to cast obloquy on Counsel Assisting. These submissions are dealt with in Appendix 3. As explained there, they are without foundation or misconceived, and are rejected.

The Commission is concerned about these unwarranted attacks on Counsel Assisting. Similar attacks on Counsel Assisting have been made in Operation Acacia, the report on which is yet to be published and in which different Counsel Assisting from those in Operation Jasper appeared. There seems to be a pattern emerging. It is as if some legal representatives regard Counsel Assisting as fair game in respect of whom they can make presumptuous and contumelious remarks with impunity. What lies behind this conduct? The Commission cannot answer this question with any certainty. But one thing is clear. It is not persuasive.

The criticisms are made specifically of the way in which Counsel Assisting conducted the hearing of the inquiry. But, significantly, these criticisms were not made during the hearing. No explanation is given for this failure. The consequences of making criticisms that fall into this category are, first, Counsel Assisting were not given an opportunity of answering them face-to-face, in the hearing room, secondly, the Commissioner was not then asked to rule upon them, and thirdly, the Commission was not able to deal with them by calling evidence where evidence would have been appropriate. The Commission is now able to deal with the criticisms only in the report. It has done so, as mentioned above, in Appendix 3.

The Commission hereby gives notice that, in future, if submissions make serious personal attacks on Counsel Assisting on unwarranted grounds – as has been done in Operation Jasper and Operation Acacia – the Commission will take whatever steps are available to it to have the authors of such submissions called to account.

The NSW Premier's letter of 30 January 2013

On 30 January 2013, during the course of the public inquiry, the Hon Barry O'Farrell MP, NSW Premier, wrote to the Commission advising that the NSW Government would welcome any findings and recommendations the Commission may think it fit to make along the lines of the matters referred to in paragraphs (c) to (e) of the parliamentary referral in Operation Acacia. Those matters included the making of recommendations as to what action should be taken by the NSW Government with respect to relevant mining licences or leases, the possible amendment of the *Mining Act 1992* and whether the NSW Government should commence legal proceedings or take

other action against any company or individual in relation to the circumstances surrounding the allocation of relevant exploration licences.

The Commission will deal with these matters after publication of this report. That is, it will issue a further report in which these issues will be addressed.

Chapter 3: Coal in NSW

This chapter sets out some general background information concerning coal resources in NSW, the management of those resources and the legislative processes relevant to the granting of an exploration licence.

NSW coal resources

Minerals, including coal, are an important aspect of the NSW economy. In 2007, the year preceding the main events under investigation, mining was the largest commodity export in NSW and contributed substantially to the NSW economy. NSW coal was receiving record prices on what was described internationally as a "hot" market. For example, in 2006–2007, the total value of coal production in NSW was approximately $8 billion. As a result, previously non-viable mines were being reopened, and coalmining entrepreneurs were seeking access to new coal resource areas. That consideration underpins some of the matters that were the subject of investigation.

There are extensive coal resources in NSW spread widely over the state. The principal reserves are contained in the Sydney-Gunnedah basin. Within the Sydney-Gunnedah basin there are five major coal fields – the Hunter, Newcastle, Southern, Western and Gunnedah coalfields. Each of these coalfields has different characteristics, including variations as to the quality of the coal, and the depth at which coal will be found. The Commission's investigation focused mainly upon activities in the Western Coalfield.

There are different quality coals in NSW. For the purpose of this investigation, it is sufficient to divide the types of coal into two broad classes – thermal coal and bituminous coking coal.

Thermal coal is regarded as a lower grade of coal because it burns at a lower temperature. Thermal coal is mainly used in the generation of electricity, and most of the thermal coal mined in NSW is used within NSW in the local power generation industry. Coking coal burns at a higher temperature and is used in heavy industries, such as steelmaking. Most coking quality coal mined in NSW is exported. The higher quality of coking coal over that of thermal coal is reflected in the higher price paid for coking coal.

NSW coal resources are exploited by open cut mining or underground mining. There is a massive difference in the cost of the production of coal by these methods – open cut mining being the much cheaper option of the two. It appears that most of NSW's coal resources are accessible through open cut mines, although underground mining is still active in many places in NSW.

Management of coal resources

The name of the NSW Government department that has responsibility for mineral resources has changed over the years. The present name of the department with that responsibility is the NSW Department of Trade and Investment, Regional Infrastructure and Services. In 2008, the time relevant to the Commission's investigation, it was the DPI. Within the current department and its predecessors, there is (and was) a section that deals with mineral resources, and a specialist sub-section that deals with coal. As one would expect, the leading experts on NSW coal work in that sub-section.

The mineral resources of NSW belong to the state; they do not belong to owners of land. Balancing the competing interests between landowners, the state and miners has proved difficult and has led to the adoption of particular rules that govern the orderly exploitation of the resource, including the means of exploring for such resources.

In this respect, coal is treated quite differently from other minerals. In 2007, the whole of NSW was designated a "Mineral Allocation Area" for the purposes of the *Mining Act 1992*. In general terms, this gave the responsible

minister the power to issue coal exploration licences anywhere in NSW. In practice, this meant that, if the DPI recognised that there was an area in NSW in which it should carry out exploration, then the DPI would apply to the minister for an exploration licence. This, in turn, meant that in effect the DPI became responsible for exploring the particular region with a view to identifying and quantifying coal resources. Subject to its budget, the DPI has the skills and the equipment to carry out this kind of exploration.

The DPI does not conduct mining (as opposed to exploration) activities; mining is reserved for industry. If, after conducting its exploration, the DPI arrives at the view that some new area should be opened for exploitation, it makes a recommendation to the minister to that effect. A new area would usually be opened by the grant of an exploration licence. An exploration licence empowers the grantee to enter land and to bring the necessary equipment and workers onto the land to carry out exploration. An exploration licence is subject to conditions; for example, it would usually require that a grantee undertake a certain quantity and type of exploration within the area within a fixed time. An exploration licence is also usually given for a fixed term, although there may be grounds for cancelling it before the term ends, or for extending the term of the licence.

An exploration licence could be granted by the minister by a direct allocation to a particular mining company, or through a competitive process. The circumstances in which a direct allocation might be made were not the focus of the Operation Jasper segment of the public inquiry and therefore do not need to be considered in the context of that segment. If a competitive process is adopted, then it would usually be through a tender process or an EOI process. In either case, an evaluation committee would be appointed by the DPI to make an assessment of the tender bids or the expressions of interest. The evaluation committee would report to the DPI and make a recommendation to the minister as to the winning bidder.

At some time, usually during the life of the exploration licence, a mining company might apply for permission to open a coalmine. There are many planning considerations that might then apply, which could involve balancing competing economic, environmental, cultural and social considerations. It is important to note here that the grant of an exploration licence does not guarantee the eventual opening of a mine – there are other steps and processes before that can occur. Moreover, the grant of an exploration licence to a particular mining company is not even a guarantee to that mining company that, if a mine eventually opens, it will be the beneficiary of the mining lease. Again, there are other considerations that must be taken into account and processes that must be followed before that would occur.

Despite this, a coalmining exploration licence is a valuable commodity, and one which may be bought and sold.

The report on the Western Coalfield

At around the time that there was a strengthening in world coal prices, the DPI became aware of the possibility of a lessening of domestic supply to electricity generators. In the course of discussions, the department became aware that, unlike the Newcastle and Hunter coalfields, there was a lack of knowledge about the extent of the resources in the Western Coalfield.

The deputy director-general of mineral resources, Alan Coutts, arranged for a geological study to be undertaken. This resulted in the preparation of a desktop study by a geologist, John Dwyer, called *Strategic Study of the Coal Resource Potential from Hunter West to Cobbora*. This became known as the Dwyer Report. Although the Dwyer Report was initiated to identify coal resources primarily for the power generation industry, it necessarily reported on coal resources in the Western Coalfield, including identifying places where further exploration should be undertaken.

Mr Coutts explained the purpose of the Dwyer Report as follows:

> *John Dwyer was the person we engaged to do the desktop study which I referred to earlier which was the precursor for us starting a programme of more extensive drilling in the Western Coalfields and that was when we asked John to do a bit of an overview for us so we could start to identify our priority areas for future drilling.*

After receiving the Dwyer Report, the DPI on 6 June 2006 sought the minister's consent to an exploration licence being lodged within the "Mineral Allocation Area" to enable the department to explore an area of approximately 586 square kilometres in the Denman, Wollar, Dunedoo and Rylstone regions to identify potentially significant open cut resources.

On 15 June 2006, the minister approved the application for an exploration licence. On 21 November 2006, Exploration Licence 6676 ("EL 6676") was issued to the director-general of the DPI.

In all, there were seven areas that were identified within EL 6676 where the DPI proposed to undertake further exploration. One of the seven areas was the Wollar-Bylong area. The exploration program commenced in early 2007 and drilling was performed in the Cobbora area – this being the area that was identified as most important for the provision of coal to the power stations in the general area of the Western Coalfield.

Although exploration of the Wollar-Bylong area was scheduled, it never commenced. This is not without relevance in the context of what later occurred.

The purpose behind the steps taken by the DPI in EL 6676 was to identify areas that, following exploration, could provide a further coal development or tender area. It was consistent with the DPI position, as explained by Mr Coutts, that the future rational and timely allocation of coal resources in the Western Coalfield required exploration that would enable further definition of the resources prior to determining whether the resource was suitable for subsequent allocation.

The steps that Mr Coutts initiated, and the DPI undertook, were all part of what Mr Coutts described as a "measured approach" to the allocation of future coal resources. Mr Coutts expressed the position that the DPI not only regulated the industry, but also acted as an advocate for the responsible allocation of the state's coal resources.

The coal allocation guidelines

The DPI's *Coal Allocation Guidelines* provide a controlled framework for the allocation of coal. The DPI had devised and used such guidelines since the 1970s, and they were updated and amended from time to time. The guidelines relevant to this inquiry were called *Guidelines for Allocation of Future Coal Exploration Areas* and dated January 2008 ("the 2008 Guidelines").

The 2008 Guidelines envisaged four kinds of coal allocation areas: a major stand-alone area, a substantial addition to an existing mine, a minor addition to an existing mine, and a small area, unrelated to an existing mine.

Relevantly, under the 2008 Guidelines, a major stand-alone area was an area containing "sufficient coal to develop a large new mine", and a small area included remnant resources left from previous mining operations or small deposits "with some development potential".

The *Mining Act 1992*

Part 3 of the *Mining Act 1992* deals with exploration licences and relevantly, in its current form, provides as follows.

By s 24, an exploration licence may be granted over land of any title or tenure. Section 14 provides that the minister may invite tenders for an exploration licence in relation to allocated minerals in land within a "Mineral Allocation Area". Section 15 requires tenders to be lodged with the director-general of the department and to be accompanied by the following information:

a) particulars of the financial resources and relevant technical advice available to the tenderer

b) particulars of the program of work proposed to be carried out by the tenderer in the proposed exploration area

c) particulars of the estimated amount of money that the tenderer proposes to expend on prospecting

d) any other information that is specified in the tender invitation.

Section 15(3) provides that a tenderer may specify an amount to be paid in the event the tender is successful.

Section 27 provides that an exploration licence (other than an exploration (mineral owner) licence) ceases to have

effect at the expiration of such period (not exceeding five years) as the person granting the licence determines.

After the events that are the subject of this report, the *Mining Act 1992* was amended, but the provisions set out above are in substance the same as those that applied at the relevant time.

Chapter 4: Credibility issues

The credibility of each of Mr Macdonald, Edward Obeid Sr and Moses Obeid are key considerations in assessing the evidence before the Commission, as is the credibility of the DPI witnesses and members of Mr Macdonald's staff. It is convenient for the Commission to set out, at this stage, its views, generally, as to the credibility of these witnesses.

In making factual findings, the Commission has attributed substantial importance to contemporaneous records where available, comparable evidence from disinterested witnesses, incontrovertible facts, admissions against interest, and the probabilities involved. Most of the crucial witnesses were in the witness box for long periods and the Commission had the opportunity of assessing their credibility. As is inevitable in such circumstances, the Commission has formed views as to their credibility based on the way in which these witnesses gave evidence. This factor is commonly regarded as "the demeanour of the witness". While the Commission has had full regard to the more objective criteria, the demeanour of the witnesses has played a significant role.

The Commission has applied this approach in all instances in assessing the credibility of individual witnesses, not just those expressly mentioned in this section of the report.

The credibility of Mr Macdonald

Mr Macdonald was an unsatisfactory witness. In some instances, the Commission has come to the view that Mr Macdonald gave deliberately untrue evidence – it is sufficient here to refer briefly to three examples: his evidence that he believed that the Obeid family property was on the Anglo (Anglo Coal (Bylong) Pty Ltd is referred to in this report as "Anglo") tenement and not next door to it, his evidence regarding the discovery of Mount Penny in an atlas, and his evidence explaining his reasons for giving Moses Obeid the list of mining companies (the detail of these matters will be dealt with later in the report). In other instances, the Commission came to a view that Mr Macdonald was tailoring his evidence to fit the evidence of other witnesses, and attempting to concoct an innocent explanation to explain away damning facts. In many instances, Mr Macdonald demonstrated an unwillingness to answer direct questions. He attempted to avoid answering direct questions if answering the questions could do him harm.

Overall, the Commission came to the view that it could not rely on any of the evidence of Mr Macdonald, save where it involved an admission against interest or where it was corroborated by evidence the Commission regarded as reliable.

The credibility of Edward Obeid Sr

Edward Obeid Sr was an unimpressive witness. The Commission would be hesitant in accepting his evidence on any contentious issue. He gave evidence on some important issues which, for reasons explained below, the Commission regarded as deliberately untrue. The Commission regarded his repeated attempts to distance himself from the Obeid family businesses as deliberately false, and merely an attempt to construct a defensive position between him and some of the issues that lie at the heart of this inquiry. He was an aggressive witness and seemed to be more concerned with imposing his will on the proceedings than with simply telling the truth. From time to time, this aggression manifested itself in a determination to make speeches arguing his case, irrespective of the question. It was plain that, if he felt that an honest answer could damage his position, he simply evaded providing an answer. The transcript is replete with instances where Edward Obeid Sr declined to answer the question he had been asked. The evidence of Edward Obeid Sr could not

be relied upon, save where it involved an admission against interest or where it was corroborated by evidence the Commission regarded as reliable.

The credibility of Moses Obeid

Moses Obeid was an unreliable witness, willing to lie or mislead whenever it suited his purpose.

There are numerous instances where he deliberately lied at the public inquiry. The details of these matters are set out throughout this report. They include the evidence that he gave in respect of his contacts with Mr Macdonald, his receipt of the list of mining companies from Mr Macdonald, his contacts with Mr Brook, and his contacts with the investors in Cascade. His account, given in conjunction with his father (Edward Obeid Sr), regarding how he came to know of coal in the area of Cherrydale, was demonstrated to be a fabrication. The Commission specifically rejects the evidence that Moses Obeid gave in respect of the threat that he and his family perceived was caused by the presence of the Anglo tenement. In this and other respects, Moses Obeid appeared to be determined to give an account that was false but which corresponded with accounts given by other members of the Obeid family. He persisted in doing this, irrespective of the question that was asked (and this became a feature of the evidence of some of his brothers as well). The Commission is satisfied that the evidence given by members of the Obeid family in respect of the Anglo tenement was nothing more than a fabrication.

There is another factor relevant to the assessment of Moses Obeid's evidence. It is appropriate to quote the following exchange between the Commissioner and one of Moses Obeid's legal representatives, Jeffrey Tunks:

> *THE COMMISSIONER: I have noticed that there have been no questions asked on [Moses Obeid's] behalf throughout these proceedings. Now … I am sure you've read the directions on this.*
>
> *MR TUNKS: I have … I've spoken to Mr Robberds* [senior counsel for Moses Obeid] *who can't be here today and the advice or the forensic decision in regards to this matter have been made by Mr Robberds that there'll be no testing of the witnesses.*
>
> *THE COMMISSIONER: … I put you on notice that the absence of cross-examination on important issues involving your client could well lead to an inference … that the evidence that has been given relating to your client on which no cross-examination is taking place is admitted by your client. … You're on notice. That the failure to cross-examine could well lead to a finding that* [he] *is taken to admit that evidence.*
>
> *MR TUNKS: I understand that. We accept that notice.*

In its report on Operation Indus the Commission states:

> *Moses Obeid was represented by eminent senior counsel of considerable experience who did not cross-examine any witness called by Counsel Assisting. Thus, the evidence of Mr Fitzhenry and Mr Goodman was not challenged by Moses Obeid. Plainly, this omission was the result of a forensic decision. The Commission infers that senior counsel was not able to obtain coherent instructions from Moses Obeid that, in accordance with a barrister's legal and ethical duties, he could put to these opposing witnesses. Having observed Moses Obeid in the witness box, this attitude was entirely justifiable and proper, and in the interests of Moses Obeid.*

Directions made prior to the hearing commencing contained the following:

> *Although the public inquiry covers three operations of the Commission, evidence taken in one operation will be*

taken as evidence in all three operations.

The comments on Moses Obeid's evidence made in the report on Operation Indus apply equally to this report on Operation Jasper.

The Commission does not accept the evidence of Moses Obeid unless what he says is independently corroborated by a disinterested and reliable witness.

The credibility of Paul Obeid, Gerard Obeid and Damian Obeid

The Commission is unable to rely upon the evidence of Paul Obeid, Gerard Obeid and Damian Obeid.

Paul Obeid's evidence is subject to similar criticisms to that of his brother, Moses Obeid. In particular, Paul Obeid's repeated attempts to recount the story of the threat posed by the Anglo tenement are not believable, and his repetition of that story was designed to mislead the Commission.

Gerard Obeid's evidence was of a slightly different character – he was less strident and he left an impression that he was mainly acting under the direction of his brothers, Moses and Paul. Nevertheless, Gerard Obeid also recounted evidence that, while consistent with that of Moses and Paul Obeid, was not believable.

Damian Obeid testified that the Obeid family obtained options to purchase Donola and Coggan Creek because these properties were suitable for "grazing purposes". The Commission considers that there is no truth in such evidence whatsoever. This evidence, in the Commission's view, taints all of Damian Obeid's evidence.

The credibility of the DPI witnesses and members of Mr Macdonald's staff

The Commission finds the DPI witnesses, generally, to be reliable and persons of integrity. They attempted to tell the truth and to be accurate. They appeared to be dedicated to their work and desired to comply properly with the duties they were required to fulfil.

Of Mr Macdonald's staff, particular mention must be made of Jamie Gibson, Mr Macdonald's deputy chief of staff. Mr Gibson was an impressive witness. He was obviously careful in his answers. He was at pains not to overstate his evidence. His evidence was reliable. His recollection was generally good and, when it was not, he said so. To the extent that there is a suggestion made on behalf of Mr Macdonald that Mr Gibson's evidence was coloured in an attempt to place some distance between himself and Mr Macdonald, or even tailored adversely to Mr Macdonald, the Commission rejects the suggestion. On the contrary, Mr Gibson gave carefully measured evidence, and there was no sign of animosity toward Mr Macdonald.

The evidence of Craig Munnings, a ministerial liaison officer employed in the office of Mr Macdonald, was difficult to assess, largely because he had suffered a head injury in an accident and he asserted that his memory had thereby been affected. It is sufficient to state that the Commission approached his evidence with caution.

Tony Hewson was Mr Gibson's predecessor. He was an unimpressive witness. He said he could remember nothing or very little of relevant events and his evidence did not assist the Commission. He had previously worked for Mr Macdonald, and had moved from the minister's office directly to work as a lobbyist for White Energy. The Commission does not regard his evidence as truthful.

Chapter 5: Edward Obeid Sr's continuing involvement in the family business

During the course of his evidence, and through questions asked of other witnesses, Edward Obeid Sr attempted to play down the role that he had as the family leader, and to play down the involvement that he had in the family businesses. Senior counsel for Edward Obeid Sr spent many pages of their submissions arguing this issue. These arguments were based largely on evidence by members of the Obeid family and persons associated with them.

Members of the Obeid family and persons associated with them testified to the effect that Edward Obeid Sr plays no part in the business decisions involving the family's interests. Their evidence was generally to the effect that the sons of Edward Obeid Sr have collective control over the family's business affairs and he has no involvement.

The Commission does not accept that evidence. It does not believe that evidence given by those persons.

The position of Edward Obeid Sr was that his sons take the decisions in the business affairs of the family. Typical of the evidence that supports this proposition is the following exchange involving Edward Obeid Sr, himself, during which he told the Commission that business decisions involving Obeid family interests were made collectively by his sons, and not by him:

> *THE COMMISSIONER: When you say the boys, who do you mean? --- My … sons.*
>
> *Well, did all of them?---Well, they work together, Mr Commissioner?*
>
> *All of them?---Yeah, they work all together.*
>
> *What, in the same business?---In the same office. They have varied – they look after different sections of the business.*
>
> *So were they all interested in the sale of Cherrydale Park?---Well, it would be a decision they'd have to make so- - -*
>
> *All of them?---Yeah, they make decisions collectively.*

There is evidence that Edward Obeid Sr was active in the family's business activities at the time of the events relevant to this investigation, and that this has continued. In particular, Edward Obeid Sr retains considerable control over the family businesses and finances. Evidence to the contrary is rejected.

While the family's businesses were operated from Birkenhead Point, Edward Obeid Sr had his own office there, and the same arrangements have applied since those operations moved to North Ryde. Moses Obeid said that Edward Obeid Sr attends the family offices three or four days a week.

During a compulsory examination conducted by the Commission, Moses Obeid was asked about his father's continuing role:

> *…is he still not regarded as the leader of the family?---Yes, he is regarded as the leader of the family.*
>
> *And as the leader of the family is he not consulted where decisions are made that could benefit the family enormously or harm the family?--- Yes, he is.*

The family accountant, Sid Sassine, gave evidence about Edward Obeid Sr's involvement "in the last couple of years" in the family's business activities and trust arrangements:

> *All right. And did you prepare in recent times a major diagrammatic representation of the Obeid family business empire?---Yes we did.*
>
> …
>
> *Okay. So at the request of Eddie Obeid Senior you prepared such a diagram?---Yes.*
>
> *Is that right? And you provided it to Eddie Obeid*

Senior? --- Yes I did.

Why did he want it?---It was to do with understanding the group structure pretty much.

Right. And why did he want to understand the group structure?---Well I think at the time it was to do with looking after the family's interests and making sure everyone is being looked after.

…

And so when he asked you to prepare it what were his specific instructions, what did he say to you?---To provide me with a complete structure diagram of what the whole family owns.

Did you say to him something like, "why?" or, "why would you want that, Mr Obeid?"? Anything like that?---Yes.

What did he say?---As I said along the lines of he wants to look after the family, make sure all the family's interest have been, have been looked after.

…

Now, why did he say that he wanted that, that is the list of the companies, the list of the directors, the list of the beneficiaries?---He wanted to look at the whole group structure and understand what each person's - - -

…

Well, what did Mr Obeid tell you which led to you compiling a list of companies, a list of directors and a list of beneficiaries?---He said to me words along the lines I'd like a list of all my, all the companies involved, what each of their assets were, what the complete structure of the group was, along those lines.

Mr Sassine said that he had known Edward Obeid Sr "for a long, long time in a personal capacity". He regarded Edward Obeid Sr as the head of the family and upon this basis provided him with the commercial information that was sought.

Edward Obeid Sr used his wide range of contacts to initiate business opportunities for the family. For example, former minister Frank Sartor told the Commission that Edward Obeid had tried to facilitate some kind of deal between the state of NSW and Moses Obeid in respect of the business, Streetscape. There was other evidence of Edward Obeid Sr intervening with Cascade investor Greg Jones to set up a meeting in respect of Moses Obeid's business known as Geo-Radar and Edward Obeid Sr connected the investor, Alan Fang, to his sons, so that Mr Fang could look at a coal deal centred on Cherrydale.

The evidence of a direct involvement by Edward Obeid Sr is particularly strong in respect of Cherrydale itself. Although Cherrydale was purchased by a family company, Locaway Pty Ltd, as the trustee for an Obeid family trust, the evidence suggested that the predominant purpose behind its purchase was to provide a place for Edward Obeid Sr to enjoy his retirement.

Nicole Fitzhenry, who, at the relevant time, was a neighbour and friend of Moses Obeid and his family, said that Moses Obeid often spoke to her about the family's intention to buy Cherrydale. She was asked whether Moses Obeid spoke of the activities they were going to pursue on the property. She replied:

No, he just said, "Dad wants to buy another farm."

A letter from Peter Druitt & Co dated 17 September 2007 to the previous owner, John Cherry, records:

John,

Enclosed please find the offer for Cherrydale from Eddie Obeid. I have just spoken to Eddie, he said he would want to get everything signed and the $500,000 paid this week. He would like to meet with you personally to discuss the structure of the finance deal.

Please note he would like the Gym equipment included in the deal.

Regards

Peter S Druitt

PETER DRUITT & CO PTY LTD

Plainly, Edward Obeid Sr was the moving force in the decision to buy Cherrydale. He wanted to buy another farm and that is precisely what was done.

Edward Obeid Sr seems to have had the responsibility for the negotiations with Mr Cherry, in respect of the conditions of purchase, including vendor finance. There is evidence that Edward Obeid Sr retained a say in later setting the price for which Cherrydale could be sold. He said that he wanted the "boys" to sell Cherrydale at the highest possible price. He made known to, and discussed with, his sons his "expectations" in regard to the selling price of Cherrydale. Those expectations were obviously intended to weigh heavily in whatever decision was to be made with regard to Cherrydale. This is apparent from the following exchange:

THE COMMISSIONER: This farm was very important to you, wasn't it? Cherrydale Park?---Very important, yes.

You were going to retire on it?---Yes. Beautiful farm.

Nobody would take a decision about Cherrydale Park, nobody in the family would take a decision about Cherrydale Park without you agreeing to it?---I would say yes they'd confer with me and I'd probably have a major say.

In submissions, it was suggested that Edward Obeid Sr was the leader of the family only in a "fatherly sense". The Commission does not agree. The evidence reveals that the Obeid family was a closely-connected unit that accorded Edward Obeid Sr great respect. This respect was not limited to family and social decisions. The evidence reveals that it carried over to business decisions, particularly those that were important, and those that concerned him directly. He played a crucial part in such decisions.

It was not for nothing that he had an office in the family's business premises, which he attended most days a week, that he exercised his sphere of influence to facilitate business that his sons wanted to do, that he urged his sons to obtain a good price for Cherrydale, and it was not for nothing that he asked Mr Sassine for a list of the whole group structure, reflecting the family's entire business holdings. As he said, he wanted this information to make sure that "everyone is being looked after". The fact is, as Moses Obeid accepted, Edward Obeid Sr, at the very least, is "consulted where decisions are made that could benefit the family enormously or harm the family". The sale of Cherrydale, the many agreements entered into through intermediaries by the Obeid family to ensure that they would have an interest in whatever mining venture would operate to exploit the Mount Penny tenement, and the sale of the Obeid interest in the Mount Penny tenement, were agreements that had the capacity to "benefit the family enormously".

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

Chapter 6: The Obeid family

The purpose of this chapter is to show how the Obeid family's business interests operated for the benefit of the family as a whole.

Edward Obeid Sr is married to Judith Obeid. They have nine children. Five of their children – Moses Obeid, Damian Obeid, Edward Obeid Junior (Jr), Gerard Obeid, and Paul Obeid – gave evidence at the public inquiry.

The Commission is well aware of the need to consider the conduct of an individual, and not to make findings merely upon the basis of the individual's membership of a group. That has particular bearing here, and separate consideration has to be given to the role of Edward Obeid Sr, and how he personally fitted into the various events which unfolded.

Edward Obeid Sr's precise role in the business affairs of his family is difficult to determine. Edward Obeid Sr, and those members of the Obeid family who testified, generally attempted to diminish or deny his true involvement in and general influence over the family's affairs.

The Obeids treat the whole of their operations as a family unit, where – within that unit – the actions of each individual are accepted to have been taken on behalf of the whole family. The consequential gains and losses are, to the degree and in the way described below, shared and borne by the family as a whole. Because of this, it was unusually difficult to separate the activities of a single member of the family from the activities of the family as a whole.

The Obeid family has diverse business interests. Some of the businesses mentioned in the course of the public inquiry were an agricultural business, the publication of a newspaper, property development (apparently, on quite a large scale), building and construction associated with the property development, a reception lounge, restaurants and cafeterias, the design and construction of road and traffic controls (including street lighting) and technical support for the mining industry. The family also has real estate holdings, and acts as a landlord. The businesses were conducted from one central office, which, at the time relevant to this inquiry, was located at Birkenhead Point. Each of Edward Obeid Sr's sons is actively involved in the family business. One of his sons-in-law, Hassam Achie, works from the same office as a financial controller of the family's affairs or in-house accountant.

The Obeid family has a complex structure of trusts and corporate vehicles through which they conduct their business and financial affairs, but eventually the family's wealth comes back to one principal trust fund, Obeid Family Trust No 1. Each member of the family, including Edward Obeid Sr and his wife, Judith, have their ordinary living expenses paid through the trust, whether by loan or otherwise, and it seems that family members are relatively free, whether by way of loans or otherwise, to draw upon that same trust for extraordinary expenses.

Edward Obeid Sr admitted that the Obeids operated "very much as a family unit". Moses Obeid gave this evidence:

> *Your family operates in business and finance and in the distribution of the money, it operates as* [a] *unit, doesn't it?---Yes, yes, sir, it does.*
>
> *And for example it's been put together and organised in a way so that there are many sources of income which eventually end up in one pond of money, Obeid Family Trust No (1). Isn't that right?---I'm not sure if that's the way Sid Sassine has arranged things at the moment, but yes, something along those lines.*
>
> *And there's been a family policy for some long time now that each of the children, boys and girls, will each secure a house, a good house, through the earnings of the businesses?---Correct.*
>
> *And there has been a policy in place for a long time now that each of the children, the boys and the girls, would be entitled to a motor car of around about $100,000 in value,*

paid for from the trust?---Yes.

And there's been a policy around for a long time now that the way that the trust would operate is that the mortgage repayments to be made upon any house would be made through the trust?---Right.

…

Just going back to where we were, the mortgage repayments, if somebody has a mortgage, they're made through the trust?---That's correct.

And the lease repayments on a car are made through the trust?---That's correct.

And this also applies to Eddie and Judith, does it not, your parents?---Ah, yes.

…

Well, if they are to buy a house for example, they intended to buy a house at Woolwich, it would be financed through the trust?---That's correct.

And the mortgage repayments would be made through the trust?---Correct.

And everybody is able to participate equally, mum, dad, all boys, all girls, on that kind of basis?---Ah, I wouldn't not agree with you.

THE COMMISSIONER: I beg your pardon?---I don't agree, I, I, I don't disagree with you, I should say.

Mr Achie, the family's financial controller, gave evidence of a "pool" of money that "goes into" and "sits in" the Obeid Corporation Pty Ltd, a company that is owned by the Obeid family and that is the trustee of Obeid Family Trust No 1. This led to the following exchange:

THE COMMISSIONER: I thought you agreed that some moneys that were paid towards Mr Obeid's [Edward Obeid Sr's] *Mercedes Benz came out of - - -?---The pool.*

---the assets involved in the property and coalmining interests at Cherrydale?---Well, when you pool the moneys together the answer is yes.

MR WATSON: And in the sense that the pool of money is there for family?---Correct.

Mr Achie gave evidence as to how drawings are made by individual members of the family. These drawings appeared to be, generally, for a very large variety of personal and domestic reasons. It was suggested to him that, on the basis of the different amounts of the drawings, some members of the family could be advantaged at the expense of others. He replied, in effect, that eventually steps would be taken to equalise the drawings to achieve a degree of fairness between all family members. The following exchanges occurred:

All right. I see. So there is some sort of general plan of making this equitable as between the beneficiaries, is there?---As much as possible, yes.

Right. And who decides that?---The directors.

And:

THE COMMISSIONER: Mr Achie, the impression I'm getting - please correct me if I'm wrong is that the family operates as an entity and moves forward in its economic progress as a unit and the individual arrangements are made simply as a matter of convenience, but always it is the idea that the family is operating together and appropriate arrangements will be made in due course to make everything fair?--- That's a fair assumption.

Is that – so what I've said is correct?---Correct.

And:

What does the family consist of then? Please answer that

question only?---The family consists of the boys and the girls and the mother and the father.

And:

What I've put to you is that irrespective of the identity of the directors, irrespective of the identity of trustees, irrespective of the identity of beneficiaries, irrespective of [the] *identity of the shareholders, where companies and trusts and even individuals in their personal capacity conducting some kind of business, that is individuals in the Obeid Family consisting of Mr and Mrs Obeid senior and the sons and the daughters*[,] *the idea is that one for all, all for one they operate together* [as] *an entity and no matter what the book entries are the idea is that at some point in the future there will be* [an] *equitable distribution of the profits and losses?---That's a fair assumption, yes.*

In this sense, all of the family's diverse business interests operate for the benefit of the family as a whole. The family operates, in effect, as a single economic unit.

This explains the admission made by Moses Obeid that information given to him by Mr Macdonald enabled the "Obeid family to make millions of dollars in profit".

David Williams SC represented Edward Obeid Sr in connection with trust, accounting, taxation and financial matters. He made a series of submissions asserting that:

The Commission has, throughout the inquiry, sought in its questioning and otherwise to treat the operation of trusts, particularly discretionary trusts, in a manner inconsistent with the well recognised attributes of such structures. That is an error in approach.

He submitted that the Commission had committed "fundamental misunderstandings of the operation of discretionary trusts" and spent many pages of his submissions canvassing this issue. He submitted that the "Commission has, at times, grouped the Obeid family members together in ways that ignore proper legal structures". He submitted that "[a]bsent direct involvement in a business receipt of income from a trust that was, directly or indirectly, generated in the business does not render the beneficiary 'in business' with the controlling individuals". He made many other submissions in this vein.

The Commission does not accept that it has made an error in its approach, which was indeed flagged during the public inquiry. The Commission is not ultimately concerned with precisely what amount any particular member of the Obeid family, including Edward Obeid Sr, in fact received, as a matter of law, through dealings in connection with the Mount Penny tenement. The Commission investigated whether Mr Macdonald conspired with members of the Obeid family, including Edward Obeid Sr and Moses Obeid, to create the Mount Penny tenement over Cherrydale and two other properties (Donola and Coggan Creek). Any financial or other benefit that members of the Obeid family, including Edward Obeid Sr and Moses Obeid, obtained from the creation of the tenement would be relevant as a motive for the conspiracy.

In the light of the evidence referred to above, it is obvious that Edward Obeid Sr, Moses Obeid and other members of the Obeid family each benefited financially, or stood so to benefit in some way, from at least four avenues relating to the Mount Penny tenement. First, each member of the Obeid family (as members of the family economic unit, in accordance with their arrangements, as described above) stood to benefit, at least jointly, as members of that unit, by many millions of dollars on the sales of Cherrydale, Donola and Coggan Creek being completed. Secondly, each member of the Obeid family (as members of the family economic unit) benefited in the same way from the $30 million paid by Cascade (through its cleanskin company, Coal & Minerals Group Pty Ltd ("Coal & Minerals Group"), to which reference will be made in more detail below) to buy the Obeid interest out of the joint venture over the Mount Penny tenement. This money, through indirect means (also detailed below) ultimately found its way into the Obeid Family Trust No 1. Thirdly, each member of the Obeid family (as members of the family economic unit) stood to benefit from the balance owing by Coal & Minerals Group, being another $30 million. Fourthly, through their involvement in the various Mount Penny transactions, the Obeids have recently been able to acquire a parcel of shares in Cascade. Those shares have a value that, potentially, is to be measured in millions of dollars.

These avenues all stem from the planned and executed, or contemplated, transactions relating to coal under the Mount Penny tenement.

When Moses Obeid was asked how much the Obeid family stood to make "if everything fell into place" for them in regard to the matters investigated in Operation Jasper, he replied:

…in terms of those numbers, I don't know what the expenses are, so you want to talk in round terms, 75 million might, might do the number.

In fact, the probabilities are that the Obeid family stood to gain significantly more, particularly if regard is had to the parcel of shares they now hold in Cascade.

There is another, but intangible, benefit that Edward Obeid Sr received from the Mount Penny transactions. It is obvious that the Obeid family is a very close family

unit, and Edward Obeid Sr takes a close personal interest in their wellbeing. He expresses his pride in his sons and, implicitly, what they have achieved. He would derive pleasure from any major increase in their personal assets and any increase in their financial security, and that – no doubt – would increase the family pride he feels.

The relevance of members of the Obeid family benefiting in the ways outlined is that such benefits provided the motive for Edward Obeid Sr's corrupt conduct, as found by the Commission and described below. The hope and expectation that Edward Obeid Sr and his family would so benefit is part of the overall motive that Mr Macdonald had for entering into the agreement; namely, he desired to help and benefit his close friend and patron, Edward Obeid Sr, who had supported him in difficult times in his past, and who might be induced thereby to help him in similar ways in the future.

The Commission cannot leave this topic without dealing with an excessively critical attack made by Mr Williams on Grant Lockley, a forensic investigator in the Commission's employ. Mr Williams criticised Mr Lockley's evidence, his expertise and his honesty, and asserted that he was seriously biased. This attack was surprising, unjustified and, in the Commission's view, uncalled for. Apart from not accepting Mr Williams' submissions in this respect, during the hearing of the public inquiry, the Commissioner explained that the use the Commission would make of the evidence of Mr Lockley would be limited and would not include any reliance on his expertise. This is why the attack on him is surprising.

Mr Lockley's testimony remains relevant to the issues investigated to the extent that it provides details of monetary payments into, and out of, various Obeid entities. The Commission, however, has not regarded it necessary to refer to any part of Mr Lockley's evidence in this report. There are two reasons for this decision, and they do not include any reluctance to accept Mr Lockley's testimony. First, the Commission finds it unnecessary to trace each payment through the Byzantine pathways that the Obeid family constructed between the time money left a payer's hands and the time it arrived in the pockets of an Obeid family member. Secondly, the Commission considers that the benefits described above, both tangible and intangible, constitute an ample motive for the corrupt conduct that the Commission finds, and which is detailed below.

Chapter 7: Mr Macdonald's relationship with Edward Obeid Sr and with Moses Obeid

It is of central importance to this investigation to understand the relationship between Mr Macdonald and Edward Obeid Sr. That relationship, and the way that it seems to have extended so that Mr Macdonald eventually came to be in close contact with Moses Obeid, helps to explain some of the events that have occurred.

Mr Macdonald

Ian Michael Macdonald was born in 1949. He was active in politics from his university days. Mr Macdonald was employed at one stage on the political staff of Frank Walker, former NSW attorney-general. Mr Macdonald was elected to the Legislative Council in 1988, where he served for 22 years before he resigned in June 2010. During his service, he held several portfolios. Relevantly, in May 2004, he was appointed the minister for primary industries, which itself was the amalgamation of several departments, including the former Department of Mineral Resources. Mr Macdonald had ministerial responsibility for NSW coal resources from 3 August 2005 to 5 September 2008 and from 8 September 2008 to 17 November 2009.

Edward Obeid Sr

Edward Moses Obeid was born in 1943. He was appointed to fill a vacancy in the Legislative Council in 1991. He ended up serving for just on 20 years, resigning from the NSW Parliament in May 2011. From April 1999 to April 2003, he was the minister for fisheries and minister for mineral resources. He was an active businessman before he entered the NSW Parliament, having been involved in a variety of businesses. His involvement in the Obeid family businesses has been discussed.

The relationship between Mr Macdonald and Edward Obeid Sr

In order to understand how a relationship developed between Mr Macdonald and Edward Obeid Sr, it is necessary to first make some brief observations about the way in which the Australian Labor Party (ALP) organised itself in the NSW Parliament at the relevant time.

All ALP members, Upper House and Lower House, are members of a caucus, and a majority vote in the caucus will resolve the parliamentary party's vote on political issues. Caucus also decides who will be appointed to various positions, including the ministry. The caucus is broadly divided into two, reflecting the right wing and left wing of the ALP. For many years, the right wing – known as Centre Unity – has dominated the caucus; approximately two-thirds of the caucus are members of the right-wing faction. This control of the caucus has provided the right wing with the power to develop policies and the makeup of the ministry. Centre Unity is further divided into sub-factions, by far the biggest of which was the group known as the Terrigals. As the dominant sub-faction in Centre Unity, the Terrigals had a large say in the right-wing caucus, and from that basis a disproportionately large say over the affairs of the parliamentary ALP. The fact that the Terrigals could control the right wing of the Caucus in effect gave them control over the ALP.

Edward Obeid Sr was from the right wing of the party, and a de facto leader of the Terrigals sub-faction. He accepted that he had "a great deal of influence over the Terrigals". Mr Macdonald was from the left wing of the party, and a member of the hard left sub-faction. There is evidence that, traditionally, there was considerable animosity between the left and right ALP factions.

The very fact that Mr Macdonald and Edward Obeid Sr were Legislative Councillors representing the same political party meant that they needed to work reasonably closely together. The fact that they came from different factions meant they had to work even more closely together, as each tried to build a bridge between opposing factional positions. It was in this context that Edward Obeid Sr partly explained the very heavy telephone traffic between himself and Mr Macdonald. Edward Obeid Sr and Mr Macdonald shared a similar view on the contentious issue of the privatisation of power generation in NSW, and worked together trying to produce a result that could avoid further party conflict.

That political association seems to have provided the foundation for what the Commission is satisfied became a strong personal connection. Although the Commission had the impression that during the public inquiry Mr Macdonald and Edward Obeid Sr tried to play down the extent of their relationship, enough cogent evidence emerged to establish that it was personal and close.

Edward Obeid Sr testified that he and Mr Macdonald had been out to dinner together "many times", as well as having lunch together, apparently not infrequently. Edward Obeid Sr gave evidence that he and Mr Macdonald were "friends" and that, during difficult times in Mr Macdonald's political and personal life, they would speak to each other. As Edward Obeid Sr put it, "…he lent on me to sort of be someone to talk to, to work things out, what he's going to do, what's going to happen to him".

Edward Obeid Sr testified further:

> *It sounds like quite a serious intimate friendship?---Well, Mr Commissioner, if a colleague of yours needs your assistance and help and, to be a sounding board for him the least I could do was listen even though he's from the Left.*

There was other evidence of the nature of the relationship between Mr Macdonald and Edward Obeid Sr.

The Hon Morris Iemma was a member of parliament between 1991 and 2008 and was NSW premier between August 2005 and September 2008. He had been a member of the Terrigals and knew both Mr Macdonald and Edward Obeid Sr. He told the Commission that he noticed the relationship between them develop, and that they worked together to reach factional agreement to a degree "...that it became generally known within the Caucus that they were two MPs that were working together well...".

To Mr Iemma, Edward Obeid Sr frequently spoke positively of Mr Macdonald and expressed the view that Mr Macdonald was worthy of promotion to the ministry. Mr Iemma said:

> *I heard him in, in Parliament in, in offices, in, in social gatherings, in discussions in the corridor, asides in, in Caucus that Mr Macdonald was, was someone who was a very able person and would make a good addition to the Cabinet, that he had skills that then Premier Carr should, should use, he saw Mr Macdonald was somebody that was in some respect on the outer and that he had abilities that the Government could use.*

After the 2007 election, Edward Obeid Sr proposed to Mr Iemma that Mr Macdonald be appointed minister for planning. Edward Obeid Sr made a similar proposal to Mr Iemma in 2008. These proposals were not accepted.

The Hon Nathan Rees entered the NSW Parliament in 2007 and served as premier between September 2008 and December 2009. He also observed the development of a close relationship between Mr Macdonald and Edward Obeid Sr, both during his time as a member of Mr Iemma's staff and after he became a member of parliament. He told the Commission that, after being appointed premier, he was contacted by Edward Obeid Sr who expressed a view

that Mr Macdonald should be considered for appointment as minister for planning.

Other current and former members of parliament gave evidence of having seen Mr Macdonald in Edward Obeid Sr's parliamentary office from time to time.

Mr Iemma described Edward Obeid Sr as a "power broker" in the ALP. It was plain from Mr Iemma's evidence that Edward Obeid Sr's position of influence was based on a network of relationships that, over a number of years, had been carefully cultivated and developed while he was a leader of the Terrigals. He was perceived as a person of power and influence and that perception, itself, caused his power and influence to grow.

Over the relevant period, Edward Obeid Sr's power was entrenched, whereas Mr Macdonald's position as an important member of the left faction was falling into jeopardy. Mr Macdonald was labelled "Sir Lunchalot" by the media, he was receiving poor press, he had well-publicised problems with expenditure and questions of conflict of interest were raised in regard to his connection with a V8 supercars event. Week after week, matters of this kind were appearing in the press. Mr Rees described Mr Macdonald's position as follows:

> *What occurred over a period was that he was increasingly on the outer from the Left generally, operating independently, less and less frequent appearances at Left Faction meetings, to the point that the Left considered him a proxy member of the Right in all but voting patterns in a full Caucus.*

So, Mr Macdonald became more and more dependent on Edward Obeid Sr for support, and Edward Obeid Sr gave him that support. Mr Rees agreed with the proposition that the relationship between Edward Obeid Sr and Mr Macdonald was "very close indeed".

The Commission accepts the testimony of Mr Iemma and Mr Rees and is satisfied that there was a close and personal relationship between Mr Macdonald and Edward Obeid Sr.

Having regard to that relationship, to Edward Obeid Sr's position as the leader of the Terrigals, and to his considerable influence in the state ALP, his support of Mr Macdonald amounted to a kind of patronage. Edward Obeid Sr's frequent public praise of Mr Macdonald, his support – on more than one occasion – of the notion that Mr Macdonald be promoted to the office of minister, and his support of Mr Macdonald when the latter was out of favour and being subjected to considerable media criticism, is significant.

Mr Macdonald would undoubtedly have felt gratitude to Edward Obeid Sr for past favours and would have nurtured the hope that further favours would be forthcoming in the future.

The Commission has seen and heard Mr Macdonald give evidence in Operation Jasper and has formed a view as to his character and personality. The Commission concludes that Mr Macdonald's character and personality were such that, having regard to the matters described above, he was capable of easily being influenced by Edward Obeid Sr to act in inappropriate ways, and could be readily induced or motivated to undertake inappropriate measures to benefit Edward Obeid Sr.

Before leaving this subject, there is one additional matter to which the Commission should refer. Counsel Assisting submitted that the circumstances of Mr Macdonald's removal from Cabinet in 2009 and subsequent events, including his return to Cabinet, could be relevant to this assessment. The Commission declines to take this into account. There were possibly other political considerations involved and, in the absence of evidence from the then premier, the Hon Kristina Keneally, positive findings should not be made.

The relationship between Mr Macdonald and Moses Obeid

The evidence shows that, during and after May 2008, a strong friendship and connection grew between Mr Macdonald and Moses Obeid, but it is much more difficult to explain how this came about. Moses Obeid's contact with Mr Macdonald before May 2008 was "rare". He would not then have described himself as a friend of Mr Macdonald. As from May 2008, the relationship that Mr Macdonald had with Moses Obeid seemed, suddenly, to develop rapidly.

The close and long-term relationship between Mr Macdonald and Edward Obeid Sr, in the terms that have been described, and the sudden development, as from May 2008, of the relationship between Mr Macdonald and Moses Obeid into one of friendship and more frequent contact, are factors that are relevant to findings made by the Commission. The findings in question are that Mr Macdonald agreed with Edward Obeid Sr that he would create the Mount Penny tenement over Cherrydale, that Moses Obeid became a party to that agreement, and that that agreement extended into Mr Macdonald agreeing to provide confidential information to Moses Obeid relating to the creation of mining tenements in the Bylong Valley, including over Cherrydale and properties in its vicinity. More detailed reasons for these findings are set out below.

Chapter 8: Communications early in 2008 between Edward Obeid Sr and Mr Macdonald and events leading to them

Each of Mr Macdonald and Edward Obeid Sr admit that they had at least one discussion in respect of Edward Obeid Sr's property in the Bylong Valley. And they also admit, along with Moses Obeid, that there was further contact on the same subject between Mr Macdonald and Moses Obeid. They say, however, that this contact was innocent and explicable. A contrary view can, however, be taken.

Before going into the detail of the contact between Mr Macdonald and the Obeids in this respect, it is necessary to understand the background to the contact; that is, the Obeid family ownership of a property in the Bylong Valley.

The Obeid property in the Bylong Valley – Cherrydale

The diverse business interests of the Obeid family included rural interests. The family operated a rural property known as Moona Plains near Walcha. There is evidence that the family were looking to purchase other rural property, and had looked at some properties in other parts of NSW, including Oberon.

A stock and station agent identified an attractive property, Cherrydale, on the market. Cherrydale is located in the Bylong Valley, approximately 70 kilometres north-east of Mudgee.

On 27 September 2007, a contract for the purchase of Cherrydale was entered into between John Cherry as vendor and Locaway Pty Ltd as trustee for the Moona Plains Family Trust. Both Locaway Pty Ltd and the trust were Obeid controlled entities. There was evidence from Obeid witnesses that the farm was bought for the use, and enjoyment of, Edward Obeid Sr and his wife during his retirement.

The motives behind the purchase of Cherrydale

It has long been known that there are untapped coal reserves in the Bylong Valley. The Bylong Valley sits in the Western Coalfield. Edward Obeid Sr had been the minister for mineral resources from 1999 to 2003 and, in discharging the duties accompanying that portfolio, it seems likely that he developed a reasonable working knowledge of the location of coal resources in NSW.

Despite this, Edward Obeid Sr denied knowing that there were coal resources in the Bylong Valley or under Cherrydale. It is difficult for the Commission to accept Edward Obeid Sr's evidence in that respect, but it makes no finding in this regard.

Even taking into account the unsatisfactory evidence of Edward Obeid Sr, there is no evidence that the Obeids bought Cherrydale motivated by the chance that they might be able to develop a mining venture on or near it. There is other evidence that does seem to provide a satisfactory explanation for the purchase of Cherrydale. In those circumstances, the Commission does not make any finding on the matter.

Edward Obeid Sr speaks to Mr Macdonald concerning coalmining in the Bylong Valley

The initial relevant communication between Mr Macdonald and Edward Obeid Sr concerning coalmining in the Bylong Valley has to be understood against the following background. Anglo Coal (Bylong) Pty Ltd ("Anglo") is a mining company with interests in coal in NSW. In particular, Anglo held an exploration licence that was titled Authorisation A287 ("A287"). A287 was located east of the town of Bylong. A287 is referred to in this report as the Anglo tenement. The eastern boundary of Cherrydale

is contiguous with the western boundary of the Anglo tenement; indeed, a small part of the Anglo tenement intrudes into the eastern boundary of Cherrydale to a small degree.

Edward Obeid Sr testified that he did not know of the Anglo tenement when he purchased Cherrydale. When he did learn of its existence, he spoke to his friend, the relevant minister, Mr Macdonald. According to Edward Obeid Sr, this conversation occurred at the end of February 2008, but in a compulsory examination conducted by the Commission he said it occurred in May or June 2008. The Commission accepts that it occurred between the end of February and the beginning of May 2008.

Edward Obeid Sr testified that, in that conversation, he told Mr Macdonald that his farm was next door to the Anglo tenement. In view of the importance of this admission by Edward Obeid Sr, the particular passages in his evidence are reproduced below.

Edward Obeid Sr was referred to certain evidence he had given at a compulsory examination. Counsel Assisting was questioning him:

> *See the reference there to concern about the Anglo licence at Bylong because it's the one next door to your property. That's what you told him?---Yes, that's - - -*
>
> *All right. So - - -?---He had to look at the tenement for Anglo and work that out where, where our farm was.*

The questioning continued as follows, a short time later:

> *You just said to us in the context of telling him that you were concerned about Anglo because it was next door. You said yes, he had to look to see where Anglo was so he could work out where your property was.*
>
> *Remember that answer?---Yes.*
>
> *Was that answer honest and accurate?---I believe it was the best of my recollection.*
>
> *All right. Well, so can we get to this point, do we get to the point where you spoke to Macdonald identifying that you had a property next door to the Anglo Licence in the Bylong Valley?---Yes.*

Senior counsel representing Edward Obeid Sr on this aspect of the inquiry, Stuart Littlemore QC, made a statement at the public inquiry as to his specific instructions on this issue. It is a matter of some importance, so it is set out in some detail:

> *MR LITTLEMORE: … the Commission knows that that Mr Obeid has said he asked Mr Macdonald to inquire about whether Anglo had plans under its Exploration Licence in the Bylong Valley and the information was brought back to him that they didn't.*
>
> …
>
> *THE COMMISSIONER: What do you say Mr Edward Obeid said to Mr Macdonald?*
>
> *MR LITTLEMORE: Words to the effect of, "I have some land in the Bylong Valley, I have heard over Christmas or I've learned over Christmas that Anglo or Anglo American has an existing Exploration Licence affecting my land. Can you tell me whether there is any plan for a mine in the Bylong Valley by Anglo?"*
>
> *THE COMMISSIONER: So does that mean that Mr Obeid accepts that he, that Mr Macdonald knew before the Exploration Licence was granted that Mr Obeid had an interest in the farm in what's now called the Mount Penny area?*
>
> *MR LITTLEMORE: So I'm instructed.*
>
> *THE COMMISSIONER: So Mr Obeid will say that Mr Macdonald always knew before granting the Exploration Licence that Mr Obeid owned the farm Cherrydale?*
>
> *MR LITTLEMORE: Now* [sic] *owned it but had an interest.*
>
> *THE COMMISSIONER: Well, had an interest in it?*
>
> *MR LITTLEMORE: Yeah, the family farm referred, the expression used was probably to the effect of family farm.*

The significance of that statement is that it refers explicitly to the Obeids having "land in the Bylong Valley" and a concession that Mr Macdonald knew from Edward Obeid Sr that the Obeids had a farm in the Mount Penny area.

Apart from what Mr Littlemore said in this inquiry, however, Edward Obeid Sr testified, more than once, that he told Mr Macdonald that his farm was "next door" to the Anglo tenement. This was an admission against interest.

Edward Obeid Sr denied any further contact with Mr Macdonald on this subject, and said that, instead, a member of Mr Macdonald's staff came to his office and told him that the result of the enquiries was that there was no mine planned on the Anglo tenement.

On 8 May 2008, Mr Macdonald had a meeting with Edward Obeid Sr and others on matters not concerning mining. There is no evidence that Mr Macdonald and Edward Obeid Sr discussed the possible grant of a tenement over Cherrydale, but this was an opportunity for them to have done so.

Chapter 9: Communications between Moses Obeid and Mr Macdonald concerning coalmining matters

The meeting at the café in Sydney Hospital

Moses Obeid testified that, on some unspecified date in May 2008, he had asked his father to arrange for him to speak to Mr Macdonald for information regarding the status of the Anglo tenement. Even though the result of Edward Obeid Sr's enquiries suggested that there was no activity planned on the Anglo tenement, Moses Obeid claims that he needed further information from Mr Macdonald. At this stage, Moses Obeid barely knew Mr Macdonald, and, perhaps, he did not think he was in a position to approach the minister directly. In those circumstances, he asked his father to organise a meeting.

In response to Moses Obeid's request, Edward Obeid Sr told him that Mr Macdonald would be having coffee with a number of other persons at the café within the premises of the Sydney Hospital and he should go there to meet Mr Macdonald. The hospital is adjacent to Parliament House, and politicians use that café for private discussions. At the time, Edward Obeid Sr and Mr Macdonald were meeting with others at the café. When Moses Obeid arrived, he was introduced to Mr Macdonald, and the two separated slightly from the group to have a discussion regarding the family property and the threat posed by the Anglo tenement.

According to Moses Obeid, during the conversation he explained to Mr Macdonald that the Obeids' property in the Bylong Valley was "encroached upon" by an exploration licence held by Anglo, and asked Mr Macdonald some questions.

Moses Obeid testified that Mr Macdonald explained that, although there were no plans, Mr Macdonald was driving a "use it or lose it policy", which might lead to either Anglo or a new miner becoming active on the site. This would mean that, if it occurred, "they could have it up and running in three years".

It is important to record that this meeting between Moses Obeid and Mr Macdonald was organised by Edward Obeid Sr and in the full knowledge of the likely purpose for the meeting. Edward Obeid Sr was told about the subject matter; Moses Obeid told his father that he wanted to speak to Mr Macdonald about "something about an exploration title" and Edward Obeid Sr spoke to Moses Obeid after the meeting with Mr Macdonald.

The use it or lose it policy

According to Moses Obeid, this policy meant that Anglo would thereby be induced to develop its tenement and that might result in a mine near Cherrydale. On the other hand, if Anglo did not use its licence, the probabilities were that Anglo would lose the exploration licence, which would then be acquired by another miner who would use it, and that could result in a mine next door to Cherrydale. Paul Obeid said that Moses Obeid had told him of the use it or lose it policy and, "that was the defining moment, that was the point for me".

But the evidence from the DPI witnesses was different. Mr Coutts said that he was not aware of such a policy, "although we had discussed from time to time whether we need to, to have that sort of approach in NSW but we never introduced it". Brad Mullard, director of coal and petroleum development, said that there was no such policy: "we never had a specific use it or lose it policy but we were looking at developing such a policy and that basically came from the Minister". Mr Gibson, who was the minister's deputy chief of staff with specific responsibility for mining, was "vaguely aware" that the minister had mentioned to him that the Federal Government had a use it or lose it policy with respect to mining exploration licences and mining leases. He agreed that the minister had said to him that, when the DPI came to consider renewals of exploration licences, they should take the policy into

consideration. But it was never put to Mr Gibson that such a policy had been adopted by the DPI or that Mr Macdonald had instructed the DPI to adopt that policy.

The Commission does not regard Moses Obeid or Paul Obeid as reliable witnesses. On the other hand, it does regard Mr Coutts, Mr Mullard and Mr Gibson as witnesses who attempted at all times to give truthful and accurate evidence. On this issue, Mr Coutts and Mr Mullard were persons who would have been charged with administering such a policy, had it existed, and they were persons who would have known whether the policy did, in fact, exist.

Accordingly, the Commission does not accept the evidence that the use it or lose it policy was referred to by Mr Macdonald in the terms in which Moses Obeid testified.

The first telephone conversation

Moses Obeid said that, in late May or early June 2008, about two weeks after the meeting at the café in the Sydney Hospital, Mr Macdonald telephoned him and asked him where his father was as he, Mr Macdonald, needed to speak to him urgently. In the course of that conversation, Mr Macdonald said:

> *By the way, there's nothing on that Anglo but the Department is going to put out a number of Explorations Licences … by the end of the year.*

Moses Obeid gave this evidence as to what was said further in that conversation:

> *MR WATSON: Mr Obeid, do you admit that Ian Macdonald told you that the Department of Primary Industries intended to open Exploration Licences in your region?---Yes.*
>
> …
>
> *To come back to where we were earlier, Mr Obeid, do you admit that Ian Macdonald told you that the Department of Primary Industries intended to open Exploration Licences in your region by an EOI process?---Yes.*
>
> …
>
> *Now, I asked you earlier whether you understood the reference to the region to include the Bylong Valley and you agreed?---Include the Bylong Valley, yes.*
>
> *I asked you whether you understood Macdonald's reference to region to include Cherrydale Park. Do you agree that it did?---Yes.*

Moses Obeid expanded further upon that conversation and said that Mr Macdonald told him that about 20 exploration licences were to be issued in his region. He said:

> *So we felt the best way to protect ourselves especially in the light of the fact that there is now 20 coming out on the market would be to option up that and just wait and see what happens and see if the Government actually proceed*[s] *with this*.

He explained that by "option up" he meant "to take options over the properties" known as Donola and Coggan Creek. He said that is, in fact, what "we proceeded to do".

Moses Obeid said: "…we thought the best way to defend the value of our land and if in fact to make a profit was to acquire the two properties immediately along Anglo's boundary".

Moses Obeid admitted at a compulsory examination that he had asked Mr Macdonald for information that was not publicly available. He also admitted that he was using his "powerful connection ie your father to speak to a powerful man ie the Minister to acquire information which was not publicly available".

It is of significance that the information Mr Macdonald gave to Moses Obeid enabled Moses Obeid to realise that the best way to make a profit was to acquire Donola and Coggan Creek. This was information of a highly confidential nature, the possession of which was likely to (and did) enable the Obeid family to make a great deal of money.

The Commission further infers that Mr Macdonald told Moses Obeid that the exploration licence would cover Cherrydale as well. After all, the three properties lie in one line from north to south and are contiguous to the Anglo tenement. Once Mr Macdonald admittedly gave Moses Obeid information to the effect that an exploration licence would be granted over Donola and Coggan Creek, it is highly probable that he told him that it would cover Cherrydale as well (which, in fact, occurred). It is relevant to note that once the exploration licence was to cover Donola and Coggan Creek, the existence of other features in the vicinity (the Anglo tenement to the east, the national park to the north and Authority A286 to the south) it was virtually inevitable that the exploration licence would cover Cherrydale.

The reasons given by the Obeids as to why these conversations occurred

Although the story varies slightly from witness to witness, each of Edward Obeid Sr and his sons gave broadly similar evidence about how the family became aware of the presence of the Anglo tenement, and how they then became fearful that a mine was to be opened. They felt

threatened by the Anglo tenement. Their fear was that a coalmine could ruin the tranquillity of the family farm, and diminish its value. Edward Obeid Sr and Moses Obeid say that the conversations with Mr Macdonald took place because of this fear. They wanted to find out what was going to happen with the Anglo tenement.

The Obeid story runs as follows: in early 2008, a worker on Cherrydale named Noel Taylor told Damian Obeid that there was coal under the mountain (Mount Penny) and "they're saying that they, they could be mining within five to 10 years". The Obeids' version is that this triggered their fear for Cherrydale and this is why Edward Obeid Sr made his original approach to Mr Macdonald for information regarding activities on the Anglo tenement. The subsequent meeting that Moses Obeid had with Mr Macdonald at the café at the Sydney Hospital was stimulated by the same concern.

The Commission has arrived at the view that the account given by the various members of the Obeid family in respect of the threat posed by Anglo was false, and that their evidence about it was deliberately untrue. There are numerous reasons why this is so.

There was direct evidence, which contradicted the Obeid evidence, as to how they came to be aware of the threat posed by the Anglo tenement. Mr Taylor gave evidence, which was perfectly straightforward and believable, contradicting the suggestion that he was the source of the rumour. Three long-term residents of the Bylong Valley – Jodie Nancarrow, Stuart Andrews and Craig Shaw – gave evidence that they had not heard rumours of an expansion of Anglo activities. Mr Cherry, the former owner of Cherrydale, gave evidence to similar effect. Given the depth of their connection with the area, it is inconceivable that members of the Obeid family could have picked up rumours that would have evaded those four locals. The Anglo geologist, Toni Best, gave evidence that Anglo had no plans to develop a mine. Both Ms Nancarrow and Mr Andrews spoke with a geologist from Anglo and both were told that there would not be a mine in their lifetime.

The actions of the Obeid family, and the reasons they gave for taking action, are inconsistent with the information that they had received. Mr Macdonald had advised that there was no information suggesting that Anglo was active. There was no suggestion that coalmining was expanding into the Bylong Valley. There was no "threat".

By the time of the conversation at the café, Anglo had not "used" its exploration licence. Despite that, the Obeids said they continued to regard Anglo as a threat. In any event, the evidence that Moses Obeid gave as to the use it or lose it policy is, as stated above, rejected.

Shortly after that conversation, as Moses Obeid admitted, he set about taking steps to purchase the two properties to the north of Cherrydale; namely, Donola and Coggan Creek. He admitted that the information that Mr Macdonald gave him during that conversation caused him to take those steps. The purchase of Donola and Coggan Creek is inconsistent with the Obeids holding a genuine fear of a threat from Anglo. Damian Obeid gave evidence of his concern that, because Anglo might open a mine, the value of Cherrydale had been diminished and his family's enjoyment damaged. Why – if that were true – would two adjoining properties be purchased? It would be an odd response in light of that information to purchase two additional rural properties to fend off a "threat". If the "threat" was an intensification of activities on the Anglo tenement, it is not clear how purchasing those properties could diminish the threat – only a small part of Coggan Creek is covered by the Anglo tenement and Donola is quite unaffected by it. It is not immediately obvious how ownership of those properties could have done anything to inhibit Anglo's use of its tenement.

In the same context, it is inconceivable that these measures would have been taken without any measures to attempt to verify Anglo's intention – yet, that is the case. Moses Obeid said that Mr Macdonald told him to contact the DPI, but, despite that, no member of the Obeid family appears to have done so. It also seems that no member of the Obeid family attempted to contact Anglo. There is, in fact, no evidence or even suggestion that any member of the Obeid family made any enquiries beyond the two brief discussions with Mr Macdonald.

There is no objective or disinterested support for the proposition propounded by the Obeid family. In fact, there is much to contradict it. As will be explained later, the Obeids spoke to several parties about their being involved in the purchase of Donola and Coggan Creek – Peter Fitzhenry and Nicole Fitzhenry, brothers Brian Boyd and Garry Boyd, Mr Fang, their solicitor (Christopher Rumore), brothers Rocco Triulcio and Rosario Triulcio, and Mr Lewis. The idea of purchasing the properties to fend off the threat posed by the Anglo tenement is not supported by the evidence of these persons. There is no reference to Anglo or its tenement in any of the records of the Obeids' solicitor, Mr Rumore. As will be explained later, the purchase of Donola and Coggan Creek was for the purpose of exploiting a contemplated mining tenement over those properties – not to fend off a threat from the Anglo tenement. The Obeids realised that they would be able to make a great profit if they acquired rights to these two properties while being the owners of Cherrydale.

Chapter 10: May 2008 – the minister's interest in Mount Penny

In May 2008, Mr Macdonald called for information on coal reserves in the area of "Mount Penny". There is evidence that, while a beautiful feature of the Bylong Valley, Mount Penny is of little geographical or geological significance and would have been largely unknown outside those persons familiar with the Bylong Valley. Mount Penny is on the northern edge of Cherrydale.

The circumstances in which the minister made the request for information about coal reserves in the Mount Penny area are an important feature of the investigation.

Mr Macdonald's request for information

For the purposes of this chapter, it is better that the Commission first sets out its conclusions, so that it can be understood how the evidence supports those conclusions.

The Commission finds that, on about 9 May 2008, Mr Macdonald directed his deputy chief of staff, Mr Gibson, to make enquiries of the DPI as to coal reserves in the area of Mount Penny. The Commission finds that Mr Gibson did so, by making a telephone call to a departmental liaison officer, Graham Hawkes. To be clear about it, the Commission rejects any suggestion that the reference to "Mount Penny" was initiated by anyone other than Mr Macdonald, and finds that the idea to look for reserves in Mount Penny came wholly and solely from Mr Macdonald.

An exchange of emails

During the course of its preliminary investigations, the Commission's investigators found the following email that had been sent by Mr Hawkes to Mr Gibson on 9 May 2008:

Jamie

Is this adequate

Graham

Fw: Coal Reserves in Mt Penny area of Bylong Valley.

Mr Hawkes' query as to whether something was "adequate", was a reference to the attachment – an email sent earlier that day to Mr Hawkes by a departmental officer, Robert Larkings, which was titled "Coal Reserves in Mt Penny area of Bylong Valley":

Graham,

There are significant coal resources in the area of Mount Penny in the Bylong Valley.

We are unsure of the exact area of interest, however there are a number of coal titles in the area including Exploration Licence (EL) 6676, held by the Department of Primary Industries (shown by blue shading on the attached diagram) and Authorisation 287 held by Anglo Coal (shown by yellow shading). There is also a Petroleum Exploration Licence, PEL456, held by Macquarie Energy (shown by blue cross hatch).

The department holds the EL so that it can carry out drilling and it is expected that this program will include some drilling in the vicinity of Mount Penny to further delineate the resource, which is expected to consist mainly of thermal coal. This exploration may identify an area suitable for tender.

The closest mining lease to Mt Penny is at Wilpinjong.

Regards

Rob

(See attached file: Mt Penny Area.pdf)

Mr Larkings' email attached a file – "(See attached file: Mt Penny Area.pdf)". This file was a map of the area, which, on 9 May 2008, was prepared by a DPI geologist, Leslie Wiles. The map in question appears as figure 1 on page 42. The map is significant because it not only identifies the location of Mount Penny, but it also shows the town of Bylong and the exploration licences or authorisations in the immediate area. In particular, the map clearly demonstrates the Anglo tenement, A287, just to the east of Mount Penny. The yellow section to the south-west of the map is A286, another DPI Authorisation. The blue area, EL 6676, is part of a DPI exploration licence. The green area to the north is a national park. Mount Penny is shown on EL 6676, very close to the western boundary of A287, the Anglo tenement. Roughly speaking, the blue area, in fact, became the Mount Penny tenement.

Ms Wiles prepared the map, figure 1, in response to a departmental request to draw a map of the Mount Penny area. Ms Wiles described how she used the DPI's mapping system – known as the Geographic Information System (GIS) – to create the map, and how she was able to use the GIS to locate and highlight Mount Penny.

The background to the request for information

Those two emails mentioned above are the earliest documents that the Commission has been able to find in respect of this issue. But it is obvious that something happened before the first of those two emails, something that initiated the action. There was oral evidence on this subject.

Mr Gibson recalled the events:

> *And you hadn't heard I take it of Mount Penny prior to this time, had you?---No.*
>
> *The specific request for the information for this area, including the description Mount Penny, came from Mr Macdonald, did it?---Yes.*
>
> *To you?---Yes.*
>
> *And you've got a clear recollection of that?---Yes.*
>
> *What did he ask you specifically to do, Mr Gibson, which generated the telephone call that you made to Mr Hawkes on 9 May, 2008?---He asked me to seek advice off the Department on the coal reserves for the Bylong Valley and the Mount Penny area.*
>
> *And that's what you did?---Yes.*
>
> *He made it clear, did he, that he needed it fairly promptly?---Yes, he did.*

Mr Gibson said that he specifically asked Mr Hawkes for information concerning the Mount Penny area. Mr Gibson explained that he made this request because he was expressly asked by Mr Macdonald to do so.

The Commission accepts the evidence of Mr Gibson on this subject, and finds that it was Mr Macdonald who initiated the enquiry in relation to Mount Penny.

The author of the email, Mr Hawkes, had a recollection of the circumstances in which he wrote his email. Mr Hawkes gave careful evidence about it, and demonstrated a good recollection. The Commission regards his evidence as entirely reliable:

> *Are you familiar with the area known as Mount Penny?---Yes.*
>
> *When did you first become aware of the area known as Mount Penny?---I received a phone call from Jamie Gibson.*
>
> *Right. Now are you able to put first a year on the phone call, when did he make it?---2008.*

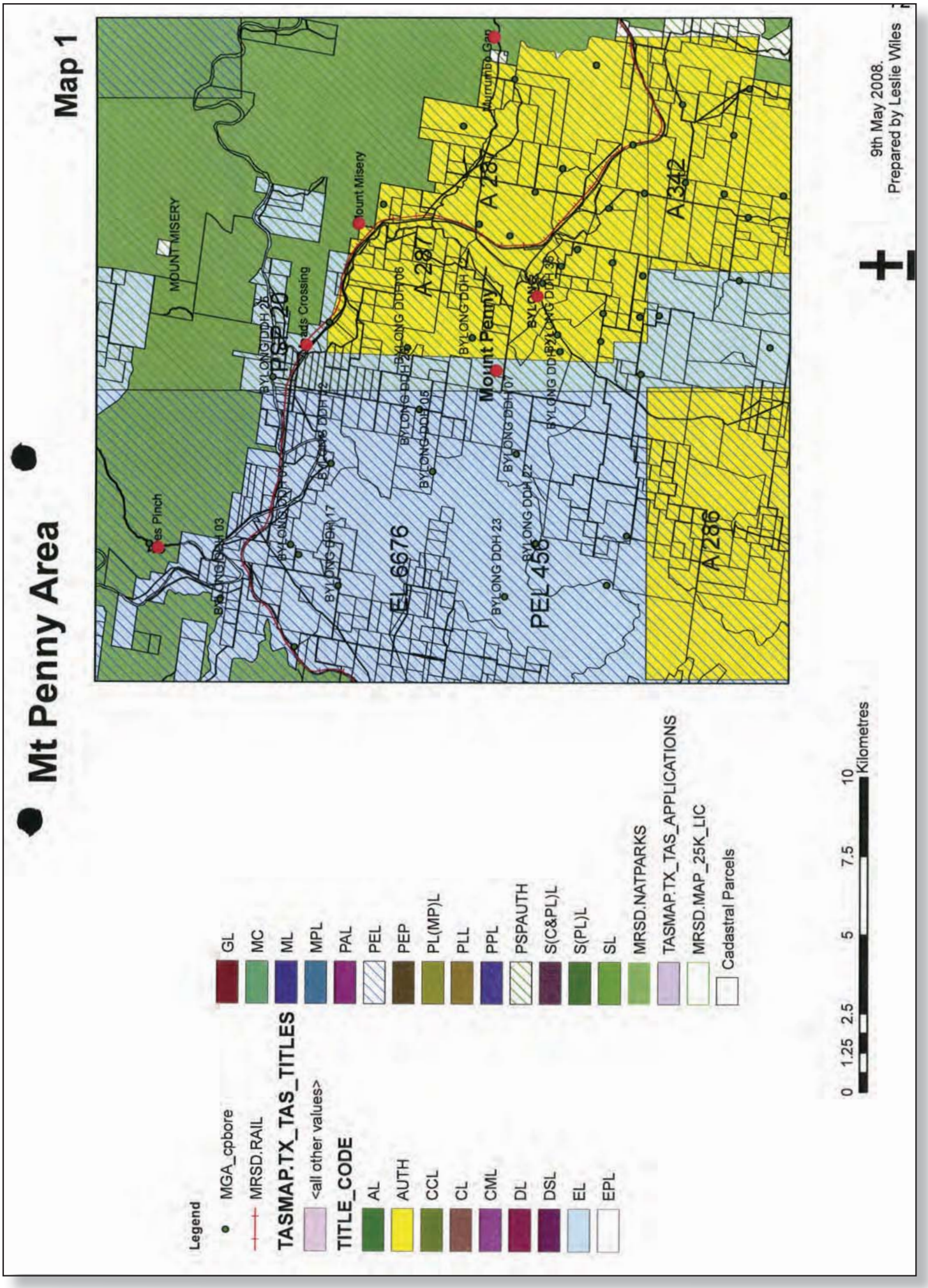


Figure 1: Map, 9 May 2008 – Mt Penny Area

Do you remember more specifically the date of when he contacted you?---I think it was May.

So Mr Gibson contacted you by phone, is that right?---Correct.

In May of 2008?---Yes.

And he raised Mount Penny with you did he?---Yes.

What specifically doing the best you can did Mr Gibson ask of you in that phone call in May of 2008 relating to Mount Penny?---My best recollection was that the, Mr Gibson asked me to source the information of coal reserves in, in the Mount Penny area or around Mount Penny.

Did he say anything else to you about why he needed that information?---No.

Did he tell you the time at which he'd expected a response?---Yes. I recollect it was very urgent and I think the turn around time was he asked for two hours or an hour and a half, something like that.

Now prior to the time that Mr Gibson contacted you had you ever heard of Mount Penny?---No.

Mr Macdonald is briefed on the coal reserves in the Mount Penny area

Six minutes after Mr Hawkes sent his email, Mr Gibson responded:

Hi Graham, map is great, can I just get the email details in brief form? I've got to fax it to the boss – I've bought us another hour.

Thanks heaps.

The "boss" referred to was Mr Macdonald. The "map" referred to is the map of the Mount Penny area attached to Mr Hawkes' email (figure 1). The request for provision of the "email details in brief form" is ministry jargon meaning that the document must be put into a template formal briefing document – described as a "ministerial briefing". This occurred, and the DPI sent to Mr Gibson a ministerial briefing titled "Mt Penny – Bylong Valley". That briefing attached a copy of the map that had been prepared by Ms Wiles on 9 May 2008, and included a recommendation: "The Minister notes this brief".

At one point during Mr Macdonald's evidence, he sought to suggest that he may not have received the briefing documents, but no submissions have been made to this effect. Nor has it been suggested that he did not read the contents of them. It is likely he did – this was obviously a matter of interest to Mr Macdonald. The briefing documents were received by Mr Gibson, Mr Macdonald's deputy chief of staff. He specifically showed Mr Macdonald Mr Larkings' email to Mr Hawkes.

It has, however, been submitted by Mr Macdonald that there was no evidence that an email was sent to the minister's office attaching the map dated 9 May 2008 prepared by Ms Wiles. This submission is without substance. Contrary to the submission, the evidence established that the first email sent to Mr Gibson – and, thus, to the minister's office – attached Ms Wiles' map dated 9 May 2008. Mr Gibson specifically recalled receiving this email and the map:

You recognise that as an email directed to your email address at Mr Macdonald's office on 9 May 2008 at 12 o'clock from Graham Hawkes?---Yes.

And that was the followed up email that Mr Hawkes sent to you after the discussion that he had had with you earlier that day?---Yes.

And that was attached – do you recall receiving this email?---Yes.

... And if you turn over to page 40 to the page I invited you to look at first up, you'll see that attached to that email is a copy of the map. Do you see that map?---Yes.

And do you recognise that as the map that you received at that time from Mr Hawkes?---To the best of my recollection, yes.

This evidence was not challenged. There could not be any issue that what Mr Gibson had said accorded with fact because it is fully supported by what happened next: immediately upon receipt of it, Mr Gibson acknowledged receipt of the email from Mr Hawkes that attached the map by responding that the "map is great".

Mr Macdonald's submission ignores or overlooks all of this evidence. The Commission finds that the map of the Mount Penny area prepared by Ms Wiles on 9 May 2008 was sent and received by Mr Macdonald's office on that day.

The Commission finds that Mr Macdonald received the ministerial briefing on "Mt Penny – Bylong Valley" and the map (figure 1) and he received these on 9 May 2008.

The minister's follow up request: the email of 14 May 2008

The interest of the minister did not end at this point. On 14 May 2008, Mr Gibson sent an email to Craig Munnings, a DPI liaison officer employed in the office of Mr Macdonald, concerning "Coal Reserves in Mt Penny area of Bylong Valley". The email was marked as having a high importance.

The content of that email was:

> *Mate – is there any possible way that we can get more detail on this area? For example is it possible for DPI to open its holdings for tender? You'll see from the map the area that DPI has, and are there any better assessments on how much coal might bet* [sic] *there? We need it asap.*
>
> *Thanks again*

Mr Gibson explained the background to the email:

> *MR CHEN: There were a series of questions that you have put into that email to Mr Munnings. Upon what did you base those questions that are, that appear in that email on 14 May?---Those were questions put to me by Mr Macdonald to seek advice from the Department.*
>
> *So the first question is, is there any possible way we can get more detail on this area was something that Mr Macdonald told you, is that correct?---That's correct.*
>
> *And similarly is it possible for the DPI to open up its holdings for tender. Is that something that Mr Macdonald told you?---Yes.*
>
> *And the further or third question was any better assessments on how much coal might be there. Was that something that Mr Macdonald asked of you to seek from the Department?---Yes.*
>
> *And that's the purpose of this email?---That's correct.*
>
> …
>
> *THE COMMISSIONER: "We need it as soon as possible." Where does that come from?---Mr Macdonald was asking me for it as soon as possible, Commissioner.*
>
> *"And importance high." Why did you rate the importance as high?---Given the sheer number of emails that pass between ministerial office staff they tend to not always look at their emails promptly and given that Mr Macdonald was chasing me for this information I wanted to make sure that and I can only assume that because I've asked the departmental liaison officer to do it I had something else happening at the time that I wanted to make sure he followed up the request.*

Mr Gibson said he was acting upon specific instruction by Mr Macdonald. The "we" in the email is a reference to the minister seeking this specific information.

Mr Munnings forwarded the email to Mr Hawkes with the following message:

> *Graham,*
>
> *I am just back at my computer.*
>
> *Could this be actioned asap*
>
> *Thanks*
>
> *Craig*

When Mr Hawkes received this email from Mr Munnings, he forwarded it to Mr Coutts, deputy director-general of mineral resources, and copied it to Mr Mullard, director of coal and petroleum development; both men in senior positions in the DPI.

Mr Hawkes spoke to Mr Coutts about the request and perhaps Mr Mullard, as the information contained in the email below did not originate from Mr Hawkes. Mr Hawkes sent a response to Mr Munnings as follows:

> *Craig,*
>
> *Can we get more information on the background/reason for this information request.*
>
> *The department hasn't done sufficient exploration drilling in the Mt Penny area to give a definitive estimate of the coal reserves.*
>
> *If it was desired that the area be open to tender what time frame may we be looking at.*
>
> *thanks*
>
> *Graham*

Mr Gibson also received this email and another sent by Mr Coutts:

> *We also need a bit more info on what is the area we are looking at – What do you mean by Mt Penny – it is not an area we recognise by that name as a potential allocation area*

Mr Hawkes said that he could not recall any request being made to him by a minister similar to that conveyed by Mr Gibson. He said the request was "quite unique". He had never before received a ministerial inquiry about the extent of coal reserves.

Mr Macdonald's submissions

Mr Macdonald has submitted that the enquiry that he directed be made on 9 May 2008 was part of the promotion of investment in NSW, and because he was about to depart for a trip to Hong Kong, China and Korea and he "still didn't have any tender areas to tell potential investors about". Mr Macdonald relies in his submissions on evidence given by Mr Gibson to support this submission, specifically the following:

> *MR HALE: Yes. And, and you were, now, during, during the course of 2008 you can recall, can't you, that there, the Minister was asking the Department to come up with*

new areas for Exploration Licences that could be put up to public tender like the Watermark and Caroona?---Yes, he was.

And when there's – there's been some reference to urgency in some of the documents. Your understanding of part of the urgency was that there were no immediate Exploration Licences ready to be put up for public tender?---That would be a question that a technical officer in the Department could answer but certainly it didn't appear that there was.

This evidence does not support Mr Macdonald's submission. The subject matter of the question does not refer to any need to communicate with potential investors, and nor does the answer. More generally, the Commission does not accept the submission that the enquiry of 9 May 2008 was motivated to satisfy potential overseas investors. These investors were never to be part of the release that related to Mount Penny or the Bylong Valley.

The briefing material: closer analysis

The Commission has found that Mr Macdonald received the ministerial briefing on 9 May 2008. The Commission has also found (contrary to a submission made by Mr Macdonald) that Mr Macdonald's office received the map prepared by Ms Wiles on that day as well.

It is appropriate, bearing in mind issues raised later, to set out once more what Mr Macdonald would have gleaned from the ministerial briefing and map dated 9 May 2008.

To the experienced eye, the map shows that, practically speaking, a new tenement to be known as the "Mount Penny" tenement, containing the actual geographical feature shown on the map as "Mount Penny", inevitably would have to have, as its eastern boundary, the western boundary of the Anglo tenement (A287), with its northern boundary the national park and its southern boundary A286. Its western boundary would be at some unspecified distance, still to be decided, west of Mount Penny itself. This was the evidence of Mr Mullard, which the Commission accepts. That evidence is consistent with the evidence of other DPI officers, Ms Wiles and Julie Moloney. The evidence established that Mr Macdonald had acquired considerable knowledge and experience of mining during the seven-and-a-half years that he was minister responsible for mining matters. From a quick glance at the map, he would have realised these implications.

Mr Macdonald, in addition, would have seen that Mount Penny was located three kilometres north-west of the town of Bylong, that there were significant coal resources within the general region of Bylong, that the Anglo tenement (A287) was located to the east of Mount Penny (and shown in yellow shading on the map), that there was an expectation that exploration drilling would allow an assessment of the coal reserves (including some drilling in the vicinity of Mount Penny), and that the resource was expected to consist mainly of thermal coal. He would have read the DPI's view that further exploration might identify an area suitable for tender.

Mr Macdonald must have read the briefing – he instructed Mr Gibson to request more information about it. Mr Gibson's email to Mr Munnings on 14 May has been set out earlier.

The request sought more "detail" on "this area". That area could only have been the area that was not covered by specific titles, which, from the map, could not have been to the east of Mount Penny (where Anglo held A287). It could not have been to the north (where the area was part of the Goulburn River National Park), and it could not be to the south (where the DPI held A286). The Mount Penny area was that shown in blue on the map dated 9 May 2008 (figure 1).

It was this specific area – the area that, three weeks later, in substance became the Mount Penny tenement – that was Mr Macdonald's focus and the only interest at this time that he had in any of the prospective mining areas.

Conclusion

The Commission concludes that, when Mr Macdonald called for information on the coal resources in the Mount Penny area, he did so at the instigation of Edward Obeid Sr and in terms of the agreement he had arrived at with Edward Obeid Sr and Moses Obeid to create the Mount Penny tenement over Cherrydale. The Commission finds that, at the time that Mr Macdonald did so, he was fully aware of the location of Cherrydale, he knew it was next door to the Anglo tenement, not on it, he was fully aware that there was coal under and around Cherrydale, and he was fully aware that Edward Obeid Sr and Moses Obeid had sought information from him (which he had provided) with the intent that they could profit from it.

In addition, the Commission finds that Mr Macdonald's effort to explain how he struck upon "Mount Penny" was deliberately false and a lie, which he constructed to attempt to explain away his actions.

Chapter 11: Why did Mr Macdonald pick Mount Penny?

If Mr Macdonald's actions were innocent, and the result of only a bona fide decision taken by a responsible minister in the course of discharging his duties, then one of the most curious features is how his decision came to provide such an extraordinary benefit to his friend and supporter, Edward Obeid Sr. Even more curious is the fact that, when Mr Macdonald initiated enquiries, he happened to ask for information in respect of "Mount Penny", and it just happened to be that Mount Penny is a striking and obvious geographical feature on the edge of the Obeid family farm, clearly visible from the farmhouse.

If Mr Macdonald's actions were innocent, then it was a most remarkable coincidence. Were Mr Macdonald's actions innocent?

Mr Macdonald's evidence

Mr Macdonald gave his own account as to how it came to be that he asked for information on resources in the area of Mount Penny. The Commission is convinced that Mr Macdonald gave evidence about this issue that was deliberately untrue.

During the course of the public inquiry, the Commission was asked by many witnesses to accept that coincidences occurred, or that chance had intervened to give a sinister complexion to an innocent decision. One example relates to Mr Macdonald's enquiry about Mount Penny. Mr Macdonald's account says that it was an innocent decision, and that it was only by coincidence or chance that the tenement he created sat on top of Cherrydale. In particular, Mr Macdonald says that he struck upon "Mount Penny" in an innocent way, and he did not even know that Mount Penny sat on the edge of Edward Obeid Sr's farm.

As the Commission has indicated, it rejects that evidence. In rejecting that evidence, the Commission has had regard to the objective probabilities. One of those matters applicable here is whether or not it was likely that the minister could have considered Mount Penny as an area ripe for coal exploration. The evidence shows that Mount Penny had never been considered by the experienced members of the DPI as a potential area for exploration.

This is the evidence: Mr Hawkes had in excess of 40 years' experience in the DPI. He had never heard of Mount Penny and had to Google it to find its location. Mr Larkings had in excess of 30 years' experience, and had never heard of Mount Penny. Ms Wiles was an experienced coal geologist. She had never heard of Mount Penny. Mr Mullard was the DPI's director of coal and petroleum development and former chief coal geologist for NSW. He had never heard of Mount Penny. Mr Coutts was the deputy director-general of mineral resources and former chief coal geologist for NSW. He had never heard of Mount Penny. Ms Moloney was a senior and experienced DPI geologist. She had never heard of Mount Penny. Harold Bowman was a retired DPI geologist, with 45 years' experience. He had never heard of Mount Penny.

In light of that, what are the objective probabilities that Mr Macdonald would have struck on Mount Penny? The Commission believes they are negligible but Mr Macdonald says that the evidence of these experts is unimportant, because he is able to explain exactly how he struck upon Mount Penny.

It is necessary now to turn to that evidence of Mr Macdonald.

Mr Macdonald's evidence – the atlas

Mr Macdonald described how he hit upon the idea to call for resources in Mount Penny. According to Mr Macdonald, he had set his mind upon taking advantage of an internationally "hot" coal market by releasing new

areas for exploration. Mr Macdonald said that he knew something of the geology and geography of the area, and went looking for potential areas along the Ulan coal seam. Because he was aware of the location of the Anglo tenement, he was intent on looking for unexploited areas west of the township of Bylong. He knew that these areas fell within the Ulan seam.

It was in this context that Mr Macdonald claims that he consulted a NSW atlas that was kept in his ministerial office. He claims that he used the atlas to pick up the next geographical feature west of the township of Bylong, and that happened to be Mount Penny. He wanted to fix on such a feature as that would enable him to enquire about the part of the Ulan seam that ran to the west of Bylong town. He said that Mount Penny was the "first feature north west of Bylong on that map and I knew that there was [sic] areas in there for potential Exploration Licences".

The Commission rejects this evidence, and finds that it was deliberately untrue. This evidence was an invention by Mr Macdonald to attempt to explain away the adverse implications from his selection of Mount Penny. Putting aside the generally unfavourable view that the Commission took of Mr Macdonald's credibility, his evidence on this point was particularly unbelievable. There are several reasons why the Commission arrives at this view.

In the first place, there was the evidence of Mr Macdonald's familiarity with the atlas. According to Mr Macdonald's evidence, he had last looked at his atlas when he found Mount Penny sometime before 9 May 2008. There is no suggestion made by Mr Macdonald that there was ever any need for him to return to that atlas, and no evidence that he did so. He was asked what he had done to secure a copy of the atlas and he denied that he had secured a copy. He said at first that he could not recall when he had last seen the atlas. Later, when was shown the atlas, he said that the last time he had looked at the atlas was before 9 May 2008. By the time that Mr Macdonald gave his evidence at the public inquiry, it had been nearly five years since he had last looked for Mount Penny in the atlas.

During the public inquiry, Counsel Assisting provided Mr Macdonald with a copy of the same NSW Atlas. Mr Macdonald received the atlas, put it down, and then replaced one set of glasses with his reading glasses. With new glasses on, Mr Macdonald picked up the atlas, but did not take any time to familiarise himself with it – he did not open it to look at the index or even the table of contents. In fact, Mr Macdonald did not even fully open the atlas – he only opened it enough to enable him to flick through the top right hand corner of the volume, looking at page numbers. It was obvious that Mr Macdonald knew before he opened the atlas that the pages were numbered in the top right hand corner. Without stopping at any other page, Mr Macdonald then opened the atlas at page 127, and within an instant placed his finger upon Mount Penny – a tiny reference on a large page. He had obviously known what page number to look for and where to look on the page.

The words "Mount Penny" and its location are not easy to find in the atlas. Apart from the fact that the atlas is 134 pages in length, the print of the words "Mount Penny" is exceedingly small. Yet, from the time Mr Macdonald was handed the NSW atlas until he located Mount Penny, less than 20 seconds passed, including the time that it took to remove and replace his glasses.

It was quite obvious that Mr Macdonald had consulted a copy of this same NSW atlas a very short time before he gave evidence. The Commission is satisfied that that is the only way he could have found the location of Mount Penny without hesitation and as quickly as he did.

In making this credibility finding, the Commission relies

on the demeanour of Mr Macdonald. When confronted with the sheer improbability of this account about the atlas, Mr Macdonald began to stumble in his evidence, and to dissemble. The Commission formed the view that he realised that he blundered, and that he had been caught out.

There are other factors upon which the Commission has relied in coming to the view that Mr Macdonald's evidence was false. The Commission has taken into account the whole of the evidence on the issue. The whole of the evidence includes the unusual nature of the request made by Mr Macdonald for details of coal resources in the Mount Penny area – this has been discussed above. Another matter is the sheer unlikelihood that the minister (who, in his own submissions, described himself as being one of the "busiest" ministers, unable to read ministerial briefings because of his many other commitments) would take it upon himself to identify new coal development areas, even though he had within his department the leading experts on that very subject. It is also strange that he used an atlas in his office to identify this virtually unknown area when he had all the resources of his department available to perform this task. And all of this must be connected with Mr Macdonald's unusual degree of interest in the Mount Penny tenement, as opposed to all the other tenements that were to be opened.

Mr Macdonald's story about the atlas was an invention – and a recent invention at that. The first time it was raised was when Mr Macdonald gave his evidence after the Commission's Christmas recess. Before the recess – as the next section of this report reveals – he seemed to be suggesting otherwise.

Challenges to the DPI evidence

In accordance with the directions that were made before the commencement of the public inquiry, counsel were permitted to cross examine only if presenting an affirmative case; that is, there was no "fishing" allowed, and counsel were restricted to putting propositions that they knew would be supported by evidence. No one would have been more mindful of this restriction than Tim Hale SC, senior counsel representing Mr Macdonald. The "affirmative" case provisions of these directions had been applied on more than one occasion at early stages of the inquiry in the course of the Commission disallowing questions Mr Hale wished to ask.

It can be seen from some of the cross examination of the departmental witnesses, before the Christmas recess, Mr Macdonald's "affirmative case" was that the reference to Mount Penny had come from the DPI, and not from him. For example, counsel for Mr Macdonald asked these questions of Mr Hawkes:

> *It would be fair to say that your recollection is perhaps slightly vague after the passage of four years I think now?---Correct.*
>
> *Could it also, could it have been that perhaps Mr Gibson asked you to make inquiries about coal resources in the Bylong Valley and perhaps didn't mention Mount Penny at all?---No, Mount Penny was mentioned.*

A similar approach was taken by Mr Hale when cross examining Mr Larkings, suggesting that it was Mr Larkings who had come up with the description "Mount Penny":

> *And when, when was the first time you were asked to cast back into your memory to find out or to recall what occurred in May 2008 in relation to this subject matter?---When I was contacted by an officer of the Commission.*
>
> *So that was some four years after the event?---Yes.*
>
> …
>
> *And could it, could it be that the person said to you they wanted to know the resources in the Bylong Valley and then you've looked to Mount Penny?---No, Mount Penny was clearly the subject.*

The questioning of Mr Hawkes and Mr Larkings is incompatible with Mr Macdonald's story about the atlas.

If Mr Macdonald had truly discovered Mount Penny by using an atlas kept in his office, it would be expected that he would have raised it with those familiar with his office. Mr Gibson worked in that office – yet Mr Gibson was not asked about it. Instead, Mr Gibson's recollection of Mount Penny was challenged on the basis it was a reconstruction. Mr Gibson rejected this, and gave evidence, which the Commission accepts, that he had a specific recollection of the circumstances of Mr Macdonald instructing him to seek the information he did:

> *MR HALE: … So the, the – prior to reading the transcript and the exhibits from Friday do we understand your evidence that you had no recollection of the conversation that you had with the Minister which led to the emails of the 9 May 2008?---I do have a recollection of it because he asked me for this information. This is not generated from my own volition.*

And later:

> *THE COMMISSIONER: … is your evidence that you had a discussion with the Minister based entirely on reconstruction or do you have any independent memory that you had such a discussion?---I do have some*

independent memory too, Commissioner.

MR HALE: All right. Can you recall what the Minister actually said to you?---The Minister called me in and asked me to source information on the coal reserves for the Bylong area and Mount Penny area.

...And can you remember circumstances in which he called you in?---It was a Parliamentary sitting week is my understanding which is a busier time than usual for a ministerial office, there was a number of advisors standing around waiting for Mr Macdonald's time, he just said to me Jamie, can you get this information on these areas from the Department as quickly as you can.

Right. Do you think you would have been in a position to recall that conversation had it not been for the fact that you had read the evidence of Mr Hawkes and looked at the documents on Friday?---Yes, I would have been able to recall it.

In those circumstances, it is odd that the questioning would not turn to the presence or use of the atlas. It was an important part of Mr Macdonald's version of events. There was no reason to keep it secret. It seems more likely that it was a story invented by Mr Macdonald only after those witnesses had come and gone.

Selecting Mount Penny – coincidence or evidence of corruption?

The rejection of Mr Macdonald's evidence does not necessarily mean that the selection of Mount Penny came about through a corrupt agreement. The Commission has to consider whether the selection of Mount Penny was a bona fide decision by the minister responsible.

After considering the factors involved, the Commission is convinced that Mr Macdonald's call for information on coal reserves in the area of Mount Penny was influenced by Edward Obeid Sr, and that it was one of the steps in an agreement designed to produce decisions favourable to Edward Obeid Sr and his family. The Commission also considers that the lies Mr Macdonald told in the inquiry relating to the way he came to ask about Mount Penny reinforces the finding of such an agreement.

What did Mr Macdonald know about Cherrydale?

The Commission infers that Mr Macdonald was fully aware of the exact location of Cherrydale before calling for information on Mount Penny. That finding is based upon the circumstantial evidence.

The location of Cherrydale: discussions with the Obeid family members

Edward Obeid Sr told Mr Macdonald the location of Anglo's licence. From what Mr Macdonald had been told, he could not help but know, at least, the approximate whereabouts of Cherrydale. To escape this conclusion, Mr Macdonald submitted that he believed, from the conversations that he had with Edward Obeid Sr and Moses Obeid, that the Obeid family farm was on the Anglo tenement, not adjoining it or encroached upon by it.

The Commission does not accept this submission. In the first place, Mr Macdonald's "belief" is wrong – Cherrydale is not on the Anglo tenement. The Anglo tenement intrudes to a very small extent over Cherrydale. It has not been suggested that this intrusion is of any significance.

It is hardly likely that Edward Obeid Sr or Moses Obeid would have made an error in this respect, and it is not believable that they would have used language that could have suggested that Cherrydale was completely covered by the Anglo tenement. Their enquiries were, so they said, triggered by their fear of having a mine nearby.

The evidence of Edward Obeid Sr and Moses Obeid in this regard constitutes in effect admissions against interest and the Commission regards their versions of the conversations as being far more likely than the testimony of Mr Macdonald.

Mr Macdonald's own evidence on this issue is highly suspect. This can be seen from the following exchanges.

Well, if it did occur and Mr Fang has said that it did that would seem to indicate that you have been, at this point, talking to Mr Fang about a visit to the Obeid family farm, the possibility of a deal on the project, that there were good coal resources under the farm, do you see all of that?---Yes, yes.

So just thinking about it now these are things that you knew at the time, isn't that right?---No I knew, about the part of their farm - - -

All right. Well - - -?--- - - - having potentially, you know - - -

Which part?---The vast majority of it, all of it.

THE COMMISSIONER: No, no, I'm sorry, Mr Macdonald, you went to part of the farm[,] to the majority of it, to all of it?---That's correct, the last one's correct.

And I got the impression, and I have to tell you now so that anybody who wishes to make submissions on it in the end my impression was that when you said part of it you meant it and then from my observation of your features it

seemed to me that you were then – you then realised that you'd [said] *something that was prejudicial and you hastily changed your answer. Now, that was my impression, I don't ask for any submissions about it … not at the moment because I do not think it will be appropriate, but because of the nature of these proceedings and … giving everybody the opportunity of dealing with that I would call upon those persons who wish to do so to deal with this particular aspect in the written submissions.*

The impression given by Mr Macdonald when giving this testimony was that, when he volunteered that he "knew about *part* of the farm" he was intending to convey that he knew that part of the farm was on the Anglo tenement. When he was asked, "which part", he suddenly realised that he had blundered in not sticking to his story. He then, in immediate confusion, said "the vast majority of it". He then realised that he had still not got it right and hastily added "all of it".

The Commission regards this episode in Mr Macdonald's evidence as significantly revealing.

Additional matters support the Commission's finding on this issue. First, if this was truly Mr Macdonald's position, one would have expected that he would have challenged Moses Obeid's evidence on the subject – he did not. Secondly, although there was cross examination of Edward Obeid Sr on the subject, his evidence (contrary to Mr Macdonald's submission) did not support the conclusion that Cherrydale was within the Anglo tenement. The question and answer relied upon by Mr Macdonald in his submissions only create an ambiguity, which, in any event, are contradicted by Edward Obeid Sr's direct evidence on the point. Thirdly, there is the evidence of Mr Macdonald himself. He said that he knew that the Anglo tenement ended around the town of Bylong. He knew that Mount Penny was "near" the Anglo tenement. He admitted that, if he had looked at the map (figure 1), he "would have worked out immediately that where you are talking about at Mount Penny was immediately adjacent to the Anglo tenement". Fourthly, the conclusion that Mr Macdonald knew a good deal about Cherrydale is supported by the evidence of Mr Fang. This is dealt with below. Accordingly, it is difficult to understand how Mr Macdonald failed to understand that a Mount Penny tenement would affect his friend's farm directly.

Mr Fang's evidence

Mr Fang is a businessman with a number of industrial interests. As at 2008, Mr Fang had an interest in developing coal in NSW. Mr Fang's evidence is significant for other reasons, and the Commission deals with more of it, in detail, later. In the present context, Mr Fang's evidence is important in resolution of the extent to which Mr Macdonald knew of the location of Cherrydale.

Mr Fang's evidence shows that Mr Macdonald's knowledge of Cherrydale was far more extensive than Mr Macdonald admitted.

Mr Fang gave evidence that he was introduced to Edward Obeid Sr by Mr Macdonald at Edward Obeid Sr's office at Parliament House in Sydney:

Did Ian Macdonald escort you to Eddie Obeid's office?---Yes, he took me there.

And did Ian Macdonald tell you why he was taking you to meet Mr Obeid?---Because I spoke to Ian before that I'm looking for investments in farms and coal minings.

Mr Fang then gave evidence of a relevant conversation he had with Mr Macdonald. At first, Mr Fang said that this conversation took place in the "first part of 2008". Later, however, he accepted that, soon after that conversation, he attended a meeting with the Obeids' solicitor, Mr Rumore, and three of the Obeid brothers. There was independent evidence that that meeting occurred on 30 June 2008. Further, as is referred to below, there is independent evidence that Mr Macdonald met with Mr Fang on 26 June 2008. The Commission infers that the conversation in question, between Mr Fang and Mr Macdonald, occurred on 26 June 2008. That conversation included the following:

And what did Ian say about Eddie Obeid in that respect?---In my memory but I'm not exactly sure I remember I was told that the Eddie family has a farm, a very good farm and, and see whether it could be offer, any possibility.

After Mr Fang attended Cherrydale, he told Mr Macdonald that he had been to the Obeid family farm:

And did you speak to Ian Macdonald and ever tell him about your attempt to do the deal with the Obeid boys?---I mentioned that on occasion when I met with Ian Macdonald.

…

And did you tell him about the nature of the project?---And I just said it was about the farm and also underneath the farm there is coal resources.

And what did Mr Macdonald say when you told him that there were coal resources under the farm?---I cannot remember exactly but I remember Ian Macdonald's reply is that their farm is a very good farm and they have very good resources underneath the farm. As regard to the details you have to discuss that yourself.

But when he said that they had good resources did you say underneath the farm, was he referring to the coal?---Yes.

…

Well, so you definitely spoke to Ian Macdonald about the coal under the farm?---I mentioned that.

Mr Fang was a credible witness. He was a friend of Mr Macdonald. His recall of these events appeared sound. The Commission accepts his evidence. This evidence shows that, in June 2008, Mr Macdonald knew a good deal about Cherrydale and the Obeids' intention to enter a coal-based deal.

Conclusion in regard to the matters described in this chapter

Mr Macdonald's knowledge, in June 2008, "that their farm is a very good farm and they have very good resources underneath the farm", and his conduct referred to in this chapter, support the finding of an agreement by him with Edward Obeid Sr and Moses Obeid to create a mining tenement over Cherrydale and demonstrate some of the steps he took in furtherance of that agreement.

Chapter 12: Confidential documents found at the Obeid offices

In the course of its investigation, the Commission seized a number of documents from the Obeid offices at Birkenhead Point. These documents included two maps prepared by Ms Wiles – one dated 9 May 2008, titled the "Mount Penny Area" (see figure 1) and the other dated 30 May 2008, titled the "North Bylong – Mt Penny Area". The map dated 30 May 2008 appears on page 54 as figure 2.

These maps were confidential government documents. They had been prepared by the DPI on the instruction of Mr Macdonald. They had been prepared solely for the purpose of government business. They should not have been provided to outsiders.

The Commission finds that these two maps were provided by Mr Macdonald to a member of the Obeid family, probably Edward Obeid Sr or Moses Obeid. The Commission finds that these documents were provided in furtherance of an agreement between Mr Macdonald, Edward Obeid Sr and Moses Obeid. The reasons for this finding are set out below.

The maps are seized

On 23 November 2011, Commission investigators, accompanied by other law enforcement officers, executed a search warrant at the offices used by members of the Obeid family at Henry Lawson Business Centre, Roseby Street, Drummoyne. Amongst the papers, Commission investigators found a large orange-coloured envelope. Within that envelope were a number of documents and a manila folder. Within the manila folder were four documents, namely, an *Australian Financial Review* article dated 19 September 2008, a "Memorandum of Understanding (Mt Penny, NSW)" dated 26 October 2008, a copy of the map prepared by Ms Wiles dated 9 May 2008 (figure 1), and a copy of the map prepared by Ms Wiles dated 30 May 2008 (figure 2).

The large envelope containing the manila folder was found in the office of Paul Obeid. The outside of the large envelope indicated that it was to be collected by Gerard Obeid from the offices of Colin Biggers & Paisley.

All four documents found inside the manila folder related, in one way or another, to the Obeid activities at Cherrydale. The article from the *Australian Financial Review* was on the subject of coalmining. The memorandum of understanding (MOU) was a draft document, which reflected a potential agreement between the Obeids and a Chinese company and which would have affected the Mount Penny tenement. There was handwriting contained on the draft MOU, which Moses Obeid admitted was his handwriting. The two maps, of course, were those key maps that had been prepared by the DPI.

Each member of the Obeid family who used the offices at Birkenhead Point was asked about the large envelope, the manila folder and the maps. None of them admitted to seeing any of the documents before. None of them could explain how the documents came to be at the Birkenhead Point offices. Paul Obeid claimed he could not explain how the documents came to be present in his office. Gerard Obeid had no recollection of the documents, even though it would appear that he may have collected them from Colin Biggers & Paisley. Moses Obeid did not recognise the documents, even though his handwriting was on one of the documents.

In summary, no member of the Obeid family was able to explain how confidential governmental documents came to be in their possession.

Yet, the evidence establishes that the Obeids were in possession of confidential government information. How did this occur?

How did the Obeids get the maps?

Obviously, someone "leaked" the confidential maps to the Obeid family. There are only two categories of persons who could have had contact with the two maps. First, persons from inside the DPI who had dealings with the maps, or knew of their existence, and who had motives or reasons to disclose the maps to the Obeids. Secondly, persons from inside Mr Macdonald's office who, likewise, had dealings with the maps or knew of their existence and who had motives or reasons to disclose the maps to the Obeids.

Each person who worked in the DPI at the relevant time and who could have had contact with the maps or known of their existence was asked whether they had leaked the maps to the Obeids. Each denied it. Each was a credible witness. It was not put to any such witness that he or she was the source of the leak. No evidence was adduced as to any motive or reason that any of the DPI officers might have had to provide the Obeid family with the maps or any other confidential information. There is no evidence of any contact between any of the DPI officers and any of the Obeids. It was not suggested that any person from the DPI, who was called to testify, could have been the source of the leak.

On the evidence, the only persons within Mr Macdonald's office apart from himself who had dealings with the maps, or who otherwise knew of them, were Mr Gibson and Mr Munnings.

Mr Gibson denied that he had provided any confidential information to the Obeids, as did Mr Munnings. There is no evidence and no suggestion of any personal connection or even contact between Mr Gibson and the Obeids. There is no conceivable reason why Mr Gibson would provide some benefit to the Obeids. It was not suggested to him that he was the source of the leak.

Mr Munnings did have some contact with Edward Obeid Sr, Moses Obeid and Edward Obeid Jr, but this did not constitute a motive or reason to pass confidential maps or other information to the Obeids. Mr Munnings was asked by Mr Littlemore, on behalf of Edward Obeid Sr, whether it was possible that he went to Edward Obeid Sr's office in early 2008 with information about the Bylong Valley. Mr Munnings replied that he did not believe that he did. He said, at the relevant time, he only saw Edward Obeid Sr in the corridors of Parliament House. It was not suggested to Mr Munnings that he was the source of the leak.

Mr Macdonald, who had particular knowledge of the personnel in the DPI and persons inside his office who dealt with mining matters, did not suggest that any particular person not called by the Commission to give evidence was the culprit.

That leaves Mr Macdonald himself. Mr Macdonald was a friend of the Obeids. He was motivated to provide information to the Obeids and had ample opportunity to provide the maps to the Obeids.

The Commission finds that the two maps were provided by Mr Macdonald to a member of the Obeid family. It cannot now be established to which member of the Obeid family Mr Macdonald provided the maps, but the evidence established that there was regular contact between Mr Macdonald and Edward Obeid Sr and Moses Obeid.

Before passing from this matter, it is necessary, however, to deal with submissions made on behalf of Mr Macdonald in this regard.

Mr Macdonald's submissions

In his submissions, Mr Macdonald accepted that someone must have leaked these maps to the Obeid family. Mr Macdonald denies that he leaked the maps, and even goes so far as to suggest that he could not have been the person

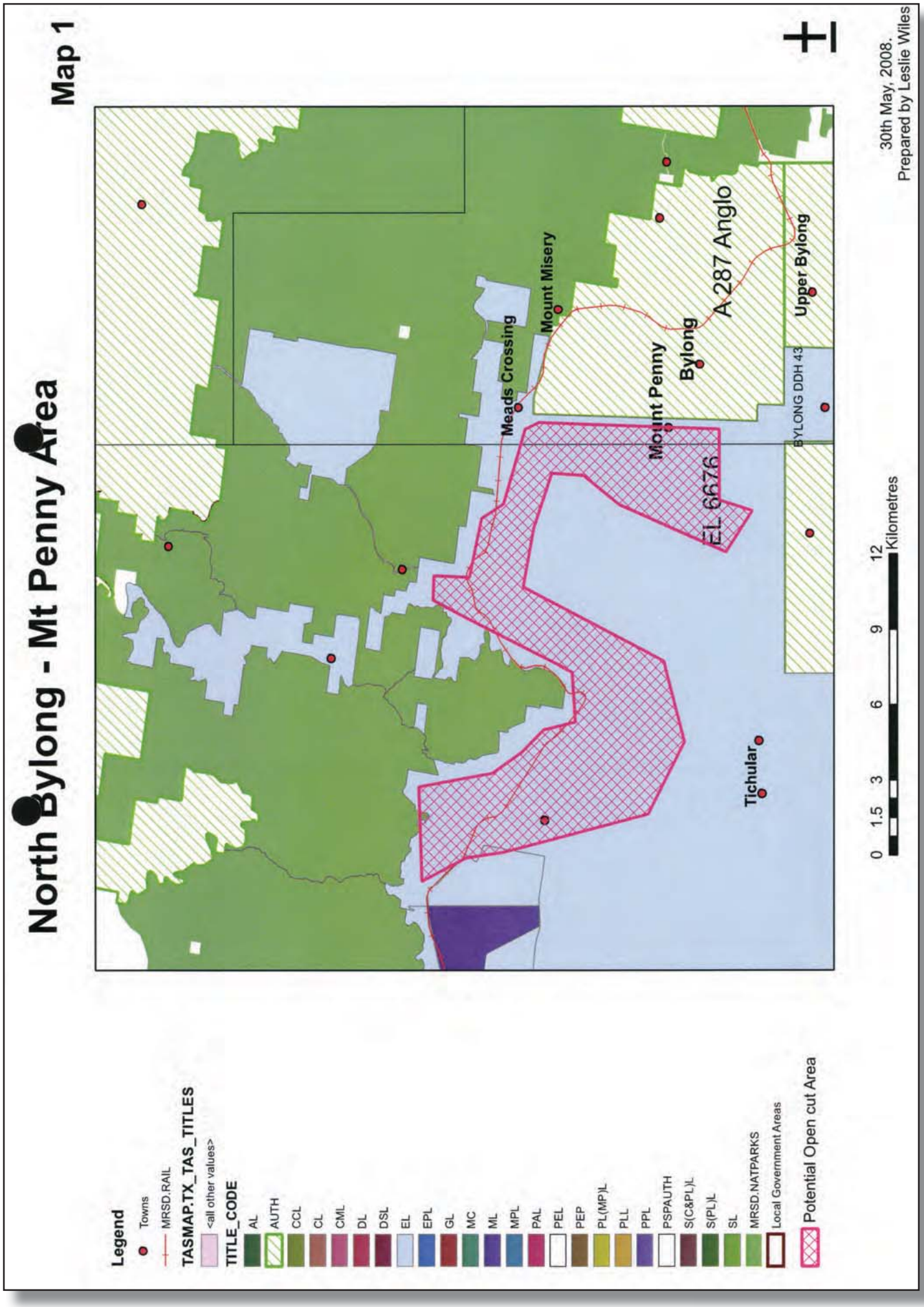


Figure 2: Map, 30 May 2008 – North Bylong – Mt Penny Area

who did so. He says that this is because he did not have access to the maps.

This submission is ill-founded and wrong. In chapter 10, attention has been drawn to the clear evidence that the map dated 9 May 2008 was provided to Mr Macdonald. There is no doubt that this map was sent to Mr Macdonald's office on that date. The 30 May 2008 map (figure 2) was sent to Mr Macdonald's office on 3 June 2008, and later on 5 and 6 June 2008.

Mr Gibson agreed that he received a copy of the ministerial briefing titled "Potential Coal Allocation Areas in Western NSW", which Mr Mullard had prepared in anticipation of a meeting between Mr Macdonald, Mr Gibson and Mr Mullard in early June 2008. Mr Gibson recollected that Mr Mullard brought to this meeting the specific maps that were attached to that briefing. One of the maps was the one prepared by Ms Wiles and dated 30 May 2008 (figure 2). At around 5.00 pm on 4 June 2008, Mr Gibson sent an email to Mr Mullard requesting: "could we please have all the maps that you showed Ian today blown up as big as you can and sent up tomorrow". On 5 June 2008, Mr Gibson acknowledged receipt of the maps by email. Mr Gibson said that Mr Macdonald had asked for the maps to be blown up because he wanted to see the areas in more detail. He recollected that the maps prepared by Ms Wiles on 9 May 2008 and 30 May 2008 were included in the ones blown up and sent to him by Mr Mullard. He agreed that he had provided the maps to Mr Macdonald. In short, Mr Macdonald would have had access to these maps no later than the first week of June 2008. But there is more. On 6 June 2008, Mr Gibson asked Mr Munnings by email to "get the latest Bylong Valley (Mt Penny) map emailed up on Tues". Mr Gibson said that he had been asked to do this by Mr Macdonald. On the same day, Mr Mullard emailed the map that was prepared by Ms Wiles on 30 May 2008, titled "North Bylong – Mt Penny Area", (along with others) to Mr Munnings, who forwarded it onto Mr Gibson.

Mr Macdonald's submission is wrong.

Mr Macdonald made an alternative submission. He seems to say that he was denied procedural fairness because copies of these maps were supplied to him too late. The Commission does not accept that, but it is unnecessary to examine the issue further as Mr Macdonald does not identify how or why this could cause any unfairness.

The email and attachments sent to Barry Yin

There is evidence that the Obeid family had access to other confidential DPI documents at other times. On 22 September 2008, Mr Brook sent an email to a potential investor, Barry Yin. The email had attachments, one of which was a map titled "Proposed EOI Areas". That map was dated 21 July 2008 and prepared by a DPI officer, Fred Schiavo.

The map in question appears as figure 3 on page 56.

The DPI had put together a ministerial briefing dated 23 July 2008, and figure 3 (Mr Schiavo's map of 21 July 2008), was attached to that briefing. This was, of course, very early in the EOI decision-making process, and Mr Schiavo's map contained three coal areas that were subsequently removed – Benelabri, Ridgelands and East Bargo. As a consequence, the map was superseded.

Somehow Mr Brook had been able to acquire a copy of the map of 21 July 2008 so that he could attach it to his email to Mr Yin. When Mr Brook was shown his email and shown the map (figure 3) he suggested that he may have got it from "Monaro" or Moses Obeid. The reference to Monaro is a reference to Monaro Mining, a company with which Mr Brook was dealing at the time. But there is no evidence or suggestion that anyone at Monaro Mining could have got their hands on the superseded map (figure 3). That leaves only Moses Obeid.

The document emailed by Amanda Turner and the document emailed to Mr Yin

Amanda Turner was a personal assistant at Lehman Brothers. On 22 September 2008, she sent an email to Mr Brook attaching a document ("the Amanda Turner document"). The Amanda Turner document contained descriptions of four tenements that formed part of the 11 coal release areas: Goonbri, Spur Hill, Glendon Brook and Mount Penny.

Mr Brook was unable to recall the circumstances as to how Amanda Turner came to send this document to him. His best recollection was that it was a scanned copy of a document that he had received from somebody else, which he accepted was either some unknown person connected to Monaro Mining or from Moses Obeid. The Commission finds that the "somebody else" was Moses Obeid. There is no reason to think that a person connected to Monaro Mining could have obtained the Amanda Turner document.

Mr Macdonald has submitted that the inquiry did not investigate how the Amanda Turner document was leaked to Mr Brook. This submission is mistaken: Mr Brook gave evidence about how it came into his possession, and the Commission has made a finding about that.

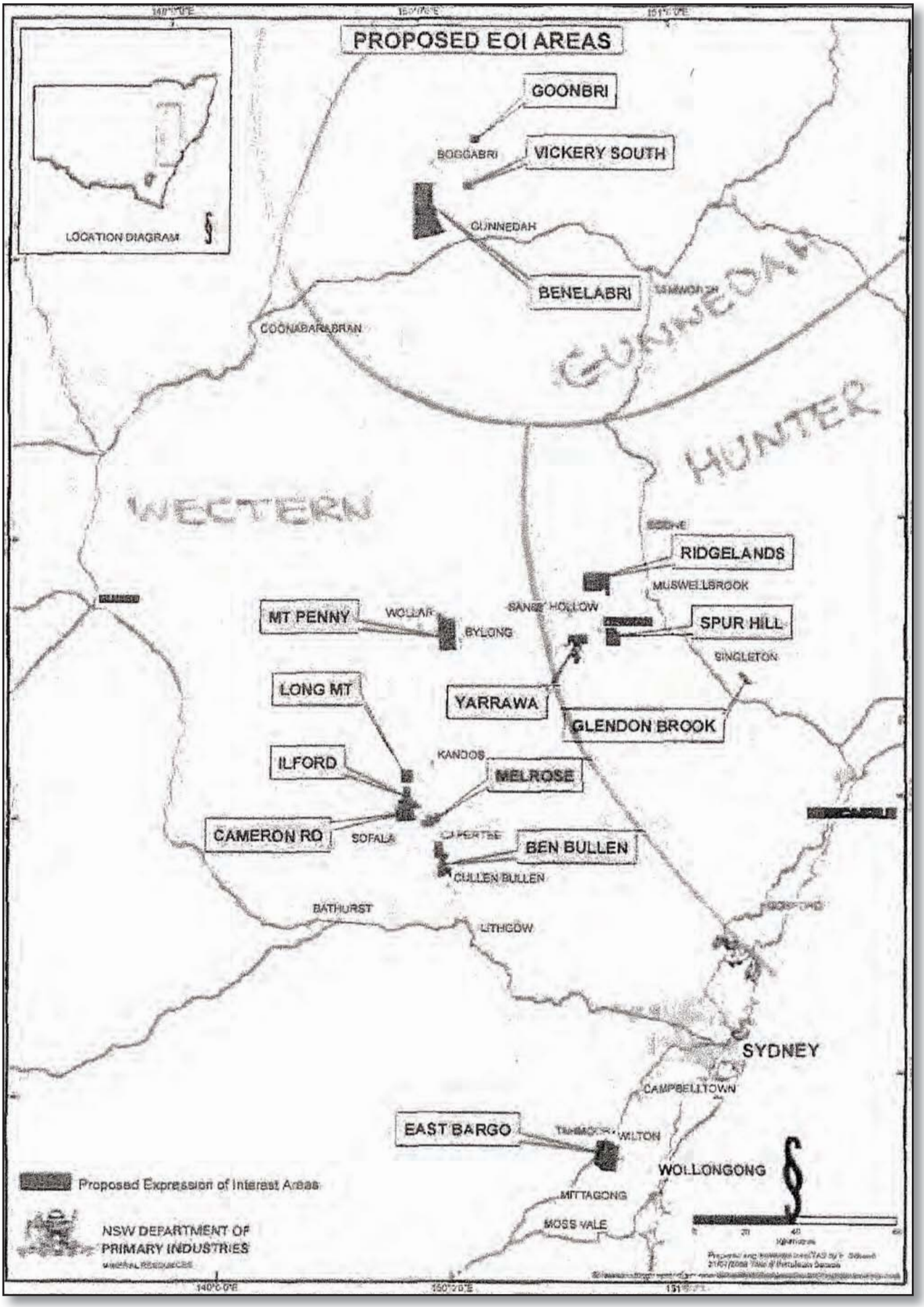


Figure 3: Map, 21 July 2008 – Proposed EOI Areas

Mr Macdonald has also submitted that the Amanda Turner document was not sent to the minister's office. This is true. The Commission is not satisfied, however, that this document was a DPI document. Rather, the Commission considers it likely that the information contained in the Amanda Turner document that Mr Brook had was taken from another document, or other documents. This is because the format and typescript of the Amanda Turner document is unlike all other documents that were generated by the DPI during this process.

Mr Macdonald, in his submissions, has pointed out, correctly, that the ministerial briefing that was sent to him on 23 July 2008, relating to the proposed allocation areas, did not contain the description of the area described as Spur Hill in the same terms that appears in the document that Mr Brook had. The document in Mr Brook's possession ("the Barry Yin document") had a two-sentence description of the Spur Hill area, whereas the ministerial briefing had only one. Mr Macdonald (and his office), however, certainly had briefing material from the DPI that contained the two-sentence description of the Spur Hill area in the terms contained in Mr Brook's document. On 18 July 2008, the DPI had prepared briefing material on proposed coal allocation areas that included this description, which Mr Gibson had a specific recollection of being handed to him, or sent to him, and a recollection of providing it to Mr Macdonald. Mr Mullard, too, had a recollection of sending this material to the minister's office.

The Commission should, for completeness, deal with two matters, lest it be thought they have been overlooked.

First, there is a change in the spelling of one word in the DPI briefing notes sent to the minister's office, when compared to the "document" Mr Brook received, in connection with the description for the Spur Hill area. In the Amanda Turner document that Mr Brook received, the word "remodeling" (spelt with one "l") is used, whereas in the documents created by the DPI the word "remodelling" is used. This difference does not detract from the finding that the Commission has made about the information relating to Spur Hill being available to Mr Macdonald, but it does provide a further basis to conclude that the Amanda Turner document that Mr Brook received was copied from one or more documents.

As has earlier been stated, the email that Mr Brook sent to Mr Yin on 22 September 2008 attached two documents: the first was a DPI map, called "Proposed EOI Areas" dated 21 July 2008 (figure 3), and the second was the Barry Yin document that provided descriptions of three areas – Spur Hill, Glendon Brook and Mount Penny. The Commission has found that the map that is figure 3 was provided to Moses Obeid by Mr Macdonald.

Mr Macdonald has submitted that the Barry Yin document attached to the email sent by Mr Brook to Mr Yin on 22 September 2008 was not a document sent to the minister's office, and that this supports an inference that the map (figure 3) was not "leaked" by Mr Macdonald. The Commission does not accept this submission, nor the premise of it. Although a document in the form that was attached to the email was never sent to the minister's office, the Commission is not satisfied, for reasons developed earlier in connection with the Amanda Turner document, that the Barry Yin document was a DPI document. It is likely that the information contained in it was sourced from one or more documents. Further, as described earlier, the description of the three areas was information that was provided to the minister's office.

Secondly, the document describing the three areas, which was attached to the email to Mr Yin on 22 September 2008, contains some additional words – relating to "stages of development". There is no evidence about how these additional words came to be on these documents, or where they came from. The Commission does not regard this as material to any findings it has made.

Conclusion

The Commission finds that Mr Macdonald provided the superseded map (figure 3) and, the information contained in both the Amanda Turner document and the Barry Yin document, to the Obeid family, probably to Moses Obeid. The Commission finds that this was in furtherance of the agreement between Mr Macdonald, Edward Obeid Sr and Moses Obeid to which reference has been made above.

Chapter 13: The involvement of Mr Fang

This section of the report returns to the evidence of Mr Fang, but in a different context. Mr Fang gave evidence of a conversation he had with Edward Obeid Sr on the subject of the Obeid farm and coal under the Obeid farm. Both Mr Macdonald and Edward Obeid Sr say the conversation never occurred. The resolution of this dispute is important. If the Commission accepts that the conversation occurred, and accepts that Mr Fang's version of the conversation is reasonably accurate, then it is supportive of the existence of the agreement between Mr Macdonald, Edward Obeid Sr and Moses Obeid to which reference has been made.

For reasons detailed below, the Commission finds that the conversation did occur, and that Mr Fang's evidence is accurate and reliable.

Mr Macdonald's records show that on 26 June 2008 he had a lunch with Mr Fang. The Commission infers that it was that day that the conversation occurred. Following lunch, Mr Fang returned to Parliament House with Mr Macdonald, and Mr Macdonald took Mr Fang to the office of Edward Obeid Sr. Mr Macdonald made an introduction and then left the room. Mr Fang then had a conversation with Edward Obeid Sr in Edward Obeid Sr's office.

The conversation of 26 June 2008

The Commission accepts that the discussion that Mr Fang had with Edward Obeid Sr included a discussion about the family farm at Cherrydale, and that the discussion included a reference to Mount Penny. This was made clear from evidence elicited by counsel for Edward Obeid Sr:

> *MR LITTLEMORE: What did Mr Obeid say?---We say hi each other and then I tried to give him, give him a briefing on my company's business.*
>
> *What did Mr Obeid say? If you don't remember, please say so?---Yeah, we, we say hello each to each other and then I remember we, he mentioned his family farm in Mount Penny.*
>
> *What did Mr, I didn't ask you what he mentioned. I asked you what words he spoke?---Sir, if you need a detail, can you allow me to have my interpreter please?*
>
> *No, I'm asking, the conversation took place in English. You learned your understanding of it from English. What did he say in English?*
>
> *THE COMMISSIONER: … Can you remember the words that Mr Obeid used, the very words? Can you remember or can't you remember?---Okay. For my, for my best recollection he mentioned his own farm.*
>
> *MR LITTLEMORE: Please, please - - -*
>
> *THE COMMISSIONER: No. Please let him finish the question.*
>
> *MR LITTLEMORE: Well with respect - - -*
>
> *THE COMMISSIONER: Because he's using, he is using mentioned in the sense of saying. So please proceed?---Okay. He said, he said he had a farm in Mount Penny, Mount Penny, and it is a good farm, something like that.*

This conversation is important for at least two reasons. First, it demonstrates a connection between Mr Macdonald and Edward Obeid Sr in respect of a potential coalmining transaction involving Cherrydale. Secondly, Mr Fang was adamant that Edward Obeid Sr was referring to "Mount Penny". The evidence is that this conversation took place shortly after the Mount Penny tenement had been created formally – and Edward Obeid Sr could have got that information only from Mr Macdonald. It is strong evidence of complicity between Mr Macdonald and Edward Obeid Sr. Edward Obeid Sr denied knowing the name "Mount Penny" at this time, but the Commission rejects that evidence. Mr Fang contradicts it; it is not believable that,

given the prominence of Mount Penny in relation to the Obeid farm, that Edward Obeid Sr would not know its name, and Edward Obeid Sr was a generally unreliable witness.

What followed after the conversation between Edward Obeid Sr and Mr Fang appears from the following exchange:

> *THE COMMISSIONER: And, Mr Fang, were you surprised when Moses phoned you or were you expecting a call from one of the Obeid boys?---The former.*
>
> *You were surprised?---No, no, no, he would call me.*
>
> *How did you know that?---Because when I met with their father, the father said he will introduce me.*
>
> *To his sons?---Yes.*
>
> *Did he explain why? Why he, why you should meet his sons?---To discuss the corporation of this project, the, their family farm.*
>
> *The project being what?---The farm.*
>
> *But, yes, but you see we've been talking* [to] *you about a farm and we've been talking to you about coal, so what we're trying to find out is when, when the father spoke to you about the project was he talking about the farm or coal or coal under the farm?---We discussed the farm of which underneath the farm there is coal.*
>
> *And that's the project?---You can say that.*

A day or so later, Mr Fang was contacted by Moses Obeid and an invitation was extended to him to visit Cherrydale, which he did on 28 June 2008.

On 28 June 2008, Moses Obeid had a discussion with Mr Fang whilst the latter was visiting Cherrydale. The Commission is satisfied that Moses Obeid referred to the probability that the government would allow the area underneath Cherrydale to be opened for coal exploration. The Commission is further satisfied that this could only mean that, as at that date, Moses Obeid was conveying to Mr Fang that an exploration licence would be permitted over an area that included the property Cherrydale. This could only be a reference to the tenement called Mount Penny that Mr Macdonald had caused to be created.

Mr Fang's evidence in this respect was as follows:

> *MR WATSON: You arrive at the farm?---Yeah.*
>
> *Did you meet the Obeid boys there?---In my memory we met up either on M3 or M4, M5.*
>
> *Did they travel in a separate car?---Yes.*
>
> *So you followed them to the farm, did you?---Yes.*
>
> *And when you got to the farm you got out of your car and spoke to them?---Yes.*
>
> *And did any of them speak to you about coal?---They show me around.*
>
> *Did they speak to you about coalmining coming to that farm or coal on that farm?---I was told there were coal resources underneath.*
>
> *Did they tell you anything about their plan to develop the coal resources?---Yes.*
>
> *What did they say about that?---They said the Government probably will allow this area to be explored.*

Mr Fang repeated this later in his evidence:

> *THE COMMISSIONER: ... You had the discussion with Moses Obeid at the farm concerning the project which involved, I assume, an Exploration Licence and eventually a mine on the farm Cherrydale. Is that right or wrong?---I understand Commissioner's question and at that time when I discussed that the project is mainly about the farm,*

of course I understand there is resources underneath the farm and it's possible that later the government will allow for the exploration of that mining but I don't know when we will be able to get the licence.

… did that come from Mr Moses Obeid?---Yes. Yeah, that's what he said to me.

The credibility of Alan Fang

The Commission has found that Mr Fang was a reliable witness. His evidence referred to in this chapter is credible, and there are no obvious reasons not to believe it. Mr Fang was personally friendly with Mr Macdonald, and no suggestion was made that he had tailored his evidence because of some animosity toward Mr Macdonald or Edward Obeid Sr. The Commission accepts Mr Fang's evidence. Specifically the Commission finds that Mr Macdonald introduced Mr Fang to Edward Obeid Sr in the parliamentary office of Edward Obeid Sr, that Mr Fang explained to Edward Obeid Sr Mr Fang's interest in at least securing an interest in coal, that Edward Obeid Sr told Mr Fang of the family farm, that Edward Obeid Sr described the farm as being in Mount Penny, that Mr Fang left his contact number with Edward Obeid Sr, and that Edward Obeid Sr advised Mr Fang that his son, Moses Obeid, would be in contact with him to take the matter further, and that, shortly thereafter, occurred.

Some submissions challenged the value of Mr Fang's evidence. Mr Fang is a native and citizen of China, and much of his evidence was given with the assistance of an interpreter. His conversations with Mr Macdonald, Edward Obeid Sr and any of the Obeid sons would have been held in English. Submissions have been made that the value of Mr Fang's evidence is diminished because of what was described as his "poor English".

The Commission rejects this submission. As stated, Mr Fang gave most of his evidence through an interpreter, but an application was made that he give part of his evidence in English in response to questions framed in English. Mr Fang was reticent about this because he felt that presenting his evidence in inadequate English might be disrespectful to the Commission. When convinced that he should give evidence in English, Mr Fang did so. The exercise demonstrated to the satisfaction of the Commission that Mr Fang not only had a reasonable command of English, but also a reasonable working knowledge of the Australian idiom. The Commission was satisfied that Mr Fang's English-language speaking skills were adequate, and that the reliability of his evidence was not diminished on that score.

It is appropriate to record the evidence of Edward Obeid Sr on this point. Edward Obeid Sr denied meeting Mr Fang, other than the possibility of having had a casual introduction to him at a fundraising function. Specifically, Edward Obeid Sr denied meeting Mr Fang in his office. In part, this was because Mr Fang said that he had been brought into the office by Mr Macdonald.

Edward Obeid Sr said Mr Macdonald had "never been in my office in 20 years of me being in politics". This statement by Edward Obeid Sr was emphatic and, if true, would be significant evidence in support of his denials. The Commission formed the view that, in making this statement, Edward Obeid Sr was being perfectly serious – he was not merely making a point by means of an overstatement. Three witnesses contradicted Edward Obeid Sr on this issue. The Commission finds, on this particular issue, that Edward Obeid Sr was deliberately dishonest. Edward Obeid Sr, through counsel, later made a statement to the effect that he had been mistaken in his evidence (this was after his statement had been falsified by the three witnesses). But the Commission saw how he gave that evidence, and just how emphatic he was when he gave it. The Commission has no doubt that Edward Obeid Sr knew the words were untrue at the very moment he spoke them.

Chapter 14: The minister seeks a briefing

In mid-2007, coal was achieving record prices due to record demand. The state of NSW had greatly benefited from the opening of the two major coal areas of Watermark and Caroona. According to Mr Macdonald, he was motivated by these facts to seek further opportunities by opening new coal areas. Mr Macdonald says that these considerations drove him to look at his atlas, and gave him the idea of creating new tenements, including the one near Mount Penny.

Mr Macdonald had to take his idea to his department.

The minister contacts the DPI

There is evidence that, from around May 2008, Mr Macdonald was actively seeking information from the DPI, which could be used to support the opening of a number of new coal resource areas.

On 1 June 2008, Mr Macdonald contacted Mr Coutts by telephone and they discussed other possible areas to be put out for tender. On that day, Mr Coutts was in Hong Kong, and about to commence a period of leave. Mr Mullard was assuming Mr Coutts' role during the period of leave. Mr Coutts sent Mr Mullard an email advising Mr Mullard about the contact that he had with Mr Macdonald. In that email, Mr Coutts warned Mr Mullard that Mr Macdonald expected to receive something "early next week" concerning future allocations.

According to Mr Coutts, there had already been some discussions in May 2008 between Mr Mullard, Mr Macdonald and himself concerning possible future allocations. During those discussions, Mr Macdonald was advised that the DPI did not presently have any identifiable areas that could be put out to tender, but that a program could be instituted, and accelerated, so that over the course of the following three years, three major coal areas could be put out to tender – one each year.

Mr Coutts understood that Mr Macdonald wished to be briefed on these matters and this was the purpose of Mr Coutts' email to Mr Mullard on 1 June 2008.

The DPI prepares a briefing for the minister

Mr Mullard then set the DPI to work to create the briefing sought by the minister. Part of the work had already been commenced because of the discussions in May 2008. He divided the work into two parts. The first part was allocated to Ms Moloney, a senior geologist. Ms Moloney was asked to investigate the potential for smaller or remnant areas to be put out for allocation. The second part was allocated to Ms Wiles, who was the manager of coal advice, a section in the Maitland office of the DPI. Mr Mullard asked Ms Wiles to identify any areas "more significant than remnant areas" that might be suitable for allocation.

Ms Moloney prepared a report titled, *Small Areas in the Western Coalfield which may be suitable for a Competitive Expression of Interest*. She identified six areas, and a map was attached showing the location of each of these six areas. In her report, Ms Moloney described how each of these areas was "speculative", that the DPI had little or no exploration data, and that the areas were considered to be "remnant resources". Ms Moloney sent her report to Mr Mullard on 2 June 2008.

Ms Wiles prepared a report titled, *Potential Coal Tender Areas*. She identified three large or major areas that were given these titles – "Ridgelands", "Benelabri", and "North Bylong – Mt Penny Area". By this time, Ms Wiles had become aware of Mr Macdonald's interest in Mount Penny and, on 9 May 2008, had prepared the map (figure 1), hence the reference in the report to the "North Bylong – Mt Penny Area". As part of Ms Wiles' report, she prepared three maps showing each of the three areas.

It is important to note that, although Ms Wiles identified these three areas as "potential" areas, she remained firmly of the view that the area titled "North Bylong – Mt Penny Area" was not suitable for allocation. In her report, she made the comment: "This area should not be tendered until further exploration is completed in the area".

Ms Wiles elaborated on this position in her oral evidence. She described how she was aware that the Wollar-Bylong area (of which the newly termed "North Bylong – Mt Penny Area" formed part) was planned to be the subject of exploratory drilling, and this was recommended in the Dwyer Report. She was also aware that that exploratory drilling had not commenced.

The map that Ms Wiles prepared and attached to the briefing and titled "North Bylong – Mt Penny Area" has been referred to earlier in this report (see figure 2). A copy of this map is one of the maps that were seized under search warrant from Paul Obeid's office in Birkenhead Point. The map was prepared in response to a ministerial request, and supplied in a ministerial briefing. It was plainly confidential. It was provided to Mr Mullard on 2 June 2008 and to Mr Macdonald in the first week of June 2008. As has been found previously in this report, the maps, which are figures 1 and 2, were provided by Mr Macdonald to a member of the Obeid family.

Mr Macdonald's submissions

Mr Macdonald has made a specific submission in respect of the briefing. He has said that the selection of the title "North Bylong – Mt Penny Area" demonstrated that there was DPI knowledge of the "Mt Penny Area", and even indicative of the fact that the DPI had some preliminary idea or plans in respect of that area.

The submission is wrong. Although Ms Wiles had no specific recollection concerning the issue, she gave evidence that the reference to the "Mt Penny Area" possibly related to the map that she had earlier prepared on 9 May 2008. The Commission accepts that this is so – especially in light of the evidence that neither Ms Wiles nor the other senior DPI officers with whom she worked had ever heard of Mount Penny before 9 May 2008. Additionally, and significantly, all the DPI officers who testified, and they were the senior officers in the DPI who were concerned with geological and mining matters, including the creation of tenements and dealings in tenements, said that they had never heard of Mount Penny until Mr Macdonald made enquiries about it.

The DPI provides the briefing document

Mr Mullard worked on the reports that had been provided by Ms Moloney and Ms Wiles to prepare the ministerial brief. Mr Mullard commenced this process in late May 2008. Mr Mullard's brief to the minister incorporated introductory material and attached the descriptions of the various areas, as well as the maps that had been prepared.

Mr Mullard made a substantial alteration in respect of the area that Ms Wiles had identified and titled "North Bylong – Mt Penny Area". Mr Mullard altered the title of the area so it was reduced simply to "North Bylong". He then altered the description of this particular area so that the briefing on North Bylong read as follows:

> ***North Bylong***
>
> *The Department has contracted to drill a number of exploration wells for the area. The area is expected to contain substantial open cut resources close to existing rail facilities.*
>
> *Current estimates indicate open cut resources greater than 200Mt in the Wollar-North Bylong area.*
>
> *Resources are contained within the Ulan Seam, raw ash ranges from 15 – 27%.*
>
> *Further exploration is required to define a potential tender area.*

It can be seen from the map (figure 2) that North Bylong is very large. It can be seen from the briefing that the DPI's position was tentative – see the reference to "current estimates" and the like. Finally, the ministerial briefing specifically drew attention to the fact that further exploration was "required".

In his oral evidence, Mr Mullard described the process of putting together a briefing like this, in the absence of hard data. He said, "effectively these numbers are being plucked out of the air a bit. We did not know enough to be confident that that was the resources there". His own view was that the area was not ready for tender and that further exploration was necessary.

This seems the appropriate moment for the Commission to comment upon Mr Mullard's evidence. Mr Mullard gave an impression that he was a careful, loyal and dedicated public servant. He was an obvious expert in his field. He gave his evidence carefully. His recollection was confirmed by documents to be sound. The Commission accepts him as an honest, accurate and reliable witness.

In due course, Mr Mullard had to provide the ministerial briefing to Mr Macdonald, and that will be described in the next chapter. It is necessary, however, at this stage to pause to consider the consequences of making decisions to open areas for tender where there is insufficient or inadequate exploration data.

The resources in the Bylong Valley

The coal resources of NSW belong to the state and should be managed with care. Over many years, the DPI has managed those resources by attending to exploration, and has gained a reasonably good grasp of coal reserves before they are ever allocated to industry. In the instance of the North Bylong area, evidence supports Mr Mullard's view that he was reduced to plucking figures out of the air.

The evidence disclosed that the DPI had undertaken some investigation of coal reserves in the Bylong Valley, but the information was scant and old – the last investigations had been undertaken in 1982 and 1984. The DPI had recognised by 2005 that there was a need to undertake a detailed drilling program. Following the preparation of the Dwyer Report, some drilling had occurred in the Western Coalfield, but not in the Bylong Valley. The DPI was aware that there were good coal resources in the Bylong Valley, and had estimated that there was a resource that was something in the order of 800 million tonnes – 200 million tonnes open cut, and 600 million tonnes underground.

On any view of it, the North Bylong area was a major coal area. The implications of opening a North Bylong area were complex – there would need to be considerable consideration given to social, environmental and cultural concerns, as well as financial concerns. The financial concerns were important. Based on the experience at Watermark and Caroona, the opening of a resource of this size and kind could provide the state with a windfall – an extremely large additional financial contribution.

Each of these features means that it would not be good management of the state's resources to rush the decision to create a Mount Penny tenement, or to fiddle with the general size and shape of the proposed North Bylong area, or to compromise it in a way that could jeopardise the state receiving a large additional financial contribution.

As will be seen in the next chapter, Mr Macdonald ignored all of these matters and failed to manage this asset properly on behalf of the state.

Chapter 15: Mount Penny is created

The evidence shows that it was Mr Macdonald who directed that a Mount Penny tenement be created. The same evidence shows that, in doing so, his decisions were focused on Mount Penny, rather than feasible alternatives. The same evidence shows that, once his decision was made, it was inevitable that the Mount Penny tenement would fit on top of Cherrydale.

The first meeting with Mr Macdonald – 4 June 2008

On 4 June 2008, Mr Macdonald, Mr Gibson and Mr Mullard met to discuss the ministerial briefing dated 3 June 2008.

Mr Mullard had a specific recollection of advising the minister that the three larger areas were not suitable to be released because further exploration was needed. This appears from the following exchange:

> *THE COMMISSIONER: Mr Mullard, I understand your reservation about this but the recommendation was that more drilling take place so I take it that means that the potential of the area was not, could not yet be measured?---That's correct and in fact that is an indication that while we have plucked numbers, effectively these numbers are being plucked out of the air a bit. We did not know enough to be confident that that was the resources there. There was an indication there could be large resources but more data was required to define it.*
>
> *… hence the view that it should not yet go out to tender?---That's correct.*
>
> *Because you may be able to establish by further drilling that there is a mineable underground resource as well as the open cut?---Exactly.*
>
> …
>
> *MR CHEN: And I take it you told the Minister as much, did you, in the meetings that you had with him in this short* [sic] *of period?---Yeah, we weren't supportive of releasing large areas where we – and that, that goes to a number of these areas where we did not have sufficient data because we believed it would not attract a value bid for the resource and in fact you would miss out on – you would leave an awful lot of money on the table so potentially someone would pick up a resource for quite a low cost and then suddenly find they've got a bonanza.*
>
> *And I take it you made it clear to the Minister that that was your view?---I believe we did with, with Mr Coutts, yeah.*
>
> *And Leslie* [Wiles] *made it clear to you but you also when you forwarded on your briefing note said further exploration was required, isn't that so?---I believe so, can you point me – is that in the document?*
>
> *I'll take you to it in a moment?---That's my recollection that we made that very clear.*

Mr Mullard's views were entirely reasonable: exploration was vital to ensure a potentially valuable resource was not put out to tender with a consequence that an insignificant financial contribution would be made to secure it. To release an area without proper investigation was contrary to DPI practice and, according to Mr Mullard, would be economically irresponsible: "Even relatively small amounts of exploration significantly increase the amount of money that would be paid and we saw that in relation to Caroona and Watermark".

It seems, at least at first, that Mr Macdonald was persuaded that more exploration was necessary. There seems to have been some discussion about delays in scheduled exploratory drilling and the need for further funds to be made available to secure the necessary drilling rigs and staff. The meeting on 4 June 2008 seems to have

finished on the basis that Mr Mullard would produce a ministerial briefing to support an application for funding. A second meeting was scheduled for 6 June 2008.

Steps taken between 4 June 2008 and the meeting on 6 June 2008

Mr Gibson sent the following email to Mr Mullard after the first meeting:

> *Hi Brad,*
>
> *Thanks for coming in today. A couple of things:*
>
> *12pm Friday at GMT is confirmed for the follow up meeting and we're really keen to see a proposal to Treasury on the drilling rig/crew purchase.*
>
> *Thanks*
>
> *Cheers*

On 5 June 2008, Dr Richard Sheldrake, the director general of the DPI, sent an email to Mr Mullard (it is quoted verbatim with errors as they appear in the exhibit):

> *B given mins comments to u yesterday u better give me an idea of extra resources required for drilling etc to fast track. Just rough ish will do but it would be good to have something to go back with in the next few days. Then* we can talk strategicly *R*

Mr Mullard secured indicative costings for the purchase of a drill rig and assisted in the preparation of a draft Cabinet minute, which included:

> *The Department has had a small program aimed at identifying future coal allocation areas. This program undertook drilling and other exploratory work to identify the recent Caroona and Watermark coal allocation areas. This preliminary work by the Department is necessary to provide a base of core information to enable companies to gain an understanding of the quality, extent and total quantity of resources in the area in order to formulate a competitive cash bid. Without this preliminary geological data from the Department companies would have little information on which to base a tender and as a result the return to Government would be very low.*
>
> …
>
> *As stated above, it is emphasised that this return can only be achieved with areas where Government makes sufficient information available on the nature and extent of the coal resources for companies to form an opinion on the value of that resource in a competitive tender situation.*

Despite these efforts, no funding was forthcoming.

Mr Macdonald says he sought funding for additional exploration through an informal discussion with the treasurer, Michael Costa, who indicated that the funding request would be refused. The Commission considers this issue to be one of marginal relevance, and will act on the basis that Mr Macdonald did speak to Mr Costa, and Mr Costa refused the request.

The second meeting with Mr Macdonald – 6 June 2008

On 6 June 2008, Mr Macdonald, Mr Gibson and Mr Mullard met a second time. At this meeting, decisions were taken to create a Mount Penny area (for mining purposes) and the mining tenement that became known as the Mount Penny tenement.

Who directed the creation of Mount Penny?

The context of the creation of the Mount Penny tenement is very important. It will be recalled that the DPI briefing had identified two kinds of areas – large areas and small

areas. The DPI briefing included a reference to one of the large areas – the North Bylong Area. Prior to the 6 June 2008 meeting, there was no Mount Penny Area.

During the meeting on 6 June 2008, the decision to create the Mount Penny Area was taken. The decision to do so meant that the DPI's proposals in respect of a North Bylong Area would not be followed. This decision was taken without notice, without deliberation, and without a DPI briefing.

The decision to create a Mount Penny tenement was similarly taken without notice, without deliberation, and without a DPI briefing.

It is important to understand how these decisions could have been made in these circumstances. There were three key players involved – Mr Gibson, Mr Mullard and Mr Macdonald. It is appropriate to set out parts of their evidence.

The evidence of Mr Gibson

Mr Gibson was questioned on this matter at a time before it was apparent to the Commission that the decision had been taken on 6 June 2008, and the questions reflect that.

> *But at some point a decision was made for there to be a specific Mount Penny tenement. Isn't that right?---Yes.*
>
> *And whose decision was it, Mr Gibson, to create specifically the Mount Penny tenement?---Mr Macdonald's.*
>
> *The decision to create the Mount Penny tenement was made by Mr Macdonald, wasn't it, in one of these meetings either, if not 4 June, on 6 June. Isn't that right?---Yes, it would have come out in one of the three meetings.*

Mr Gibson was shown the pages of the ministerial briefing, and in particular the page of the ministerial briefing that contained the map showing the North Bylong Area. This was his evidence:

> *Now if you turn to page 180 you'll see that what was otherwise described as North Bylong at page 107, you remember North Bylong had that pink hatched area?---Yes.*
>
> *Now has become Mount Penny. Do you see that?---Yes.*
>
> *And that you say was specifically the instruction of Mr Macdonald do you?---Yes.*
>
> *And was specifically instruction* [sic] *given to Mr Mullard at one of these two earlier meetings in June either 4 or 5 June 2008?---That's correct.*

It is quite apparent that this process was being driven by Mr Macdonald, and that he took control over the issue:

> *But what happened as I think you've said is that the area which was North Bylong became Mount Penny and you've given evidence about that?---Yes.*
>
> *But the specific thrust of this whole process was only for there to be small remnant areas initially, isn't that so?---That's correct.*
>
> *And it's the case, isn't it, that there was a specific direction given for Mount Penny to be created from what used to be North Bylong?---Correct.*
>
> *And Mr Macdonald gave that direction?---Yes.*
>
> *Do you recall specifically there being a discussion about the size of the resource that needed to make up the Mount Penny tenement?---I can't remember exactly what the parameters on the small to medium size were in terms of tonnes of coal that needed to be, to be, you know, the band width they needed to be between but yes, my understanding of, of the Mount Penny was that it needed to be a certain level to fit the criteria.*
>
> *And who gave that instruction?---Mr Macdonald.*
>
> *You clearly remember that?---I'm, I'm sure he said something to that effect to the Departmental officers present.*
>
> *So is this the position, that Mount Penny on your evidence was created specifically at the request of Mr Macdonald?---Yes.*
>
> *The size or area of the resource was defined by Mr Macdonald?---Yes.*

In the end, it seemed to be accepted by Mr Macdonald that he was responsible for the decision to create the Mount Penny Area and the Mount Penny tenement, and that he was responsible for the idea of reducing the tenement in size so that it would fit the criteria of a small to medium mine.

This evidence was given by Mr Gibson during his cross examination:

> *THE COMMISSIONER: Whose idea was it, Mr Gibson, that the Mount Penny area be included?---Minister Macdonald's.*
>
> *… how did the transition occur from Bylong Mount Penny area to Mount Penny area?---Mr Macdonald wanted that area changed to fit the medium criteria, Commissioner.*
>
> *And, and he wanted it changed to be the Mount Penny area?---That's correct.*
>
> *MR HALE: And he, he wanted, or he raised with you, Mr Coutts and Mr Mullard the fact that if it was to come within the medium coal allocation areas, the area would need to be reduced in size?---Yes.*

Yeah. And there was some, there were instructions so far as you were concerned given to somebody to define an appropriate size for the Mount Penny, Mount Penny area if it were to be included as a medium allocation area?---Yes.

THE COMMISSIONER: ... Who gave the instructions?---Minister Macdonald.

THE COMMISSIONER: And to whom were the instructions given?---The Departmental officers, Mr Coutts and Mr Mullard.

The evidence of Mr Mullard

Mr Mullard's recollection was a little different. He seemed to believe that the direction regarding the creation of the Mount Penny tenement did not come directly from Mr Macdonald, but came indirectly through Mr Gibson:

You were advocating the creation were you of a specific tenement for Mount Penny were you?---No.

Are you sure about that?---Positive.

Was it your idea to create a Mount Penny tenement?---No.

Whose idea was it?---The idea basically came from the Minister's office. Now I don't know whether the Minister said it to me directly, my recollection was it was the Minister's staff.

Who, who are you referring to as the Minister's staff?---Well, dealings with Jamie Gibson.

That he specifically told you that he wanted a Mount Penny tenement created?---Well, he told me that the Minister wanted Mount Penny.

Used those words those very words?---I can't recall exact words.

THE COMMISSIONER: That's the gist of it is it?---Sorry?

That's the gist of what he said?---That's right, that's correct.

The Commission concludes that Mr Mullard's recollection was faulty in that respect, and that the instruction to create the Mount Penny tenement was given directly by Mr Macdonald to Mr Mullard. It can be seen from his evidence that Mr Macdonald accepts that this was so.

One of the key issues here is that Mr Macdonald was also providing the instructions in relation to the size of the new tenement. In other words, it was Mr Macdonald who was driving the reduction of the larger North Bylong Area into the smaller Mount Penny Area, and, by fixing the size of the resource within the new tenement, he could effectively fix the geographical size of the Mount Penny Area.

Mr Mullard gave this evidence:

...Were you told that Mount Penny had to fit within the description of a small area, small to medium sized area?---I believe we were told – I don't, I don't know whether it had to fit the description but I believe we were told that the Mount Penny area would be part of the small area release package, not the large area release package.

When cross examined, Mr Mullard said:

I see. But you can recall when he said that he wanted medium allocation areas he said that he wanted the Bylong Mount Penny area reduced in size to become a small area?---Oh, well, he certainly made it clear that he wanted Mount Penny - - -

Yes, yes?--- - - - as a small area.

...

MR HALE: He said, he said in relation to what, if we look at the area that might be described as North, North Bylong Mount Penny area which was a large area, he said that he wanted it to be a smaller area so that it could be regarded as a medium allocation area?---I don't know whether he used those exact words but he certainly wanted Mount Penny as a separate area.

Yes. And what he wanted was a smaller area to be taken out of the larger Mount, North Bylong Mount Penny area?---Yes.

...

MR HALE: In short he wanted part of the larger North Bylong Mount Penny area to be made smaller so it would become a medium allocation area?---That was the effect, yes.

Mr Mullard's further evidence showed that Mr Macdonald secured the location of the new Mount Penny tenement:

Well, I'm still trying to find out how it came about that this tenement was created in the way it was created. It's really important and you are the person who can tell us?---Well, I am clear that the Minister wanted a Mount Penny area created, I am clear that the area - that he was referring to as Mount Penny was the eastern part of the Bylong area but I cannot recall that we had specific directions as to precisely where the boundaries were. I believe, my understanding and my recollection is that the Department defined those boundaries.

There will be a further discussion of the evidence about how the DPI went about fixing those boundaries.

The evidence of Mr Macdonald

Mr Macdonald admits that he drove the decision to create the Mount Penny tenement; however, Mr Macdonald attempts to explain this in a way which has no connection with the Obeid family or Cherrydale.

Mr Macdonald's explanation was that he accepted the DPI's advice that the three large areas – Ridgelands, Benelabri and North Bylong – were not ready to be put on the market. While he accepted that decision, however, he said he also wanted "to meet the market expectations". He said that, even though the DPI had identified several small areas that could be put out to the market, "there was no competitive tension in there" and because of this he said, "we needed something to beef it up", and as a consequence he said this:

> *I said – my precise words were, "Why don't you take a chunk of the – from this large area … and make – and have it confined within what you think are the parameters of the small and medium areas["]. That was the only thing I said.*

Mr Macdonald's evidence presents a number of problems. As at 6 June 2008, the larger areas were still under consideration. In that sense, his vague reference to a "market" is quite misleading. It is true that coal was achieving record prices and there was heavy demand, but there was no evidence that there was a market demand for small or remnant areas. To the contrary, the real area in which the market was "hot" was in respect of the large areas, and the major investors, in this respect, were from China – investors who were not interested in small areas.

Even if there was some kind of "market" for smaller areas it seems quite unlikely that potential bidders would be driven by a "competitive tension". This was a sophisticated group of investors committing themselves to years of heavy expenditure before they could anticipate a return. To think that they would be induced to make a bid, or larger bids, because there were 11 rather than only 10 small coal areas being opened, is quite absurd. The evidence of Dr Nicole Williams, the chief executive officer at the time of the NSW Minerals Council, (the body that represented the mineral resource industry) was to this effect.

There is another coincidence here. Was it only a coincidence that, of the three major coal areas that were on offer, Mr Macdonald selected the North Bylong Area? In his evidence, he claims: "I said why don't you take a bit of the North Bylong which was the third cab off the rank, the other two being more advanced…". This does not appeal as a sophisticated or professional basis for taking rapid action in respect of a potentially very valuable state asset.

Why redesign North Bylong?

The decisions made by Mr Macdonald involved taking the much larger North Bylong Area and reducing it to the small Mount Penny Area. As set out above, the decision to redesign the large area to create a small area was done at the specific direction of Mr Macdonald.

The decision to reduce the larger area to a smaller area was a bad decision for a number of reasons. For example, the original design was based upon geological considerations, which were, in turn, based upon such data as the DPI had in its possession. The original design was prepared by experts. The original design was viable as a mine; Ms Wiles was asked to consider this and said, "there was no reason at all why it couldn't be subject to a mine". A decision to reduce the size of the area was bad because the economic viability of a mine depends upon the size of the resource, and the greater the resource the more attractive it is to mining companies. And, by this time, it had been shown that a very large resource was likely to attract a very large additional financial contribution for the benefit of the state. Why jeopardise that outcome?

Put in another way, the larger the tenement, the higher the financial contribution of bidders for the tenement was likely to be. And the state was likely to receive a far higher financial contribution from the successful bidder for a large tenement than the sum of the financial contributions that would likely be made for fractions of that tenement, were it to be sub-divided. The breaking up of the North Bylong tenement made no practical sense. It was a decision made by Mr Macdonald, seemingly on the spur of the moment, without any apparently valid reason, and without the appropriate investigation, study or even thought.

Redesigning the larger tenement

Once Mr Macdonald had made the direction that the Mount Penny tenement was to be created, it was inevitable that the tenement would be created in the eastern section of the larger North Bylong Area – Mount Penny itself is on the edge of Cherrydale, close to the western edge of the Anglo tenement. The evidence was that for a new tenement, to be known as the Mount Penny tenement, and containing Mount Penny within its boundaries (and these matters represent Mr Macdonald's wishes and instructions), it would have to have its eastern boundary adjacent to, and contiguous with, the Anglo tenement. Moreover, according to the evidence, it was obvious that, for practical reasons, the new Mount Penny tenement to be created should have its northern boundary adjacent to the national park and its southern boundary adjacent to A286 (see figure 1).

Mr Gibson testified that Mr Macdonald gave the instruction that Mount Penny "needed to be a certain level to fit the criteria". He indicated that this involved the tenement being for a small or medium sized mine. Mr Mullard testified that Mr Macdonald made it clear that he wanted Mount Penny as a small area. Mr Mullard gave instructions to the DPI staff to draw the Mount Penny tenement in accordance with these criteria. Significantly, once the Mount Penny tenement had to satisfy those criteria, the western boundary had to run more or less from north to south in the middle of the North Bylong Area. In that way, one would create a tenement with a resource of less than 100 million tonnes, which was the applicable criterion. As has been pointed out, the Mount Penny tenement almost exactly covered the area that was depicted in blue in the map that Mr Macdonald was sent on 9 May 2008.

Once the larger North Bylong Area was redesigned to create the smaller Mount Penny tenement, in accord with Mr Macdonald's instructions, it was also inevitable that it would fall more or less over the top of Cherrydale – Mount Penny being on Cherrydale, and at the western edge of the Anglo tenement.

As explained, the actual way in which the Mount Penny tenement eventually emerged, was the inevitable product of working within the boundaries of Mr Macdonald's directions and other design imperatives. Mr Mullard described the features of obeying Mr Macdonald's wishes and instructions as follows:

> *So, well, I'm sure you understand, Mr Mullard, the Commission – one of the things that the Commission is trying to find out is whose idea was it to create the Mount Penny tenement in the way it was created. What you've told us is that you were directed by the Minister's office to create a Mount Penny tenement, you've said that you knew it had to be on the eastern side.*
>
> *Was that a matter of inference that you drew or were you told that?---Well, it was an inference I drew because that's where Mount Penny, the location was located.*
>
> *Are you saying that it was a necessary inference? Once you were told to create a Mount Penny tenement in the North Bylong Valley, it was necessary that that would have to be in the eastern boundary. Do you, is that what you're saying?---That's correct. My, in my mind, Bylong, if you talk about, I mean some of the maps descriptions talk about Bylong Mount Penny. Bylong was in the west, Mount Penny was in the east.*
>
> …
>
> *THE COMMISSIONER: In this, in this allocation one thing was clear there had to be a Mount Penny tenement?---That's correct.*
>
> *MR CHEN: And it was also clear that the Minister was referring as you said to the eastern part of what was the North Bylong map that Ms Wiles had prepared which is at page 107, that was the other thing you said was clear?---That's correct.*

Edward Obeid Sr testified that, from the information he had given Mr Macdonald, Mr Macdonald would have been able to work out the position of Cherrydale. Mr Macdonald, in any event, would have seen from the map (which is figure 1) that Mount Penny was located to the east of the Anglo tenement. Thus, it would have been obvious to Mr Macdonald that, as Cherrydale was next door to the Anglo tenement, its eastern boundary would be adjacent to the western boundary of the Anglo tenement. It was in this knowledge that Mr Macdonald directed that a Mount Penny tenement be created to fit the criteria of a small mine. The Commission finds that he deliberately gave the instructions to Mr Mullard with the specific intent that those instructions would result in the Mount Penny tenement being created over Cherrydale. It would be a tenement suitable for a small mine and would cover Cherrydale like a blanket.

The newly-created Mount Penny tenement was to be included amongst the new areas that were to be released to the market. Some other decisions were made, including a decision that the new areas would be placed on the market through an EOI process – commonly abbreviated to "the EOI process". A decision was made that the EOI process was to commence at the end of July 2008.

Because there had been no Mount Penny in the original ministerial briefing, a separate and specific briefing had to be prepared. The briefing had to be accompanied by a map defining the boundaries of Mount Penny.

The map in question appears on page 70 as figure 4.

On 16 June 2008, there was to be a third meeting with the minister. On that day, Mr Mullard received the DPI's new map of the Mount Penny tenement (figure 4). Mr Mullard took the map with him to the meeting with the minister, and Mr Gibson had a specific recollection of receiving information from Mr Mullard, including the map.

The effect of these arrangements was that, after the meeting on 16 June 2008, only one tenement was properly defined and decided upon – the Mount Penny tenement. There was still ongoing debate as to which of the other potential areas would be included in the EOI process. Some of the areas that were eventually included had not yet been considered. After the meeting on 16 June 2008, Mr Mullard went away with instructions in respect of

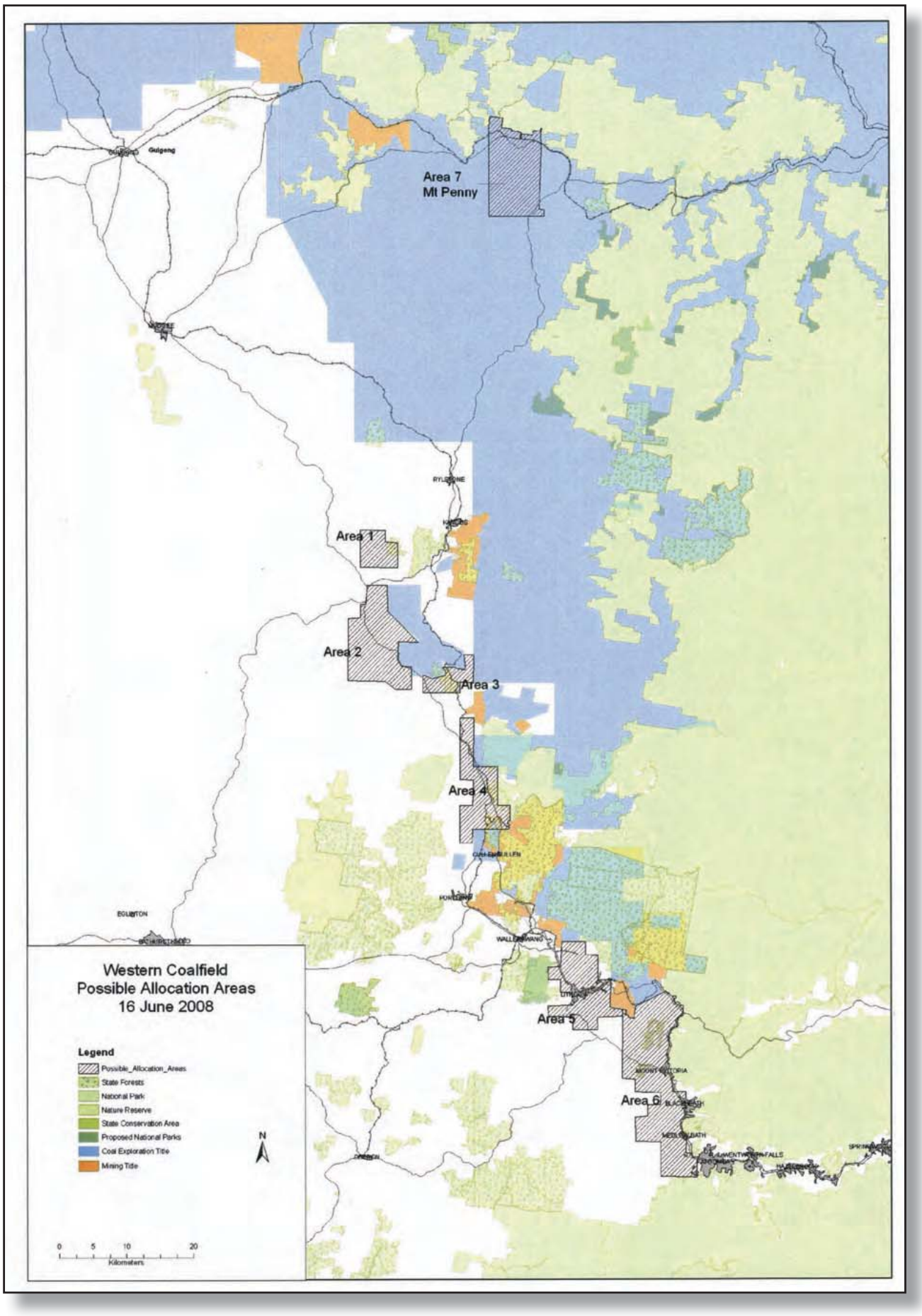


Figure 4: Map, 16 June 2008 – Western Coalfield Possible Allocation Areas

other potential tenements. So far, Mount Penny had gained special ministerial attention far beyond any other tenement.

From mid-June to August 2008, the DPI worked on refining the new areas to be released to the market. The original date for the EOI process had to be extended.

In the end, it was resolved that there would be 11 areas that would be released to the market. These included Mount Penny, Glendon Brook and Yarrawa. It was decided that the EOI process would commence in September 2008.

Chapter 16: The limited form of EOI

It will be recalled that Mr Macdonald claims that Mount Penny was created because he wanted to create a "competitive tension" in the EOI process. It might be supposed that the purpose of creating a competitive tension was to maximise the benefit to the state. The Commission has passed judgment upon that evidence earlier, but as a further indication that such a claim is disingenuous, Mr Macdonald directly involved himself in the way in which the competitive process for the areas, including Mount Penny, was to be conducted. In so doing, he made a series of decisions that had the effect of deflating any "competitive tension" and reducing the possibility that the state of NSW would maximise its benefits.

There were two other aspects of the EOI process that were the subject of particular direction by Mr Macdonald. The first was that the participation in the EOI process would be by invitation only. The second was that the invitees would be limited to "junior miners". Before going to the detail of those two particular decisions, this chapter deals with a submission made by Mr Macdonald that he was justified in taking these actions.

As at January 2008, the DPI had in place *Guidelines for Allocation of Future Coal Exploration Areas* ("the 2008 Guidelines"). The 2008 Guidelines envisaged that, in certain circumstances, a limited form of EOI process could take place. Specifically, according to the 2008 Guidelines, a limited form of EOI could take place in connection with "small areas unrelated to existing mines". The 2008 Guidelines themselves defined small areas to include "Remnant coal resources left from previous mining operations" and "Small deposits with some development potential".

In the ministerial briefing dated 3 June 2008, the DPI had identified nine areas – six small areas and three large areas – that the DPI considered had potential to be suitable for competitive EOI. In the ministerial briefing, the DPI identified six small areas in the Western Coalfield that "would be suitable for smaller industry players". The DPI did not recommend to Mr Macdonald that there be a limited form of EOI for these six small areas. The original brief and talking points said: "Potential coal resources which may be suitable for a Competitive Expression of Interest".

Mr Macdonald has submitted that placing limitations on the EOI process was consistent with the 2008 Guidelines. That is literally, but only partly, true. The 2008 Guidelines only envisaged limitations for "small" or "remnant" areas, and did so without specifying what those limitations might be. The problem is that the particular limitations insisted upon by Mr Macdonald were limitations that could not be justified. They were limitations that damaged the competitive process, prejudiced the state's assets, and were, in one instance, self-defeating.

The limitation to "invitees only"

The first limitation Mr Macdonald placed upon the EOI process was that it was not to be an "open" process, but that participation would be by invitation only. This decision might be justifiable, if the only areas to be opened were small or remanent areas, but not otherwise. At the time Mr Macdonald made this decision, the areas that were to be opened had not even been settled.

A limitation of this kind was contrary to NSW Government policy, which called for open processes. The government policy was designed to encourage competition and reduce the risk of favouritism. The advantages behind the policy are obvious.

It was not easy to discern any advantage in limiting the participation in the bidding to invitation only. It plainly undermined Mr Macdonald's expressed desire to create a "competitive tension".

The "junior miner" policy

Mr Macdonald, in his submissions, does not dispute that he made the decision to confine the invitees to the EOI process to small to medium miners. Mr Macdonald did not seek any advice from the DPI on whether such a decision was economically good or bad, or whether or not it was a good or bad policy, more generally.

Mr Mullard's evidence was that, after he provided the ministerial brief dated 3 June 2008, the minister advocated that the process should be undertaken by a registered competitive tender. Mr Mullard's evidence was:

> *At that point in time was it your understanding that these two areas to the extent that they may be refined, reviewed and ultimately released would be by competitive Expression of Interest?---My understanding was that they would be by competitive interest although I, I, I think the smaller areas the Minister was talking about that being a restricted competitive tender.*
>
> *That was not your idea to restrict the numbers or class of invitees was it?---No, it wasn't.*
>
> *Whose idea was it?---It was the Minister's, well, it was communicated to me by Jamie Gibson. In fact I, I do remember the Minister actually advocating that idea as well.*
>
> *And you're clear he gave you a direction on it?---I'm clear the Minister's office gave me a direction on it.*
>
> *So you're certain that you didn't, you weren't initiating this as being closed tender because of your own previous position towards it?---Definitely not.*

A "closed" or limited tender of this kind was contrary to government policy at the time. As Mr Iemma explained when giving evidence, the starting point for any government tender was that it should be open to all players.

Dr Williams, then CEO of the NSW Minerals Council, explained that the industry had a negative reaction to the limited-form EOI process that the government announced in September 2008. She said that the decision to limit participation in the process to small or medium sized mining companies was "unprecedented", that the industry's reaction was one of "outrage", and the decision was contrary to the interests of the state:

> *And at your personal level given the experience that you had in the industry at that time, what was your reaction to it?---I thought it was contrary to the interests of this state, I thought that these leases ought to be tendered to companies that were best placed to develop those which had nothing to do with their size.*
>
> *Well in determining that it could be contrary to the interests of the state, in what sense?---You need to have companies that are best qualified to exploit a resource, to identify a resource and exploit it and to build a mine and sustain a mine in order that you can actually sustain the royalty revenues that go to the people of New South Wales via government and that is the criterion that is typically been* [sic] *used to inform a decision for the awarding of a lease.*
>
> *Can I just ask you this, if the government was to open these mines and throw it open to all colours they would get presumably both big and small players responding?---They may.*
>
> *Well would the market sort itself out as to which kinds of areas that the big players were interested in and those areas in which only small players were interested in?---Yes, it would.*
>
> *Was there, and can you understand if there was any policy imperative which might make it desirable to limit the participants only to small or medium-sized miners and thus to exclude the large miners?---No, I can see no policy imperative for that.*

You met with the Minister from time to time, is that so?---Yes.

Did he ever try to explain to you how there could be a positive policy imperative behind imposing such a limitation?---No.

Did you ever receive a satisfactory explanation as to why a decision like this was made to limit the participants to only small or medium sized miners?---No.

Mr Macdonald has attempted to justify his decision in a variety of ways. For example, he has submitted that part of the decision was informed by his desire to avoid "land banking" by larger miners. At best, Mr Macdonald had anecdotal evidence of this. As Mr Gibson explained during evidence, Mr Macdonald did not seek any kind of external advice to ascertain whether or not his policy initiative was good or bad, necessary or unnecessary. It was also said that a policy reason was to encourage diversity in the mining industry, but whether or not it would achieve this is a matter of some debate. There was evidence that opening up exploration licences for junior exploration companies would be self-defeating – most junior miners have limited means to perform exploration, and would be incapable of meeting infrastructure costs. It would be inevitable that a junior miner would be looking to bring in the skills and capital of a larger mining company to undertake mining the resource.

Conclusion

In light of these matters, it might seem that Mr Macdonald's decision to limit the EOI process in this way was not just puzzling but it was unjustified, unprecedented and counter-productive. Those limitations did, however, bring about one effect. Because the list was restricted to "invitees only", it meant that Mr Macdonald would know who exactly was on the list. That would be convenient if, for example, Mr Macdonald wanted to provide that information to a third party. And the limitation to "junior miners" meant that the names of the companies on that list might be the kind of companies that would be more amenable to entering a joint venture; for example, a joint venture with one of the landowners in the tenement.

Chapter 17: The Obeids secure rights involving more property in the Bylong Valley

As has already been explained, members of the Obeid family were behind the purchase of two additional rural properties in the Bylong Valley known as Donola and Coggan Creek. Donola was adjacent to the northern boundary of Cherrydale. The southern boundary of Coggan Creek was adjacent to the northern boundary of Donola. The eastern boundaries of Coggan Creek, Donola and Cherrydale, were adjacent to the Anglo tenement. Each was within the area that ultimately became the Mount Penny tenement. When the land covered by the three properties is combined, it covers a substantial proportion of the whole of the area that was to become the Mount Penny tenement. This can be seen from the map which appears below as figure 5.

Ownership of a rural property within the boundaries of a newly-declared coalmining tenement can bring large and rapid financial rewards. Coalmining companies are eager to acquire control over the land within any tenement and, as a consequence, are willing to pay multiples of ordinary value of the rural properties. In some instances, mining companies have been known to pay up to 10 times the ordinary value of a rural property.

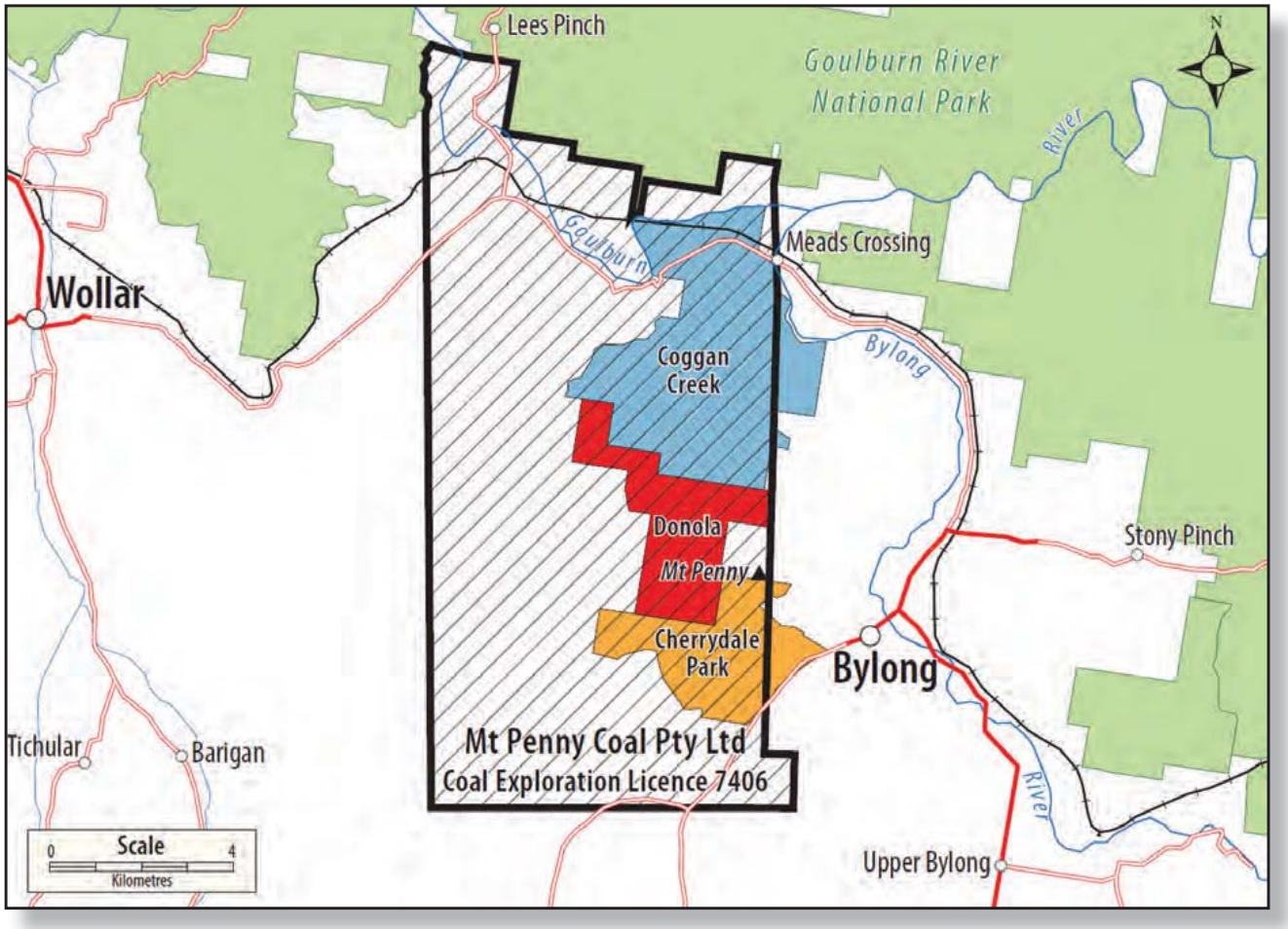


Figure 5: Map – Mt Penny Coal Pty Ltd Coal Exploration Licence 7406

This makes early knowledge of the likely creation of a coalmining tenement extremely valuable information. Armed with foreknowledge, an investor could purchase a rural property for its ordinary market value, and sell it for multiples of that purchase price after the mining tenement is created. The Commission investigated whether that was what happened here. The Obeid family claimed in evidence that they did not have foreknowledge that a Mount Penny tenement was to be created, and they organised the purchase of Donola and Coggan Creek for other reasons.

Those other reasons were not always the same. Moses Obeid, Paul Obeid and Gerard Obeid asserted that Donola and Coggan Creek were purchased as part of a strategic alliance designed to protect the Bylong Valley and Cherrydale from coalmining. Edward Obeid Sr also appeared to endorse this approach. Paul Obeid seemed to accept that the properties in combination could produce a better financial outcome in terms of what they called an "Exit Strategy". Paul Obeid agreed that the purpose of the purchase "was to get the advantage of this increase three or four times in the value of the land". And then Damian Obeid – the Obeid son with responsibility for overseeing the family's agricultural interests – said that the properties were purchased for grazing purposes.

The additional properties – Donola and Coggan Creek

Donola is a comparatively small property in the Bylong Valley – 607 hectares for mixed farming and grazing purposes. The Obeids took an option to purchase Donola for $600,000. There was no homestead on the property and there were no naturally-occurring or permanent water courses. There were some negative features – access could be gained to it only along a five-kilometre dirt road that ran through a neighbouring property. The soil was below average, there was a high percentage of unusable country and only limited pasture improved country.

Coggan Creek was a far more attractive property, comprising 1,457 hectares with direct frontage to the Goulburn River. The Obeids took an option to purchase Coggan Creek for $3.5 million. There was a dilapidated single-level homestead and various improvements on the property. Part of the property was suitable for irrigated cropping and the title held three water licences. The Sandy Hollow–Ulan railway intersected Coggan Creek, which made it especially attractive to a coalmining company, should a mine be opened in the area.

Did the Obeid family have foreknowledge of the Mount Penny tenement?

Members of the Obeid family were given early information by Mr Macdonald that a new tenement was to be created in the Bylong Valley. That information was sufficiently detailed to enable those members of the Obeid family to know where the tenement was to be located.

Moses Obeid, Paul Obeid and Gerard Obeid possessed this information sometime before 23 June 2008. There has already been reference to the communications in May and June 2008 between Mr Macdonald and Moses Obeid when relevant confidential information relating to, amongst other things, the opening of about 20 exploration licences "in your region" was disclosed. Moses Obeid expressly admitted that this information was relied on by him to take steps for the purchase of Donola and Coggan Creek for the purposes of making a windfall profit.

This was not a solo project by Moses Obeid – he gave evidence that he shared the information that he obtained from Mr Macdonald about the exploration licences with his brothers Paul Obeid, Damian Obeid and Edward Obeid Jr, and perhaps Gerard Obeid. He also involved his father:

Do you remember ever having a discussion with your father Edward in which you mentioned that you intended to buy the property or acquire the rights to buy the property known as Donola?---Yes.

Paul Obeid admitted that he had found out from Moses Obeid about the DPI's intention to open exploration licence areas, and that Donola and Coggan Creek were bought because of that knowledge. There is other evidence, including notes taken by an Obeid solicitor, Mr Rumore (which will be discussed later), that indicate that Paul Obeid and Gerard Obeid were also involved in this decision.

A further factor that favours the conclusion that the Obeids were acting upon confidential information is the speed with which they moved to secure the rights over Donola and Coggan Creek. There is in evidence a rural inspection report for Coggan Creek dated 20 June 2008 and a letter dated 23 June 2008 from Elders Real Estate to Mark Morgan, a solicitor acting for the Boyd brothers, relating to negotiations for Donola. As from about the end of June 2008 onwards, a series of draft Heads of Agreement were drawn by Mr Rumore with Obeid interests as purchasing parties but with other potential co-purchasers, the identity of whom changed in each succeeding Heads of Agreement. These differing Heads of Agreement demonstrate that, over this period, the Obeids

were contemplating entering into various kinds of purchase transactions with various people, whereby they were hoping to arrange for the purchase of Donola and Coggan Creek and to obtain an interest in each of these properties when they were so purchased.

Eventually, contracts for the purchase of Donola were exchanged on 6 August 2008 and options for the purchase of Coggan Creek were obtained by the same date.

The rights to these properties had to be secured before the EOI announcement became public. Consistent with this haste, there is a complete absence of evidence of any investigation that the Obeid family undertook *before* taking out options to purchase. They had no information that allowed them to assess the economic viability of the properties as rural enterprises. There is also evidence that suggests that, in their haste, the Obeids agreed to pay too much for Coggan Creek – the vendor's agent estimated that the property was worth between $2.7 million and $2.8 million, but the Obeids agreed to pay $3.5 million. This discrepancy is explicable if the purchase was made in haste and being driven by a need to secure Coggan Creek before the public announcement of the coalmining tenement.

These matters would be sufficient to establish that some members of the Obeid family were consciously acting upon the information received from Mr Macdonald, but the evidence goes on to demonstrate two further matters – that Mr Macdonald had provided the Obeids with a great deal more information than any had admitted to, and that Mr Macdonald was fully aware of the Obeids' intentions in this respect.

From the inception of a plan to purchase Donola and Coggan Creek, the Obeid family were looking for other parties with whom they could purchase the properties. Eventually, the Obeids came to purchase Donola on an equal sharing with their business and personal friends, Rocco Triulcio and Rosario Triulcio, and eventually another family friend, Mr Lewis, came to purchase Coggan Creek (subject to an arrangement to provide 30% of the profits from any dealings with Coggan Creek to the Obeid family). But, as explained above, before those arrangements were secured, the Obeids had approached other potential co-investors. The evidence of these investors is relevant.

The attempted involvement of Mr and Mrs Fitzhenry

At the time of these events, Moses Obeid lived in Elizabeth Bay, next door to Peter Fitzhenry and Nicole Fitzhenry. The families became close friends and the contact between them was close. Mr Fitzhenry gave evidence that he had discussions with Moses Obeid soon after the Obeid family purchased Cherrydale. Mr Fitzhenry gave evidence of a discussion that he had with Moses Obeid:

> *Do you remember in broad terms, not precise words, but in broad terms what Moses said about it?---Moses said that the results of the* [sic] *buying Cherrydale and the opportunity to get the coal and actually produce the deal* [will] *be a life changing experience.*
>
> …
>
> *Did he ever speak to you about the potential that you might get involved in the project?---He did.*
>
> *And what did he say to you?---That I should be buying the property next door because it had a coal, a coal or it had a railway line running through the top of it and I was, I should mortgage something and borrow the, borrow the money to buy the farm and I would then reap a huge amount of money.*

Mrs Fitzhenry gave evidence that she was told of the Obeid family's intention of purchasing Cherrydale and that, within months of the purchase, she had a conversation with Moses Obeid along the following lines:

> *Yes?---Well, initially they were just talking about the fact that it was going to be a family farm but then later on he was, he was referring to, to coal on the farm.*
>
> *Right. Now, just to try and put that into perspective, how long after the time when the family purchased the property, was it days, weeks or months after that, that there were discussions which involved coal?---I would say it probably would be months.*
>
> *And in what context did he mention coal?---He said that they would be, that there was, there was something to do with coal leases on the farm and that they would be making a lot of money out of it.*
>
> *And did he talk about any other properties nearby?---Yes, he referred to an adjacent property to Cherrydale.*
>
> …
>
> *THE COMMISSIONER: ... You, you said that the coal was mentioned in a period of months after you'd been told that they'd purchased Cherrydale, that's your evidence?---That's correct.*
>
> *When you talk about months could it be more than a year or less than a year?---Oh, no, it was less than a year.*
>
> …
>
> *And did he tell you how this could make them as he said money? --- There were, there were varying conversations which I was obviously tuned into some and not in others. I, I remember him, he, when he referred to the, to the Coal*

Leases he was referring also to a company that was being set up and he was meeting with a gentleman and he was getting that all in order.

Mrs Fitzhenry gave evidence that Mr Macdonald was mentioned by Moses Obeid in this context:

...Then there was more than one conversation where Moses spoke of coal?---There was many conversations after he had referred to the coal.

Did he ever in that context refer to Ian Macdonald?---Yes, he did.

...

Nobody's pressing you for that detail but according to the best of your recollection?---The best of my recollection there was an association between Ian Macdonald and his father and Cherrydale and the coal.

But is that your clear recollection, that he mentioned Ian Macdonald in that - - -?---Yes, it is.

Did he say anything about the, the relationship between Ian Macdonald and Eddie Obeid?---Yes, they, they were quite close from what I could gather.

All right. And so you're confident of that, that Moses was speaking about some involvement with Ian Macdonald?---Yes.

And this is conversation which occurred maybe what, a year after the family purchased the farm?---No, no, it was less than a year.

...

What was said about Mr Macdonald? Was he going to do something? What was said about him?---There was a lot said about varying Ministers so basically it was just, you know, Ian's, Ian's going to help Dad out.

About, anything said about how he was going to help dad out?---Well, it was, it was in the same conversation with reference the property at Cherrydale or the property Cherrydale.

It is apparent that there has been a falling-out between Edward Obeid Sr, Moses Obeid and Mr Fitzhenry and Mrs Fitzhenry. Submissions were made that this falling-out was a basis to reject the evidence of Mr Fitzhenry and Mrs Fitzhenry, but the Commission had the opportunity of seeing each of them, and has formed a view that on the issues in respect of which they testified, they were generally credible and reliable. Mrs Fitzhenry, in particular, appeared to have a good recollection of detail. The Commission accepts their evidence. Much of what they had to say is similar to the evidence of other witnesses.

The attempted involvement of the Boyd brothers

By June 2008, the Obeids had agreed to purchase Donola and Coggan Creek. The evidence is unclear as to the exact detail of how this was organised, but in the first place the options appear to have been taken out in the names of Brian Boyd and Garry Boyd.

The Boyd brothers had previously been involved with the Obeid family in property development. On a date that is not established by the evidence, but must have been before 23 June 2008, one of the Obeids telephoned Garry Boyd about looking at a property in the Bylong Valley.

Garry Boyd said that the Obeids wanted to purchase a block of land next door to Cherrydale. He told his brother, Brian, about the proposition. Brian Boyd was not attracted to it. In any event, the Boyd brothers drove up to a roadhouse near Lithgow where they met up with Moses Obeid and Damian Obeid. From there, they followed the Obeids to Cherrydale.

At Cherrydale, they also met the agent who was selling the property. Garry Boyd remembered travelling down to a railway line on a property and the agent telling him that the line was great because if coal was ever found on the property it could be transported easily. By this stage, however, the Boyd brothers had decided not to go ahead with the transaction.

Garry Boyd told the Commission that the Obeids had not spoken to him about buying the properties to try to prevent coalmining from entering the Bylong Valley or to set up a land alliance to prevent miners coming in.

The options that were taken out in the name of the Boyds appear to have been taken out without their agreement.

The Obeids retain Colin Biggers & Paisley

The Obeids needed a solicitor to act on their behalf in respect of the proposed transactions.

They retained Mr Rumore, a senior partner at Colin Biggers & Paisley. The files of Colin Biggers & Paisley were acquired by the Commission, and they included notes prepared by Mr Rumore during conferences that he had with his clients. The notes are a valuable source of evidence. They are clear, contemporaneous and reliable. They demonstrate that Moses Obeid, Paul Obeid and Gerard Obeid had foreknowledge of the likely creation of the Mount Penny tenement, and were using that information as the basis to purchase Donola and Coggan Creek so that they would make windfall profits once the creation of the tenement was made public knowledge.

The first meeting occurred on 23 June 2008, when Paul Obeid and Gerard Obeid met with Mr Rumore. At this stage, it appears that Paul Obeid and Gerard Obeid still believed that they would be able to purchase the properties in some arrangement with the Boyd brothers.

Paul Obeid and Gerard Obeid instructed Mr Rumore to the effect that, once the EOI process was issued, they anticipated that the value of the rural properties would increase – Mr Rumore's note is that the "land value increases many fold (3 or 4 times)".

The Boyd brothers are out; an approach is made to Mr Fang

It appears that, sometime after 23 June 2008, the Boyd brothers must have told the Obeids that they were not interested in the project. Following that, the Obeids attempted to make a deal with Mr Fang. The significance of Mr Fang's evidence has already been discussed.

On 26 June 2008, Mr Macdonald introduced Mr Fang to Edward Obeid Sr, and they had their discussion about Mount Penny. A couple of days later, Mr Fang visited Cherrydale where he met with some members of the Obeid family. On that occasion there was a discussion with Mr Fang that included references to "coal resources underneath" their property and that "the Government probably will allow this area to be explored".

A return to Colin Biggers & Paisley

On 30 June 2008, Moses Obeid, Paul Obeid and Gerard Obeid conferred with Mr Rumore at Colin Biggers & Paisley. On this occasion, there was a discussion to the effect that Mr Fang's company, the Tianda Group, was likely to be the "new partner", presumably in replacement of the Boyd brothers.

In addition to his notes, Mr Rumore had some recollection of this particular meeting and gave this evidence:

...So the, these provisions suggest to me that the Obeid brothers were contemplating the real prospect of exploration, of coal exploration activities being conducted on the three properties?---Yes.

MR WATSON: Could I add to that by taking you back briefly to page 882 where after telling you that the Boyds were out they told you that the Tianda Group was the new partner?---Yes.

Did they tell you, can you recall, that Tianda was in fact a company which was seeking to mine coal in New South Wales?---It says it's associated with one of the ultimate bidders for coal development so - - -

If you'd been putting all of this together it's pretty plain that what they were doing was actually putting together agreements to hopefully open up the property for coalmining?---Yes.

As it turns out, Mr Fang did not wish to continue with the proposed partnership. On 18 July 2008, Moses Obeid and Gerard Obeid told Mr Rumore that the "deal with Tianda is off". This left the Obeids in a position where they needed to find new partners, and, in due course, they did find investors willing to come in on the projects – matters relevant to that are discussed later in this report.

Conclusion

As the notes of Mr Rumore and his evidence make plain, and as the course of conduct makes plain, members of the Obeid family had access to foreknowledge that a coalmining tenement was to be created in the Bylong Valley and in the area of Cherrydale. This was confidential information that had been provided to the Obeid family by Mr Macdonald. Members of the Obeid family used that information for the purpose of attempting to make a profit.

The Commission finds that the confidential information was provided deliberately, and in furtherance of an agreement between Mr Macdonald and the Obeids.

The Commission does not accept the evidence of Mr Macdonald, Edward Obeid Sr and Moses Obeid about the extent of the information that was provided – it is obvious that much more information was provided than those persons have owned up to. The Commission accepts the evidence of Mr Fang, and that proves that Mr Macdonald was aware as early as June 2008 of the Obeid family's intention to engage in a mining deal in the Mount Penny area.

Moses Obeid admits that he received useful information (which was confidential) from Mr Macdonald. For the reasons explained above, the information received was probably much more detailed than the information to which Moses Obeid admitted.

It is also plain from the notes of Mr Rumore that each of Paul Obeid and Gerard Obeid had access to this information – the matters appear to have been freely discussed between them at the various conferences. The Commission also regards it as likely that Edward Obeid Sr was privy to this information, given the closeness of his relationship with Mr Macdonald, the early contact between them, and the evidence of the discussions his sons had with him about Cherrydale.

The purchase of Donola

After each of the Boyd brothers and Mr Fang had declined to participate in a joint venture, the Obeids were left looking for co-investors to become involved in the purchase of Donola and Coggan Creek. In the case of Donola, the Obeids went to Rocco Triulcio and Rosario Triulcio – two men with longstanding personal and commercial relationships with the Obeid family.

The Commission has already found that particular members of the Obeid family had received confidential information from Mr Macdonald, and had used that information by taking an option to purchase Donola. The Triulcio brothers were swiftly brought in on this transaction, and the real question for resolution is whether they were brought in after having been told of the confidential information regarding Mount Penny, or whether there was some innocent explanation of the circumstances in which they became co-investors with the Obeid family in Donola.

The involvement of the Triulcio brothers

Rocco Triulcio and Rosario Triulcio are the proprietors of a property development company called Challenge Property Investments Pty Ltd.

Rocco Triulcio said that he was approached by Paul Obeid regarding the potential purchase of Donola in August 2008. The negotiations must have been brought to a swift conclusion because there is evidence that the Triulcio brothers had taken formal steps to purchase Donola by 6 August 2008.

The timing is significant, as the intention to open an exploration licence in the Mount Penny Area was made public only on 9 September 2008.

The Commission has arrived at the view that the Triulcio brothers were bought in for the purchase of Donola upon the basis of the confidential information, and that they were lured to do so by the very large profit that would become available once the mining tenement was formally created. This finding involves disbelieving the evidence of the Triulcio brothers. Neither of the Triulcio brothers gave believable evidence.

There are several reasons why the Commission has arrived at the conclusion that the Obeids had provided the Triulcio brothers with the confidential information and the Triulcio brothers acted upon it.

The first stems from a matter mentioned earlier; that is, the very closeness of the relationship between the Obeid family and the Triulcio brothers. The two families appear to have been business partners in several different kinds of developments, and to be closely linked business-wise, financially and socially. There was evidence that the businesses were financially connected, and that there were significant inter-company loans. There was also evidence that some of the money that was used by Edward Obeid Sr toward the purchase of Cherrydale came either from a loan made by the Triulcio brothers or by their father. The Commission would have no hesitation in accepting that, if the Obeids possessed confidential information, they would be willing to share it with the Triulcio brothers for the mutual benefit of the two families.

The second is the speed with which the Triulcio brothers acted after having been told of the opportunity to purchase Donola. Only days passed between Rocco Triulcio being told of the property and his decision to purchase it. Rosario Triulcio did not even see Donola before it was purchased. There is no evidence that the Triulcios did anything to verify the market value of the property. There is no evidence that they made any enquiries as to the viability of the property as a rural enterprise, and the evidence clearly established the Triulcio brothers did not know much about agriculture. Under questioning, it became obvious that the Triulcio brothers knew nothing about previous activities on Donola.

The third is the participation of the Triulcio brothers in an elaborate corporate and trust structure to make the purchase. This was the simple purchase of a moderately-priced rural property, and there was no apparent need for any kind of structure, much less a complex structure to be put in place. The Obeids had commenced the purchase by the adoption of a trust structure and the insertion of their solicitor, Mr Rumore, as director of the corporate vehicle, Geble Pty Ltd, and as their trustee. They admitted that this was done to disguise the Obeid family involvement. When the Triulcio brothers were introduced, the transaction became more complex, with the insertion of John Campo, as the director of Geble Pty Ltd and the creation of the Elbeg Unit Trust. Neither Rocco Triulcio nor Rosario Triulcio could offer an explanation for why this was done, and their solicitor, Dianne Nilson, was in agreement that the complex ownership structure was unnecessary.

The Commission has arrived at the view that the complex structure was adopted for the sole purpose of hiding an Obeid involvement, and this, in turn, was done because it may otherwise have surfaced that the Obeids had received confidential information from Mr Macdonald or would benefit, or had benefited, by the creation of the Mount Penny tenement. In making these findings, the Commission has taken into account the evidence of the Triulcio brothers' accountant, Mr Campo, that the only sensible reason to explain the arrangement was so that the Obeid involvement

could be concealed. These elaborate measures to disguise the Obeid involvement included Paul Obeid instructing Mr Campo to tell lies to the journalist Anne Davies of the *Sydney Morning Herald* as to the ownership of Donola and the circumstances in which it was purchased.

The fourth reason the Commission has arrived at its conclusion stems largely from the falsity of the account given by the Triulcio brothers as witnesses. Each of the Triulcio brothers gave evidence that they were attracted to purchase Donola upon the basis that they had been looking for a leisure property, but the facts show that to be untrue. Even though each of the Triulcio brothers has had access to the use of Donola since it was purchased five years ago, neither has returned to visit the property. In fact, it remains the case that Rosario Triulcio has never even been to Donola. Neither of the Triulcio brothers seem possessed of any of the information that may have been elicited had the purchase been genuine; in particular, their lack of knowledge as to how the property could be used or had been used before they purchased it indicates they were not interested in Donola as a rural or leisure property.

Conclusion as regards the Triulcio brothers

The Commission concludes that Rocco Triulcio and Rosario Triulcio agreed to purchase Donola only because they had been provided with the confidential information that the Mount Penny tenement was soon to be announced. The Triulcio brothers received that information from members of the Obeid family – they certainly received the information from Paul Obeid but probably others as well. They must have known that the confidential information was improperly obtained, yet remained motivated to enter the transaction. And, as will be seen, the Triulcio brothers have received benefits as a result of acting upon this confidential information. The Triulcio brothers could stand to make a further substantial profit in the event that a mining lease is granted.

Notwithstanding these findings, the conduct of the Triulcio brothers does not amount to corrupt conduct as defined by the ICAC Act. That is because there is no evidence that the Triulcios knew that Mr Macdonald was the source of the information nor that they had done anything that adversely affected, or that could adversely affect, either directly or indirectly, the honest or partial exercise of official functions, or had done anything that otherwise constitutes corrupt conduct under s 8 of the ICAC Act.

The purchase of Coggan Creek

There was some delay in finding a suitable purchaser for Coggan Creek. Coggan Creek was a much larger and much more expensive property than Donola. Perhaps the delay was because it was more expensive, or perhaps the Obeid family had attempted to keep it for themselves, but these are matters of speculation and unnecessary to resolve.

Eventually, the Obeids did find a purchaser for Coggan Creek. Again, it was an old friend who had known the Obeid sons since childhood, Mr Lewis. Mr Lewis became the purchaser of Coggan Creek through a corporate vehicle originally known as Coopers World Pty Ltd but which changed its name to Justin Kennedy Lewis Pty Ltd. The latter company was in the nature of an alter ego for Mr Lewis, so the Commission will address this part of the report as though it was Mr Lewis himself who was the purchaser of Coggan Creek.

The Obeid family dealings with Mr Lewis are different from their dealings with the Triulcio brothers. The Triulcio brothers agreed to be involved in the purchase of Donola before the public announcement of the creation of the Mount Penny tenement, whereas the only evidence is that Mr Lewis agreed to purchase Coggan Creek *after* the public announcement.

The introduction of Mr Lewis

Mr Lewis said that, once the Obeids had introduced him to the idea of purchasing Coggan Creek, he was attracted to it because it gave him the potential to fulfil a desire to buy a rural property to set up a motorcycle track, or to provide a rural experience for his son, or for both those reasons.

It is not clear exactly when Mr Lewis was first invited by the Obeids to consider purchasing Coggan Creek. It is known that Mr Lewis travelled with one of the Obeid sons on 6 November 2008 to the offices of Colin Biggers & Paisley, where he conferred with the solicitor, Mr Rumore, and signed the necessary documents that bound him to purchase Coggan Creek.

As mentioned, the Obeids had obtained an option to purchase Coggan Creek by no later than 6 August 2008. The option price was then significantly above the then market value (the vendor did not know of the imminent EOI process) but was significantly below the market price once the EOI process was publicly known. Mr Lewis exercised the option (obtained by the Obeids) to purchase Coggan Creek after the public announcement of the EOI process. By then, the information on which the Obeids had relied to obtain the option was no longer confidential.

Conclusion as regards Mr Lewis

Mr Lewis was not a satisfactory witness. He gave evidence that, in the Commission's view, was false. Nevertheless, the evidence does not establish corrupt conduct on his part within the meaning of the ICAC Act, and the Commission shall say no more about him.

Chapter 18: The introduction of Mr Brook

Although the various male members of the Obeid family had wide and extensive experience in different kinds of businesses, none had experience in the entrepreneurial or practical side of coalmining. They needed assistance. They found that assistance through an introduction to an investment banker, Paul Gardner Brook. At the relevant time, Mr Brook was a senior vice-president of Lehman Brothers.

The introduction of Mr Brook

The Obeids were introduced to Mr Brook by an intermediary, Arlo Selby, who appears to have been in a business relationship or friendship with Moses Obeid, and a similar kind of relationship with Mr Brook. That is the only extent to which the Commission will rely upon Mr Selby's evidence. Mr Selby was an unreliable witness, and although he had many things to say that, on their face, were relevant to the investigation, he was so unreliable that the Commission has taken the view that his evidence should be put to one side.

The first meeting between Mr Brook and the Obeid family occurred at about 2.30 pm on 3 July 2008 in a coffee shop in the Sofitel Sydney Wentworth hotel in Sydney. So much is established. There is, however, a conflict between Mr Brook and Moses Obeid and other of the Obeids on most other issues involving their evidence. Given this divergence, it is necessary to assess the relative credibility of those witnesses. The Commission has already described the evidence of Moses Obeid – he was an unreliable witness, who gave deliberately untruthful evidence during the public inquiry. Similarly, the Commission has arrived at negative views in respect of each of Paul Obeid and Gerard Obeid. The reliability and credibility of Mr Brook's evidence is more difficult to assess.

Broadly speaking, the Commission formed a favourable view of Mr Brook and his evidence; he gave his evidence in a slow and careful way, and in a manner that was designed to be generally honest and accurate. There were numerous instances where Mr Brook gave evidence that was against his own self-interest. Even so, there were times when Mr Brook was hesitant in telling the full story, possibly as a matter of self-preservation.

One matter is clear – if there is a conflict between the evidence of Mr Brook and the evidence given by Moses Obeid, Paul Obeid or Gerard Obeid, the Commission generally prefers the evidence of Mr Brook.

Returning to the sequence of events, Mr Brook met with Moses Obeid and another Obeid son on 3 July 2008. The Commission accepts the evidence of Mr Brook that the following matters were raised during the discussion on that day:

> *Now in response to your introduction or pitch in relation to Lehmans, did Moses start talking to you about a potential deal?---Yes, sir.*
>
> *What did he say?---He said he was interested – well, he said he was looking at putting together a coal deal.*
>
> *Right. What else did he say about that? Anything?---He said that he owned, he had formed a, a property or a landholders' alliance in the Bylong Valley. I, I knew nothing about the area.*
>
> *… had you ever heard of the Bylong Valley - - -?---No.*
>
> *- - - before meeting Moses?---I'm not familiar with New South Wales.*
>
> *All right. Well, he said that I've formed a land alliance in the Bylong Valley. What did he go on to say?---He said that he'd formed a land alliance, they were conducting due diligence through geologists, consultants, to ascertain if there was any potential mining opportunities and by forming a land alliance he felt that they could be, participate at a mining commercial level other than just being landholders and receiving compensation.*
>
> …

THE COMMISSIONER: Was that, but was that the idea to effect this investment through a joint venture? Whose idea was that? --- As – Commissioner, Moses Obeid made it very clear when I first met him that they wanted to partner with a mining company to enjoy the benefits of its success if there was coal there.

There was evidence that there were two meetings of this kind between Mr Brook and some of the Obeids. The evidence is not quite clear whether some matters were discussed at the first meeting or second meeting. In the end, it probably does not matter. Mr Brook gave evidence that at one or other of the meetings he was shown a particular map by the Obeids who were present, and they indicated on the map itself the area in which the mining tenement was to be created.

During the public inquiry, Mr Brook was shown the map that was prepared by Ms Wiles on 30 May 2008, which is figure 2 in this report. Mr Brook identified figure 2 as being the same as the map that he was shown by the Obeids. He went on to say that, when he was provided with this map, he was shown a portion of the larger area that he described as "the initial tenement". He marked a copy of the map to show the area within the initial tenement. The map as marked by Mr Brook is figure 6 on page 84. The Commission has enhanced Mr Brook's marking to make it more legible.

What Mr Brook was shown coincided closely with the eventual Mount Penny tenement. The inference is that, by early July 2008, the Obeids who met with Mr Brook knew exactly where the Mount Penny tenement would be created. At the time he marked the map, Mr Brook recounted a conversation that he had with the Obeids:

...So they showed you that and then you were going on to show with your finger something else that was said or shown to you on the day?---They indicated that the area, the area to the west- - -

Yes?--- - - -the contiguous area, they believed through their sources, and they were those words, was much more coal rich than this initial area.

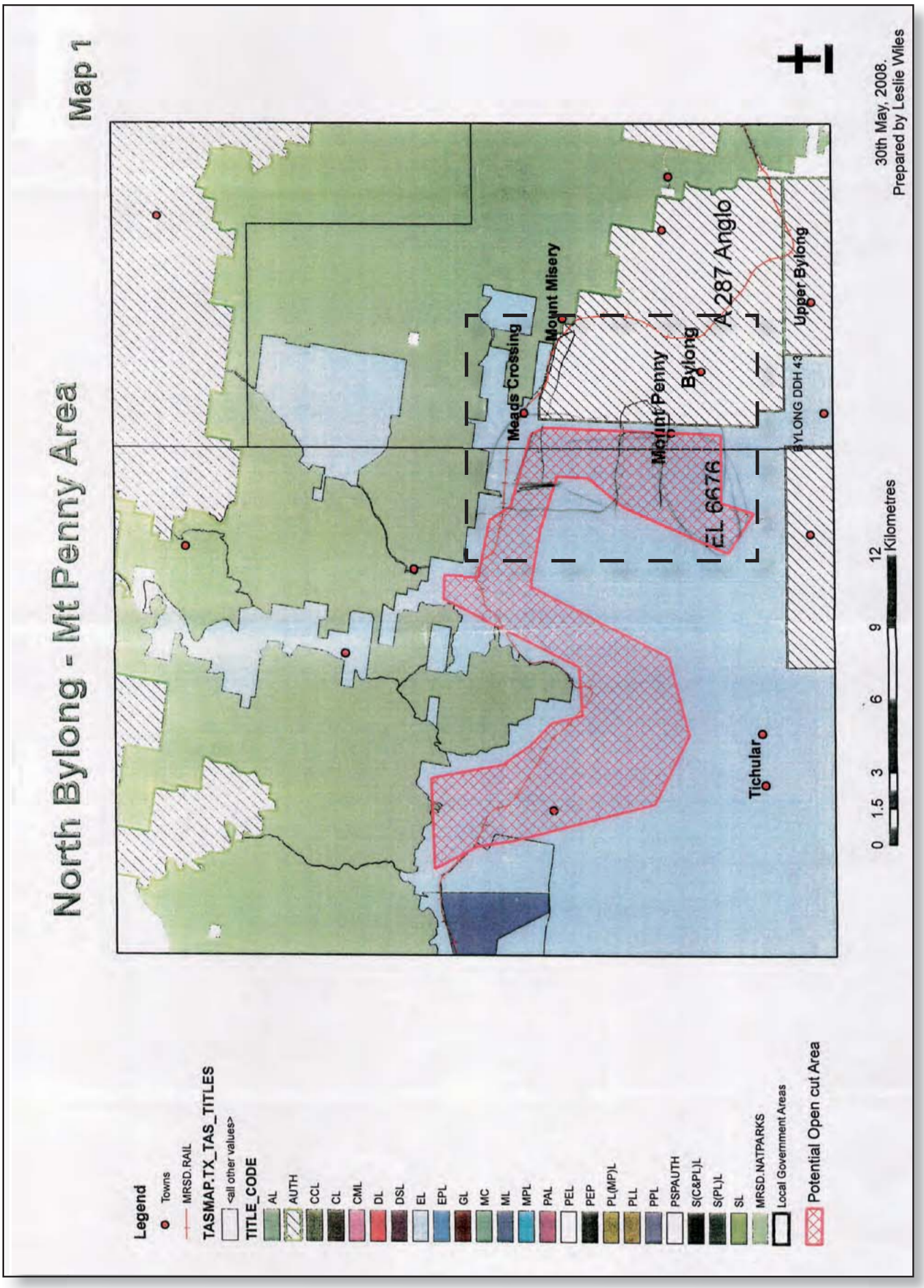
And did they indicate that that area to the west, the contiguous area, did they indicate whether it was likely that that would ever be opened or what they knew about that?---What they told me was that – and again at that time I knew nothing about mining or resources – they told me that once you start mining a particular area you have to apply for any contiguous areas, however the likelihood of being granted the contiguous area is very high. So instead of 100 million tonnes they were talking 700 to a billion tonnes.

Two particular matters of significance emerge from this evidence of Mr Brook. The first is that members of the Obeid family had a copy of a map of the Mount Penny Area. This was a map that had been produced by the DPI for the use of Mr Macdonald. Mr Macdonald had provided the map – quite improperly – to Moses Obeid (the detail of the findings in this respect have already been discussed).

The second feature is the reference to "contiguous areas". As discussed above, one of the features of reducing the size of the Mount Penny tenement was to leave untapped a large area to the west – an area "contiguous" to the proposed Mount Penny tenement. The large area to the west was likely to contain substantial and valuable coal reserves (more than in the Mount Penny tenement). The concept of "contiguous areas" is well recognised within the coalmining industry, and refers to areas that are adjacent to the particular mine or exploration area or tenement. If a mine is opened and, if there has been infrastructure spending by a particular mining company, that same mining company is likely to be rewarded by being given the benefit of the licence or lease in respect of the contiguous area.

Hence, the importance of the areas contiguous to the Mount Penny tenement – taking control of the Mount

Figure 6: Map, 30 May 2008 – North Bylong – Mt Penny Area marked by Gardner Brook



The Commission has enhanced Mr Brook's markings and placed a boxed insert in order to better locate these markings.

Penny tenement would provide the likely additional benefit of access to the major resource to its west.

The Obeid family had direct access to valuable information in respect of the mining aspects of the development of the Mount Penny tenement. So much is obvious from the fact that they had possession of the map, and so much is also obvious from their reference to "contiguous areas" – which seems to be a term of art which was probably previously unknown to them given their inexperience in coalmining areas.

Immediately after the meeting, Mr Brook sent an email to colleagues at Lehman Brothers. These attempts by Mr Brook to find sources within Lehman Brothers were diverted by the next development.

Chapter 19: The list of companies

One of the decisions made by Mr Macdonald, in connection with the EOI process to be undertaken for the new coal areas, was to restrict participation in the process by "invitation only". The identity of those companies was something known only within the minister's office and the DPI. Putting a list of invitees together, which the DPI did, was state business, and its contents were confidential.

Mr Macdonald disputes that the identity of the companies was confidential or that the information on the list of invitees was of a valuable nature. That submission is rejected. The identity of the companies invited to participate in the EOI process was valuable information. An unscrupulous investor who knew that a mining company was likely to be invited to participate, could use that information to invest in the company before the announcement was made. It might also be apparent to the knowledgeable investor which of the companies on the list was likely to put in a bid that could well succeed. At the least, an investor obtaining the list would be able to make enquiries to establish which companies on the list would be likely to put in relatively high bids. Knowledge of this kind would afford the investor many opportunities to acquire shares in the more likely companies. This very thing occurred in connection with the Mount Penny EOI process.

The Commission finds that the identity of the companies likely to be invited to participate in the EOI process was not only confidential information that belonged to the state of NSW, but information which was potentially valuable to outsiders.

Yet Mr Macdonald admits that he provided this very information to Moses Obeid. As explained below, Mr Macdonald does, however, attempt to provide an excuse for doing so – an excuse adopted and repeated by Moses Obeid. It is important that the Commission makes its finding on this subject quite clear: the Commission rejects the evidence of Mr Macdonald and Moses Obeid when they attempt to explain why Mr Macdonald provided a list of mining companies to Moses Obeid. As they each gave a similar false account, the Commission finds that the two colluded on their story as to how it came about.

The list of invitees

The circumstances in which Mr Macdonald restricted the EOI process to an "invitation only" process has been described above. This may have been done because it could assist the Obeid family in pursuing an interest in investing in a mine in the area of the Mount Penny tenement. Even if not planned that way, the information was valuable to the Obeids. That information, however, could not benefit the Obeid family unless Mr Macdonald provided further information; that is, the identity of the companies that were likely to be invited to participate.

The whole of the circumstances compel the conclusion that Mr Macdonald set about acquiring information as to the identity of the invitees from his department so that he could pass this information to Moses Obeid, and this was done for the purpose of allowing the Obeids to pursue a mining interest. There are a number of reasons why this is so.

In the first place, there is the fact that Mr Macdonald, most unusually, restricted the process to a list of invitees who were junior miners. The circumstances surrounding this have been discussed earlier in the report. Junior miners fall into a category of entrepreneurial companies that, generally, welcome third parties investing in them.

In the second place, it is highly likely that on 7 July 2008 Mr Macdonald sought and received information from the department as to the identities of the companies that were likely to be invited to participate. The timing of this has to be set against the initial contact between Moses Obeid and Mr Brook, which occurred on 3 July 2008.

In the third place, there is the very fact that Mr Macdonald provided the information to Moses Obeid a day or so after he received it. As explained above, this was state-owned confidential information of a valuable character, and there would need to be a good reason why a minister was providing it to an outsider. Mr Macdonald offered a reason. It is encapsulated in this evidence:

> *Can you explain that?---Are you going to give me a chance to explain it?*
>
> *I am just doing that right now, Mr Macdonald?---Thank you. He had rung me a few days in advance of that. He said he'd met with Lehman Brothers, he was very excited about Lehman Brothers being in, in New South Wales. He said he met with senior people with it. He said they're keen to invest. He said is there any way I could find some potential partners for them to, to invest in resources specifically with coal.*
>
> *Who's he? Moses Obeid?---Moses Obeid, yes.*
>
> *Right. So this conversation is with Moses Obeid?---Yes. Correct.*
>
> *Go on?---And I said, "Well, you know, if something comes across my desk I might be able to give them a hand." He then talked a fair bit about, you know, in very animated terms about, about Lehman Brothers, at that stage, of course, we didn't know the events that would happen subsequent. So on about the 8th when I had that list I thought maybe that would be an appropriate series of companies that they could think of investing with, that is, Lehman Brothers and so at some point I – from my office I rang and said, "Here's a list of companies they might like to invest with." And I gave them the names, I changed – going down the list I gave him the Felix Resources company not White Mining because I thought that was the appropriate company given that they were seeking partners and other investment and subsequently sold so I just quickly listed down a number of the companies and then stopped.*

Moses Obeid's account was different, but only slightly so:

> *Yes?---When I'd first met Gardner Brook he had expressed to me that Lehman Brothers were new in town and they'd spent a whole lot of money on a new office and they were here to do business in Australia. They wanted to invest in infrastructure and mining industries. He said that you know look he'd appreciated* [sic] *if he could, if he could arrange for his executives his bosses to meet with members of the Government I said by all means, I'm sure they'd be delighted to, to meet you guys. He had asked me if I could arrange or put him in touch with someone that could arrange a meeting for him and for his bosses with the Department of Mineral Resources, so I said look I'm happy to talk to them and, and make a representation on your behalf. I did that and I mentioned it to Ian and I can't be sure whether it was over a breakfast that, that he was having or whether it was over a phone but I said to Ian that I've met this fellow from Lehman Brothers they want to do some big things in this State and he would like to come and see you guys and he said well, okay what do they want to invest in and I said infrastructure and, and mining and he said well, he probably should meet the, the Finance Minister as well.*
>
> ...
>
> *Let's move to the conversation, telephone conversation, Macdonald rang you and Macdonald tells you something about the identity of the miners. Let's go to that conversation. What was said?---He contacted me and he said look, mate, that banker mate of yours, I've got a list of companies that have interests in New South Wales that have mines. He should go and do his research and work out if any of these are suitable or he wants to talk to any of these companies and I can then set it up with the Department and I said okay. He said just take these names down so I wrote down as he said to me a series of names and I passed them on to Gardner Brook.*

No satisfactory reason is given by Mr Macdonald as to why he wished to pass on state-owned confidential information of a valuable nature to a merchant bank.

If a minister was truly eager to encourage some combination in business between the state of NSW and an American merchant bank, then there is no explanation as to why formal channels were not followed. Even if informal channels were going to be followed, there is no reasonable explanation as to why the minister would bypass contacting a senior and appropriate officer of the merchant bank. Why would the minister speak to Moses Obeid about it? The story is not credible.

The subsequent events also suggest the story is false. It is unlikely to be mere coincidence that the third party to whom the minister entrusted the information – Moses Obeid – was immediately able to use that same information for his own benefit. At the time Mr Macdonald gave the information to Moses Obeid, Moses Obeid was seeking that information for personal gain. The following exchange that occurred with Moses Obeid is relevant:

> *You see, this is another coincidence, isn't it, that strangely right at the time that you're interested in identifying such companies Macdonald rings you with a list of mining companies interested in developing coal assets in New South Wales?---Well, it was from a request, sir, and the request had come from Lehman Brothers.*
>
> …
>
> *Well, hold on, you were talking to coalmining companies?---Well, that's correct.*
>
> …
>
> *Right at the same time that you were looking at talking to people who had coalmining interests, Ian Macdonald rings you and provides you with a list of names of companies interested in mining coal in New South Wales?---Yes.*

Moses Obeid immediately provided the information to Mr Brook who, in turn, used that information as the critical base for the Obeid family investing in the mining tenement. Mr Brook gave this evidence about Moses Obeid and "his sources":

> *Right. When he gave it* [the list] *to you what did he tell you about it?---He said that through his sources he believed these companies may be invited to tender.*
>
> *Did he tell you who his sources were?---Again, he referred to them as consultants, geologists, very vague.*
>
> …
>
> *Well, I mean it might have been obvious to you but I'm afraid not to me?---I beg your pardon, sir. He gave me the list with the intention for me to review the list and identify if Lehman would be interested or capable of assisting any of them in a bid for a coal licence.*

The story regarding Lehman Brothers investing in NSW is rejected as being improbable. The Commission finds that Moses Obeid sought the information from Mr Macdonald because he wanted to provide it to Mr Brook to initiate a mining venture. That finding is not inconsistent with Moses Obeid's own evidence on the point. The Commission further finds that Mr Macdonald willingly provided the list to Moses Obeid to help him. Finally, the Commission finds that Moses Obeid provided the list of companies to Mr Brook, and the list was used successfully to identify a potential medium for their introduction into coalmining – Monaro Mining.

Chapter 20: The involvement of Monaro Mining

Mr Brook was able to use Mr Macdonald's list of companies, which had been given to Mr Brook by Moses Obeid, in an attempt to select an appropriate company with which the Obeids could enter a mining venture.

Mr Brook had a method – he preferred public companies to private companies because information is more readily available in respect of public companies. Mr Brook examined the reports issued from time to time by the public companies on Mr Macdonald's list to determine their suitability. His experience suggested to him that the best target was a company that might superficially appear to be unattractive – a small, undercapitalised company. From Mr Macdonald's list, he identified a small public company previously involved in uranium exploration and which was stating an intention to get involved in coal – Monaro Mining. One of the key features of Monaro Mining that attracted Mr Brook was that it was "financially weak". This weakness was likely to make Monaro Mining receptive to an approach about any deal that included financing.

Although there was some evidence to the contrary, it is quite apparent that neither Mr Brook nor Lehman Brothers had any earlier contact or dealings with Monaro Mining. The selection of Monaro Mining came about solely as a result of it having been identified on the list of companies that was provided by Mr Macdonald to Moses Obeid.

Monaro Mining was an exploration company with particular focus upon base metals and uranium. In around early 2007, Monaro Mining was looking to move into coal exploration. The strategy was to look at remnant areas – specifically areas that other explorers were not interested in. The reason for this was explained by their consultant, Mr Bowman:

> *Their specific strategy was to look at areas other people weren't particularly interested in because Monaro didn't have a lot of capital on it and the idea was to get in cheaply and not have too much opposition for the areas we're seeking.*

Mr Brook approaches Monaro Mining

On 15 July 2008, Mr Brook had his first meeting with the managing director of Monaro Mining, Mart Rampe. There was some preliminary discussion between them as to the potential of Mount Penny as an investment, and Mr Rampe recognised that this was an opportunity that should be referred to the chairman of the board.

The non-executive chairman of the board of Monaro Mining was Warwick Grigor. Mr Grigor had a long history in finance and mining. He listened to, and eventually acted upon, Mr Brook's proposals. Before dealing with the detail of those proposals and their consequences, it is appropriate to make some observations about the reliability of the evidence of Mr Grigor.

Some aspects of Mr Grigor's conduct were unusual, and inconsistent with conduct that one would expect of an experienced businessman. Taken as a whole, documentary evidence would suggest that Mr Grigor must have suspected that there were irregularities associated with the proposals that had been put to him by Mr Brook. The Commission's impression is that Mr Grigor was willing to take advantage of these irregularities by pressing ahead to do the deal.

Mr Grigor met Mr Brook on 16 July 2008. It is clear that, during their first discussion, Mr Brook was able to tell Mr Grigor certain important facts:

> *...So Mr Brook said something?---Mr Brook said that he had clients of Lehman Brothers who had interests in land under which it was believed there was coal and he'd made inquiries of the Mines Department as to the bona fides of Monaro Mining and he was informed that yes, there was a process that we were involved with in, in, in investigating and seeking to acquire coal Explorations Licences in New South Wales and he wanted to form some sort of association with Monaro Mining to bid for Coal Licences*

that were going to come up for tender in the foreseeable future.

Did he tell you how he knew that?---No.

Did you ask him how he knew that?---I can't recall.

Did you ask him as to the nature of the process which the government proposed to allocate those licences?---Whether it was at that meeting or a subsequent meeting I can't recall but early on he said that there was going to be a number of companies that would be invited to bid for Exploration Licences and these companies were smaller companies, not the BHPs of the world because the, the projects under consideration were not big enough to attract those and he told us, he told me that Monaro would be one of the companies to be invited to tender.

…

And did he tell you the names of any of the tenements which were likely to come up?---He mentioned Mount Penny.

Now I've got to pause and just say this could be important, if he mentioned Mount Penny did he mention that on 16 July or do you think after 16 July?---I couldn't be specific but around about then.

Well, if he didn't mention it at your first face to face meeting was it again within a matter of days that he mentioned Mount Penny?---I believe so.

Now that name Mount Penny means something to us. At the time he mentioned it to you had you ever heard of Mount Penny?---No.

Did you ask him where Mount Penny was?---Yes.

And where did he say it was?---The Hunter Valley.

And did he, he mentioned to you that he had clients of Lehman Brothers who had an interest in land under which coal lay?---Yes.

Did he relate that to Mount Penny at all?---Yeah, I believe so. They, they were landowners.

...Did Brook mention Mount Penny in the same context as landowners and if he did what did he say?---He did and he said that he had an association and agreement or consent or whatever of the landowners and that was - - -

THE COMMISSIONER: The landowners in Mount Penny?---In the – no, in the surface land.

Yes. But which surface land?---Well, which would a Mount Penny licence would have overlain and, and - - -

MR WATSON:… Could you just pause for a second and try and recollect what he said which connected the land owners to Mount Penny if indeed he did say so?---The, the basis was that his clients owned land under which they believed coal existed which would be the subject of a, a licence application with a property called Mount Penny and that was of interest because obviously if you've got land owners on side that's usually helpful in an application process.

Mr Brook was receiving his information from Moses Obeid. The kind of information that Mr Brook was providing to Mr Grigor demonstrates that Moses Obeid had received a good deal of information. It is evident that that information included the following: the identity of Monaro Mining, that coal licences were coming up for tender in the foreseeable future, that only smaller companies would be allowed to participate, that Monaro Mining would be one of the companies invited to participate, that the licences would be coming up in a matter of days, that one of the tenements that would come up was named Mount Penny and, of course, that the Mount Penny tenement would cover Cherrydale, Donola and Coggan Creek. The Commission finds that this information was imparted to Moses Obeid by Mr Macdonald.

A proposal – Lehman Brothers, Voope and Monaro Mining

There is not a great deal of detail about the original proposals put by Mr Brook to Mr Grigor, but that does not really matter. It is clear that it was a deal that would involve three parties: Lehman Bros as financier, Voope as an investor (the creation and purpose of Voope is dealt with below), and Monaro Mining to undertake the technical coal-mining aspects of the proposal and project, if successful.

Mr Brook drew up a letter that was taken by Mr Grigor and endorsed on Monaro Mining letterhead. In substance, the letter was a proposal, made in the name of Monaro Mining and addressed to Lehman Brothers. Mr Brook then used this to work up a pitch to Lehman Brothers.

Mr Grigor instructs Clayton Utz

Meanwhile, on 21 July 2008, Mr Grigor instructed a firm of solicitors, Clayton Utz, to act on behalf of Monaro Mining in the transaction. A solicitor at Clayton Utz with carriage of the matter, Felicity Ford, took careful notes of her meetings with Mr Grigor, and those notes reflect the matters of which Mr Grigor was aware at particular points in time.

Mrs Ford's notes from the meeting on 21 July 2008 refer to the exploration licences that were to be issued. Specifically,

Mrs Ford took instructions from Mr Grigor that the exploration licences were going to be opened by inviting EOIs during the week commencing 28 July 2008.

Significantly, the DPI had originally proposed that invitations for EOIs should be sought by the end of July 2008. That was confidential information. The information concerning details of the EOI process that Mr Grigor possessed had been given to him by Mr Brook. According to Mr Brook's evidence, which the Commission accepts, he obtained that information from Moses Obeid. The Commission infers, for the reasons already given, that Mr Macdonald gave that information to Moses Obeid.

The Obeids instruct Colin Biggers & Paisley

Meanwhile, the Obeid family continued their professional relationship with Mr Rumore at Colin Biggers & Paisley.

On 18 July 2008, Moses Obeid and Gerard Obeid conferred with Mr Rumore and provided instructions on the potential transaction involving Mr Brook, Lehman Brothers and Monaro Mining. Mr Rumore's notes of that meeting record:

> *Monaro Mining NL Uranium miner: looking for coal mine.*
>
> *Lehman Bros. option re 60% –*
>
> *Monaro Coal is to be only exercisable:*
>
> *(a) once M.C. wins rt - to mine pursuant to EOI*
>
> *(b) buy 3 Obeid ptys @ multiple (3 or 4) x valuation*
>
> *(c) at time of exercise L.B. directs MC to issue 15% shares to LB & 45% shares to Obeid.*

These notes are significant, as they demonstrate the foreknowledge possessed by Moses Obeid and Gerard Obeid concerning the EOI process and their intention concerning the sale of Cherrydale, Donola and Coggan Creek.

Later in July 2008, Mr Rumore met with Moses Obeid, Paul Obeid, Gerard Obeid and Mr Brook. Mr Rumore was asked to arrange for the purchase of a shelf company that would become the vehicle through which the Obeids could deal with Lehman Brothers and Monaro Mining. That company was Voope, and eventually another partner at Colin Biggers & Paisley, Gregory Skehan, became the sole director of Voope and held the shares in Voope under a bare trust in favour of the Obeids. According to Andrew Kaidbay, an associate of the Obeids, Voope was a trustee for "a couple of [Obeid] trusts".

The departure of Lehman Brothers

Mr Brook took the letter that he had drafted for Mr Grigor and placed it before his superiors at Lehman Brothers for consideration. The proposal seems to have been rejected almost immediately. This may have been because more senior persons at Lehman Brothers were aware of the instability that led to the collapse of Lehman Brothers. Whatever the case, this left Mr Brook and the Obeids without the financial backing of Lehman Brothers.

It is somewhat surprising that Mr Brook remained in the negotiations at this time; after all, his employer, Lehman Brothers, had rejected the proposal. Mr Brook's own position was that he might have been able to talk Lehman Brothers around, and he persisted with negotiations. It must, however, have become evident to him at some time that Lehman Brothers would not back the deal, and it could be done only between Voope and Monaro Mining.

Voope and Monaro Mining

Even though Lehman Brothers had declined to participate in the deal, Mr Grigor remained eager to put together a transaction. On 5 August 2008, Mr Grigor provided instructions to Mrs Ford about a proposed agreement and told her, amongst other things, that the agreement had been drafted in a particular way because "there are people they don't want to disclose to DPI", and that the bid would be made on behalf of Monaro Mining without disclosing to the DPI the existence of the option to Voope. It was in this context that Mrs Ford made a note: "Warwick said he didn't want to rock boat and just to sign anything".

Mr Grigor's attitude in this respect, as well as his subsequent conduct, gives rise to grounds for suspecting that he was aware that there was something "special" about the proposed transaction. In the first place, it seems that Mr Grigor was acting on his own, and not referring these decisions for board consideration or approval. It is also odd that he was eager to pursue a deal that Lehman Brothers had rejected, and was willing to deal with a person he barely knew, Mr Brook, who was representing unnamed investors who lay behind a two-dollar company.

On 20 August 2008, Mr Grigor executed an agreement with Voope on behalf of Monaro Mining. That agreement, which was titled "Option Deed Over Shares", is an extraordinarily lopsided arrangement. It imposes a large number of obligations upon Monaro Mining, which carried with them substantial financial commitments. The agreement then allows Voope, at its choice, to acquire 80% of the benefit acquired by Monaro Mining at no cost. Although Counsel Assisting pursued the matter with several witnesses, no one could provide evidence of why

Monaro Mining would wish to enter such an unequal arrangement.

The obvious explanation is that Mr Grigor was being provided with confidential information, but it is difficult for the Commission to come to an affirmative conclusion in this regard. There is no direct evidence on the point, and Mr Grigor denied it; yet, the circumstantial evidence points strongly to that conclusion. In the end, the Commission declines to make a finding of that kind against Mr Grigor, but the same circumstantial evidence adds to other evidence to strengthen the Commission's findings that the Obeid family were receiving and using inside information. The most obvious instance of this is the fact that the agreement between Monaro Mining and Voope was made on 20 August 2008. That was 20 days before a public announcement that there was to be an EOI campaign or that new coalmining tenements were to be opened. Yet the agreement itself refers to such a process. The agreement defines "tenement" as:

> *…the mining lease, exploration licence or any other mining interest applied for pursuant to the invitation to tender issued by the Department at any time after the date of this document but prior to 1 January 2009 and granted pursuant to the Act in the State for the exploration or mining of coal.*

The solicitor, Mr Skehan, who executed the agreement on behalf of Voope in his capacity as a trustee for the Obeid family, was asked to explain how the agreement could come to refer to events that were not public, and would be announced only in the future. He was asked about the reference to an invitation that was yet to be extended:

> *No, I'm not talking about tenements I'm talking about the invitation. The invitation has not yet been extended. How is it that you knew it would be extended?---I, I could have only known that from what I was told by the Obeids.*
>
> *Do you think now that the Obeids must have told you that they knew that the Department was going to extend* [an] *invitation?---Yes.*
>
> *It must be the case mustn't it?---Yes.*
>
> *Now sorry to put you through this but this is what I wanted to come to. Somebody had to tell you so that you were satisfied that they knew the Department was going to do something in the future?---Correct.*
>
> *Did the Obeids tell you how they knew that?---No.*
>
> *Did you ask how they knew that?---No.*

It is plain that the Obeid family had confidential information and that they were using it. The significance in this instance is that the confidential information enabled them to enter the agreement with Monaro Mining, which, as it turns out, became the key to the Obeid family receiving a massive payout.

Chapter 21: The EOI campaign is announced

The DPI formally called for EOIs by sending letters to those companies invited to participate. The letters were dated 9 September 2008, and were accompanied by some relevant briefing materials. Each of the mining companies receiving the letter was invited to express interest in respect of any or all of the eleven separate coal areas. For the purpose of the Commission's investigation, three areas were important – Mount Penny, Glendon Brook and Yarrawa.

Under the terms of the invitation, any EOI was to be enclosed in a sealed envelope or parcel, clearly marked "Expression of Interest – Coal Release Area", and identifying the area for which the EOI was made. A covering letter was to be included in a separate envelope, and attached to the outside of the main envelope containing the bid. That covering letter was required to identify the area for which the bid was lodged, and the company or consortium submitting the bid. These matters emphasised the confidentiality of the information being sought. Each application was required to be accompanied by a non-refundable EOI lodgement fee of $1,000. The closing date for making an EOI was 12 noon, Monday, 24 November 2008.

The EOIs were to be assessed using defined criteria. Most of the evaluation criteria are irrelevant to the Commission's current considerations. One particular criterion must be noted, which relates to financial contributions:

> *Expression of Interest applicants may nominate additional financial contributions to those listed in Section 7 to be considered as part of the evaluation process.*

Section 7 further defined the financial obligations of a successful applicant, and enabled an applicant to make an additional financial contribution as part of an EOI. It is appropriate to set out parts of Section 7:

> *As part of the Expression of Interest commitments, for each release area the successful applicant/s, will within 30 days from the date of a registration of part transfer of the current exploration licence or within 30 days of the Minister granting consent to apply for a new exploration licence, be required to pay:*
>
> …
>
> *(a) an assessment fee of $10,000 to cover Department of Primary Industries' Expression of Interest administration, advertising and evaluation costs;*
>
> *(b) a one off payment by the successful applicant/s for the allocation of each area listed below as a contribution towards the Department's Coal Development Fund for continued coal exploration as follows … Yarrawa $150,000 … Glendon Brook $300,000 … Mount Penny $1 million...*
>
> *(c) Additional financial contributions may be included as part of an applicant's expression of interest.*
>
> *The successful applicant/s will be required to pay the standard for Application of Exploration Licence fee for Group 9 (coal) of $600 + $600 per square kilometre...*

The provision relating to an "additional financial contribution" is significant. No amount is fixed in this regard, and each of the mining companies was being asked to make its own offer in this respect.

The idea of seeking an "additional financial contribution" from mining companies was a relatively new idea. Whereas coal and other mineral assets are, in law, the property of the state of NSW, the state had historically allowed free access to the resource, and sought financial compensation through royalty payments. By 2005, this had changed. From 2005, the *Coal Allocation Guidelines* included a provision for a "minimum financial contribution" and an "additional financial contribution" as part of the allocation of new areas.

This issue about the size and payment of an additional financial contribution assumes importance because Monaro

Mining made a very large offer of $25 million of additional financial contribution for Mount Penny. The significance of this is discussed later, in the context of the winning bidder, Cascade, which declined to make an additional financial contribution at all.

Recent experiences: Caroona and Watermark

In August 2005, EOIs were called in respect of the Caroona coal exploration area. The exploration area was located approximately 30 kilometres southeast of Gunnedah. The area included three seams suitable for underground mining operations, with a potential production of up to 1 billion tonnes.

Applications for Caroona closed on 12 December 2005. Four EOIs were received. An evaluation team undertook an assessment and recommended the acceptance of the bid received from Coal Mines Australia Pty Ltd (a wholly owned subsidiary of BHP Billiton Limited). That company was invited to apply for the exploration licence.

As part of its bid, Coal Mines Australia Pty Ltd had offered an additional financial contribution of $91 million, plus further staged payments of $50 million and $65 million.

In October 2007, EOIs were called in respect of the Watermark coal exploration area. This area was located approximately 35 kilometres southeast of Gunnedah. The subject area covered approximately 190 square kilometres and was expected to contain approximately 1 billion tonnes of domestic and export quality thermal coal.

Bids closed on 4 February 2008 and seven were received. On 11 March 2008, the EOI Evaluation Committee recommended that China Shenhua Energy Company Limited be selected.

China Shenhua Energy Company Limited had offered substantial additional financial contributions: $276 million, plus an extra $200 million at mining lease grant – a benefit to the state of approximately $389 million when discounted to present value.

At this point, it is appropriate to recall that the proposed North Bylong Area was thought to contain 800 million tonnes of coal.

The value of an additional financial contribution

There were two areas of dispute in respect of additional financial contributions.

The first area of dispute was how a mining company might arrive at a figure that it should offer the state of NSW by way of additional financial contribution. Mr Bowman was an extremely experienced geologist, with a long working history in the DPI. He was an impressive witness, and obviously an expert in his field. Mr Bowman was an acquaintance of Mr Grigor and, through this connection, was asked to provide consulting services on a range of issues to Monaro Mining. Mr Bowman provided advice generally upon Monaro Mining entering coalmining in NSW, and specifically on the makeup of the bids it should make in the EOI process. One part of that was how to calculate the additional financial contribution. His advice in this respect was that it should be calculated by reference to the DPI's coal allocation guidelines, which allowed for 20 cents per tonne of the estimated resource. This led to Monaro Mining making its offer to pay an additional financial contribution of $25 million in respect of Mount Penny. On the other hand, John McGuigan – a businessman with a great deal of experience in the mining sector – believed that an appropriate additional financial contribution would be negligible because, at the time it was to be paid, too little was known in respect of the true value of the resource. No doubt Mr McGuigan's opinion was a key factor in formulating Cascade's bid for Mount Penny, because it declined to offer an additional financial contribution.

For the purpose of its deliberations, the Commission does not need to state a preference for Mr Bowman's opinion or John McGuigan's opinion – the difference is probably explicable by reference to different mindsets – the view of John McGuigan obviously reflected hard-nosed business considerations. The point is that the state of NSW was dealing with one of its assets and asking for an additional financial contribution. It is obvious that the size of the additional financial contribution that the state could acquire was highly relevant to its decision-making.

The other area of dispute is whether the state of NSW would acquire much benefit from an additional financial contribution, especially when compared with the collection of royalties over the long term. Again, the dispute here centred on differences in the evidence given by Mr Bowman and John McGuigan. Mr Bowman's opinion was based upon a deep experience from his position on the Coal Compensation Board, where these factors were taken into

account. There is an economic factor that also needs to be considered – calculating the net present value in respect of two differently-timed payments.

Again, the Commission does not need to resolve this issue. Were it to be necessary, the Commission would find that Mr Bowman's evidence was more likely to be correct. But it is quite obvious that each of the additional financial contributions and royalties is separately valuable. A substantial upfront payment is a significant advantage for the state of NSW, as will be the royalties that will flow in the long term.

Chapter 22: Monaro Mining makes its bids

After receiving its invitation to participate in the EOI process, Monaro Mining had to decide upon the tenements for which it would bid, and how those bids would be framed. As mentioned previously, Monaro Mining's experience in coalmining was scant – it was a uranium explorer. In those circumstances, it sought the assistance of Mr Bowman and utilised the services of a variety of expert organisations.

Mr Bowman was originally brought in by Mr Grigor to advise how Monaro Mining might be able to diversify into coalmining and, during 2007 and early 2008, he spoke to the relevant persons at the DPI and some opportunities were identified. These opportunities were the possibility of Monaro Mining taking up some small or remnant areas that had been identified by the DPI. These areas were not in the Western Coalfield. Mr Bowman said he was "flabbergasted" when, on 9 September 2008, Monaro Mining received the invitation to express interest in the 11 coal areas – he had expected only some response in respect of the other, small or remnant areas.

Mr Bowman was then retained by Monaro Mining and he provided mining and economic advice to identify those areas amongst the 11 coal areas for which Monaro Mining should bid, and the content of the various bids.

Armed with its expert advice, Monaro Mining resolved to make bids in respect of nine of the 11 new coal areas. Relevantly, Monaro Mining made bids for each of the Mount Penny, Glendon Brook and Yarrawa tenements.

The potential involvement of Monaro Mining in opening nine new coal tenements raised a number of questions and problems. The lack of experience in coalmining was one obvious problem, and Monaro Mining had doubtful skills and experience on its team to open one new coal area, much less nine.

An additional problem was generated by the fact that, acting partly upon the advice of Mr Bowman, Monaro Mining had made generous offers for additional financial contributions in respect of several of the nine areas, and, given that it was not financially strong, there was no way that Monaro Mining could meet those commitments without external backing. At all times, it was Monaro Mining's intention to seek financial backing – if and when it was awarded an exploration licence. Mr Grigor was confident of gaining that backing.

There was an additional problem that was generated by a misunderstanding on the part of Monaro Mining as to the terms governing the payment of the additional financial contribution. Monaro Mining's management believed that the additional financial contribution could be paid over time. The DPI understood, and its position was, that the additional financial contribution was payable immediately upon taking up the tenement.

It is probable that, at the time it made its bids, Monaro Mining was acting in good faith on the belief that, if its bid on any particular area succeeded, it would have time to arrange the necessary financial backing. If it is necessary to make a finding, the Commission finds that Monaro Mining was genuine when it made its bids, and it made the bids with the intention of fulfilling its obligations, should it succeed.

In any event, in accordance with the terms of the EOI process, Monaro Mining lodged its bids by the deadline of 12 noon, Monday, 24 November 2008.

Chapter 23: Establishing the assessment process

Expressions of Interest were lodged by various mining companies before 24 November 2008. The fact that a particular company had lodged an EOI was public information and, on 24 November 2008, the companies that had lodged bids in respect of a particular tenement were announced by the DPI, although the terms of the individual bids were kept confidential.

The EOI process then entered its next phase – the assessment of the various bids.

The DPI set up a practice for the assessment of bids. An evaluation committee was appointed in the first half of November 2008. Three persons were selected to serve on the EOI Evaluation Committee – William Hughes from the DPI (where he was a principal advisor in the area of minerals), Ms Moloney from the DPI (where she was a senior geologist) and Ado Zanella from the NSW Department of Premier and Cabinet (where he was a project director). It seems that the idea was to bring persons of different disciplines to the task of assessing the various bids.

An external probity auditor was appointed on 20 November 2008. In this instance, it was Kevin Fennell, an experienced public servant. His letter of engagement stated his role was to oversee the "Coal Release Areas" EOI process, however, it was unusual that he was engaged this late in the process as probity auditors are normally engaged well in advance of an EOI being released. The nature of the probity auditor's duties or obligations is uncertain. Mr Fennell was asked about his role and he was very frank about the lack of clarity:

> *THE COMMISSIONER: Just tell us what the duties are Mr - - -?---Oh, what the duties are, oh, well. This might take some time, Commissioner.*
>
> *MR CHEN: Well, can you try and give us an economical description? I mean - - -?---Oh, economical, okay. The main idea is to make sure that every proponent gets an even, even break, that's the first thing. The second thing is to make sure that the State of New South Wales gets value for money, prima facie, this is, and that's all that there is in it.*
>
> *So you don't have any formal training to become, as it were, a probity auditor, I'm not saying you do but you don't assume qualifications to become a probity auditor?---No, no, anybody could do it really.*
>
> *It's just a general yardstick to use your common sense I suppose is it?---Yeah. The big problem in my mind is, and we've got to this stage over many years, that there's no legal backing, in other words, the probity auditor hasn't got the backing of say something like the Public Finance and Audit Act behind him so I'm getting to the opinion now that the Audit Office should take it over and appoint probity auditors if somebody wants one. If a department really needs a probity auditor there's probably something in the background as to why they need some kind of reassurance that it's been done properly.*
>
> *There's no, as it were, legislative or regulatory framework within which a probity auditor works, is that right?---That's true.*
>
> *So when you're assessing whether someone's had an even break or whether the State of New South Wales gets value for money it's very subjective, is that so?---Yes, yes.*

After hearing the evidence of those persons who served on the EOI Evaluation Committee, and Mr Fennell, the Commission has some reservations about the business and political efficacy of the committee and of the role of the probity auditor, generally. More will be said specifically about the role of a probity auditor in the Commission's corruption prevention report. It is unnecessary to ventilate those concerns here, and the Commission points out that its concerns do not, in any sense, reflect adversely on the integrity of any of the members of the EOI Evaluation Committee or Mr Fennell. The Commission finds that each of those persons did their task honestly and to the best of their ability.

The deliberations of the EOI Evaluation Committee were forestalled, however, because of the decision that the whole of the EOI process was to be reopened.

Chapter 24: The EOI process is reopened

As described earlier, the EOI process was confined to invitees only. Invitations had been issued on 9 September 2008, and EOI responses had to be made before 24 November 2008. Despite this, in October 2008, Mr Macdonald began to speak of reopening the EOI process for the purpose of allowing other mining companies to participate. This, by itself, is puzzling, given that it was Mr Macdonald who imposed the limit on those allowed to participate.

Mr Macdonald's actions and his reasons for acting were important issues in the investigation, and there is probably an advantage in the Commission spelling out its conclusions in respect of these matters now. For the reasons set out below, the Commission concludes that the decision to reopen the EOI process was Mr Macdonald's decision, and that Mr Macdonald was motivated to do so as a favour for a mining magnate, Mr Duncan.

The decision to reopen

Mr Macdonald took the first steps toward reopening the EOI process on or before 1 October 2008. An email was sent by Mr Munnings at 4.43 pm on 1 October 2008 in the following terms:

> *Jamie,*
>
> *I have just spoken with graham, who has advised that Alan Coutts is not prepared to give packages to the Mining Companies (Amerod Resources, White Energy, Real Brand Holdings and Cascade).*
>
> *The reason for this is that these are not "open tenders" Further I am advised he has already told you this directly.*
>
> *Submitted for your further advice*
>
> *Craig*

The "Craig" is Craig Munnings, a DPI liaison officer who worked in Mr Macdonald's office. The "Jamie" is Jamie Gibson, Mr Macdonald's deputy chief of staff. The "graham" is Graham Hawkes, a departmental liaison officer. The date of the email – 1 October 2008 – is significant because the invitations to participate in the EOI process had already been sent on 9 September 2008. The terms of the email clearly refer to an earlier request made by Mr Gibson. Given there is no record of an earlier email, it seems reasonable to infer that Mr Gibson made his request orally.

The email is important. Due to an injury, Mr Munnings has an impaired memory and no recollection of the email or the EOI process at all. Mr Gibson also had an incomplete recollection of the email, although he explained, based upon practice and experience, that his request would have been made on the instruction of Mr Macdonald. That evidence was not challenged by Mr Macdonald. There is no reason to think that Mr Gibson would have made the request of his own accord; in fact, he gave evidence, which the Commission accepts, that he had not heard of Amerod Resources Pty Ltd, Real Brand Holdings Limited or Cascade before 1 October 2008.

As the terms of the email disclose, Mr Gibson's request had been passed on to Mr Coutts, who had made a decision to decline to provide "packages". Given the history of the matter, it is easy to understand why Mr Coutts was reluctant to do so: the EOI process had already been started, and the parties were preparing their bids in accordance with clearly defined terms. To alter those terms was a significant decision. It was capable of resulting in unfairness.

Despite Mr Coutts' initial refusal, Mr Macdonald pressed on with his intention to reopen. Mr Coutts said that he had two or three conversations with Mr Gibson in which Mr Gibson requested that the EOI process be reopened. Mr Coutts gave this evidence:

> *Was this the position, and please tell me if this is an inaccurate summation, but your initial view that you'd expressed was that it shouldn't be reopened?---Correct.*

But there had been further contact made to you by Mr Gibson - - -?---On behalf of the Minister, correct.

And the communications that you'd had from Mr Gibson on behalf of the Minister was that the Minister wanted it reopened?---Correct.

And you wanted then to take steps to see whether in fact from a probity perspective this could occur?---Correct.

You understood that it was the desire and direction of the Minister to reopen this process?---Correct.

You - - -?---It, it certainly was not the Department's desire to open up the EOI process.

And I take it it wasn't yours?---Certainly not.

Mr Coutts was not alone. There were others in the DPI who thought that the process should not be reopened. Mr Mullard gave this evidence:

Did you have a view about whether the process should or should not be reopened?---My personal view is that it shouldn't be reopened.

Why was that?---Well, basically because we'd gone out to a tender process. We're, we're very concerned about the integrity of the, the coal allocation or any sort of title allocation process and we were concerned that when you start changing the rules halfway through processes it certainly throws into question the, the coal allocation processes in New South Wales.

Did you express that view to Mr Gibson?---Yes.

Was it your idea to reopen the Expressions of Interest?---No, it was not.

Whose idea was it?---Well, Mr Gibson told me it was the Minister.

The issue of the reopening was referred to the probity auditor, Mr Fennell. Mr Fennell prepared a preliminary advice that recommended against the reopening.

Mr Fennell's original draft of his report on this issue recommended that, "In the interest of complete even handedness in this case I would recommend that the evaluation of the offers received should proceed forthwith". But he changed this advice following a meeting where he was told that there had been a change of mind at ministerial level, and Mr Fennell – drawing on a long experience in the NSW public service – decided he should go with the flow. In the world of politics and public administration, Mr Fennell recognised that the minister has the final say. He gave this evidence:

And so if the Minister gives a direction that it's going to be changed there's really nothing you can do to stop it. Isn't that right?---No, it wouldn't have mattered what I said, as far as I could see.

The Commission pauses to note that this, generally, is not a desirable attitude on the part of a probity auditor and that, if it is the general practice of probity auditors, practice should change as soon as possible. It is a practice that would tend to defeat the purpose of appointing a probity auditor.

Mr Macdonald made the decision to reopen

Mr Macdonald has made some submissions that "although [he] was generally in favour of the reopening", it was not his decision to reopen the EOI process and he made no direction to that effect. He also gave some evidence along these lines during the public inquiry, and his counsel cross examined some of the witnesses to similar effect.

The Commission rejects Mr Macdonald's evidence and finds that he was behind the decision to reopen. In effect, he directed that the tender process be reopened. There was evidence from each of Mr Gibson and Mr Mullard to the effect that the decision was that of the minister, not of the DPI. The Commission has previously expressed its

acceptance of the honesty and accuracy of the evidence of each of those witnesses. The evidence of Mr Coutts also strongly supports this conclusion, especially to the extent that he says he was told by Mr Gibson as to the particular reasons that the minister wished to reopen the process. Similarly, the recollections of Mr Fennell support the contention that the process was reopened as result of a ministerial direction.

Why did the minister reopen the EOI process?

On any view of the matter, it was an unusual decision for Mr Macdonald to direct that the EOI process be reopened and that new parties be invited to participate. It was, after all, his original decision to limit the process to invitees, and any decision under which a government department alters its protocol must be taken with some care.

This is an area in which Mr Macdonald's evidence was most unhelpful. At first, Mr Macdonald said that the suggestion for a reopening had come from the DPI because "a number of companies had written into the Department wishing to, to have access to it" and in this respect he referred to two companies – Cascade and Griffin Coal. He then suggested that he had been told by Mr Gibson that, "a number of companies had written to Dr Sheldrake". On this basis, Mr Macdonald claims that he decided that he would await the DPI's opinion on the matter. But Mr Macdonald provided no detailed evidence to support this contention. Moreover, it was contradicted by Mr Gibson and the DPI witnesses. The DPI did not support a reopening.

In his submissions, Mr Macdonald specifically denies that he gave a direction to the DPI. There is evidence that suggests that Mr Macdonald attempted to disguise his role in the matter. Mr Mullard described the course of events relating to the reopening as follows:

MR CHEN: This was his process to this point in time, he was charged with the responsibility was he not?---That's correct.

And this was not a Departmental process it was a Ministerial process.---It was a Ministerial process he initiated it, he approved the process and he was effectively the [sic] *directing the way it would be undertaken.*

And it was only after this process was reopened that in fact the Minister took steps then to try and delegate the process back to the Department. Isn't that so?---I do recall, I can't remember the exact dates but the Minister did decide that he didn't want to sign off on the actual decision to invite companies to apply for an exploration title.

When he was shown this evidence, Mr Macdonald explained it away because he had been "facing a number of attacks over Coroona and … Watermark … and I wanted to get as far away from a number of, a large number of licences being issued". He said he was trying to relieve the pressure he was facing. He said:

> *I … had faced a lot of pressure from sign offs of the previous ones and so I thought that in, in a political sense that it would be better if the Department signed off.*

He said he was concerned about "potential public criticism".

The Commission has arrived at the view that Mr Macdonald directed that the EOI process be reopened because he had been requested to do so by Mr Duncan. There are several reasons why the Commission has arrived at this conclusion; they are set out below. But this raises another question that must be resolved – was it improper or inappropriate for Mr Macdonald to bend to the wishes of Mr Duncan? That issue is also discussed in more detail below.

Mr Duncan requested the reopening

Mr Macdonald failed to give an adequate explanation for the reopening of the tender. It is clear, at the least, that he was coy about being seen by the public as the person responsible for the decision to reopen. He knew that, were it to become known the decision to reopen was his, he would be criticised.

There must have been a reason for the decision to reopen the EOI process. In trying to ascertain that reason, the Commission returns to objective and circumstantial evidence, which suggests that the reopening occurred because Mr Duncan wanted his companies, or at least one of them, to be given the opportunity to participate.

There is evidence that Mr Macdonald and Mr Duncan had a close working relationship, which expanded beyond an ordinary working relationship. Mr Macdonald described Mr Duncan as "one of our key stakeholders". They had travelled together on two visits to China; one a trade mission and the other a cultural mission. They had met on many occasions, including at functions, lunches and dinners and even for breakfast. They had met at restaurants, clubs and hotels. They had each others' mobile telephone numbers, and they would speak on the telephone from time to time, often about social or sporting matters, such as football.

Mr Macdonald said that he had no recollection of a call from Mr Duncan to request the reopening of the EOI

process, and said that he did not know if such a call had been made. Mr Duncan denied that he had made such a request of Mr Macdonald. In those circumstances, an assessment needs to be made of the reliability of Mr Duncan's evidence.

Mr Duncan was strongly opinionated and apparently intolerant of any challenge to his views. While this does not, by itself, render his evidence unreliable, it was the case that when parts of his evidence were shown to be wrong, he still made strong assertions to the contrary. At times, the accuracy of his evidence was contradicted by telephone intercepts or contemporaneous documents (the details of these are described, where appropriate). On at least one occasion (when he gave the meaning of the phrase "weasel words", which he had used), he was deliberately disingenuous. Maybe Mr Duncan was deliberately untruthful or maybe he had a faulty memory. But the fact is that, at times, his evidence was demonstrably unreliable. The Commission has had to approach the evidence of Mr Duncan with care, and it does not accept his evidence on the issue of the reopening.

Reference has been made to Mr Munnings' email of 1 October 2008 to Mr Gibson, referring to Mr Coutts' refusal "to give packages to the Mining Companies (Amerod Resources, White Energy, Real Brand Holdings and Cascade)".

As previously found, Mr Macdonald instructed Mr Gibson to make the enquiries about these four companies. How did Mr Macdonald know of them? He, too, must have been told of them by someone. The four companies are hardly household names. They are, however, related: Mr Duncan is one person who is associated with each of them.

Amerod Resources is a company that became White Energy. Mr Duncan directly or indirectly owns shares in White Energy, Real Brand Holdings and Cascade. The evidence did not identify any other person who is so connected to each of the four companies.

Real Brand Holdings is particularly significant in this context. At the time, it was not a mining company, although there might have been plans for it to become so involved. Mr Duncan, himself, was not able to identify any person connected to Real Brand Holdings who would have been interested in making such a request to the minister. Plainly, however, Mr Duncan was such a person.

In the circumstances, Mr Macdonald's specific request in relation to those four companies is strong evidence that he had been speaking to someone associated with each of those companies and that that person had asked for permission to be given to those four companies to participate in the EOI process. An inference arises that that person was Mr Duncan.

The Commission also relies upon the evidence of Mr Coutts, who gave this evidence:

> *Did he ever mention any names to you?---He did in the, I think probably the final, final set of conversations we had when he asked me again after I'd said no, he asked me again look, the Minister wants to know can we open up the EOI process to which I said something along the lines of well, Jamie, I've already given you the answer to that, why, why are we getting pressured and my recollection of that conversation is Jamie said words to the effect that Travers Duncan is wanting to get the opportunity to tender for the EOI process.*
>
> …
>
> *I just want to ask you to – when Mr Gibson mentioned Travers Duncan wanted to get an opportunity, what did you say?---I'm not sure what I said but- - -*
>
> *THE COMMISSIONER: You smiled, Mr Coutts?---Yeah, well, I probably can't say what I said here.*
>
> *MR CHEN: You can say it?---What, what I, what I said to Jamie was, "Look, my, I've given you my response, my, my view is that we shouldn't open the Expression of Interest process because it just raises a whole range of potential difficulties in trying to manage industry expectations, probity et cetera, but given that the Minister is persisting in asking us, I will check with Kevin Fennell who is out* [sic] *probity auditor and see what his view is."*
>
> *Because I took the view there was no point in me just sitting there saying, no, you can't do it.*

Mr Coutts gave the Commission a strong impression that he had a good recollection of this particular incident, and the Commission accepts his evidence. It is true that Mr Gibson did not recall this exchange, but Mr Gibson's lack of recollection does not detract from Mr Coutts' recollection.

From the evidence outlined, it can be inferred that Mr Gibson was acting on Mr Macdonald's instruction, and repeating something that had been said to him by Mr Macdonald, namely, that "Travers Duncan wanted to get an opportunity", and that Mr Duncan's request was behind the minister's decision.

There is corroborative evidence contained in notes of a meeting that were kept by the managing director of Monaro Mining, Mr Rampe. When the reopening was announced, it would have been of direct interest to those at Monaro Mining, such as Mr Brook and Moses Obeid. A telephone conference was convened in January 2009 between Mr Rampe, Mr Grigor and Mr Brook – at this stage, Mr Brook was working on Monaro Mining's behalf.

Mr Rampe took notes of their discussions and there is a note taken by him that Mr Brook had explained that the DPI had reopened the process to extend time to allow the "White Group" to participate. In that context, the reference to the White Group was, in all probability, a reference to White Energy or other companies in that group with which Mr Duncan was associated.

Finally, the Commission relies upon inferences available from some evidence given by John McGuigan. On 29 November 2008, John McGuigan was in possession of two pieces of information that could have come only from Mr Macdonald, or persons high up in his office, or the DPI. The two pieces of information were a rumour that the EOI process was going to be reopened (that is, only five days after it had been closed) and a document that had come from the DPI. John McGuigan's evidence was that he believed that the likely source of the information was Mr Duncan and, following questioning, it is quite apparent that Mr Duncan was the only viable source for that information. Viewed as a whole, that evidence of John McGuigan is supportive of direct and personal contact between Mr Macdonald and Mr Duncan.

Before passing from this matter, the Commission observes that it has considered whether the request was not made by Mr Duncan, but by an unregistered lobbyist, Mr Hewson. Mr Hewson, who, himself, was an unimpressive witness, had previously worked for Mr Macdonald, and had moved from the minister's office directly into work as a lobbyist for White Energy. At White Energy, he acted upon the direct instruction of Mr Duncan. Even if this request had been made by Mr Hewson, the Commission is satisfied that the request truly emanated from Mr Duncan.

Was Mr Macdonald's decision to reopen the EOI process appropriate conduct?

It has been submitted on behalf of each of Mr Macdonald and Mr Duncan that, even if there was contact between the two and even if that contact led to a reopening of the EOI process, there was nothing inappropriate about their actions. In this respect, it has been suggested that close contact between a minister and a major industry stakeholder is to be expected, and that lobbying to obtain a favourable decision is commonplace and acceptable conduct. In this sense, it was submitted that both the contact and the outcome were entirely appropriate; indeed, it was suggested that the contact could be compared with the attempts by Dr Williams of the NSW Minerals Council to lobby for a similar kind of result.

In the present context, there are a number of problems with the submission. The Commission does not accept that this kind of close contact between a wealthy entrepreneur and a minister of state is always appropriate. If it is properly organised and recorded, it might be acceptable. If such "lobbying" produces a direct result, then the lobbying must be conducted openly and transparently. The views of other parties should be received, and the grounds for the decision should be revealed. In controversial areas, providing reasons for a decision might be appropriate. In the present context, neither Mr Macdonald nor Mr Duncan admitted to the contact, so the Commission does not know the detail of the discussions and any efforts made to render the discussions fair to others.

Another problem with the submission is derived from Mr Macdonald's own evidence on the issue:

> *Well let's just think about this, let's got* [sic] *the abstract. If you had an EOI process would it be appropriate for a Minister to reopen it at the request of a particular key stakeholder?---Well I don't think that would be right, no.*
>
> *No. It would be wrong?---You'd need, you'd need substantial, substantial groups wanting to be reopened for you to consider it.*
>
> *Substantial groups?---Well, and, and a number, it wouldn't just be one person pushing, you wouldn't do it on one person pushing.*
>
> *That's right. For one person, just one individual to put pressure on a Minister to reopen an EOI process like that, that would be corrupt, wouldn't it?---Well, I don't know if it would be corrupt to be trying to put pressure on but um, if, if you responded to that in a way and to do it on the basis of that, that would be wrong.*

In those circumstances, the conduct of Mr Macdonald and his decision to reopen were inappropriate. It is unnecessary, however, to decide whether Mr Macdonald's decision to reopen the EOI process, alone, was "corrupt conduct" because of an additional feature – the supply of governmental information by Mr Macdonald to Mr Duncan, which is covered by the next chapter of this report.

The Commission finds that there is insufficient evidence to establish that Mr Duncan put any pressure, inappropriate or otherwise, on Mr Macdonald to reopen the EOI process. This precludes a finding of corrupt conduct against Mr Duncan in connection with the reopening of the EOI process.

Chapter 25: Mr Duncan and the inside information

Mr Duncan had access to government information that came directly from Mr Macdonald. The detail of the provision of that information has a bearing upon judgments that must eventually be made about Mr Macdonald and Mr Duncan. In assessing the value of this evidence, some dates should be kept in mind: Mr Macdonald first raised the possible reopening of the EOI process on or about 1 October 2008, the original EOI bidding process closed on 24 November 2008, and the decision to reopen the EOI process was announced publicly only in January 2009.

The information

On the morning of Saturday, 29 November 2008, John McGuigan met with his son James McGuigan at the family home. During the public inquiry, James McGuigan was shown a document titled "Proposed NSW Coal Allocations" and he gave this evidence about receiving it:

> *Who gave it to you?---John McGuigan.*
>
> *When did he give it to you?---The morning of Saturday, 29 November, 2008.*
>
> *Now, let's have a look at it, it says "Proposed New South Wales Coal Allocations"?---Yes.*
>
> …
>
> *All right. Where were you when he passed it to you?---I was at my parents' house.*
>
> *Did he pass it to you in paper form?---Yes.*
>
> *And what did he say when he passed it to you?---He said, "James, here's a document, I've heard rumours that the Expression of, that the allocation process is going to be reopened. I will be going in for surgery for my cancer on Monday so do you think it's possible to arrange a meeting with Richard, John at the offices of Arthur Phillip and we can discuss this document should it be reopened."*

That evidence was confirmed by John McGuigan.

This information was not available to ordinary persons. The "Proposed NSW Coal Allocations" document will be described in more detail below, but whatever might be said about it, it was not a public document. Moreover, the rumour that the process was to be reopened was information that could have come only from Mr Macdonald or someone high up in his office or the DPI. John McGuigan was recounting the rumour at around the same time that the decision to reopen was being taken. There is evidence from a member of the EOI Evaluation Committee, Ms Moloney, to the effect that there was a direction from the ministerial office to keep any discussions of a potential reopening quiet.

The source of the information

John McGuigan was asked about the source of his information. The Commission's general findings in respect of John McGuigan's credibility are set out later, but in this respect the Commission specifically accepts John McGuigan's evidence as his earnest attempt to give an honest and accurate account of the events. When John McGuigan was shown the document titled "Proposed NSW Coal Allocations" his evidence was as follows:

> *… And where did you get the document, Mr McGuigan?---Mr Watson, I don't have a clear and precise recollection of where I got the document. The number of sources are very limited, but I've wracked my memory and I do not have a clear and precise recollection.*
>
> *Could you tell us those limited sources?---Well, I think I did not have direct relationships with the Department and, and I think the likely source is that I got the document from Mr Duncan.*
>
> …

And I mean after exploring the matter fully, as you put it, the likely source is Travers Duncan. Do you agree?---I think that is correct.

Well, I'm going to try and emphasise that because there's another part to it. You said it was not an unfair summary for me to say that at the time you passed it over you passed it over suggesting that there had been a rumour about the reopening?---Correct.

So it's not going to come from a Website. It seems as though the probability is that whoever gave you this document at the same time conveyed to you the rumour. Do you agree?---I think that's a fair assumption.

And that means that the probability is enhanced that it was Travers Duncan. Don't you agree?---When, when I think of possibilities I have to agree.

The Commission finds that it was Mr Duncan who gave John McGuigan the DPI document, and it was Mr Duncan who told John McGuigan of the rumour regarding the reopening of the EOI process. This, in turn, raises an issue – from whom did Mr Duncan get the document and from whom did he hear the rumour?

Mr Duncan's source was Mr Macdonald

As at 29 November 2008, only very few people would have had access to the DPI document and also known of the proposal to reopen the EOI process. On the political side, those who had access would have included Mr Macdonald and Mr Gibson. On the DPI side, they would have included Mr Coutts, Mr Mullard, the members of the EOI Evaluation Committee, and the probity auditor, Mr Fennell. There is no suggestion and no evidence of any personal or professional contact between Mr Duncan and Mr Gibson, the members of the EOI Evaluation Committee and Mr Fennell. The Commission does not accept that there was any leak by Mr Coutts or Mr Mullard. That leaves only Mr Macdonald as a possible source.

But the Commission does not arrive at that conclusion only from a process of elimination. The closeness of the relationship between Mr Macdonald and Mr Duncan has been discussed earlier. Having regard to these matters and the finding that it was Mr Duncan who influenced Mr Macdonald to reopen the process (including the circumstances on which that finding was based), the Commission infers that Mr Macdonald was also the source of the DPI document and the information relating to the reopening of the EOI process.

The significance of the supply of the information

It has been pointed out on behalf of Mr Macdonald and Mr Duncan that neither of the pieces of information supplied was of any great significance. That submission is incorrect – the information was confidential and potentially valuable.

The document titled "Proposed NSW Coal Allocations" was one prepared at a time when the DPI was contemplating opening large areas. As a consequence, the document, and the map (figure 3) identified a number of areas that the government considered might be ripe for opening. These included the large and potentially valuable areas of Benelabri and Ridgelands. As it turns out, Mr Macdonald's later decisions meant that these larger areas were not included amongst the 11 areas involved in the EOI process.

Knowledge that the NSW Government contemplated opening Benelabri and Ridgelands was, potentially, valuable information. An unscrupulous investor could have used that information to purchase rural lands within those tenements at a value not affected by any knowledge that those areas would or might be declared to be open for mining. By these means, such an investor would make significant windfall profits, were those areas in fact declared to be open for mining. The fact that those areas eventually turned out not to be the subject of the EOI process at the time does not detract from the proposition that, when the DPI document was first given to Mr Duncan, it was a confidential document potentially of great value.

It is not appropriate to dismiss the inside information that the EOI process was going to reopen as being merely some kind of "rumour" – on the Commission's findings, it was the fulfilment of an agreement between Mr Macdonald and Mr Duncan. Mr Duncan had requested that the process be reopened; Mr Macdonald had agreed to do so, and went to some lengths to secure that outcome. Once the matter had been decided, then Mr Macdonald informed Mr Duncan that he had done so.

And, with due respect to the submission, the information can hardly be dismissed as valueless – when Mr Duncan provided John McGuigan with the information, he quickly passed it on to his son, James McGuigan, and instructed him to arrange a meeting with John Atkinson and Richard Poole. That meeting was held the same day, a Saturday. As a result of the meeting, Cascade commenced making its plans to bid for tenements, and by these means it ultimately secured the exploration licences at Mount Penny and Glendon Brook.

The information provided by Mr Macdonald to Mr Duncan was valuable and put to effective use by Cascade.

Findings in regard to the reopening of the EOI process and the provision of the confidential information

The Commission finds that Mr Macdonald made a partial decision to benefit Mr Duncan when he reopened the EOI process and disclosed the confidential information referred to in this chapter to him.

Is there an inconsistency between the assistance Mr Macdonald gave to Mr Duncan and that which he gave to the Obeids?

At first glance, the reopening of the EOI process was potentially prejudicial to the Obeids as it introduced the possibility that Cascade or some other bidder might be awarded the Mount Penny and other relevant exploration licences (at a time when the Obeids had entered into a joint venture with Monaro Mining, conditional upon that company being awarded an exploration licence).

The point, however, is that Moses Obeid says he never informed Mr Macdonald of the deal that he, on behalf of his family, had done with Monaro Mining and Mr Macdonald testified that he did not know of any deal that the Obeid family had done with any bidder for the exploration licences in question. Thus, in reopening the EOI process to accommodate Mr Duncan, Mr Macdonald would have had no idea that he might be doing some harm to the Obeid mining aspirations in connection with the Mount Penny exploration licence. Indeed, he may well have thought that he was assisting them further, and this – in fact, as it ultimately turned out–- is what he had done.

Chapter 26: Cascade takes control of Mount Penny

It is now known that Cascade became the successful bidder for the exploration licences at Mount Penny and Glendon Brook. This came about in a convoluted way. There were three major steps. The first was the reopening of the EOI process, which led to Cascade being permitted to make its bids for Mount Penny and Glendon Brook. The second step involves the deliberations of the EOI Evaluation Committee, which would have led to the nomination of Monaro Mining as the winning bidder. The third step involves the circumstances in which Monaro Mining withdrew from the bidding, and Cascade took its place as the winning bidder. The details of those second and third steps are discussed in this chapter.

The deliberations of the EOI Evaluation Committee

The appointment and makeup of the EOI Evaluation Committee have been discussed above. The EOI Evaluation Committee did not have time to commence its original deliberations before it was told that the EOI process was to be reopened.

The second round in the EOI process required that any bids had to be made on or before 16 February 2009. It was after that date that the EOI Evaluation Committee commenced its deliberations, and it met on several occasions from February to May 2009. Under the terms of the process, the EOI Evaluation Committee had to apply "evaluation criteria", which had been defined in section 6.2 of the Expression of Interest Information. There were several parts to this; for example, it required a bidder to set out details of its commitment to explore the area, to provide a conceptual mine development proposal, to address certain financial considerations, and to display technical competence.

The EOI Evaluation Committee followed a method in this respect, by applying a kind of "scoring system" and allocating a certain number of points under each criterion. By this means, the EOI Evaluation Committee felt it could better compare the bids by looking at an overall score.

Over time, results were compiled in respect of each bid in respect of each tenement. As part of testing the process, Mr Fennell sat in on these deliberations and also compiled his own assessment of the bids – this was so he could draw a comparison between his own thinking and that of the EOI Evaluation Committee – even though these were not part of his functions as a probity auditor. It is not suggested that he was not entitled to do so.

By 6 May 2009, the deliberations of the EOI Evaluation Committee had drawn to a close, and it had arrived at a position where it was able to make recommendations to the minister as to which mining company made the winning bid. To this end, the EOI Evaluation Committee had even gone to the length of drafting letters, which, if their recommendations were accepted, could have been signed by Mr Macdonald and issued by the department.

The EOI Evaluation Committee decided that Monaro Mining should succeed in respect of six of its nine bids. Relevantly, three of the six were Mount Penny, Glendon Brook and Yarrawa. Monaro Mining's comprehensive success is a surprising result because it was only a small player with no experience at all in coal. A member of the EOI Evaluation Committee, Ms Moloney, remembered that there was discussion as to whether Monaro Mining could cope if it won that many bids. Nevertheless, the EOI Evaluation Committee stood by its decision, and its recommendation was that Monaro Mining's bids should win those six tenements.

Before those recommendations were able to be formalised, however, Monaro Mining withdrew its bids in respect of the Mount Penny, Glendon Brook and Spur Hill tenements. The circumstances behind that withdrawal are the subject of the next part of this chapter.

The withdrawal of Monaro Mining

As described earlier, Mr Grigor had negotiated the joint venture for Monaro Mining with Voope without board knowledge or approval. The board of Monaro Mining seems only to have become aware of the details over time, and it is clear from matters recorded in the minutes that the board was becoming increasingly concerned about meeting its commitments.

Part of the problem stemmed from the information that was being provided to the board by Mr Grigor, Mr Rampe, and Mr Brook. Minutes of board meetings reflect growing concern as Mr Brook's attempts to secure funding for coal projects remained unsuccessful. It was in this context that the board was repeatedly told by those three men that Monaro Mining's prospects of success in its bids were almost certain.

There was growing acrimony between members of the board and Mr Grigor. This resulted in the removal of Mr Grigor as the chairman of Monaro Mining on 29 April 2009. Mr Grigor immediately resigned from the board and appears to have had nothing further to do with Monaro Mining. Monaro Mining then set about uncovering the detail of its commitments. In this respect, there was a question of interpretation – when it made its bids, Monaro Mining had proposed the additional financial contribution on the understanding that it would be payable over time, but discussions with the DPI indicated otherwise. The DPI confirmed that, if Monaro Mining was selected as the winning bidder, it would be expected to pay the promised additional financial contribution as one payment, upfront.

With no firm funding in place, the board of Monaro Mining became concerned about such a commitment. The board sought legal advice, and eventually resolved that it should attempt to get out of its bids on the best available terms.

Monaro Mining's bids pass to Loyal Coal

Monaro Mining was placed in a difficult position. It wanted to withdraw from its bids, but it had expended a substantial amount in putting its bids together. It was eager to recover some, or all of, those expenses. Rather than withdraw from the bids, a better outcome would be produced if it could find a party willing to "buy" the bids; that is, a party who would assume control of the bids in return for paying Monaro Mining's expenses. One obvious person to consult on this issue was Mr Brook.

On 22 May 2009, a meeting was held between Mr Brook, James Malone, Greg Barns and Mr Rampe, directors of Monaro Mining. At that meeting, Mr Brook said that the investors in Voope were keen to preserve their position and that they wanted to "take their chances" in pursuing the bid.

Immediately following the meeting held with Mr Brook, a meeting of directors of Monaro was held involving Mr Malone, Mr Rampe and Mr Barns. They resolved to abandon the NSW Coal Project and all the EOIs submitted by Monaro Mining, contingent upon a new agreement being entered between Monaro Mining and Voope.

Agreement was reached between Monaro Mining and Voope, whereby Voope assumed the responsibility for the Monaro Mining bids. The document embodying the agreement between Voope and Monaro Mining, described as a "Deed of Release", made provision for the changes that were to occur following Voope assuming control of the bids that had been submitted by Monaro Mining.

The first substantive change was that Monaro Coal, the company who would apply for any exploration licences that were awarded to Monaro Mining, was to change its name to Loyal Coal. This name was selected by Moses Obeid and Mr Brook. Monaro Mining was required to change the name of Monaro Coal to Loyal Coal by 6.00 pm on 1 June

2009, which it did. Monaro Mining was also required to transfer all of its shares in Loyal Coal – it had all 10 ordinary shares that had issued – to Voope, which it did on 2 June 2009.

Further, pursuant to the Deed of Release, Monaro Mining was obliged to notify – and did notify -– the DPI, before 5.00 pm on 2 June 2009, of the following:

(a) *That any coal exploration areas are to be awarded to the entity known as Loyal Coal Pty Ltd.*

(b) *That to comply with the Department's requirements that all financial obligations are paid in 30 days, Monaro is transferring its interest in Loyal Coal to Voope.*

(c) *Monaro will communicate to the Department that Voope is a financial partner.*

(d) *It is intended that Monaro will provide Voope with consultancy services via a management agreement should Loyal Coal be awarded any Exploration Licences.*

On 4 June 2009, the two directors of Loyal Coal – Mr Malone and Mr Rampe – resigned and Mr Kaidbay was appointed the sole director.

The agreement also provided that, in return for Monaro Mining performing the above, Voope was to pay Monaro Mining the sum of $300,000, upon being awarded any exploration licence. As it turned out, Voope did not pay Monaro Mining this sum of money; it ultimately paid Monaro Mining only $70,000.

The introduction of Cascade

Mr Brook and Moses Obeid were now free to attempt to resurrect their prospects of a mining venture. They needed to find a new business partner.

The new partner was a former competitor. After the process had reopened, Monaro Mining and Cascade had each made a bid for the Mount Penny tenement and were competing against each other. It is not clear as to how much, if anything, that Monaro Mining or Cascade knew about the other. But a connection between the two was effected. Moses Obeid had a business that provided technological services to the mining industry called Geo-Radar. The details of Geo-Radar are unimportant, except that it led to contact being made between Moses Obeid, John McGuigan and Mr Jones – the latter two being investors in Cascade.

The Geo-Radar introduction

Although Geo-Radar was a business under Moses Obeid's control, the original relevant contact was organised by Edward Obeid Sr. Edward Obeid Sr knew Mr Jones. According to Mr Jones, Edward Obeid Sr called him to tell him that Moses Obeid was about to call with a business proposal.

Moses Obeid did contact Mr Jones regarding Geo-Radar. Mr Jones then involved John McGuigan. Moses Obeid, John McGuigan and Mr Jones met to discuss Geo-Radar at the Ramada Hotel in Sydney sometime before or on 20 May 2009. Nothing ever came of the discussions in respect of a business transaction involving Geo-Radar, but that is presently unimportant. The significance is that this was the first contact between these men – Moses Obeid, John McGuigan and Mr Jones – who would subsequently become business partners in a joint venture involving Mount Penny.

Mr Jones was asked about the Geo-Radar meeting during a compulsory examination, and gave this evidence:

> *Do you remember in May 2009 that at one of these meetings, Moses Obeid drew to your attention and McGuigan's attention, all three of you were there, the fact that he had influence in respect of a mining company, Monaro Mining, which was interested in Mount Penny. Do you remember that?---Yeah.*
>
> *Now it was just the three of you at that meeting?---Yeah*
>
> *Did he tell you, well what did he tell you? I'm not suggesting you're going to recall the precise words?---No, no. But his position was, I think he was looking for some funding or he was looking for some knowledge or some, some funding mechanisms. And I said, oh you should talk to the Whites guys, they're, they're - - -*
>
> *THE COMMISSIONER: Was he looking for a joint venture partner?--- I think he may have been, yeah. And he was saying we need someone to run with to do things. I said, well you should talk to McGuigan or Whites and Travers. I said they're the guys I know that are in that business. And that's where I left it.*
>
> *MR WATSON: ... But at that meeting Moses Obeid made it plain that he was or his family was involved in the business aspect of the mine itself, the proposed tenement. Is that right?---Yeah, I think he did, yeah.*
>
> *And as a result of that there was a meeting teed up was there not, this meeting was more formal at which another man was introduced, Gardner Brook?---Yeah*

Mr Jones' reference to "Whites" is a reference to White Energy – a company that was closely associated with

John McGuigan and Mr Duncan. The significance of this conversation is that it shows that Moses Obeid was openly admitting to Mr Jones that he or his family had an interest in coalmining at Mount Penny – an issue that becomes important later.

Negotiations with Cascade

Within days of the failed Geo-Radar meeting, Moses Obeid made telephone contact with John McGuigan to set up a meeting. Mr McGuigan said that Moses Obeid "wanted to talk about a proposition that he thought I'd be interested in in relation to Mount Penny".

In all, there is evidence that four meetings were held in respect of these negotiations – on 23 May, 31 May, 1 June and 3 June 2009. There was then a fifth and final meeting on 5 June 2009, at which two documented agreements were signed. Some of the meetings were more important than others, and the persons present at the meetings were different. It will be necessary briefly to refer to each of the meetings, as the negotiations during each meeting contribute in one way or another to the agreements that were entered into on 5 June 2009.

There were two agreements, reflecting two aspects of an overall agreement – a property agreement and a mining agreement. It is generally conceded that it was known that the Obeids were behind the property aspect of the transaction, but the dispute is over whether or not it was known that the Obeids also stood behind the party that was to become the co-venturer in the mining tenement. For reasons that are set out in detail later, the Commission has concluded that those present and negotiating on behalf of Cascade – John McGuigan, James McGuigan, Mr Jones and Mr Poole – knew full well that the Obeids were the party with whom they were entering a joint venture.

The four meetings

The initial meeting was appointed for Saturday, 23 May 2009. On one side, there was Moses Obeid and Gardner Brook; on the other side, there was John McGuigan and James McGuigan. The details of the negotiations at the first meeting do not emerge clearly through the evidence, but it becomes obvious from later conduct that the broad parameters of an agreement must have been discussed at this time. It is probable that the negotiations between the two groups were advanced to the extent that it was recognised that there were two separate components to any potential deal. One lay in property transactions; that is, if a deal was to go forward, then some arrangements would be made so that the three properties – Cherrydale, Donola and Coggan Creek – would be the subject of a sale to a Cascade entity. The other component involved the terms under which any mining venture on the Mount Penny tenement would be taken forward.

There is a divergence in this area between the evidence of Mr Brook and the other witnesses. Mr Brook gave evidence that, by the time he attended the first meeting, there had already been an agreement struck by Moses Obeid to the effect that the Obeids would receive 25% of a mining venture, but the other witnesses have contradicted that, and said this detail was only agreed on at a later date. In this instance the Commission is inclined to doubt the recollection of Mr Brook, and to accept the other evidence. This does not have an important bearing upon the ultimate findings.

The second meeting occurred on Sunday, 31 May 2009. On this occasion, Moses Obeid, Paul Obeid and Mr Brook were on one side, and John McGuigan, James McGuigan and Mr Jones were on the other.

Most of the critical terms of the ultimate transaction were negotiated and broadly agreed to on this day. John McGuigan, who was a very experienced lawyer, drew broad Heads of Agreement between the parties. These notes were transcribed and put in a document titled "Key Principles". That document was to provide the cornerstone for the ultimate agreement.

This second meeting is important because it shows that all of the parties were open about the fact that the Obeids were behind the mining side of the transaction. Apart from anything else, this is quite evident from references in the Key Principles document, where the references to the United Pastoral Group (UPG) are references to the Obeid family.

After the second meeting, there was a change in the identity of Cascade's principal negotiator. To this point in time, Mr Poole had been away, and John McGuigan left Australia on 1 June 2009 to travel to Indonesia with Mr Duncan. Mr Poole then assumed control of the detail of the negotiations, and he conducted those negotiations with the assistance of James McGuigan.

There is evidence of a brief, third meeting on 1 June 2009 at Arthur Phillip Pty Ltd (a company controlled by Mr Poole) between Mr Brook and Mr Poole. Mr Brook and Mr Poole had known each other in some other capacity, and their relations were friendly. The meeting seems to have been some kind of reintroduction, during which Mr Brook and Mr Poole discussed the background to the negotiations, which to that point in time had been conducted with John McGuigan.

A fourth meeting occurred at the offices of Arthur Phillip Pty Ltd on 3 June 2009. On this occasion, Moses Obeid and Mr Brook were present on one side, and Mr Poole and James McGuigan were on the other. It is clear that, even at this late stage, some of the details of the transaction had not been finalised. For example, James McGuigan gave evidence that at this meeting there were still discussions about whether or not there would be a "free carry" in relation to the mining aspect of the venture, and that Moses Obeid was asking that the rural properties be purchased for 10 or 15 times their market value. By the end of this meeting, these details must have been close to resolution.

Background: the involvement of Buffalo Resources

At one of the meetings, agreement was reached that the Obeids were going to employ a new or "cleanskin" shelf company to own their interest. To this end, on 3 June 2009 a new company was registered, Buffalo Resources Pty Ltd (Buffalo Resources). The directors of that company were Mr Brook, Mr Kaidbay and Mario Sindone. The registered office of Buffalo Resources was the office of Mr Sassine, the Obeid family accountant. The original shareholding allocated 88% of the share capital to Equitexx Pty Ltd, a company that acts as trustee for one of the Obeid family trusts. The remaining 12% of the share capital was owned by Warbie Pty Ltd, a company owned and controlled by Mr Brook.

It may well go without saying, but the Commission finds that Buffalo Resources was a company controlled by the Obeid family and, subject to Mr Brook's interest, owned by the Obeid family.

Something needs to be said about two of the directors of Buffalo Resources – Mr Kaidbay and Mr Sindone.

Mr Kaidbay is a close associate of the Obeids, and has acted as a front man for the Obeid family in several instances and in different kinds of transactions. Mr Kaidbay was an unimpressive witness. Soon after these transactions, he allowed himself to become a conduit for the Obeid family to pass to Mr Brook a document prepared by Paul Obeid as some kind of *aide memoire* in respect of the events. That document is slanted and not a reliable version of the events it describes. It appears to have been given to Mr Brook to attempt to influence him to give evidence of assistance to the Obeid family. Further, there was other evidence that showed that Mr Kaidbay seems, to a degree, to be reliant on to the Obeids for his earnings and financial wellbeing. The Commission considers that Mr Kaidbay is inclined to give whatever answers might work to the advantage of the Obeids.

Mr Sindone was an experienced lawyer who, as at May 2009, was assisting the Obeid family on legal issues unrelated to their coal interests. He was requested by Mr Kaidbay to become a director of Buffalo Resources, and agreed to do so. The Commission is satisfied that there was no impropriety on Mr Sindone's part, and that he appears to have attempted to provide temporary assistance in the context of an ongoing relationship with the Obeids. He had no part in any wrongdoing, and was simply being used by the Obeid family to assist in disguising their involvement.

The agreements between Cascade and Buffalo Resources

On 5 June 2009, Cascade entered two separate agreements. Although the agreements were separate, and although the agreements purported to be between different parties, they were interdependent in the sense that, unless Cascade entered both agreements, there would be no deal at all. The first agreement related to the mining venture and this agreement was made between Cascade and Buffalo Resources. That agreement was executed by John McGuigan on behalf of Cascade and by Mr Brook on behalf of Buffalo Resources.

The key components to the mining venture agreement were that, in the event that an exploration licence were granted to Cascade in respect of Mount Penny, the parties agreed to form a joint venture "to explore and develop" the area with a view to obtaining mining approval. It was further agreed that, as joint venturers, they would, if they could, pursue the development "over the area contiguous to" Mount Penny. The agreement then went on to provide as follows:

> *In recognition of Buffalo's intellectual property contribution and in consideration of Buffalo:*
>
> - *and its associates or related parties including Gardner Brook and Loyal Coal Pty Ltd withdrawing any existing applications in relation to Mount Penny and Glendon Brook Coal Release Areas and undertaking not to pursue the grant of any mining rights to the Area or any Contiguous Area, or the Glendon Brook EOI Coal Release Area;*
> - *agreeing to assist Cascade to explore and develop the Exploration Licence and obtain the Mining Approvals;*
> - *agreeing to make available and provide their expert knowledge of the Area to assist with further exploration and review of the Contiguous Area.*

Cascade agrees to:

- *vest 100% of its interest in the Exploration Licence in the JV; and*
- *grant to Buffalo a 25% interest in the JV.*

There are several troubling aspects to the above part of the agreement. Buffalo Resources was receiving a substantial benefit under the agreement – 25% of a potentially extremely valuable coalmining tenement – but what was it giving in return? Part of the consideration is said to be "Buffalo's intellectual property contribution", but it was readily conceded that nobody behind Buffalo Resources had any experience or knowledge in the area of coalmining or coalmine development. It does not appear that Buffalo Resources truly had any "intellectual property" that it could contribute. Similarly, Buffalo Resources did not have skills that would enable it to "assist Cascade to explore and develop the area" and did not have any "expert knowledge" that could enable exploration of contiguous areas. In short, these items specified as consideration were shams and no consideration at all.

That leaves only one item that Buffalo Resources was providing in return – arranging the withdrawal of the bids made by Loyal Coal in respect of Mount Penny and Glendon Brook.

The second agreement related to the three rural properties – Cherrydale, Donola and Coggan Creek. The agreement took the form of a letter of offer addressed by Cascade to Mr Kaidbay of UPG. This agreement was made between Cascade on one side, and each of UPG, Geble Pty Ltd and Justin Kennedy Lewis Pty Ltd on the other. Geble Pty Ltd, as explained earlier, was a corporate vehicle for the ownership of Donola, which was fronted by Mr Campo, and controlled a trust under which the Obeid family and the Triulcio brothers were entitled to half shares of the property. Justin Kennedy Lewis Pty Ltd was the corporate alter ego of Justin Lewis. The involvement of UPG is a different story – and the Commission makes its findings in that respect further below.

The key components of the property agreement were that, if Cascade won its bid for the Mount Penny exploration licence, it would enter into an agreement to purchase each of the three properties for four times their market value. That purchase, however, was contingent upon Cascade successfully obtaining mining approval – so it involved events that, at the time the agreement was concluded, could occur only sometime in the future.

Involvement of UPG

Cherrydale had been purchased in the name of Locaway Pty Ltd, a corporate vehicle of the Obeid family. In about February 2009, Edward Obeid Sr wanted to alter the ownership of Cherrydale and to do so he needed the permission of the mortgagee, Mr Cherry. Mr Cherry gave evidence that he received a call from Edward Obeid Sr requesting the change in the name of the owner of Cherrydale and that, "He wanted to change the name for reasons associated as he put it to me [with] the Obeid name not being linked with the coalmining activity".

At the same time, Mr Kaidbay was involved in a project that seems to have been designed to create a false paper trail pretending that Locaway Pty Ltd had sold Cherrydale to a company said to be owned by Mr Kaidbay, namely, UPG. There was an exchange of correspondence between the two, all of which was apparently drawn by Moses Obeid, and all of which was patently false. Moreover, UPG was not Mr Kaidbay's company – it was in effect beneficially owned, and controlled by, the Obeid family.

Although these steps were taken toward transferring the ownership of Cherrydale from Locaway Pty Ltd to UPG, they were never completed. They were still planned as at the execution of the agreement with Cascade in June 2009.

In any event, the Commission finds that UPG was a company owned and controlled by the Obeids.

A side issue: Mr Duncan's knowledge of the deal

Mr Duncan denied knowledge of the negotiations that resulted in the agreement with Buffalo Resources. During the public inquiry, he gave the surprising evidence that he had become aware of the agreement only "sometime during the course of these actions", which the Commission takes to mean that he became so aware only during his preparation for the public inquiry. This was surprising because Mr Duncan seems to the Commission to be strong-willed and demanding, and it is unlikely he would respond kindly to being kept in the dark by the other Cascade investors. It seemed unlikely that an important deal could be made without his knowledge; it seems even less likely it could have been kept secret from him for two or more years.

The Commission rejects Mr Duncan's evidence in this respect. It is plain from a course of emails sent in early June 2009 that John McGuigan was then in Indonesia with Mr Duncan and speaking to Mr Duncan about these very matters. Moreover, it seems that Mr Duncan was critical to the negotiations that led to the Obeids taking a 25% share in any joint venture. Although he said this conversation

occurred sometime later, Mr Duncan said that he had a telephone conversation with John McGuigan:

> *THE COMMISSIONER: You must have been very surprised?---I had some aggressive discussion in relation to it.*
>
> *Tell us about that please. What did you say and what did Mr John McGuigan say in that discussion?---He said that there's going to be a joint venture for 30 per cent of the exercise, it's a package deal tied up with the purchase of the land and I said 30 per cent with some profanity is not a, is not a sensible number, you shouldn't go any more than 20 per cent and sometime after that he rang me back and said I've done a deal at 25.*

That is plainly a reference to the transaction that Cascade struck with Buffalo Resources and demonstrates that Mr Duncan was closely involved in the negotiations and in fixing the terms upon which a deal could be made.

Cascade had inside information

Reference has been made to a critical feature of the agreement between Cascade and Buffalo Resources; namely, that Loyal Coal would withdraw its bid for Mount Penny. That was critical to the deal because those persons negotiating on behalf of Cascade believed that, if Loyal Coal withdrew its bid, Cascade was guaranteed of success. This information had been provided to Cascade by Moses Obeid and Mr Brook in the context of the negotiations. Mr Jones agreed that this information was "decisive".

Knowledge of the EOI rankings

Monaro Mining and Cascade were, of course, competitors in the bidding process. When Moses Obeid and Mr Brook approached Cascade, they had a very valuable asset with which to bargain – that asset was the control that they were able to exercise over each of three key properties in the tenement. This, by itself, would have been very attractive to any mining entrepreneur. But Moses Obeid and Mr Brook offered an additional factor, and one which appears to have assumed equal importance – they had the power to withdraw the bid that had been made by Monaro Mining.

In truth, at the time that Moses Obeid and Mr Brook were negotiating with Cascade on behalf of Monaro Mining, they were in a weak position. They were aware that success in respect of the Mount Penny tenement would require $25 million to be paid by way of additional financial contribution (a sum of which they had no prospect of providing). They were aware that Mr Brook had unsuccessfully been pursuing finance on behalf of Monaro Mining for many months. But Cascade did not know this. John McGuigan only found out later that Monaro Mining had made the $25 million offer for additional financial contribution. As far as Cascade was aware, Monaro Mining was a viable opponent in the bidding for Mount Penny.

Moses Obeid and Mr Brook ramped up the negotiation by telling Cascade that they had inside information in respect of the progress of the EOI assessment, and that Monaro Mining was going to succeed and that Cascade would come second. Each denied that he had done so, but the Commission prefers the evidence to the contrary.

Mr Macdonald ascertains the successful bidders

The processes of the EOI Evaluation Committee have been described earlier. The EOI Evaluation Committee had been deliberating for some months since the process had closed. By May 2009, its deliberations were finalised. The EOI Evaluation Committee had resolved to recommend that Mount Penny be awarded to Monaro Mining and a letter to that effect had been drawn up for execution by the minister.

On 28 May 2009, there was a meeting in the ministerial office. Mr Macdonald, Mr Gibson, Mr Mullard and the chairman of the EOI Evaluation Committee, Mr Hughes, were present. Mr Macdonald was informed during this meeting of the outcome of the deliberations of the EOI Evaluation Committee. Mr Gibson could not recall specifically, but was sure that the DPI officers either read out the list of winners or provided the actual list. Whichever be the case, from that time Mr Macdonald had the confidential information of the identity of the successful bidder in respect of the Mount Penny tenement. Significantly, there was no evidence as to whether those who came second were on the list read out or whether those present at the meeting were given this information.

The Commission finds that Mr Macdonald told Moses Obeid who the winners were in the bidding process. The timing of all of this is compelling: Moses Obeid opened negotiations with John McGuigan on 23 May 2009, Mr Macdonald received this information on 28 May 2009, and Moses Obeid was aware of the information by 31 May 2009. Given his contact with Moses Obeid around this time, and, given the closeness of their relationship, there would have been ample opportunity for Mr Macdonald to provide this information to Moses Obeid.

Mr Jones was present at the meeting on Sunday, 31 May 2009 – the same critical meeting from which the Key Principles document emerged. In light of the evidence of Mr Jones on this issue, the Commission accepts that

Moses Obeid and Mr Brook were using this confidential information as part of their negotiating strategy. Mr Jones gave evidence as follows:

> *Now, the Obeids or Brook were using as one of the negotiating tactics a tactic in which they said that their bid, Monaro Mining's bid, was in front and Cascade was running second. Do you remember that?---Yes, yes.*
>
> *And it was quite explicit. They said to you, we're in front, you're in second place. Is that so?---I don't recall if they said we were in second place, but yes.*
>
> *They clearly told you that they knew somehow or another that they were in front?---Yeah.*
>
> *And that was a decisive factor because if Monaro was in front and you could get it to step aside, then Cascade could to the deal?---Yes.*
>
> *And it was that information, that representation which was decisive in finalising in rough terms the deal that was struck that day. Is that right?---Yes.*

Mr Jones was also shown some of the evidence that he had given during his compulsory examination. The transcript of the evidence was given to him and, after reading it, he said he stood by that part. That evidence was as follows:

> *Now, at that meeting there were two aspects to an agreement to be hammered out, one related to the creation, sorry, one related to Monaro Mining, and what was said to you was that, and I want to suggest this came out of the mouth of Brook, words to this effect, that he knew from information that he had that Monaro Mining would be the winning party on the Expressions of Interest. Do you remember something like that?---Yes.*
>
> *And that, but Gardner Brook went on to say that from the same source, not these words but like this, from the same source, he knew that the second most favoured party after Monaro Mining was Cascade. Do you remember him saying something like that?---Yes.*

Mr Brook's evidence about the negotiations was consistent with him having received and used this confidential information:

> *Now, at that meeting what was said?---Well, the broad terms of the 75/25 had been agreed on the basis that if Monaro was to surrender its bids to an Obeid interest and approved by the DPI to do so, the agreement was they would withdraw and Cascade, the presumption was Cascade was number two.*
>
> …
>
> *THE COMMISSIONER: And underlying all these negotiations is the notion that Cascade is second in line and if Monaro withdraws Cascade would become the holder of the licence?---That's the notion, sir, yes.*
>
> …
>
> *…do you know whether a representation was made to any person involved on the Cascade side that they … were second and if Monaro withdrew they'd get the licence? --- Commissioner, I don't think this agreement, conditional agreement, would have been drafted if that, that wasn't true.*

The other Cascade witnesses denied that they were told by Moses Obeid and Mr Brook that Monaro Mining had come first in the EOI process and that Cascade had come second. The Commission finds, however, that Mr Jones' evidence, in particular, is compelling. That evidence does, after all, constitute significant admissions against interest. Mr Brook's evidence, too, is persuasive.

Mr Macdonald knew who had come first in the bidding process and, having regard to the history of the assistance he had rendered the Obeids as recounted in this report, the Commission finds that he gave Moses Obeid that information.

The Commission has decided, however, that it cannot find that Mr Macdonald gave Moses Obeid the information that Cascade had come second. There are many factors, again as recounted herein, which lead to an inference that Mr Macdonald must have given Moses Obeid that information. Nevertheless, there is a hiatus in the evidence that precludes a finding that that inference is proved on a balance of probabilities. The hiatus arises from the absence of any evidence, not only that Mr Macdonald was given the information that Cascade had come second, but that he had any opportunity to obtain that information. Applying the strictures contained in the well-known *Briginshaw* test, the Commission finds the allegation that Mr Macdonald told Moses Obeid that Cascade had come second in the EOI process relating to the Mount Penny exploration licence not to have been proved.

A side issue: was the withdrawal of Monaro Mining a collusive bargain?

In their submissions, Counsel Assisting have suggested the agreement for Monaro Mining to withdraw its bid was arguably an illegal agreement, in the sense that it breached Part IV of the *Trade Practices Act 1974*. Counsel Assisting, however, have not gone on to suggest that such a breach could provide the basis for a finding of corrupt conduct by the Commission, so the Commission will not consider the matter in that context.

Cascade assumes control

It was by the means described above that Cascade was able to assume control over the Mount Penny and Glendon Brook tenements. On 9 June 2009, Monaro Mining withdrew its bids. Once it had secured the withdrawal of Monaro Mining's bids, the success of Cascade was guaranteed and, inevitably, it won.

As the events unfolded, it can be seen that, no sooner had Cascade succeeded in its bid, that the investors behind Cascade became determined to sell the benefit of the exploration licence.

Chapter 27: Did Cascade know about the Obeid involvement?

An issue arose about whether the investors in Cascade knew that the Obeid family were involved in the mining venture. The issue arose at different times and in different ways. For example, some of the Cascade investors acknowledged an early awareness of the Obeid involvement in the property transaction, but denied any knowledge of their involvement in the mining venture until much later. Others acknowledged that they were aware of an Obeid involvement in both aspects of the deal, but then some of those attempted to backtrack on the evidence. Others hid behind a philosophical approach, distinguishing between information, belief and knowledge.

For reasons that are explained in this chapter and elsewhere in this report, the Commission has come to the view that the evidence given by some of the investors in Cascade was not truthful as to their awareness of the Obeid involvement; in fact, it seemed as though some had recognised that admitting to such a knowledge could damage their position, and they were scrambling to try to prove a lack of awareness. Because of this, it is necessary to cover the evidence in respect of this matter in some detail.

What was known?

Although this issue was made the subject of substantial submissions, the Commission regards the matter as relatively straightforward. The evidence of each of those persons involved will be considered under separate headings.

The evidence of Gardner Brook

As described earlier, there were two parts to the transaction – the property agreement and the mining venture agreement. Mr Brook had a personal interest in the mining venture agreement and would be directly financially affected by the outcome of the negotiations on the mining venture. But, as earlier mentioned, the two transactions were interdependent – there had to be an agreement on both, or there would be no agreement at all.

Mr Brook was present on each of the occasions that the terms of the two transactions were negotiated. In respect of the initial negotiations, Mr Brook gave this evidence:

> *...During the mining part who was speaking on your side? Were you speaking alone, or - - -?---No, Moses was speaking.*
>
> *Now was there any, for example, any subterfuge at play? For example was Moses saying the Obeid family are not involved in this part of the transaction? Was he saying anything like that?---No.*
>
> *Was it an open discussion that the Obeids were involved in the mining part?---Well they were in the room.*
>
> *Well they were in the room but they may have been silent, you see? I want to know whether there were words said?---No, it was very, very clear to me that both sides knew each other. It was obvious.*

Draft agreements were produced as a result of the negotiations. Mr Brook gave this evidence in respect of the first draft:

> *And then at page 153 is the draft between Cascade and the nominee company, that's the company that actually ended up becoming Buffalo Resources Pty Limited?---That's correct, sir, yes.*
>
> *But this is I think the first draft that we've been able to track down. So could I ask you, is there any doubt whatsoever in your mind that during the negotiations with the people who apparently reflected Cascade Coal, was there any doubt that the Obeids were involved on the other side?---No doubt at all.*

Mr Brook commented upon the claim of an unawareness of an Obeid involvement:

> *Now, I'm going to tell you something again, not all of*

them, but some of the people from Cascade have told the Commission they had no idea that the Obeids were behind the 25 per cent interest in Mount Penny.

THE COMMISSIONER: Buffalo Resources?

MR WATSON: Which at one time was under the name Buffalo Resources ... During the negotiations leading to it, those people from Cascade you met, you've nominated them, is there any doubt in your mind that that was openly discussed and openly on the table?---It's outrageous.

You're saying it's outrageously wrong or right?---It's wrong.

Wrong?---The Obeids and Cascade at all times were dealing with each other, always.

As earlier stated, the Commission was favourably impressed by the honesty and accuracy of Mr Brook's evidence, and specifically accepts this part of his evidence.

The evidence of Greg Jones

The Commission has previously described how Moses Obeid met Mr Jones and John McGuigan in respect of the Geo-Radar business. Mr Jones recalled a conversation he had with Moses Obeid on the subject of the Obeid family's involvement in Monaro Mining and the mining venture at Mount Penny. The evidence in respect of that conversation has been set out earlier.

Mr Jones was present at the critical meeting held on Sunday, 31 May 2009. He was left in no doubt that the Obeids were behind the mining venture. Mr Jones gave evidence about the negotiations on that day:

THE COMMISSIONER: And that's the mining joint venture?---That's, that's right.

MR WATSON: And can I just say this, both Obeids were participating, chipping in what they had to say about the matter. Is that right?---Yes.

And you knew that the Obeids were behind that 25 per cent interest in the joint venture?

THE COMMISSIONER: Together with Gardner Brook?---Yes, with Gardner Brook.

MR WATSON: So it was Brook and the Obeids more or less as some kind of partnership for that corner of the joint venture. Is that right?---Yes.

Mr Jones' recollection in this respect was particularly vivid and, for that reason, more likely to be reliable because he recalled his concern at doing business with the Obeids (it also involved admissions against interest). In this respect, it is Mr Jones' recollection that he discussed these matters with John McGuigan and Mr Poole:

Were you troubled at all by the Obeids being involved?---You betcha.

...

And did you speak to McGuigan and/or Poole about your concern about the Obeid involvement?---I did.

What did you say or did they raise it or did you raise it? I should ask that?---Oh, I did. I sort of said, gee, I don't know about, you know, whether it's, it's in the group's best interest to have them appear up front in it, same as, you know, ultimately my own. Um, but it's um, it is, will be what it will be so- - -

Do you remember any discussion that it was more palatable if you used this nominee company as a means of perhaps concealing or disguising or- - -? ---Well, I think that was, I think that was their push as well as well as our desire as well I would have thought.

THE COMMISSIONER: They, they too didn't want to - - -

...be publicly displayed as the owners?---Play their hands, yeah.

That's right is it?---Yeah.

MR WATSON: Did one of the Obeids say something along those lines?---I can't recall.

THE COMMISSIONER: But that was your impression?---Yeah.

The effect of Mr Jones' evidence was summarised during his compulsory examination:

Well, what I was going to say is this, is that from the moment the deal was struck with this company, Buffalo Resources Pty Limited, you knew that that was a company closely associated with the Obeids, is that so?---Yes.

And that was a discussion that you also had with John McGuigan?---Yes.

And with Richard Poole?---Yes.

The Commission accepts this evidence.

The evidence of Moses Obeid

There was a great deal of evidence about how the Obeid family desired to keep their business private. There was specific evidence that they initially wanted to keep their involvement in Mount Penny a secret from Cascade. Moses Obeid's evidence, however, is that the secret was revealed to the people of Cascade – as he put it during his compulsory examination: "well, Gardner obviously tipped them off".

The evidence of Moses Obeid on this particular issue is a little confusing because, understandably, there were several meetings and he had a poor recollection of what happened during any particular meeting. He did, however, have a relatively clear recollection of a meeting where the position of Monaro Mining was under discussion. If Monaro Mining was under discussion, then it had to be at one of the early meetings, probably the first meeting with Cascade. In the context of describing the meeting that way, Moses Obeid gave this evidence about negotiating the proportion of the transaction that would go to the nominee company, which he described as "Gardner's entity":

The first meeting when you arrived to speak to Cascade?---The purpose of the meeting was, how much was Gardner's entity so-called, which involved us, how much was his entity going to get?

So it was quite clear to everybody that Gardner's entity was really, to a substantial majority, you?---Yes.

That was made known then?---Oh, absolutely.

…

Yes, but they were negotiating with Voope?---That's correct.

And they knew that you and Gardner were Voope?---That's correct.

The evidence given by Moses Obeid during his compulsory examination was sufficiently clear to establish that, to his mind, those negotiating on behalf of Cascade "absolutely" knew that they were dealing with Moses Obeid in respect of the mining venture. That evidence, which is consistent with the evidence of Mr Brook and Mr Jones, is accepted by the Commission.

The evidence of Paul Obeid

The Commission accepts the evidence given by Paul Obeid during his compulsory examination, which was explicit on this issue. He described how he, his brother Moses Obeid and Mr Brook went to a meeting with Cascade in late May 2009 and that the three of them jointly represented Buffalo Resources and the landowners. He then gave this evidence:

In any event, you went to this meeting. Did you make it plain that the Obeids were behind Buffalo?---Certainly.

Right. That was openly discussed?---It was openly discussed.

Later during that evidence, Paul Obeid frankly conceded that Buffalo Resources was acting as a front for the Obeid family:

Have you ever used front men to hide the Obeid interest in coalmining interests?---Front man in coalmining interests, yes.

And could you give us some examples of that?---Well we've had a company by the name of South East, a company prior to that was a company went by the name of Buffalo Resources.

Paul Obeid gave this evidence of the negotiations with Cascade:

And one of the Buffalo companies, Buffalo Resources I think it was, entered into a deal with Cascade Coal. Is that right?---That's right. …

Now, did you tell the people at Cascade Coal however that it was in fact the Obeid family which was behind Buffalo or did you conceal that from them?---No, certainly they knew that they were dealing with Obeids.

The evidence of James McGuigan

During his compulsory examination, James McGuigan gave clear evidence about his knowledge of an Obeid involvement in the mining venture. In the context of an email sent to him by Moses Obeid that the nominee company was to be named Buffalo Resources Pty Ltd, James McGuigan gave this evidence:

Well, you'd have to know in reality that it was an Obeid interest with which you were dealing, irrespective of the name that it was given?---Yes.

He later spoke of Moses Obeid's presence at a meeting where the mining transaction was negotiated, and gave this evidence:

And Moses Obeid was participating in those negotiations?---He was present during those negotiations, yes

…

THE COMMISSIONER: And participating?---Ah, yes.

MR WATSON: So can I just suggest this to you. We don't shut our eyes to, to the truth or the reality, you knew that you were dealing on the mining interest side with the Obeids?---Yes.

His evidence was that, at the time that the agreements were signed, he knew the following:

Well, you knew that there was a lot of money which was potentially payable to Buffalo Resources Pty Limited?---Yes.

You would have known that in practical terms that meant a very large sum of money was payable to the Obeids?---Yes.

The Commission accepts this evidence, which accords with the evidence of other witnesses. During his evidence in the public inquiry, James McGuigan attempted to back away from this evidence. He claimed that he had been "flustered" while giving his evidence during the compulsory examination. This was something that the Commission had not observed. But, even so, during the public inquiry he gave this evidence about the Key Principles document:

> *And what that means is that at the time this document was prepared and read by you at least by then you knew as a fact that on the mining side of the interest, the joint venture Cascade was dealing directly with the Obeids didn't you?---Yes so at this point in time, yes.*
>
> …
>
> *You knew that the deal which Cascade was proposing was a deal between Cascade and the Obeid family over the 25% joint venture?---Yes, at this point in time yes.*

James McGuigan was relatively youthful and inexperienced at the time these events were occurring, and would have been heavily reliant upon guidance from Mr Poole or his father. Subject to one particular reservation, the Commission regarded James McGuigan's evidence as generally honest. The reservation is that James McGuigan did seem to be reluctant to give evidence that he perceived might damage Cascade or the position of the investors in Cascade. The Commission believes that James McGuigan's backtracking on this knowledge issue was an attempt to protect Cascade and its investors. The Commission accepts those parts of his evidence set out above on the issue of his knowledge of an Obeid involvement.

The evidence of John McGuigan

John McGuigan gave evidence that at all times he was aware that the Obeids were landowners, and that he was dealing with the Obeids on that part of the transaction. In this context, John McGuigan was aware that Moses Obeid was negotiating on behalf of all of the landowners, and his family company – UPG – had the relevant rights to Cherrydale. John McGuigan's understanding is reflected in the document that he drafted titled Key Principles. The introductory paragraphs dealt with the property transaction, and the remaining paragraphs dealt with the mining transaction. Relevantly, the Key Principles document provides as follows:

> 6. *In recognition of UPG's position as the key land holder Cascade will grant UPG or its Nominee a 25% interest in the Joint Venture Company formed to hold the Exploration License over Mount Penny and to pursue the grant of a mining lease and subsequent mining operations.*
>
> 7. *UPG or its Nominee will not be required to make any contribution to the costs of the Joint Venture up to the time of the grant of a Mining Lease. For the avoidance of doubt the costs will include the exploration costs, the costs associated with the development application for the Mining Lease and the costs in purchasing the land.*
>
> 8. *Once the Mining Lease is granted, UPG or its Nominee will be required to make its proportionate contribution to all costs of the development of Mount Penny or be diluted in accordance with the provisions of the Joint Venture governing the development of Mount Penny.*
>
> 9. *Cascade agrees to seek the grant of an Exploration License or other rights over areas contiguous to Mount Penny should they become available. To the extent that either Cascade or the Joint Venture Company acquires the rights over the contiguous areas, UPG or its nominee will be entered to a 25% interest.*
>
> 10. *In the principles outlined in paragraphs 7 and 8 with respect to Mount Penny will apply equally to any contiguous areas.*
>
> 11. *UPG or its nominee will be entitled to participation on the board of the Joint Venture Company to an extent to commensurate with its equity interest.*

John McGuigan knew that the Obeid family was behind UPG. Given the terms of the Key Principles document, it is clear that John McGuigan knew that the Obeids were also behind the nominee company that would hold a 25% interest in the joint venture.

The meeting which led to the Key Principles document was held on 31 May 2009. John McGuigan gave this evidence in relation to that meeting:

> *Sorry, I should have put a date on it, at least by the meeting on the 31st?---Look, I think at that point it, the, the meeting of the 31st, it was clearer that they were working together and I think as I concluded that meeting, whilst there was much to be resolved at the end of that meeting that the, the it was, the, the result would be that the landowners would have some participation in the, in the mining interest.*

In light of that evidence, it seems clear that John McGuigan knew that Cascade was dealing with the Obeid family in respect of the property transaction as well as the mining venture transaction. John McGuigan attempted to backtrack from this, suggesting that, sometime after 31 May 2009, he thought that the Obeids may have dropped out of the mining venture. If that is the true effect of that part of Mr McGuigan's evidence, then the Commission rejects it. It is not credible that a party like the Obeids

would attend four meetings to negotiate to acquire a valuable interest, succeed in those negotiations, and then relinquish the interest with no explanation.

The evidence of Richard Poole

When Mr Poole was asked about the content of the two agreements signed on 5 June 2009, he gave this evidence:

> *…I want to go further is suggest that you, you knew the, the Obeids were involved in the mining venture?---No, sir.*
>
> *You deny that do you?---Yes, sir.*
>
> *All right. Well, you must know now sitting in the witness-box, you must know now that the Obeids were involved on the mining side. Is that right?---I think it was a total charade, yes, sir.*
>
> *When did you find that out?---I found out about the Obeids involvement or became suspicious in April or May and in August when – of 10 and then in August of 10 I had a meeting with Sevag Chalabian and then later in that month I met Moses Obeids, Sevag Chalabian and eventually had a meeting with Paul, Moses and Gerard.*

The Commission interprets that last answer of Mr Poole to mean that he became "suspicious" that there might be an Obeid involvement in the mining transaction only in April or May 2010, and that it was only in or after August 2010 that he actually came to know that the Obeids were behind Buffalo Resources. The Commission finds that evidence of Mr Poole to be false.

Mr Poole's claims cannot stand with other evidence. In due course, the Commission will set out the evidence that surrounds the events that occurred in April or May 2010 when Mr Duncan issued specific instructions to Mr Poole for the removal of the Obeids from the joint venture. Mr Poole must have known about an Obeid involvement by then. There will also be reference to specific negotiations that Mr Poole conducted with Sevag Chalabian regarding the removal of the Obeid interest. As will be seen, Mr Poole was then fully aware of the Obeids' involvement. Mr Poole's evidence in the public inquiry cannot be true.

The Commission finds that Mr Poole was well and truly aware that the Obeids lay behind Buffalo Resources at the time the agreement was entered into on 5 June 2009. This finding is based upon three different matters that arise from the evidence.

The first of those matters is the direct evidence of Mr Brook, Moses Obeid, Paul Obeid, James McGuigan and Mr Jones that the Obeid involvement in the mining venture was openly discussed. Although Mr Poole was not present at all of the meetings, he was present on three occasions where it is likely, given that the issue was openly discussed, that the matter was raised. In addition, given the evidence of John McGuigan, James McGuigan and Mr Jones, the Commission regards it as inconceivable that Mr Poole would not have been briefed on this aspect of the matter. In this context, Mr Jones gave direct evidence, which the Commission accepts, that he discussed this matter with Mr Poole.

The second basis for the finding derives from the large number of documents that connect the Obeids to the mining transaction. Mr Poole admitted that, on 2 June 2009, he became aware that the Obeids owned property in the area, and he must have been aware that Moses Obeid and Paul Obeid represented all of the landowners. In light of that, he could have only interpreted the Key Principles document to the effect that the mining venture involved the Obeids. In addition, email exchanges between James McGuigan and Mr Poole clearly refer to the involvement of Moses Obeid in organising the "nominee" company. One email, sent by Mr Brook to James McGuigan and copied to Mr Poole on 3 June 2009, speaks of Mr Brook "consulting with Moses" upon the terms of the mining transaction. Subsequent correspondence also supports the contention that Mr Poole knew of the Obeid involvement by sometime before 5 June 2009.

The third basis for the finding is the sheer unlikelihood of Mr Poole's account. According to Mr Poole, he was ignorant of the details of the deals. These agreements constituted a significant investment on behalf of Mr Poole, and he was also acting on behalf of the other investors in Cascade. He is a successful merchant banker. In his submissions, he states that he has "gained the respect of some of Australia's most successful businessmen". In light of that, it is hard to understand how he was dealing with Mr Kaidbay without knowing who he was, how he could read emails from James McGuigan that refer to "Mo" and "Paul" without knowing who they were, how he could enter the transaction without a firm grasp as to the relationship between UPG and Locaway Pty Ltd, and how he could end up entering a joint venture with Buffalo Resources without knowing who stood behind it.

Conclusion

For these reasons, the Commission finds that, as at 5 June 2009, each of John McGuigan, Mr Jones, Mr Poole and James McGuigan knew full well that Cascade was entering a mining venture with an entity backed by the Obeid family. More specifically, each of those men knew, as at 5 June 2009, that Buffalo Resources was a corporate entity majority owned and controlled by the Obeid family.

Chapter 28: The results of the EOI process

Pursuant to its agreement with Cascade, on 9 June 2009 Loyal Coal withdrew its bids for the Mount Penny and Glendon Brook tenements. The EOI Evaluation Committee reconvened and made a decision in accordance with the rankings that had already been established. This made it inevitable that Cascade would become the successful bidder for those two tenements.

On 19 June 2009, Dr Sheldrake, the director general of the DPI, accepted the recommendations of the EOI Evaluation Committee and letters were sent to the winning bidders. Cascade was informed that it was the winning bidder for each of Mount Penny and Glendon Brook.

At 11.30 am on 25 June 2009, James McGuigan sent a congratulatory email to Moses Obeid, attaching the minister's letters.

The immediate effect of Cascade's success in relation to the Mount Penny tenement was that it became liable only for the standard fees and contributions – the state of NSW received nil by way of additional financial contribution.

Cascade's management of the Mount Penny tenement

Cascade has incorporated two subsidiary companies to manage the Mount Penny tenement. One of those companies, Mount Penny Coal Pty Ltd, appears to be devoted to undertaking the necessary exploration under the licence, and putting together the plans necessary for planning approval for a mine. The terms of the licence obliged Cascade to undertake further exploration of the coal reserves in the Mount Penny tenement and it appears that Cascade has obeyed the terms of its exploration licence, and has undertaken new investigations.

The evidence as to how much has been spent on carrying out exploration activities is sparse, but the Commission infers that Cascade has spent a great deal of money – millions of dollars – on its exploration activities at Mount Penny.

The other company, Mount Penny Properties Pty Ltd, appears to be focused upon acquiring ownership of, or control of or access to, the various properties that might be affected by the Mount Penny tenement, should that tenement be converted into a mining lease. Cascade, presumably through Mount Penny Properties Pty Ltd, has outlaid large sums of money to landholders within the tenement.

Since December 2009, Cascade has paid each of the monthly mortgage repayments on Cherrydale, Donola and Coggan Creek. For Cherrydale, Locaway Pty Ltd has been paid the monthly sum of $14,875. To the time of the public inquiry, the total payments made were approximately $595,000. For Donola, Geble Pty Ltd has been paid the monthly sum of $3,010. To the time of the public inquiry, the total payments made were approximately $120,400. For Coggan Creek, Justin Kennedy Lewis Pty Ltd has been paid the monthly sum of $13,825. To the time of the public inquiry, the total payments made amounted to approximately $553,000.

Chapter 29: Cascade and White Energy

Soon after Cascade succeeded in its bid for the Mount Penny and Glendon Brook tenements, it proposed to sell either the equity in Cascade or the benefit of the exploration licences to a third party. The third party was White Energy. It is necessary to understand the connection between these two companies, and the course of the negotiations between them to assist in understanding the significance of other events that occurred.

The makeup of Cascade

Cascade was the corporate vehicle for the investment activities of a group of seven active businessmen, some of whom had extensive experience and investments in the coalmining industry. These are Mr Duncan, John McGuigan, Mr Atkinson, John Kinghorn, Brian Flannery, Mr Jones and Mr Poole.

John McGuigan was the managing director of Cascade, and John McGuigan and Mr Poole were the most active of the seven investors in the day-to-day running of Cascade. Several of the key meetings that involved Cascade were conducted from John McGuigan's office, others were conducted at the offices of Arthur Phillip Pty Ltd, the registered office of Cascade.

Cascade's connection with White Energy

At the relevant time, White Energy was a major company with an interest in coal technology, and especially clean coal technology. It does not appear to have been directly involved in mining coal. Its business seems to have been in the area of treating or processing coal.

There was a close correlation between the management and ownership of White Energy and the circle of investors involved in Cascade. Mr Duncan was the chairman and is a director of White Energy. Mr Atkinson had been the managing director of White Energy and, after he stepped down as managing director, remained on the board. Mr Flannery is the managing director of White Energy. John McGuigan and Mr Kinghorn are also each members of the board of directors of White Energy. Mr Poole also had a pre-existing connection with White Energy as a financial advisor, and as the controller of a "substantial" shareholding in White Energy.

Cascade and a deal with White Energy

One of the decisions made by Mr Macdonald was to limit the participants in the EOI process to small or "junior miners". Although Mr Macdonald, in his evidence, provided reasons for such a decision, including encouraging diversity in the makeup of those miners in control of NSW's coal, it was always a policy that was likely to fail in practical application. The infrastructure expenses associated with setting up a coalmine are so great that it is unlikely that a junior miner would be in a position to meet them. There is a very high degree of probability – virtually an inevitability – that a junior miner would call for the technical and financial assistance of a major mining company.

That is what happened here. Within only months of acquiring the Mount Penny tenement, the investors in Cascade decided to sell either the company or the company's only assets – the exploration licences at Mount Penny and Glendon Brook. The sale had to be to a mining company with financial backing and technical skills and experience; that is, a major company. There was little difficulty in identifying a suitable, major company because of the investors' close involvement with White Energy.

It is not clear who amongst Cascade's investors first had the idea to sell the asset to White Energy, although Mr Atkinson thought it may have been him. In any event, there are records produced by Arthur Phillip Pty Ltd that suggest that it was already advising on such a sale in a project known as Project Phoenix as early as February 2010.

Immediately, it can be seen that there was the potential for a conflict of interest. The overlap in the management and ownership of Cascade and White Energy meant that there would automatically be a conflict of interest if one of those persons was making a decision that could affect either company.

As will be seen, from this point on, the role of several of the people involved in this transaction become so blurred that it is now impossible to discern on whose behalf they were acting (that is, whether it be Cascade or White Energy or both) at any particular point in time. John McGuigan summed it up neatly when he said "we were selling it to ourselves".

The negotiations with White Energy

The initiation and course of the negotiations between Cascade and White Energy remain obscure. It is known that Mr Poole and his firm, Arthur Phillip Pty Ltd, were examining the prospects of such a transaction as early as February 2010, but it is not clear as to when or how negotiations were commenced, and who participated in negotiations. For example, although it is known that Cascade agreed to sell the Mount Penny licence to White Energy for $500 million, it is not clear who on behalf of White Energy agreed to pay that price. Mr Duncan, the chairman of White Energy, gave this evidence:

> *Now I'm talking about after the deal was announced with White Energy I'm talking about before the deal was announced. You were a director of Cascade at the time – were you the person who put the valuation on the asset for Cascade?---I was involved in the valuation of Cascade.*
>
> *Who else was involved?---I think all the shareholders were involved.*
>
> *Well, who, name them?---I think Mr Poole, Mr Atkinson, Mr McGuigan, I think Mr Kinghorn.*
>
> *Mr Flannery?---No, I don't believe so.*
>
> *All right. Mr Jones?---I don't recall discussing the price with him.*
>
> *...So McGuigan, Kinghorn, Atkinson, Poole and Duncan were the people at Cascade Coal who put the valuation on the Cascade Coal asset? --- Arrived at a number that was offered.*

Mr Duncan could not explain who it was at White Energy who agreed to take out an option at a price of $500 million:

> *At the time it was agreed that White Energy would take the option of $500 million? Who were the people at White Energy who worked out the value of Cascade Coal?---I don't know who worked out - - -*
>
> ...
>
> *Well, you see, when it was presented to the Independent Board Committee that Independent Board Committee was looking at an option which put a value on Cascade of $500 million, do you accept that?---Yes.*
>
> *I want to know who were the people at White Energy who put the valuation on Cascade?---I believe Cascade Coal made an offer to White Energy - - - Sorry, stop for a second, we know, we know these sorts of things. I want, you want to buy my car, I offer this, you offer that, a bit of negotiation.*
>
> ...
>
> *Who at White Energy thought that this was worth looking at in the sense that they looked at it and thought the offer presents a reasonable offer at a valuation of $500 million? Who was that? Was that you?---No, the board received it and there was abstentions from people having discussions on it and I asked for Graham Cubbin, I specifically asked Graham Cubbin to form an independent committee of the three directors on the board of White's that did not have an interest in Cascade and for him to make the - well, for that to make the decision whether they would accept the month's long option to examine the exercise.*

As for the negotiations, Mr Duncan gave this evidence:

> *Now you were a shareholder* [sic] *Cascade Coal and you were the chairman of the board of White Energy?---Yes.*
>
> *I'm asking you who was involved with the discussions on the side of Cascade Coal the company of which you were a shareholder?*
>
> *THE COMMISSIONER: You see, Mr Duncan, this is before the board was appointed so the question that Mr Watson is asking you concerns a period before the board was appointed. Who was involved in those discussions?---Well, I would have been.*
>
> *On behalf of whom?---On behalf of White's.*
>
> *Right. But you were also a shareholder of Cascade?---But I wasn't a director of Cascade.*
>
> ...
>
> *No. But you – this refers to discussions between White Energy and shareholders of Cascade. Do you see that?---Yes, but it doesn't say all the shareholders of Cascade.*
>
> ...
>
> *MR WATSON: Well, you were a shareholder of Cascade and the head of the board at White Energy, did you have the discussion with yourself ---That would have been a*

very interesting discussion I would have been able to arrive at a decision straightaway.

Who else was there?---I don't recall who was there.

Are you trying?---No, and I don't even recall the discussion but it says it in the letter so it must have occurred.

Well, you, I think agreed that you were probably there wearing a White Energy hat?---That's correct.

And who would you have been likely to discuss this with?---Most likely with Mr Poole.

It can be seen from this evidence that not even Mr Duncan had a clear idea whether he was acting on behalf of Cascade or White Energy at the time the deal was negotiated. Nor can he say who else was involved in the negotiation. It seems that the most likely position is that the most active of the investors in Cascade – Mr Duncan, John McGuigan, Mr Atkinson, Mr Poole and, perhaps, Mr Kinghorn – were active on both sides of the transaction and agreed amongst themselves that the price would be $500 million.

But, before the transaction could be completed, it was recognised that there was another problem that had to be resolved – the involvement of the Obeid family.

Chapter 30: The Obeids – a problem that must be "fixed"

By early 2010, Edward Obeid Sr was already a controversial figure and any involvement by him in any business transaction that involved state assets was bound to attract publicity. Whether he deserved it or not, Edward Obeid Sr had acquired notoriety, and his family's business activities were receiving close scrutiny. Members of the Obeid family acknowledged this, and gave this as the reason why the family was insistent upon privacy. By the time that the investors in Cascade wanted to enter into a deal with White Energy, the problem had become more pointed, as there had been some public discussion about the Obeid family's involvement in the Bylong Valley. Just two examples among many – there had been a significant article about the Obeid family involvement in the Bylong Valley in the *Australian Financial Review* published on 19 December 2009 and, on 19 May 2010, a pointed question was asked in the NSW Legislative Council.

In about March or April 2010, Mr Duncan, recognising the problem, issued a direction that meant that the Obeid family involvement in the Mount Penny tenement had to be terminated.

Mr Duncan's direction

In early 2010, Mr Duncan initiated the process under which the Obeids' involvement in the Mount Penny tenement was terminated. Mr Duncan claims that he was motivated to act because this was the first time that he discovered that Edward Obeid Sr or the Obeid family were involved in any way with Cascade's proposals at Mount Penny. There is some doubt as to the precise date when Mr Duncan initiated this process, but it probably occurred in March or April 2010. Mr Chalabian was retained as the solicitor to act for the Obeid family in respect of this matter, and his first file note relating to the particular issue is dated 28 April 2010.

Presumably, Mr Duncan's direction to remove the Obeids was a decision on behalf of Cascade, and solely for the benefit of Cascade – the information that was discussed at these meetings, as will be explained later, was kept secret from White Energy. The actual people present at the different meetings is unclear, but John McGuigan, Mr Poole and Mr Atkinson were each aware of Mr Duncan's direction. This appears from the following exchange involving Mr Duncan:

> *When you discovered it did you have a conversation with your knowledge that they Obeids were involved in the mining venture with anybody else from Cascade?---Yes.*
>
> *With whom?---Mr McGuigan, Mr Poole and Mr Atkinson.*
>
> *All at once?---I'm not sure.*
>
> *According to Mr Duncan, the conversations were heated:*
>
> *THE COMMISSIONER: What generated the heat?---I felt upset about the matter and I demanded that it get fixed.*
>
> *What were you upset about?---I didn't believe that they were parties we ought to be involved in if we are going to try and develop this as a property and as a major mine and we go out and try and borrow money from the banks that the – their reputation with the bankers would not – would make it very difficulty* [sic] *for us.*
>
> …
>
> *Did you suggest how it should be fixed?---I said we have got to get them out of this place.*

Why was the Obeid involvement a problem?

Judging by the submissions made by various persons, there seems to be a dispute as to the motivation of Cascade in wishing to remove the Obeid family involvement. It is, nevertheless, clear as to why it was felt necessary to remove the Obeids from the transaction; namely, their

continuing involvement posed a risk to the value of the Mount Penny tenement. One risk, which was regarded as only a small risk, was that the existing exploration licence might be cancelled by government action. Another, much larger, risk was that a mining lease would never be granted. An election was looming in March 2011, and it was clear that there was likely to be a change of government. A new government of a different political complexion would not be likely to view an Obeid family involvement in a mining venture favourably. It was in this context, and in the context of questions being asked in NSW Parliament, that the decision-makers at Cascade felt they had to act. For example, Mr Duncan gave this evidence:

> *....What it meant was that if it became public knowledge that the Obeids had historically been involved or were involved that might be a powerful factor against the chances of getting a Mining Lease. Do you agree?---It was a risk.*
>
> *And let's face it if the Exploration Licence was cancelled or if a Mining Lease wasn't issued the asset was worth nothing. Do you agree?---It, if there was no lease the money spent on the exploration would have been lost.*

Mr Atkinson gave the following evidence at a compulsory examination:

> *Well you just said yourself that the fear was that if the Obeids were involved that the mining licence would never issue to Cascade Coal?---I think that was the fear, yes.*
>
> ...
>
> *You also believed that if the Obeids were the co-venturer with Cascade Coal that the government would not proceed to issue a mining licence?---I thought there was a high risk that - - -*
>
> *And if the government did not proceed to issue a Mining Licence the value of that tenement would collapse to nothing, correct?---It's worthless if the government doesn't.*

Mr Atkinson recognised that the continuing Obeid involvement gave rise to a political reality that it would be unlikely that a mining lease would be granted:

> *And why is that because?---Because I believe it would've been very difficult for, I think the risk of a Department, they would've, I believe they would've judged the mining, granted the mining lease on an objected* [sic] *basis, but the political nature of it I think would've been very hard ultimately for that mining lease to have been granted.*

John McGuigan held a similar view. His evidence was:

> *I'm not - - -?---And I, look I think the concern grew as publicity grew, as, so there was certainly a point and in my case, Commissioner, by early 2010 it, it was my strong view that we had a major problem with this particular project if the Obeids continued to retain their equitable interest.*

The submissions of various parties have attempted to explain away the need to get rid of the Obeid family as a means of more easily "controlling the asset", valuing the asset or presenting the asset to bankers to obtain financial backing. Each of these might be a good reason why one joint venturer would wish to secure 100% control of the venture, but it is plain that they were not the primary or dominant motives here. Those same people who suggested that these were the reasons behind the removal of the Obeids were at great pains to keep the historical involvement of the Obeids a secret from White Energy. If the true reason was, basically, a financial reason, then there would be no reason to keep it a secret.

Mr Duncan meets with Moses Obeid

There were one or two specific meetings on this subject that were attended by Mr Duncan, Moses Obeid and Mr Chalabian. There is evidence that John McGuigan and Mr Poole were also present. Mr Duncan gave evidence about those meetings as follows:

Well, just tell us the times you met the Obeids?---I met Moses Obeid and I think one of the other Obeid brothers with, with a third person I think was a lawyer in the Kent Street offices together with John McGuigan and John, John McGuigan and Richard Poole where it was a continuation of a conversation where I said we have to get these people out of the company and I told that to Mr Moses Obeid and his response was, "Why do you want us out there?" 'cause I had said, "You've got a bad reputation." His response was, "There's nothing wrong with us, we've been investigated everywhere, they've looked down our throat, up our arse and they haven't found anything. We're just good businessmen," and I said, "But still, you have a bad reputation and I want you out."

And was that the last time you spoke to any member of the Obeid family?---No. I think I met with them again and I don't know if the same – Moses Obeid was there and I'm not sure that the other, the brother that was there the first time was there the second time and that's when there was discussion about the price that they wanted to go for and the conversation went more along the lines that you can't make us go, we don't have to go and I said well, you may wish you had gone when you got the opportunity because you may have nothing to sell because we'll spend you out of your position and dilute you out.

Moses Obeid's account of the meeting is not dissimilar:

Let's move to the extraction of the Obeids. You know of the evidence of Travers Duncan and … what he says occurred at a meeting with you, don't you?---Yes.

And did that meeting occur?---Yes.

He said we're either going to buy you out or we're going to spend you out?---Yes, he said something to that effect.

Well, what he was saying there was you can either take our offer or we will start expending money on capital expenses, you'll have to contribute your 25 percent, you won't be able to afford it. That was the impact of his threat wasn't it?---Yes.

Then so it was a fairly ruthless business negotiation?---Yes.

He wanted you out?---Yes.

And he made it clear that he was either going to buy you out or drive you out?---Yes.

Negotiations between Cascade and the Obeids

The responsibility for negotiating the removal of the Obeid family interest was handed by Cascade to Mr Poole. The Obeid family retained a solicitor, Mr Chalabian, to act in their interests. Working out what happened requires a consideration of the oral evidence of Mr Poole and Mr Chalabian.

It first becomes necessary to consider the reliability of Mr Poole. Mr Poole was an unimpressive witness. For reasons explained elsewhere, his evidence as to the extent of his knowledge of an Obeid involvement on the mining side of the transaction was not believable and was deliberately untrue. The Commission is unable to trust Mr Poole's evidence.

The difficulties associated with relying upon Mr Poole's evidence are alleviated because the Commission believes it can rely upon the evidence of Mr Chalabian. Mr Chalabian is an important witness because he gives direct evidence as to statements made by Mr Poole in respect of the purposes behind the termination of the Obeid interest in the Mount Penny tenement, and the reason why the transaction became so elaborate. The Commission has come to the view that Mr Chalabian's evidence was honest and reliable. Where there is an inconsistency between the evidence of Mr Chalabian and the evidence of Mr Poole, the Commission prefers the evidence given by Mr Chalabian.

The course of the negotiations

The negotiations between Mr Poole and Mr Chalabian were conducted in a relatively formal manner. The parties exchanged discussion papers, advancing their views on particular issues. The details of the negotiations obviously had two key components – the price to be paid to purchase the Obeid family interest, and the mechanism under which the Obeid family interest would be terminated. As it turns out, there is little evidence of any dispute between the parties in terms of a price – that seems to have been agreed fairly easily – but there seems to have been more difficulty in negotiating the termination mechanism.

As for the price, it is now known that the investors in Cascade agreed to pay the Obeid family $60 million to purchase those rights that it had in respect of the joint venture involving the Mount Penny tenement. Those rights, if exercised, would have entitled the Obeids to take up a one-quarter share in a joint venture to develop a mine. The purchase price of $60 million would imply the whole of the project being worth in the order of $240 million.

The means agreed on to terminate the Obeid interest involved the introduction of two new "cleanskin" companies – the deal was eventually effected between Coal & Minerals Group and Southeast Investments. Coal & Minerals Group was an inactive company with no capital owned by Mr Poole and his family. Southeast Investments was a shelf company, purchased by Mr Chalabian on behalf of the Obeid family for the sole purpose of doing the deal.

During his compulsory examination, Mr Chalabian gave evidence about why the transaction had to be effected using a new, "cleanskin" company:

That's why the company, Southeast Investments Group Pty Limited was incorporated?---Correct.

It was incorporated for the sole purpose of facilitating disguising the Obeid involvement at Mount Penny? --- Correct.

And to disguise that involvement for fear that it would alert people to the chance that this Exploration Licence had been corruptly obtained? --- It was to disguise the Obeids' interest.

But that was because of this whiff of corruption which surrounded the whole of the transaction? --- Yeah, that was the concern Poole had, yes.

During his compulsory examination, Mr Chalabian gave evidence that Mr Poole was quite frank about the reason why the Obeid interest had to be concealed:

He explained to you, didn't he, that the beneficial ownership of the Obeids had to be disguised?---That's correct.

And he explained to you that the beneficial ownership of the Obeids had to be disguised because it would have been unpalatable to investors had they known that the Obeids were involved?---Correct.

He explained to you that was because there was a fear that there would be an association drawn between the Obeids and corruption?---That's an inference he drew but yes, that, that was his - - -

That's what he said?---That's what, that was his view, yes, yes, yes.

And what it was was that there [sic] *a fear that people would say that the Exploration Licence had been acquired corruptly and it might be set aside?---That was their fear.*

And he told you that because of that it was important that this interest of the Obeids be disguised, is that so?---Yes.

During the public inquiry, Mr Chalabian was asked some specific questions about that:

Was it done with a view to disguising their involvement? --- Yes.

Did you have conversations with Richard Poole on this very subject? --- Yes.

Richard Poole from your dealings with him from the outset – did he know that the Obeid's were involved? --- Yes.

He mentioned it several times to you, didn't yes? --- Yes.

THE COMMISSIONER: That's in the mining[?]*---Yes, yes Commissioner.*

The mining aspect of Mount Penny?---Yes Commissioner.

…

MR WATSON: …What I'm trying to establish here is is that throughout your discussions with Richard Poole is this a fair summary – first he knew the Obeids were involved.---Yes.

This is the mining joint venture of Mount Penny and the extraction. To [sic] *– he was the one who was telling you that the Obeids interests had to be carefully disguised.---Yes.*

He told you it had to be carefully disguised because otherwise the government might set aside the exploration license.---That was his concern Mr Watson.

And he was telling you that because of that you had to go through this kind of elaborate installation of trustees and companies so no one could find the Obeid name?---Yes.

These conversations are obviously important. The Commission relies upon Mr Chalabian's evidence in finding that the real reason for the transaction was to hide the Obeid involvement so as to reduce the risk that the government might take action against the exploration licence, or not grant a mining licence.

Why the elaborate termination mechanism?

In a straightforward version of this kind of commercial transaction, the deal would have been struck directly between Cascade and Buffalo Resources. In the ordinary commercial world, Cascade would have negotiated a price to buy out the rights of Buffalo Resources, raised the necessary capital, and entered into a straightforward transaction, where a payment drawn on the account of Cascade would be made into the account of Buffalo Resources. That is not what happened here. The transaction is one of remarkable complexity. Because of some submissions made on behalf of various parties, it is necessary to set out some of this complexity.

The first complex factor derives from the interest that Mr Brook held in the joint venture. As mentioned earlier, his company Warbie Pty Ltd held 12% of Buffalo Resources. This was the subject of a separate agreement made on 30 September 2010 between Coal & Minerals Group and Warbie Pty Ltd. Under the agreement, Coal & Minerals Group agreed to pay $1,750,000 to acquire Mr Brook's interest. The payment was made in a very strange way. On 22 September 2010, Amanda Poole, Mr Poole's wife,

transferred $1.75 million from her bank account into a bank account in Singapore associated with Mr Brook. Concurrently, an entry was made in the records of Coal & Minerals Group to the effect that Mrs Poole had loaned the company $1.75 million.

Mrs Poole gave evidence. Based upon her evidence, her personal bank account is used for ordinary domestic transactions. It appeared that she had not directed the payment to Mr Brook, and she knew nothing about a loan to Coal & Minerals Group.

The payments made to the Obeid family were even more complicated. Under the agreement, Mr Poole arranged for the $60 million to be paid in two tranches, each of $30 million. The first $30 million was to be made in stages. Records show that Mrs Poole made payments of $5 million on 21 October 2010 and $2.5 million on 25 October 2010. When she was asked about these payments, Mrs Poole was unable to explain why or how they were made.

Meanwhile, Coal & Minerals Group was also making payments to the Obeids – $7.5 million on 4 March 2011, $10 million on 16 June 2011 and $5 million on 3 May 2012.

Those payments tally the $30 million required in the first tranche. Although most of them were made to a trust account associated with Mr Chalabian, banking records show that, after some costs were deducted, most of the $30 million made its way into bank accounts associated with the Obeid family.

What did the investors in Cascade know?

As has been established by earlier findings, each of Mr Duncan, John McGuigan, Mr Atkinson and Mr Poole knew full well that the transaction with Southeast Investments was, in truth, a transaction with the Obeid family. In addition, each of those men knew that the transaction was carried out with a view to disguising the Obeid involvement from the government or other investigatory agencies. There is no evidence that Mr Flannery was aware of these matters. This leaves an issue in respect of Mr Kinghorn and Mr Jones.

What did Mr Kinghorn know?

If Mr Kinghorn is to be believed, he did not know until November 2010 that the payments being made through Coal & Minerals Group had anything to do with the Obeid family. In the public inquiry, Mr Kinghorn said that he was told about their involvement by John McGuigan. Before accepting that evidence, the Commission needs to make some assessment as to the credibility of Mr Kinghorn.

Mr Kinghorn was as an aggressive witness. He, like Mr Duncan, was strongly opinionated. Mr Kinghorn has been very successful in business and, taking that into account, it renders some of the evidence that he gave at the public inquiry implausible. For example, Mr Kinghorn's evidence that he was ignorant as to the nature or purpose of the massive capital issue to Coal & Minerals Group could not be truthful. In making an assessment of the reliability of Mr Kinghorn's evidence, regard must also be had to his evidence about his knowledge of Buffalo Resources.

Mr Kinghorn was a director of Cascade from 19 February 2009, so he was in that position well before the agreements with Buffalo Resources. Despite that, during the course of his compulsory examination on 25 July 2012, Mr Kinghorn denied knowing of the agreement or even having heard of Buffalo Resources:

> *…Now, you do know that Cascade Coal entered an agreement with a company called Buffalo Resources Pty Limited?---Ah, no, I do not know.*
>
> *Really?---Really. Never heard of them.*
>
> …
>
> *You don't know of any deal between Cascade and Buffalo Resources Pty Limited?---I have never heard of a company called Buffalo Resources.*

It is impossible to reconcile a combination of Mr Kinghorn's vast business experience, his obvious sophistication in business and company matters, his duties as a director of Cascade, and his duties as a director of White Energy, with a complete ignorance of the transactions between Buffalo Resources and Cascade. For example, as a director of Cascade it was his obligation to know something about the agreement that the company had reached with Buffalo Resources, resulting in that company entering a joint venture with Cascade. Moreover, as a director of Cascade, he surely must have known about an agreement under which Cascade agreed to pay at least $30 million to Southeast Investments.

Even more telling was his evidence about his attendance at various board meetings. There was evidence that Mr Kinghorn was present at a board meeting of Cascade on 13 October 2010. He gave this evidence:

> *And then the first item on the agenda is Mount Penny Coal's proposed termination of Coal & Mineral Group's rights interest?---Yes.*
>
> *What did you understand about that at the time you attended this meeting?---Nothing.*
>
> *What did you understand about that at the time you left this meeting?---Very little more.*

And, further:

> *And have a look at the price that was being paid by the, for the shares. 9.3 per cent of the capital of Cascade Coal was being sold for one ten thousandth of a cent per share, do you see that?---I do.*
>
> *Well surely you asked the question about that?---Yes, I did.*
>
> *At the meeting?---No, I did not.*
>
> *Right. You sat there at the meeting thinking, "Good God, they've just given away" - - -?---60 million, yeah, 60 million dollars of value. Yeah.*
>
> *60 million?---Mmm.*
>
> *You must have been cranky?---No, no, but I wanted to find out what the hell it was all about.*
>
> …
>
> *So you just sat there and just thought ["]Dear me they've just given away $60 million for $71.78c["]. Is that what you thought?---It certainly piqued my interest and I wanted to find out what it was about.*

That evidence is highly dubious. As an experienced businessman, Mr Kinghorn must surely have wanted to know why $60 million in capital was being given away. As a director of Cascade, he was under a duty to find out why $60 million was being given away. Mr Kinghorn was holding to a position that was untenable:

> *You know now that the use of CMG, Coal & Minerals Group, you know now that the purpose of that was a disguise, don't you?---I'm not sure that I do know that, I have a different view.*
>
> *I suppose I better take the risk and ask you what's your different view other than it was being used as a disguise?---I think Mr Poole is a very smart, a, a very opportunistic investment banker and he's looking for a way to make a dollar, and my understanding is he then did so.*
>
> *Right. That Coal and Minerals Group was a genuine investor in Cascade Coal, is that what you're saying?---No, I don't think I said that. I just said that Mr Poole was an investment banker looking for an opportunity to make a dollar.*
>
> *THE COMMISSIONER: And you were prepared to contribute to that dollar?---Certainly, sir, if he provides the services to us, yes.*
>
> *What were the services?---Um - - -*
>
> *What were the services that he provided by the use of CMG?---Um, okay. We're now going back to what Mr McGuigan's briefed me on. He briefed me that the decision had been taken to, to buy out this 25 per cent or this 25 per cent right, that Poole or his investment bank was given the, the task of doing that, of negotiating that and this is the way he did it and he did so and it happened.*
>
> *MR WATSON: Right. Well then, then that seems to be accepting that it was a disguise. Doesn't it?---No, sir, I – my guess – well I'm – I, I, I, my speculation is he was doing it to, um, to look to make a profit, which was - - -*
>
> *Speculation. Are you saying that even today you don't know that the involvement of CMG, Coal and Minerals Group, was to disguise the Obeids involvement?---I've been told but I don't know it for fact. I, I prefer to only deal with facts. I've been told that CMG made quite a lot of money about that deal. But that's got nothing to do with me, he's a good investment banker and good luck to him.*
>
> *So you're – if you come back to my question rather than whatever question you're answering, are you saying that even now you don't know or you do not know that CMG or Coal and Minerals Group was used as a disguise for the* [purpose] *of extracting the Obeid interest?---I have no such knowledge. Correct.*

Mr Kinghorn was plainly dissembling when he made statements like, "I've been told but I don't know it for a fact. I prefer to only deal with facts". The telephone conversation that Mr Kinghorn had with Mr Duncan on 11 April 2011 demonstrated that his evidence during the public inquiry was false. Here, he was talking to Mr Duncan about a question that had been asked by Mr Cubbin of the IBC, to which reference is made below:

> *DUNCAN: Right and — and, eh, the — we can't answer it without disclosing the various steps that, eh, the money went to CMG which is –*
>
> *KINGHORN: Yeah.*
>
> *DUNCAN: – which traces back to Richard Poole and his family.*
>
> *KINGHORN: Right.*
>
> *DUNCAN: And if anyone goes behind that, it goes back to the guys that dropped out of the tender.*
>
> *KINGHORN: Are — are they likely to get behind Richard Poole's?*
>
> *DUNCAN: Eh, well only if they ask the question and he answers it.*
>
> *KINGHORN: Yeah, yeah well I guess if they ask him a straight question he's got to — he's got — he's got to give them a straight answer hasn't he?*
>
> *DUNCAN: That's right. Right, now we – we tried all sorts of weasel words and everything else to –*

KINGHORN: Trav they — they're — they're obviously being — I mean this — this is — this is not a question that's got anything to do with ASIC whatsoever. It's got nothing to do with the ASX whatsoever.

DUNCAN: That's right.

KINGHORN: It's just — it's — it's a — it's a question that's been — it's a — it's a question that's been, um, you know, deliberately placed there, eh, eh, by people who are mischievous, yeah.

The Commission finds that Mr Kinghorn was giving false evidence about his lack of knowledge concerning Buffalo Resources.

The knowledge of Mr Jones

Mr Jones gave some critical evidence, involving admissions against interest, which is inconsistent with the evidence of some of the other investors in Cascade. The Commission regards that evidence as reliable and accurate. This relates to knowledge of the Obeid involvement in the mining side of the transaction, the discussion about the deliberations of the EOI process committee, and the likely outcome of that process. The Commission relies upon the evidence of Mr Jones in that respect. On the other hand, Mr Jones, who was a close friend of Mr Macdonald, appeared to be defensive and evasive in respect of some of the evidence of his relationship with Mr Macdonald.

The evidence about Mr Jones' direct involvement in Cascade is scant. There was evidence of an arrangement that had been entered into between Mr Jones and Mr Kinghorn about the way in which his shares would be held:

…Were you invited to take up shares?---Yeah, I was, yeah.

Did you do that?---I did through John, through John Kinghorn.

Why?---Well because of my previous relationship with the Minister, Ian Macdonald and the way the press had handled things and we'd had a, a very bad run in with the Fairfax organisation over two, two areas and I just — one of the things that we thought was probably the best way to go was that I don't appear as a shareholder so that if anyone was to sort of make inquiries as to who owns Cascade, I wouldn't appear and there wouldn't be any assumptions made that anything untoward had gone on.

Did you have a discussion to that effect with – sorry, I'll withdraw that. I think you said that you bought them through John, you meant John Kinghorn?---Yeah.

Did you have a discussion of the effect you've just mentioned with Kinghorn?---Yes.

Did he agree with that?---Yes.

Was it also discussed with the other five mates or colleagues who were involved in Cascade?---Yes.

And where was that sort of discussion held, at a particular place?---It could have been up in our offices in York Street or it might have been up in, in one of the other officers [sic]. *I can't pin down exactly what office it was.*

That evidence tends to demonstrate some distance between Mr Jones and the day-to-day running of Cascade.

There is no evidence that establishes when Mr Jones first may have become aware of the decision to extract the Obeids and of the involvement of Coal & Minerals Group or Southeast Investments. Words spoken in the course of telephone conversations that Mr Jones had, especially with Mr Poole, show that he had full knowledge from around April 2011, but this is after the relevant time.

Chapter 31: The sale to White Energy

The extraction of the Obeids from the Mount Penny tenement left Cascade free to pursue its transaction with White Energy. There were a number of problems that still had to be overcome. The investors behind Cascade came to the view – rightly, as it turns out – that the transaction would founder if it ever emerged that the Obeids had been or were involved. As will be seen, the negotiations were taken a long way down the track toward a final agreement, but collapsed because it was realised that the Obeid involvement was likely to be revealed.

It is impossible to get to the bottom of the preliminary negotiations. It seems as though the investors in Cascade as a group, acting on behalf of Cascade, dealt with themselves, acting as representatives of White Energy, to agree upon a sale and the $500 million price.

On 26 November 2010, a letter of offer was made by Cascade to White Energy offering a binding option agreement under which White Energy could decide whether it would purchase 100% of the shares in Cascade "for an enterprise value of $500 million". There were other terms and conditions applicable, but it is not possible to work out who, on behalf of Cascade, came up with those terms and conditions. The letter was signed by Mr Poole in his capacity as a director of Cascade.

To give some idea about just how remote these transactions were from the rest of White Energy, one of the directors of White Energy who was not an investor in Cascade – Mr Cubbin – did not know that there had been any negotiations between Cascade and White Energy before he saw the letter of offer by Cascade dated 26 November 2010. Mr Cubbin was not aware of any of the negotiations that surrounded the selection of a price of $500 million, and he did not see any work that White Energy had done on valuing the asset.

On 29 November 2010, White Energy responded with a counter-offer that set out terms and conditions of what was described as an "Option and Exclusivity Undertaking". Again, it is not now apparent who on behalf of White Energy formulated the terms and conditions contained in the letter.

On 30 November 2010, White Energy made an announcement to the Australian Stock Exchange (ASX). The release was titled "White Energy signs option to acquire two significant coal deposits in New South Wales". The ASX release highlighted the key components of the deal. It pointed out that Cascade was "owned by a syndicate of investors including entities associated with current White Energy Directors" and set out the interests owned by each of Mr Duncan, John McGuigan, Mr Atkinson, Mr Kinghorn and Mr Flannery.

The appointment of the IBC

To overcome the potential conflict of interest, White Energy appointed an Independent Board Committee (IBC) to oversee the transaction on the part of White Energy and its shareholders. Three members were appointed to the IBC – Mr Cubbin, Hans Mende and Vincent O'Rourke. Mr Cubbin was appointed chairman and he was by far the most active and most important person working on the IBC. The IBC needed legal and other technical support. A partner at Freehills, Phillip Podzebenko, was appointed to provide legal advice on behalf of White Energy and Paul Harris of Citi was appointed to provide financial advice.

The IBC commences its task

The IBC had to address many questions. This was, after all, a $500 million purchase. The IBC met from time to time and kept minutes of each of the meetings. From the commencement of its deliberations, the IBC identified four major issues that had to be resolved. The first was described as "the circumstances in which EL7406 was granted to Mount Penny Coal". The second was whether or not there was any involvement by the Obeid family in the grant of the Mount Penny exploration licence. The

third was whether the Obeids were or had been involved in any joint venture to which Cascade was or had been a party. The fourth was to work out why Cascade had paid $28 million to a company called Coal & Minerals Group. Towards the end of the public inquiry, the Commission established that this sum was part of the $30 million that had ended up in the hands of the Obeid family. The payment of $28 million was not investigated in depth and the Commission makes no findings in connection with it.

Each of these issues was important to the IBC. In regard to the circumstances in which the Mount Penny exploration licence had been granted, Mr Cubbin said this:

> *Now, this was a critical issue for White Energy as I'll come to in some documents later but just because you can* [sic] *an Exploration Licence doesn't mean you're going to get a Mining Lease, is that right? --- Absolutely.*
>
> *And if there was a bit of a stink surrounding the grant of the Exploration Licence your fear, tell me if I'm wrong, your fear was when the government came to grant a Mining Lease they may not grant a Mining Lease at all?---Absolutely, that was my major concern.*
>
> *I'm going to come to some documents which suggest that in those circumstances you feared that you could be payment* [sic] *$500 million for an asset worth nothing?---Exactly, exactly.*

Mr Podzebenko confirmed the importance of the issues. Like Mr Cubbin, Mr Podzebenko's concern was for the asset:

> *And the concern there was that if it was granted in suspect circumstances it might render the Exploration Licence liable to cancellation by the Government?---That was one concern although we also were concerned that it would render the Government unwilling to grant other approvals necessary to build a mine and also to allow the licence to lapse without renewal.*

The IBC discussions regarding Edward Obeid Sr

The records kept by the IBC showed that from time to time there were discussions with various persons on these issues. In the minutes of the seventh meeting of the IBC there is this entry: "the IBC was told that Eddie Obeid purchased the land within Mount Penny Exploration Area at least 12 months before the New South Wales Government called for expressions of interest". It follows that there were discussions on this very subject, but the investors in Cascade were not forthcoming with information. Mr Cubbin gave this evidence:

> *At any time did any of these people Atkinson, John McGuigan, Travers Duncan, Brian Flannery, did any of them tell you that there was an Obeid involvement apart from or in addition to the mere ownership of Cherrydale Park?---To the best of my recollection, no.*
>
> *Well, let's put it this way, Mr Cubbin, as head of the Independent Board Committee and given the concerns that you'd had if any of those men had ever told you of an involvement by the Obeid family in the mining venture what would you have done?---I'd become very worried.*
>
> *Well, would you - - -?---But, well, I think the best way to answer that is to say that I think that probably would have been the end of the transaction because you know from a practical viewpoint if, if I was informed of that to use your words* [as] *the head of IBC then I would be required to inform Deloittes who are doing the independent assessment of the deal and it would have to go into the notice of meeting to the shareholders and that would have meant a number of things including I think Deloitte would have said that it wasn't a fair and reasonable deal and I obviously when, when in the notice of meeting the, there would have been a lot of adverse publicity and I think that would have meant the end of the transaction.*
>
> *Well, just surely as a director of White Energy and in your role as the head of the IBC would you have been recommending that the deal proceed had you known that fact?---No.*

It is appropriate here to record that the Commission generally accepts the evidence of Mr Cubbin. Mr Cubbin was a careful and reliable witness. He took care not to overstate any part of his evidence, and not to impute unfairly a negative motive to the words or actions of others. In addition, much of Mr Cubbin's evidence was corroborated by the evidence of Mr Podzebenko, whose evidence was not only reliable, but supported by detailed and contemporaneous notes.

Mr Podzebenko gave evidence that he was never told by any of the investors in Cascade – Mr Duncan, Mr Flannery, Mr Atkinson, John McGuigan, Mr Kinghorn or Mr Poole – that there was any Obeid involvement in the actual mining venture at Mount Penny or that any part of the $28 million payment was to interests associated with the Obeids.

The directors' response

This is a clear area where there was a direct conflict of interest. As earlier identified, each of Mr Duncan, John McGuigan, Mr Atkinson and Mr Kinghorn, knew of the Obeid involvement, and had arranged for the removal of the Obeids from the joint venture upon the basis that it jeopardised the assets of Cascade. At the same time, each

of those men was a director of White Energy and owed a fiduciary duty to White Energy.

Each of those men must have been aware of the interest that Mr Cubbin and the IBC had in the question of any historical involvement of the Obeid family at Mount Penny. Each must have been aware that Mr Cubbin and the IBC were trying to ascertain whether there had been any Obeid involvement in the Mount Penny tenement (and the joint venture relating to it) and to understand why Cascade had paid $28 million to Coal & Minerals Group. Each must have understood that this information was vital to White Energy.

This raises the following question: what did those men do in respect of sharing this information? Put another way: what did those men do to discharge their fiduciary duty owed to White Energy?

Mr Duncan

Mr Duncan was well aware of the Obeid involvement, and the importance of the issue. It was he who said that the Obeids were a problem that had to be "fixed". He knew of these matters, and he was the chairman of White Energy. Mr Duncan gave this evidence about what he did when Mr Cubbin raised the issue of the Obeids:

> *THE COMMISSIONER: Well did he raise it with you at all?---I think he did.*
>
> *What did he say?---I told him that they weren't in there, I think I told him that they weren't in there.*
>
> *MR WATSON: You told him they weren't in there?---I think I told him they weren't in there.*
>
> *Well if you did that then you would've lied to him?---Why would I have lied to him?*
>
> *Well you knew they were?---I thought you used the tense that they – he raised the question with me that they were in there.*
>
> …
>
> *THE COMMISSIONER: Well did you notice he was asking you questions about the Obeids involvement?---I think so.*
>
> *In the mining aspect?---I think so.*
>
> *MR WATSON: Did you tell him that you knew they had been involved?---No I don't believe I did, I don't recall.*
>
> *Why not? Why wouldn't you do that?---Why would I?*

The Commission interprets this to mean that Mr Cubbin was seeking assistance and information from Mr Duncan, and that Mr Duncan was misleading Mr Cubbin and the IBC for his own personal financial advantage.

The personal advantage that Mr Duncan so obtained was brought about by the concealment of the Obeid involvement in the creation of the Mount Penny tenement in the EOI process and in the joint venture relating to the exploitation of the exploration licence and the tenement generally. The Commission has earlier found that the continued Obeid involvement constituted a risk to the value of the tenement. The risk involved possible government intervention in the exploration licence and a risk that a mining lease might not be granted. Public awareness of that risk would have reduced the value of investors' shares in Cascade. Thus, a personal advantage to Mr Duncan in concealing the Obeid involvement was the avoidance of reduction in the value of his share of Cascade.

Mr Duncan was the chairman and a director of White Energy and had a fiduciary duty to the company. The Commission is satisfied that, despite this, Mr Duncan deliberately concealed the Obeid involvement in the Mount Penny tenement from Mr Cubbin and the IBC.

John McGuigan

John McGuigan's position was a little different because he claimed that he had made a disclosure to Mr Cubbin, albeit in other circumstances. When asked about this matter, John McGuigan gave this evidence:

> *Well, tell me, at the time that this was all under consideration, do you acknowledge that you were a director of White Energy?---Yes, I was.*
>
> *Do you acknowledge that you were subject to a fiduciary relation, in a fiduciary relationship with its shareholders?---Yes, I was.*
>
> *Did you do anything to reveal your knowledge of an Obeid involvement?---Yes, I did.*
>
> *How did you do that, Mr McGuigan?---I'd had a specific discussion with Mr Cubbin sometime prior to the transaction where I had informed him of my view that in the 25 per cent interest that the Obeid, there were Obeid interests owning* [sic] *portion of that.*
>
> …
>
> *So your evidence is you told Cubbin that it was your belief that the Obeids were involved?---This was in February 2010.*

There are a number of problems with this evidence. John McGuigan insists the conversation occurred in February 2010; Cascade only made its offer to sell its assets to White Energy on 26 November 2010. Mr Cubbin was not privy

to any of the preliminary discussions between Cascade and White Energy – he said he only found out about the matter when the offer was made. So, any discussions between John McGuigan and Mr Cubbin, if they occurred, must have been on an informal basis, unrelated to the business of White Energy. In addition, Mr Cubbin's evidence made it plain that he was unaware of any actual Obeid family involvement in mining interests at Mount Penny; indeed, that is the precise information he was seeking.

The Commission prefers the evidence of Mr Cubbin and finds that John McGuigan did not have the conversation with Mr Cubbin about which he testified. But, even if John McGuigan had mentioned such a matter to Mr Cubbin, it was done in such a way that it would not discharge his fiduciary duty to White Energy at the time when Mr Cubbin and the IBC were investigating the specific issue.

John McGuigan must have known that Mr Cubbin was looking for this information in November 2010, yet he did nothing about it:

> *You must have been disappointed that after telling Cubbin this that he did not reveal it, even though it was a matter of primary concern for the independent board?---I was surprised. I, I, I did not repeat the conversation that I'd had with Mr Cubbin in February, I did not repeat that in November.*

This was obviously a significant issue for Mr Cubbin, the IBC and White Energy. John McGuigan identified that it did become an issue, but he did nothing:

> *Did, did that later on become a factor in your mind?---Well, I, I endeavoured to answer it just now in the way that I did and I believe I said yes, it did become a factor.*
>
> *MR WATSON: So when it did become a factor what did you then* [do] *to inform the shareholders of White Energy?---I, I did nothing.*
>
> *But you're under a fiduciary relationship with them weren't you?---Well, let, let me - - -*
>
> *Were you or were you not in a fiduciary relationship with the shareholders of White Energy?---I obviously was.*

His failure to inform the shareholders of White Energy would be a breach of a fiduciary duty to White Energy because the discharge of such a duty required proactive disclosure. In addition, the Commission finds that John McGuigan was engaged in conduct designed to mislead Mr Cubbin and the IBC.

Anthony Levi is the divisional director of corporate finance at Arthur Phillip Pty Ltd. He knew about the Obeid involvement and he was asked some very direct questions by Mr Podzebenko about that very matter in January 2011 – at a time that White Energy was looking at the deal, but months after the Obeid interest had been terminated. Mr Levi gave this evidence:

> *But what did he ask you, Mr Levi?---He wanted, he, he asked me something along the lines of what is Eddie Obeid's involvement in Cascade Coal.*
>
> *Why didn't you tell him?---Well, first of all at that point in time the Obeids were, were not involved in the joint venture.*
>
> *But he wasn't, he asked you what the involvement was or had been, didn't that include had been?---My response to him was - - -*
>
> *Do you mind answering that question?---I understood him to be asking what their present involvement was, not what their historical involvement was.*
>
> *MR WATSON: Mr Levi, look, we started off pretty well. You said I needed to go and take instructions?---Yes.*
>
> *Isn't that right?---Correct, and that's what I did.*
>
> *You knew full well what they were after. They wanted to know whether there was any Eddie Obeid involvement in the deal. You knew that?---Yes.*
>
> *You knew it was a concern to them?---Yes.*

According to Mr Levi, he sought instructions the next day from Mr Duncan and John McGuigan as to what he should tell Mr Podzebenko in response to his questions. He was told by them that John McGuigan was going to make contact directly with Mr Cubbin on the issue. Mr Levi, therefore, did nothing about the matter after that. Mr Levi understood that what he was told by Mr Duncan and John McGuigan meant that John McGuigan would deal with the matter, and Mr Levi should not reply to Mr Podzebenko. The Commission interprets this episode as an occasion when the IBC came close to getting the truth, but Mr Duncan and John McGuigan stepped in to prevent that truth from emerging.

The nature of a fiduciary duty is that the person owing the duty cannot switch the duty on and off. Despite his experience as a lawyer, his conflict of interest completely blurred John McGuigan's judgment on this issue. At a time when he was a director of White Energy (and he acknowledged that he was in a fiduciary relationship with that company), he said: "I was clearly acting for Cascade and I was wearing a Cascade hat and I was involved from January on not so much in the early stage as being the person who was representing Cascade in negotiating the agreement and seeking to advance that transaction". By law, John McGuigan could negotiate on behalf of Cascade,

but he was not permitted to withhold critical information from White Energy – by law he could not wear two hats.

John McGuigan is a very experienced lawyer, obviously astute, and with a keen businessman's mind. The Commission had some difficulty in assessing the value of the evidence of John McGuigan – large parts of it were honest and complete versions of what had occurred. There were occasions, however, when it seemed that John McGuigan was reluctant to tell the whole story if he perceived there was some downside. His wavering evidence on his "knowledge" of an Obeid involvement in Buffalo Resources is an example of that. In the end, the Commission resolved to treat John McGuigan's evidence with care and would prefer to rely upon other, disinterested, evidence, were such evidence to be available.

The Commission finds that John McGuigan misled Mr Cubbin and the IBC by taking active steps to conceal from them the Obeid involvement in the Mount Penny tenement. The active steps involved preventing Mr Levi from telling Mr Cubbin about the Obeid involvement. This concealment was carried out for John McGuigan's personal advantage. His personal advantage was, as is the case concerning Mr Duncan, the avoidance of any reduction in the value of his shares in Cascade. That reduction was likely to have resulted had he made full disclosure to Mr Cubbin.

John McGuigan was a director of White Energy and had a fiduciary duty to the company. The Commission is satisfied that, despite this, John McGuigan deliberately concealed the Obeid involvement in the Mount Penny tenement from Mr Cubbin and the IBC.

Mr Atkinson

Mr Atkinson was the least aggressive, least assertive, and probably the most reliable of the witnesses amongst the Cascade investors. Generally speaking, he made a genuine attempt to answer questions accurately, and the Commission is inclined to accept most of his claims about difficulties caused by a defective memory.

Mr Atkinson was, like John McGuigan, an experienced and accomplished lawyer. He was a director of White Energy, and had previously been its managing director. He agreed that he knew that the IBC was looking for information on a potential Obeid involvement, and the information was important to it. Mr Atkinson, like Mr McGuigan, seemed to think that a fiduciary duty could be turned on and off:

> *THE COMMISSIONER: Yes, you remained silent about your knowledge of the Obeid involvement?---That's, yes, that's correct.*
>
> *MR WATSON: And as you put it, you saw your duty as changing because you now were acting as a seller?---That's correct.*
>
> *So you owed the duty to yourself as a seller but not to the mums and dads of White Energy?---In the context of that transaction, yes.*
>
> *Yes, exactly. In the context of that transaction your duty was to protect your own interest not the shareholders of White Energy?---It was to protect the interests of Cascade and presumably, yes, as part of that my own interest, yes.*

As a director of White Energy, Mr Atkinson owed White Energy a fiduciary duty. The Commission is satisfied that, despite this, Mr Atkinson deliberately concealed the Obeid involvement in the Mount Penny tenement from Mr Cubbin and the IBC.

Mr Kinghorn

As earlier discussed, there is a difficulty in establishing the date from which Mr Kinghorn knew of an Obeid involvement. Part of the difficulty stems from the fact that Mr Kinghorn gave false evidence on the subject. It is clear, however, that, before the Cascade and White Energy transaction was terminated, Mr Kinghorn was aware of the problems created by Mr Cubbin's enquiries. So much is evident from the contents of the recordings of the intercepted telephone conversations. In light of that, Mr Kinghorn's evidence is surprising, given he owed a fiduciary duty to White Energy (as a director of that company):

> *Did you do anything to alert Mr Cubbin to your knowledge of the Obeid involvement?---No, as I said I had no, I had no conversations with Cubbin at all on this matter.*
>
> *Right.---My view is, my view is that once the independent committee is formed it's improper of me to discuss anything with them unless they ask me questions and he did not ask me any questions.*
>
> *All right. But when you say, when you've got all the facts in front of you, what did you do to make sure that Mr Cubbin had the facts in relation to the Obeids in front of him?---I did absolutely nothing, I did nothing.*
>
> *Right. What did you do then to assure yourself that he had all of the necessary facts, did you ask other people whether they had placed it before him?---No, sorry, he had, he had several, he had three sets of lawyers - - -*
>
> *No, no, facts not legal advice.---Uh, excuse me, this is a due diligence he was carrying out, he is* [sic] *the whole purpose of a due diligence is to get to the bottom of all the facts he had one of the best teams in town to do that – it was not me to tell him how to suck eggs.*

Mr Kinghorn was a director of White Energy and had a fiduciary duty to the company. The Commission is satisfied that, despite this, Mr Kinghorn deliberately concealed the Obeid involvement in the Mount Penny tenement from Mr Cubbin and the IBC.

The directors' guarantees

It has been suggested in evidence and in submissions that the Commission could not imply any ulterior or improper motives to the directors of Cascade because they agreed to take White Energy shares, and because they gave guarantees in favour of White Energy.

As several witnesses explained in their evidence, the sale of Cascade to White Energy for $500 million was not a cash transaction; it was mainly a "scrip for scrip" transaction. Moreover, toward the end of the negotiations, Mr Cubbin had secured guarantees that might have had the effect of requiring the investors in Cascade to return their benefits if the asset was adversely affected in the first 12 months after the sale. Upon this basis, it was submitted that those arrangements would not have been entered into if the investors in Cascade had other than complete faith in the integrity and value of the asset.

This argument, however, does not address the real issue. It is clear that several of the investors in Cascade had formed a view that the Obeid involvement at Mount Penny created a serious risk to Cascade, and the risk jeopardised the value of the asset. Nevertheless, they were willing to press on with the transaction to White Energy and, to do so, were willing to disguise that Obeid involvement. Whether, at the same time, they were willing to take their own risk by providing guarantees is inconclusive. Doing a deal with White Energy gave them a good chance at a windfall profit; in a sense, they had little to lose from the guarantees. These matters simply reinforce the reasons why those investors in Cascade entered into such complex and elaborate measures to try to disguise the Obeid involvement. It gave them some confidence that the Obeid involvement would never surface. In addition, the guarantees and the proposal that the sale would involve a scrip for scrip transaction meant that the directors of Cascade would continue to have an interest in concealing the Obeid involvement after any sale to White Energy was completed.

The actions of Mr Poole

Mr Poole was in a different position from the others – he was not a director of White Energy. His role, however, is highly significant because it provides some idea of the great lengths to which the investors in Cascade went to disguise the Obeid involvement. In the case of Mr Poole, it involved direct lies.

Before going to that evidence, it is important to attempt to understand the role that Mr Poole was playing. It is not easy to characterise that role. On one hand, Mr Poole was a director of Cascade and, through his family, a substantial investor in Cascade. He was the person who carried most of the burden of negotiating the transaction on behalf of Cascade. But there were times when it seems as though Mr Poole also had a connection with White Energy. There are documents that suggest that Mr Poole and his firm, Arthur Phillip Pty Ltd, were acting on behalf of White Energy – a notable example of this is the various draft responses prepared for submission to ASX, an issue that will be dealt with later.

In any event, given his relationship with Cascade, the IBC spoke to Mr Poole, and obtained information from him as part of its due diligence. A meeting was arranged between Mr Cubbin and Mr Podzebenko on behalf of the IBC and Mr Poole.

Mr Poole revealed that he had prepared for this meeting by discussing the relevant issues with Mr Duncan, John McGuigan and Mr Atkinson. It was resolved that the existence of the rights termination agreement should not be revealed, and the reason for this, Mr Poole said, was because the truth might reflect adversely on the value of the asset.

The meeting with Mr Poole

On 16 March 2011, Mr Cubbin and Mr Podzebenko met Mr Poole. There were three items on the agenda – the circumstances of the grant of the exploration licences at Mount Penny, whether or not there had been or was any Obeid involvement in the exploration licences, and the circumstances behind the payment of $28 million (part of the $30 million) by Cascade to Coal & Minerals Group.

Each of Mr Cubbin and Mr Podzebenko had a good recall of the meeting. Mr Podzebenko also took handwritten notes, which he then converted into a typescript file note, and in the end there was a formal document created.

Mr Podzebenko's file note reflected the answers given by Mr Poole relating to the three agenda items. The last two are particularly relevant. As regards the second agenda item, Mr Poole said that he personally had no issue disclosing the nature of the services that Coal & Minerals Group had provided to Cascade to which the $28 million payment related. He had been asked by other investors not to do so. He did not believe that there was any political sensitivity in relation to the payment.

As regards the third agenda item, Mr Poole told the meeting that he was not aware of any payments having been made to Edward Obeid Sr or any entities associated

with him or to other ALP politicians. In particular, as far as he was aware, none of the $28 million had been paid to Edward Obeid Sr or interests associated with him.

The Commission accepts the evidence of each of Mr Cubbin and Mr Podzebenko on the events of 16 March 2011 as well as Mr Podzebenko's file note.

Mr Poole did not tell Mr Cubbin and Mr Podzebenko the truth. In substance, as set out above, he deliberately misled them. Mr Poole feared that, if he told Mr Cubbin or Mr Podzebenko the truth, it was likely that the Obeid involvement in the Mount Penny tenement would become public. That would probably have led to a reduction in the value of his Cascade shares.

The ASX enquiry

While Mr Cubbin and the IBC were pursuing their investigations, ASX began to raise some serious issues about aspects of the transaction. On 16 March 2011, ASX wrote to White Energy asking for details of the proposed acquisition of Cascade. One particular concern was expressed as follows: "concern has been raised over the statement that [Cascade] has capitalised mining costs of $41,761,000 with no detail on how this figure has been reached and its components. Please provide a breakdown of these costs". A response was sought by 21 March 2011.

A straightforward and honest answer to that letter would have revealed the fact that $30 million had been paid to terminate the rights of the Obeids. White Energy did not, however, provide a straightforward and honest answer to that letter; instead, it sent a letter to ASX that did not address the specific concern about capitalised mining costs.

On 1 April 2011, Elizabeth Harris of ASX sent an email, part of which read: "Further, in my letter of 16 March 2011 I requested a breakdown of the capitalised mining costs of [Cascade] ($41,761,000). This was not provided in the response to my query … Could you please provide me with this". It is plain from an email chain that Mr Cubbin and Mr Podzebenko sought information on this subject from Mr Duncan. On 8 April 2011, the chief financial officer of White Energy, Ivan Maras, sent an email to Mr Cubbin and Mr Podzebenko, which read: "FYI – Travers has just advised that Cascade will be providing us with a breakdown of the capitalised mining costs today, so that we can get this to the ASX by close of business today".

Mr Maras did not receive a response and, on 11 April 2011, followed up with a second email. Mr Duncan deferred a response on the basis: "We are having a meeting this afternoon with Brian as well".

The meeting to which Mr Duncan was referring is the meeting that was captured on a telephone intercept during which Mr Duncan referred to their efforts to answer the ASX request. Mr Duncan spoke of how they had tried all sorts of "weasel words", but had been unable to come up with a satisfactory explanation for the payment. The concern, as expressed by Mr Duncan and Mr Kinghorn, was that a straightforward answer would enable ASX to "get behind" the involvement of Mr Poole. It was in light of that concern that a decision was made to terminate the option agreement between Cascade and White Energy.

There are a number of disturbing features in this evidence. The first is that it is impossible to know on whose behalf the decision to terminate was being made – was the agreement being terminated by Cascade or White Energy? The second is the fact that directors of a public company had sought to evade an ASX request for information by utilising "weasel words". The third – and, for present purposes, the most relevant aspect – is the fact that the fear of the exposure of the purpose of the payment meant that the better option was to cancel the transaction. The Commission finds that this is because those persons involved in this part of the transaction were so concerned about the need eventually to reveal an Obeid involvement that they were not willing to risk providing answers to ASX.

The deal is off: the ASX release

On 12 April 2011, White Energy made a further announcement to ASX concerning the termination of the arrangement with Cascade. The reason given for terminating the transaction was uncertainty in respect of "hydrology, cultural heritage, transportation, social impact, agricultural land" issues. It went on to say that the IBC had been "seeking additional clarity in relation to these matters and negotiating amendments to address these risks in the sale agreement".

That reason was false. Mr Flannery gave the following evidence as to the reasons for the termination:

> *I've asked you a reason, you've given a reason, was there any other reason for termination?---There were two issues associated with it. One was the escrow requirement of the independent committee who wanted a* [sic] *escrow for the, until the Mining Lease was granted and that didn't seem to be possible from some of the shareholders and the second reason was the involvement of the $28 million issue and the involvement of Gardner Brook from my point of view.*

White Energy's press release to ASX did not mention either of these two issues. The following exchange involving Mr Flannery is relevant in this regard:

THE COMMISSIONER: You concealed the fact that Gardner Brook had been involved and you … concealed the fact concerning the escrow issue and you concealed your concern about the $28 million in reporting to the Stock Exchange didn't you?---Well, I didn't deliberately concern [sic] *about the escrow issue, the escrow issue was something that had been talked about I think in, in the public domain in terms of requirement, we all knew there was an escrow period required for 12 months.*

The other two matters you deliberately concealed?---I didn't, I certainly didn't say anything about the $28 million, that's correct.

The press release made to ASX was untrue. The reason for that falsehood is transparent. The Commission finds it was yet another step in attempting to prevent knowledge of the Obeid involvement in the granting of the Mount Penny tenement and the operation of the joint venture between Cascade and Buffalo Resources escaping into the public domain.

Chapter 32: The Yarrawa tenement

The Yarrawa tenement covers an area of approximately 40 square kilometres and is located on the northern edge of the Wollemi National Park. It is approximately 10 kilometres to the south-west of the township of Denman, NSW. Unlike the Mount Penny tenement, the Yarrawa tenement is located in the Hunter coalfield of NSW. And, unlike the Mount Penny tenement, it was the DPI that proposed the inclusion of this area, rather than the minister.

Yarrawa was considered by the DPI to be a small coal allocation area and it was categorised as such in the 11 coal release areas that were released in September 2008.

Monaro Mining bids for Yarrawa

Monaro Mining submitted an EOI for the Yarrawa tenement. It, along with Coalworks Limited and Endocoal Limited, were the three parties that had submitted EOIs for this area.

Monaro Mining's EOI for the Yarrawa coal release area was dated 21 November 2008, and was prepared principally by Mr Rampe. In accordance with the requirements of the EOI information package, Monaro Mining prepared a detailed EOI, including a breakdown of its financial qualifications and funding proposal for the area.

Once a decision was made that the EOI process was to be reopened, the DPI wrote to each of the parties who had submitted bids advising that the government had made a change in policy and that the process was reopened. Mr Mullard, on behalf of the DPI, wrote to Monaro Mining on 9 January 2009 advising it of the reopening of the process. The DPI letter advised Monaro Mining (and the other interested parties that had lodged an EOI) that they could maintain their original EOI, revise or replace it, or recall it.

Monaro Mining decided to maintain its original EOI but to revise its bid in one specific respect: it increased its additional financial contribution from $1 million to $2 million. The "Total Pre-Mine Development Costs" for the Yarrawa EOI, in light of this revised additional financial contribution, totalled $9,549,600.

Monaro Mining secures Yarrawa

Notwithstanding the reopening of the EOI process, when the process closed on 16 February 2009 there remained only three parties that had submitted bids for the Yarrawa tenement – Monaro Mining, Coalworks Limited and Endocoal Limited.

As explained in earlier sections of the report, there remained, however, a significant problem: Monaro Mining had no financial backing and it had mistakenly believed that it could negotiate a timetable for payment of the additional financial contribution with the DPI. It had, in an effort to resolve this problem, made contact with the DPI to see whether the additional financial contributions it had offered as part of the bids could be paid over a negotiated time frame. Following this initial contact, Monaro Mining requested, and was granted, a meeting to discuss this issue with DPI officers – Mr Mullard and a member of the EOI Evaluation Committee, Mr Hughes. This meeting occurred on 21 May 2009, and Mr Rampe attended on behalf of Monaro Mining.

The specific purpose of the meeting was to clarify when, if successful, Monaro Mining would be required to make payment of the additional financial contribution. Although neither Mr Mullard nor Mr Rampe had a clear recollection of the meeting, it seems clear that Mr Rampe was told that, if Monaro Mining was successful in its bids, the additional financial contributions would be payable (in terms of the EOI information package) within 30 days of the granting of consent to apply for the exploration licence.

On 22 May 2009, a meeting was held between Mr Brook, Mr Malone, Mr Barns and Mr Rampe. As has been described earlier in the report, at that meeting Mr Brook

said that the investors in Voope were keen to preserve their position and that they wanted to "take their chances" in pursuing the bid. Immediately following the meeting with Mr Brook, a meeting of directors of Monaro Mining was held and they resolved to abandon the NSW Coal Project and all the EOIs submitted by Monaro Mining, contingent upon a new agreement being entered between Monaro Mining and Voope.

The detail of this agreement has been earlier set out, but the effect of it was that, if Monaro Mining was successful in the bids submitted, the shareholding in the company that was to undertake the mining activities – Monaro Coal – was to be transferred to Voope, and Voope was to assume control of the bids that Monaro Mining had submitted.

On 1 June 2009, Mr Rampe sent a letter to Mr Hughes. This letter was principally directed to clarifying Monaro Mining's understanding of the words "Upon Granting of Consent", as set out in the evaluation criteria in the EOI information package for the coal release areas. However, the letter also contained the following:

> 4. *In order to adhere to and thereby comply with Evaluation Criteria outlined in the EOI Information Package for the Coal Release Areas, Monaro requests that all Exploration Licences for which are granted pursuant to the Expressions of Interest currently lodged with your Department, that they be issued to our nominee company called Royal Coal Pty Ltd.*
>
> 5. *In order to adhere to and thereby comply with the Evaluation Criteria outlined in the EOI Information Package for the Coal Release Areas, the ownership of Royal Coal Pty Ltd will be transferred to Voope Pty Ltd, who is the financial partner of Monaro's consortium.*
>
> 6. *It is intended that Monaro will provide Royal Coal with consultancy services via a management agreement should Royal Coal be awarded any Exploration Licences.*
>
> *Should you have any questions regarding the above, please direct them to Mr Gardner Brook who represents both Royal Coal and Voope, telephone…*

The reference to Royal Coal Pty Ltd was a reference to the anticipated name of the nominee company. As it turned out, Loyal Coal became the nominee company. The DPI was advised of this by a further letter sent on 2 June 2009 to it by Mr Rampe. By this time, the shareholding in Monaro Coal – now called Loyal Coal – had been transferred to Voope, and the two directors of Monaro Coal – Mr Rampe and Mr Malone – had resigned and been replaced by Mr Kaidbay.

The communications between Mr Rampe and the DPI at this time reflected Monaro Mining's performance of the agreement that it had reached with Voope (that is, in terms of the Deed of Release referred to above). Although this deed was never executed by Voope (it was executed by Monaro Mining), it seems clear enough that both Monaro Mining and Voope considered themselves bound by the terms of it, and acted in accordance with what was agreed. As has earlier been pointed out, however, Voope paid only $70,000 and not $300,000 (being the sum payable under it).

By letter dated 9 June 2009, Mr Brook wrote to Mr Hughes advising of "our notice of withdrawal from Spur Hill, Mt Penny and Glendon Brook Expressions of Interest". This letter reflected, in part, Voope's agreement with Cascade in connection with the Mount Penny and Glendon Brook tenements – these being the only two tenements for which Cascade had submitted bids. The agreement that had been reached with Cascade required Monaro Mining to withdraw its bids for Mount Penny and Glendon Brook.

At the time Monaro Mining withdrew its bids for the three coal release areas, the EOI Evaluation Committee had already met and determined which applicant would be recommended as the successful bidders for all the 11 coal release areas. Monaro Mining had been identified as the successful party for the Yarrawa tenement and its withdrawal from the other areas did not result in the EOI Evaluation Committee undertaking a review of Monaro Mining's EOI in the Yarrawa coal release area, or its bids more generally. The EOI Evaluation Committee remained of the view that Monaro Mining should be invited to apply for an exploration licence for the Yarrawa coal release area.

On 18 June 2009, the EOI Evaluation Committee prepared and submitted a "Director General Submission" that made recommendations, in relation to each of the 11 coal release areas, that the successful applicant for each area be invited to apply for an exploration licence. The EOI Evaluation Committee provided a Director General Submission, rather than a ministerial briefing to the office of Mr Macdonald. This was because Mr Macdonald, on 23 December 2008, had executed an instrument of delegation of the minister's functions under s 13(4) of the *Mining Act 1992*. As was explained in earlier parts of the report, an application for an exploration licence in connection with coal could be made by a party only if invited by the minister to apply for such a licence. The instrument of delegation authorised the delegate to invite applications for exploration licences that related to land within the "Mineral Allocation Area", which, for coal, was the whole of NSW. An application could, therefore, in this case be made at the invitation of the director general.

In accordance with the recommendations made by the EOI Evaluation Committee, the director general wrote to Monaro Mining on 19 June 2009 advising that it was the successful EOI applicant for the Yarrawa coal release area. At the same time, the director general wrote to the other parties – Coalworks Limited and Endocoal Limited – advising that they had been unsuccessful in this process.

Monaro Mining applies for the Yarrawa exploration licence

As part of the agreement that Monaro Mining had with Voope, Monaro Mining had agreed that it would not "do anything to jeopardise Royal Coal from becoming the successful bidder". Mr Rampe understood this to mean that Monaro Mining would assist Loyal Coal in securing any exploration licence awarded to Monaro Mining. Thus, when Mr Rampe received the letter from the DPI advising that Monaro Mining had succeeded in its bid for the Yarrawa tenement, Mr Rampe forwarded this to Mr Brook for him to deal with.

The success of Loyal Coal in securing the Yarrawa tenement created a problem. Those standing behind Loyal Coal were unable to meet the financial commitments that were required – specifically the $2 million additional financial contribution that formed part of the EOI submitted by Monaro Mining. And it needed to take steps to secure the exploration licence.

It seems that Mr Brook and Mr Rampe asked the DPI whether Loyal Coal could apply, rather than Monaro Mining, for the exploration licence. Mr Brook was advised in an email sent from the DPI on 17 July 2009, that the application was required to be made in the name of Monaro Mining, but that once the application was lodged "Monaro Mining can nominate Loyal Coal as the company to whom they would like the licences granted".

On 10 August 2009, the DPI wrote to Monaro Mining advising that consent had been given, pursuant to s 13(4) of the *Mining Act 1992*, for Monaro Mining to apply for an exploration licence for coal over the Yarrawa coal release area.

Yarrawa: the involvement of Coalworks

The letter from the DPI inviting Monaro Mining to apply for the Yarrawa exploration licence was received by Monaro Mining on 20 August 2009. Mr Brook was advised by the DPI that payment of all the additional financial contributions was required by 20 September 2009. Mr Brook decided to act.

In August 2009, Mr Brook rang Wayne Mitchell, the chairman of Coalworks Limited. It was a "cold call". Mr Brook advised Mr Mitchell that he represented the company that was successful in securing the Yarrawa tenement, but that it did not have the funds to proceed to pay the money that was due to the DPI. In effect, Mr Brook suggested that there be a joint venture between Monaro Mining and Coalworks Limited. Mr Mitchell indicated that he was interested in such a proposal, but would need to raise the proposal with his board of directors, which he did.

After negotiations between Mr Brook and Mr Mitchell, Coalworks Limited accepted that, as the DPI had already been notified that the nominee would be Loyal Coal, that company would need to remain the nominated entity for the exploration licence for coal over the Yarrawa coal release area.

Mr Brook then struck a deal with Coalworks Limited under which Coalworks Limited would "farm in" by meeting the expenses of the additional financial contributions and the other payments that were due to be paid to the DPI. This was done through a unit trust arrangement, discussed further below. The outcome was that Loyal Coal would have a 10% interest in the Yarrawa tenement and Coalworks Limited would have a 90% interest.

On 18 September 2009, Monaro Mining wrote to the DPI confirming the nomination of Loyal Coal as the entity in whose name the exploration licence for coal over the Yarrawa coal release area should be issued.

On 21 September 2009, the executed "Application for an Exploration Licence" was lodged with the DPI. On 18 December 2009, an exploration licence (EL 7430) was issued to Loyal Coal in respect of the Yarrawa tenement.

The financial arrangements

As outlined, the reason for the involvement of Coalworks Limited arose because those standing behind the bid for the Yarrawa coal release area – Voope, as the shareholder of Loyal Coal – were unable to finance the contributions payable to the department upon application for the exploration licence.

Under the agreement with Coalworks Limited, Coalworks Limited lent Loyal Coal the monies that were payable to the DPI to enable the exploration licence to be issued; namely, $2,404,720. In return, the exploration licence was to be held on trust for the consortium – with the beneficial owners to be Yarrawa Coal Pty Ltd (a fully owned subsidiary of Coalworks Limited) as to 90%, and Loyal Coal as to 10%.

This agreement was replaced by a unit trust deed, dated 18 September 2009, that created the Yarrawa Coal Unit Trust. Loyal Coal was the trustee of this trust. The units in trust were held by Yarrawa Coal Pty Ltd (90 units) and Voope (10 units). There was a further agreement that there be a division in the share capital of Loyal Coal: 90% to Yarrawa Coal Pty Ltd and 10% to Voope. Following this division in share capital, Yarrawa Coal Pty Ltd had 900 fully-paid ordinary shares in Loyal Coal and Voope had 100 such shares.

Following exploration, there was a need to increase the exploration budget. On 17 June 2010, Loyal Coal made a call upon shareholders and unit holders for a financial contribution of $2,348,002. This required Voope to contribute the sum of $234,800 and Yarrawa Coal Pty Ltd to contribute $2,113,202.

At this time, the shareholding of Voope was held by Mr Kaidbay, who held 88 shares and Warbie Pty Ltd, Mr Brook's company, which held 12 shares. This share division had been agreed between the parties on 12 December 2009, and was recorded in a bare trust deed. Mr Kaidbay held the shares as a trustee. From material the Commission found on the premises of Mr Sassine, the accountant to the Obeid family, the beneficial owners of Voope were Mr Kaidbay, as to 41%, Obeid Family Trust No 2, as to 47%, JDD Capital (a British Virgin Islands company owned by Joseph Aboud, an associate of the Obeids) as to 8%, and Redmyre Holdings Pty Ltd (a company owned by Joseph Georges, an acquaintance of the Obeids and a friend of Mr Kaidbay), as to 4%.

In time, Mr Brook sold four of the 12 shares held by Warbie Pty Ltd in Voope to Redmyre Holdings Pty Ltd. This came about because, being in need of funds, Mr Kaidbay arranged for Mr Georges to loan Mr Brook money – initially $75,000, but later increased to $85,000. Rather than repay the money, Mr Brook agreed to transfer four shares in Voope to Redmyre Holdings Pty Ltd. The share sale agreement was entered on 6 September 2010, and the share transfer was executed on that date.

At a later point, Mr Brook sold four of Warbie Pty Ltd's remaining eight shares in Voope to JDD Capital, under a deal arranged by Mr Kaidbay. It appears that Mr Brook continues to hold four shares in Voope through Desert Sand Holdings Ltd, another British Virgin Islands company.

It was Mr Georges who, in fact, funded the entire contribution – $234,800 – of the call made on Voope by Loyal Coal.

The involvement of Boardwalk

Once exploration had commenced, it was realised that the expenses for exploration were, and would continue to be, much higher than Coalworks Limited had anticipated. For that reason, Coalworks Limited was required to secure a joint venture partner. Ultimately, Boardwalk Resources Pty Ltd was introduced to the project, on a farm in basis as a 50% owner of the tenement: it would spend $25 million to earn a 50% interest in the tenement.

In further negotiations, Voope, which in June 2012, had changed its name to Mincorp Investments Pty Ltd, was offered 6 million Coalworks Limited share options at different exercise prices and strike dates.

Mincorp Investments Pty Ltd exercised 4 million of these options, realising a net profit of $1,358,110. On 26 June 2012, these funds were deposited into the bank account of Mincorp Investments Pty Ltd. In time, these funds were distributed to the shareholders in Mincorp Investments Pty Ltd, including Obeid Family Trust No 2. That trust received the amount of $530,928.06, representing its 47% interest, and Mr Kaidbay received $463,150.01, a sum representing his 41% interest.

Finally, Mincorp Investments Pty Ltd sold its remaining 2 million options in Coalworks Limited to Whitehaven Coal Holdings Pty Ltd, which is a wholly-owned subsidiary of Whitehaven Coal Ltd. On 3 October 2012, Mincorp Investments Pty Ltd deposited $200,000 into its bank account; this sum represented the proceeds of that sale. Thus, Mincorp Investments Pty Ltd relinquished that part of its interest in the Yarrawa tenement. It still appears to hold a substantial interest in that tenement.

Because of a subsequent hostile takeover by Whitehaven Coal Ltd, Coalworks Limited no longer has an interest in the Yarrawa tenement.

Chapter 33: Corrupt conduct findings, s 74A(2) statements and other matters

Corrupt conduct

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

Corrupt conduct is defined in s 8 and s 9 of the ICAC Act. Those sections and the Commission's approach to making findings of corrupt conduct are set out in Appendix 2 to this report.

First, the Commission makes findings of relevant facts on the balance of probabilities. The Commission then determines whether those facts come within the terms of s 8(1) or s 8(2) of the ICAC Act. If they do, the Commission then considers s 9 and the jurisdictional requirements of s 13(3A) of the ICAC Act.

In the case of s 9(1)(a), the Commission considers whether, if the facts as found were to be proved on admissible evidence to the criminal standard of beyond reasonable doubt and accepted by an appropriate tribunal, they would be grounds on which such a tribunal would find that the person has committed a particular criminal offence.

In their submissions to the Commission, Counsel Assisting did not suggest any other part of s 9(1) as a basis for making a corrupt conduct finding. The Commission has therefore restricted its consideration to s 9(1)(a) of the ICAC Act.

Corrupt conduct – Mr Macdonald, Edward Obeid Sr and Moses Obeid

The Commission is satisfied that there was an agreement between Mr Macdonald, Edward Obeid Sr and Moses Obeid whereby Mr Macdonald acted contrary to his public duty as a minister of the Crown by arranging for the creation of the Mount Penny tenement for the purpose of benefiting Edward Obeid Sr, Moses Obeid and other members of the Obeid family.

The Commission is also satisfied that there was an agreement between Mr Macdonald, Edward Obeid Sr and Moses Obeid whereby Mr Macdonald acted contrary to his public duty as a minister of the Crown to provide Moses Obeid or other members of the Obeid family with confidential information for the purpose of benefiting Edward Obeid Sr, Moses Obeid and other members of the Obeid family.

These two agreements are essential elements of the corrupt conduct findings made below with respect to Mr Macdonald, Edward Obeid Sr and Moses Obeid.

The existence of these agreements is inferred from the findings made in the body of the report. The findings include:

- In 2008 and thereafter, Edward Obeid Sr was at all times head of the Obeid family and no important family business decisions, including decisions that might affect Cherrydale, would be taken without reference to him and without due deference to his views.
- The fact that the Obeid family conducted their affairs as a single economic unit so that Edward Obeid Sr and Moses Obeid, as well as the rest of the family, would benefit, tangibly and intangibly, from the sale of Cherrydale, Donola and Coggan Creek, or any dealings in connection with those properties (in particular from any coalmining ventures concerning those properties).
- The long-term close and personal relationship between Mr Macdonald and Edward Obeid Sr and the development of the personal relationship between Mr Macdonald and Moses Obeid.
- The communications between Edward Obeid Sr and Mr Macdonald concerning coalmining in the Bylong Valley and the opportunity for them to have had other communications.

- Mr Macdonald's knowledge of the location of the Obeid property, Cherrydale and, in particular, his knowledge that it was next door to the Anglo tenement.
- The fact that, in May 2008, Edward Obeid Sr arranged a meeting between Mr Macdonald and Moses Obeid to discuss coal licences in the Bylong Valley.
- The contact between Mr Macdonald and Moses Obeid and the confidential information given to Moses Obeid, as set out above in this report.
- The steps taken by members of the Obeid family to acquire the Donola and Coggan Creek properties for coalmining purposes prior to any public notification that there would be a call for EOIs for exploration licences.
- The foreknowledge that various members of the Obeid family had that a coalmining tenement would be created in the Mount Penny area (which foreknowledge was provided to them by Mr Macdonald).
- The elaborate ways in which the Obeid family sought to conceal their acquisition of rights in Donola and Coggan Creek.
- Edward Obeid Sr's attempt to conceal Obeid family involvement in Cherrydale through his request to Mr Cherry to change the name of the owner of Cherrydale.
- The unusual interest that Mr Macdonald took in the Mount Penny tenement.
- The various requests of the DPI made by Mr Macdonald for information about coal reserves in the Mount Penny area.
- The knowledge that Mr Macdonald had concerning coal deposits under Cherrydale and in its vicinity.
- The circumstances under which Mr Macdonald directed that the Mount Penny tenement be created.
- The various instructions given by Mr Macdonald for the creation of the Mount Penny tenement, those being such as would ensure that the Mount Penny tenement could cover Cherrydale, Donola and Coggan Creek.
- Mr Macdonald's bad management in creating the Mount Penny coal release area, in limiting its size, in creating the Mount Penny tenement with its particular dimensions, in its particular location, and against the advice of the DPI.
- The fact that the limitation of invitations to junior miners meant that the companies submitting EOIs would be more amenable to entering into a joint venture with one of the tenement landowners.
- The dealings that Mr Fang had with Mr Macdonald and Edward Obeid Sr, and the statements they made to Mr Fang.
- The decisions that Mr Macdonald made in connection with the EOI process, in particular those that had the effect of deflating the competitive extent of that process. These include limiting the invitations to a small number of companies, limiting invitees to junior miners, and putting only a portion of the North Bylong coal exploration area out to tender.
- That Moses Obeid and another Obeid son who met Mr Brook on 3 July 2008 knew exactly where the Mount Penny tenement would be created.
- The dealings between members of the Obeid family and Mr Rumore and the instructions they gave Mr Rumore.
- Mr Macdonald knew which companies would be invited to submit an EOI for exploration licences and provided a list of those companies, which was confidential, to Moses Obeid.
- The provision of confidential information by Mr Macdonald to Moses Obeid, or members of the Obeid family, and the use to which that information was put to benefit the Obeid family financially. The information included:
  - advice that the DPI intended to seek EOIs for about 20 exploration licences in the Bylong Valley region, including Cherrydale
  - advice that enabled Moses Obeid to know that a mining tenement would be created over Cherrydale and property in its vicinity
  - the maps of 9 May 2008, 30 May 2008 and 21 July 2008
  - documentary information relating to Mount Penny
  - the fact that initially the EOI process was intended to be made known publicly toward the end of July 2008
  - the information contained in the email of 22 September 2008 from Ms Turner to Mr Brook and the information contained in the document attached to the email of 22 September 2008 from Mr Brook to Mr Yin

- the list of companies invited by the DPI to submit EOIs
- advice that Monaro Mining had come first in the EOI process for the Mount Penny tenement.

The conduct of each of Mr Macdonald, Edward Obeid Sr and Moses Obeid will be considered in the terms of s 8 and s 9 of the ICAC Act.

Mr Macdonald

Mr Macdonald's conduct in agreeing with Edward Obeid Sr and Moses Obeid to act contrary to his public duty as a minister of the Crown by arranging for the creation of the Mount Penny tenement for the purpose of benefiting Edward Obeid Sr, Moses Obeid and other members of the Obeid family is corrupt conduct for the purpose of s 8 of the ICAC Act. This is because it is conduct on the part of Mr Macdonald that constitutes or involves the dishonest and partial exercise of his official functions as a minister of the Crown and therefore comes within s 8(1)(b) of the ICAC Act. It is also conduct on his part that constitutes or involves a breach of public trust and therefore comes within s 8(1)(c) of the ICAC Act.

Mr Macdonald's conduct in agreeing with Edward Obeid Sr and Moses Obeid to act contrary to his public duty as a minister of the Crown to provide Moses Obeid or other members of the Obeid family with confidential information for the purpose of benefiting Edward Obeid Sr, Moses Obeid and other members of the Obeid family and providing that information is corrupt conduct for the purpose of s 8 of the ICAC Act. This is because it is conduct on the part of Mr Macdonald that constitutes or involves the dishonest and partial exercise of his official functions as a minister of the Crown and therefore comes within s 8(1)(b) of the ICAC Act. It is conduct on his part that constitutes or involves a breach of public trust and therefore comes within s 8(1)(c) of the ICAC Act. It is also conduct that involves the misuse of information or material that Mr Macdonald acquired in the course of his official functions and therefore comes within s 8(1)(d) of the ICAC Act.

For the purposes of s 9(1)(a) of the ICAC Act, there are two relevant common law criminal offences – conspiracy to defraud and misconduct in public office.

Conspiracy to defraud is a common law offence in NSW.

Conspiracy to defraud encompasses an agreement by fraudulent means to cause a public official to act contrary to his or her public duty even where no economic loss has occurred. In such cases it is sufficient to show that there was an intention to enter into an agreement to use dishonest means to influence the exercise of a public duty for the purpose of obtaining an advantage.

In *Peters v The Queen* (1998) 192 CLR 493 McHugh J at [84] illustrated the application of the common law offence in respect of prejudice of the discharge of public duty as follows:

> *In most cases of conspiracy to defraud, to prove dishonest means the Crown will have to establish that the defendants intended to prejudice another person's right or interest or performance of public duty by:*
>
> - *making or taking advantage of representations or promises which they knew were false or would not be carried out;*
> - *concealing facts which they had a duty to disclose; or*
> - *engaging in conduct which they had no right to engage in.*
>
> *In the latter class of case, it will often be sufficient for the Crown to prove that the defendants used dishonest means merely by the Crown showing that the defendants intended to engage in a particular form of wrongful conduct. Proof of an agreement by the defendants to engage in conduct that involves a breach of duty, trust or confidence or by which an unconscionable advantage is to be taken of another will usually be sufficient evidence of dishonest means unless the defendants raise an actual or supposed claim of right or allege that they acted innocently or negligently.*

Many submissions made to the Commission suggested that it would be required to prove dishonesty as a discrete element of the offence. Those submissions are wrong: see *Peters v The Queen* at [90] and at [93]. Along the same lines, some submissions suggested that evidence of a subjective intent was essential. Those submissions are wrong also – "The beliefs of the accused persons as to whether they thought they were acting honestly are irrelevant": *Peters v The Queen* per McHugh J at [85]. In any event, the Commission finds that Mr Macdonald, Edward Obeid Sr and Moses Obeid knowingly acted dishonestly.

Although agreement is the essence of conspiracy, agreement does not have the same meaning as in a contract. What is required to establish an agreement for the purpose of a conspiracy is that the parties acted in concert in pursuit of an understood unlawful object. The matter was expressed as follows in *Saffron v R (No 1)* 1988 17 NSWLR 395 at 419-420:

> *Although a conspiracy may be established by proving an agreement which has never been implemented, it is not necessary in the usual case where a succession of overt acts are relied upon to prove the conspiracy to establish the date when, or the date before which, the conspiratorial agreement was made: R v Ongley* (1940) 57 WN (NSW)

116 at 117. *What the Crown generally seeks to prove in such a case are facts that go to establish that two or more persons acted in concert to achieve an unlawful object, or to achieve a lawful object by unlawful means. The agreement is to be inferred from those facts, which may be the "separate acts of the individuals charged which, although separate acts, yet point to a common design and when considered in combination justify the conclusion that there must have been a combination such as that alleged in the indictment.": Tripodi v The Queen* (1961) 104 CLR 1 at 6, *quoted in Ahern v The Queen* (1988) 165 CLR 87 at 93; 34 A Crim R 175 at 177.

Another relevant common law offence is misconduct in public office. The elements of the 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 misconduct himself, by act or omission, for example, by wilfully neglecting or failing to perform his or her duty;*
4. *without reasonable excuse or justification; and*
5. *where such misconduct is serious and meriting criminal punishment having regard to the responsibilities of the office and the officeholder, the importance of the public objects which they serve and the nature and extent of the departure from those objects.*

The Commission is satisfied for the purposes of s 9(1)(a) of the ICAC Act that, if the facts it has found were to be proved on admissible evidence to the criminal standard of beyond reasonable doubt and accepted by an appropriate tribunal, they would be grounds on which such a tribunal would find that Mr Macdonald has committed the criminal offences of conspiracy to defraud and misconduct in public office both in relation to the creation of the Mount Penny tenement and the provision of confidential information.

The Commission therefore finds that Mr Macdonald engaged in corrupt conduct by:

a) entering into an agreement with Edward Obeid Sr and Moses Obeid whereby he acted contrary to his public duty as a minister of the Crown by arranging for the creation of the Mount Penny tenement for the purpose of benefiting Edward Obeid Sr, Moses Obeid and other members of the Obeid family

b) entering into an agreement with Edward Obeid Sr and Moses Obeid whereby he acted contrary to his public duty as a minister of the Crown by providing Moses Obeid or other members of the Obeid family with confidential information for the purpose of benefiting Edward Obeid Sr, Moses Obeid and other members of the Obeid family.

Financial benefits received by Mr Macdonald

There was some evidence that Mr Macdonald received loans or other gifts and benefits from Mr Jones.

The illness of a critical witness, John Gerathy, meant that the Commission could not fully explore the circumstances surrounding these financial transactions, however, and the Commission does not make any finding that Mr Macdonald received a corrupt benefit as a result of his actions canvassed in this report.

Edward Obeid Sr

The conduct of Edward Obeid Sr in entering into an agreement with Mr Macdonald by which Mr Macdonald would act contrary to his public duty as a minister of the Crown by arranging for the creation of the Mount Penny tenement for the purpose of benefiting Edward Obeid Sr, Moses Obeid and other members of the Obeid family is corrupt conduct for the purpose of s 8 of the ICAC Act. This is because such conduct on the part of Edward Obeid Sr is conduct that adversely affected, either directly or indirectly, the honest and impartial exercise of official functions by Mr Macdonald and therefore comes within s 8(1)(a) of the ICAC Act. It is also conduct that adversely affected the exercise of Mr Macdonald's official functions and which could involve fraud (or conspiracy to commit the same) and therefore comes within s 8(2)(e) and s 8(2)(y) of the ICAC Act.

The conduct of Edward Obeid Sr in entering into an agreement with Mr Macdonald whereby Mr Macdonald would act contrary to his public duty as a minister of the Crown to provide Moses Obeid or other members of the Obeid family with confidential information for the purpose of benefiting Edward Obeid Sr, Moses Obeid and other members of the Obeid family is corrupt conduct for the purpose of s 8 of the ICAC Act. This is because such conduct on the part of Edward Obeid Sr is conduct that adversely affected, either directly or indirectly, the honest and impartial exercise of official functions by Mr Macdonald and therefore comes within s 8(1)(a) of the ICAC Act. It is also conduct that adversely affected the exercise of Mr Macdonald's official functions and which could involve fraud (or conspiracy to commit the same) and therefore comes within s 8(2)(e) and s 8(2)(y) of the ICAC Act.

The common law offences of conspiracy to defraud and misconduct in public office have been considered above. It is

also relevant to note that a person may aid and abet a public official in committing the offence of misconduct in public office. There is also an offence of conspiracy to commit the common law offence of misconduct in public office.

The Commission is satisfied for the purposes of s 9(1)(a) of the ICAC Act that, if the facts it has found were to be proved on admissible evidence to the criminal standard of beyond reasonable doubt and accepted by an appropriate tribunal, they would be grounds on which such a tribunal would find that Edward Obeid Sr has committed the criminal offences of conspiracy to defraud, both in relation to the agreement whereby Mr Macdonald created the Mount Penny tenement and Mr Macdonald's provision of confidential information, as well as aiding and abetting or conspiracy to commit the offence of misconduct in public office in relation to Mr Macdonald's provision of confidential information.

The Commission therefore finds that Edward Obeid Sr engaged in corrupt conduct by:

a) entering into an agreement with Mr Macdonald whereby Mr Macdonald acted contrary to his public duty as a minister of the Crown by arranging for the creation of the Mount Penny tenement for the purpose of benefiting Edward Obeid Sr, Moses Obeid and other members of the Obeid family

b) entering into an agreement with Mr Macdonald whereby Mr Macdonald acted contrary to his public duty as a minister of the Crown by providing Moses Obeid or other members of the Obeid family with confidential information for the purpose of benefiting Edward Obeid Sr, Moses Obeid and other members of the Obeid family.

Moses Obeid

The conduct of Moses Obeid in entering into an agreement with Mr Macdonald whereby Mr Macdonald would act contrary to his public duty as a minister of the Crown by arranging for the creation of the Mount Penny tenement for the purpose of benefiting Edward Obeid Sr, Moses Obeid and other members of the Obeid family is corrupt conduct for the purpose of s 8 of the ICAC Act. This is because such conduct on the part of Moses Obeid is conduct that adversely affected, either directly or indirectly, the honest and impartial exercise of official functions by Mr Macdonald and therefore comes within s 8(1)(a) of the ICAC Act. It is also conduct that adversely affected the exercise of Mr Macdonald's official functions and which could involve fraud (or conspiracy to commit the same) and therefore comes within s 8(2)(e) and s 8(2)(y) of the ICAC Act.

The conduct of Moses Obeid in entering into an agreement with Mr Macdonald whereby Mr Macdonald would act contrary to his public duty as a minister of the Crown to provide Moses Obeid or other members of the Obeid family with confidential information for the purpose of benefiting Edward Obeid Sr, Moses Obeid and other members of the Obeid family is corrupt conduct for the purpose of s 8 of the ICAC Act. This is because such conduct on the part of Moses Obeid is conduct that adversely affected, either directly or indirectly, the honest and impartial exercise of official functions by Mr Macdonald and therefore comes within s 8(1)(a) of the ICAC Act. It is also conduct that adversely affected the exercise of Mr Macdonald's official functions and which could involve fraud (or conspiracy to commit the same) and therefore comes within s 8(2)(e) and s 8(2)(y) of the ICAC Act.

The Commission is satisfied for the purposes of s 9(1)(a) of the ICAC Act that, if the facts it has found were to be proved on admissible evidence to the criminal standard of beyond reasonable doubt and accepted by an appropriate tribunal, they would be grounds on which such a tribunal would find that Moses Obeid has committed the criminal offences of conspiracy to defraud, both in relation to the agreement that Mr Macdonald would create the Mount Penny tenement and Mr Macdonald's provision of confidential information, as well as aiding and abetting or conspiracy to commit the offence of misconduct in public office in relation to Mr Macdonald's provision of confidential information.

The Commission therefore finds that Moses Obeid engaged in corrupt conduct by:

a) entering into an agreement with Mr Macdonald whereby Mr Macdonald acted contrary to his public duty as a minister of the Crown by arranging for the creation of the Mount Penny tenement for the purpose of benefiting Edward Obeid Sr, Moses Obeid and other members of the Obeid family

b) entering into an agreement with Mr Macdonald whereby Mr Macdonald acted contrary to his public duty as a minister of the Crown by providing Moses Obeid or other members of the Obeid family with confidential information for the purpose of benefiting Edward Obeid Sr, Moses Obeid and other members of the Obeid family.

Paul Obeid, Gerard Obeid and Damian Obeid

The Commission does not consider there is sufficient evidence to make findings of corrupt conduct against Paul Obeid, Gerard Obeid or Damian Obeid. That is because there is insufficient evidence that they were parties to the agreement under which Mr Macdonald provided

confidential information as is set out above or otherwise acted contrary to his duty as a minister of the Crown for the purpose of financially benefitting members of the Obeid family.

Corrupt conduct – Mr Macdonald's reopening of the EOI process and provision of confidential information to Mr Duncan

The Commission is satisfied that Mr Macdonald's motivation for deciding to reopen the EOI process for exploration licences was to favour Mr Duncan, so that companies with which Mr Duncan was associated would be able to submit EOIs.

The Commission is also satisfied that Mr Macdonald acted contrary to his public duty as a minister of the Crown by providing Mr Duncan with confidential information in the knowledge that Mr Duncan could use the information for his financial benefit. The confidential information was the document titled "Proposed NSW Coal Allocations" and advice that the process for EOIs in coal release areas was to be reopened.

Mr Macdonald

Mr Macdonald's conduct in deciding to reopen the EOI process for exploration licences in order to favour Mr Duncan is corrupt conduct for the purpose of s 8 of the ICAC Act. This is because it is conduct on the part of Mr Macdonald that constitutes or involves the dishonest or partial exercise of his official functions as a minister of the Crown and therefore comes within s 8(1)(b) of the ICAC Act. It is also conduct on his part that constitutes or involves a breach of public trust and therefore comes within s 8(1)(c) of the ICAC Act.

The Commission is satisfied for the purposes of s 9(1)(a) of the ICAC Act that, if the facts it has 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 Mr Macdonald has committed the criminal offence of misconduct in public office.

Mr Macdonald's conduct in acting contrary to his public duty as a minister of the Crown by providing Mr Duncan with confidential information is corrupt conduct for the purpose of s 8 of the ICAC Act. This is because it is conduct on the part of Mr Macdonald that constitutes or involves the dishonest or partial exercise of his official functions as a minister of the Crown and therefore comes within s 8(1)(b) of the ICAC Act. It is also conduct on his part that constitutes or involves a breach of public trust and therefore comes within s 8(1)(c) of the ICAC Act.

The Commission is satisfied for the purposes of s 9(1)(a) of the ICAC Act that, if the facts it has 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 Mr Macdonald has committed the criminal offence of misconduct in public office.

The Commission therefore finds that Mr Macdonald engaged in corrupt conduct by deciding to reopen the EOI process for exploration licences in order to favour Mr Duncan.

The Commission also finds that Mr Macdonald engaged in corrupt conduct by providing Mr Duncan with confidential information, being the document titled "Proposed NSW Coal Allocations" and advice that the process for EOIs in coal release areas was to be reopened.

Mr Duncan

Although the Commission is satisfied that Mr Macdonald reopened the EOI process following a request from Mr Duncan, the Commission is not satisfied that in making such a request Mr Duncan intended to affect Mr Macdonald's exercise of his official functions adversely. In these circumstances, Mr Duncan's conduct does not come within s 8 of the ICAC Act and therefore no corrupt conduct finding is made with respect to his request that Mr Macdonald reopen the EOI process.

Although Mr Duncan obtained confidential information from Mr Macdonald, there is insufficient evidence to find that he sought the information from Mr Macdonald or did anything to affect either directly or indirectly Mr Macdonald's exercise of official functions with respect to the provision of that information. In these circumstances, Mr Duncan's conduct does not come within s 8 of the ICAC Act and therefore no corrupt conduct finding is made with respect to his receipt of the confidential information.

Corrupt conduct – hiding the Obeid involvement from the NSW Government

Mr Duncan

The Commission is satisfied that Mr Duncan knew that, if the NSW Government found out that the Obeids had been involved in the creation of the Mount Penny tenement or in the allocation of the Mount Penny exploration licence

or had a beneficial interest in the Mount Penny tenement, the NSW Government might take action to set aside the Mount Penny exploration licence or not grant a mining lease in which case the assets of Cascade, of which Mr Duncan was an investor, would be jeopardised. He therefore intended to hide from the NSW Government and relevant public officials the Obeid family involvement. The Commission is satisfied that the steps he took to do this included:

a) deliberately misleading Mr Cubbin as to the Obeid family involvement in the Mount Penny tenement by failing to disclose the involvement to Mr Cubbin when Mr Cubbin raised the issue with him

b) deliberately failing to disclose to the IBC the fact of the Obeid family involvement despite knowing that the IBC was concerned with any such involvement

c) telling Mr Levi that John McGuigan would directly contact Mr Cubbin and thereby relieving Mr Levi from having to answer Mr Cubbin's request for information about the Obeid family involvement

d) authorising Mr Poole to arrange for the Obeids to be extracted from the Mount Penny joint venture through arrangements involving Coal & Minerals Group and Southeast Investments.

The Commission is satisfied that a substantial purpose in taking these steps was to prevent public officials and public authorities from learning of the Obeid family involvement in the Mount Penny tenement and that Mr Duncan thereby intended to deceive relevant public officials or public authorities of the NSW Government as to the involvement of the Obeids in that tenement.

Mr Duncan's conduct as set out in a) to d) above with the intention, in each case, of deceiving relevant public officials or public authorities of the NSW Government as to the involvement of the Obeids in the Mount Penny tenement, is corrupt conduct for the purpose of s 8(2) of the ICAC Act. This is because his conduct could have adversely affected, either directly or indirectly, the exercise of official functions by any public official or public authority reviewing the creation of the Mount Penny tenement or the grant of exploration licences over the Mount Penny tenement (including the circumstances surrounding the granting of such licences) or the official functions of any public official or public authority considering whether to grant a mining lease over the Mount Penny tenement and could also involve fraud or company violations and therefore comes within s 8(2)(e) and s 8(2)(s) of the ICAC Act.

For the purposes of s 9(1)(a) of the ICAC Act, it is relevant to consider s 192E of the *Crimes Act 1900* (which took effect from 22 February 2010 and covers the conduct referred to above) and s 184(1) of the *Corporations Act 2001*.

Section 192E(1) of the *Crimes Act 1900* provides that a person who, by any deception, dishonestly:

(a) obtains property belonging to another, or

(b) obtains any financial advantage or causes any financial disadvantage,

is guilty of the offence of fraud.

Section 184(1) of the *Corporations Act 2001* provides that:

A director or other officer of a corporation commits an offence if they:

(a) are reckless; or

(b) are intentionally dishonest;

and fail to exercise their powers and discharge their duties:

(c) in good faith in the best interests of the corporation; or

(d) for a proper purpose.

The concept of "good faith" in this area of company law has been defined to include at least four aspects: an exercise of powers or duties in the interests of the company, in the sense of not misusing or abusing those powers, avoidance of conflicts between personal interests and those of the company, a prohibition on taking advantage of the position to make secret profits, and a prohibition on the appropriation of the company's assets for their own benefit.

The concept of "a proper purpose" in this part of company law has been understood to mean much the same thing as "good faith".

The Commission is satisfied for the purposes of s 9(1)(a) of the ICAC Act that, if the facts it has found relating to the deliberate misleading of Mr Cubbin, 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 Mr Duncan committed a criminal offence of obtaining a financial advantage by deception contrary to s 192E(1)(b) of the *Crimes Act 1900*. The advantage was to prevent the loss in the value of his holding in Cascade should the sale to White Energy not proceed or if the NSW Government found out about the Obeid involvement and took steps to cancel the exploration licence or announced that it would not grant a mining lease.

The Commission is satisfied for the purposes of s 9(1)(a) of the ICAC Act that, if the facts it has found, relating to authorising Mr Poole to arrange for the Obeids to be

extracted from the Mount Penny joint venture so that the NSW Government would not become aware of their involvement in that tenement, 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 Mr Duncan committed a criminal offence of obtaining a financial advantage by deception contrary to s 192E(1)(b) of the *Crimes Act 1900*. The advantage was the removal of the risk to the retention of the exploration licence and the reduction in the risk that a mining licence might not be granted over the Mount Penny tenement.

The Commission is also satisfied for the purposes of s 9(1)(a) of the ICAC Act that, if the facts it has found in relation to deliberately misleading Mr Cubbin, deliberately failing to disclose to the IBC the Obeid family involvement in the Mount Penny tenement and relieving Mr Levi from having to answer Mr Cubbin's request for information about the Obeid family involvement in that tenement, 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 Mr Duncan committed criminal offences under s 184(1) of the *Corporations Act 2001*. This is because, as a director of White Energy, he was intentionally dishonest or, alternatively, reckless and failed to discharge his duties in good faith and in the best interests of that company or for a proper purpose by withholding information about the Obeid family involvement so that the value of his holding in Cascade Coal would not be adversely affected.

The Commission therefore finds that Mr Duncan engaged in corrupt conduct by:

a) deliberately misleading Mr Cubbin as to the Obeid family involvement in the Mount Penny tenement by failing to disclose the involvement to Mr Cubbin when Mr Cubbin raised the issue with him,

b) deliberately failing to disclose to the IBC the fact of the Obeid family involvement despite knowing that the IBC was concerned with any such involvement,

c) telling Mr Levi that John McGuigan would directly contact Mr Cubbin and thereby relieving Mr Levi from having to answer Mr Cubbin's request for information about the Obeid family involvement, and

d) authorising Mr Poole to arrange for the Obeids to be extracted from the Mount Penny joint venture through arrangements involving Coal & Minerals Group and Southeast Investments,

with the intention, in each case, of deceiving relevant public officials or public authorities of the NSW Government as to the involvement of the Obeids in the Mount Penny tenement.

John McGuigan

The Commission is satisfied that John McGuigan knew that, if the NSW Government found out that the Obeids had been involved in the creation of the Mount Penny tenement or in the allocation of the Mount Penny exploration licence or had a beneficial interest in the Mount Penny tenement, the NSW Government might take action to set aside the Mount Penny exploration licence or not grant a mining lease in which case the assets of Cascade, of which John McGuigan was an investor, would be jeopardised. He therefore intended to hide from the NSW Government and relevant public officials the Obeid family involvement. The Commission is satisfied that the steps he took to do this included:

a) deliberately failing to disclose to the IBC the fact of the Obeid family involvement despite knowing that the IBC was concerned with any such involvement

b) telling Mr Levi that he (John McGuigan) would directly contact Mr Cubbin and thereby relieving Mr Levi from having to answer Mr Cubbin's request for information about the Obeid family involvement

c) authorising Mr Poole to arrange for the Obeids to be extracted from the Mount Penny joint venture through arrangements involving Coal & Minerals Group and Southeast Investments.

The Commission is satisfied that a substantial purpose in taking these steps was to avoid public officials and public authorities from learning of the Obeid family involvement in the Mount Penny tenement, and that John McGuigan thereby intended to deceive relevant public officials or public authorities of the NSW Government as to the involvement of the Obeids in that tenement.

John McGuigan's conduct as set out in a) to c) above, in each case with the intention of deceiving relevant public officials or public authorities of the NSW Government as to the involvement of the Obeids in the Mount Penny tenement, is corrupt conduct for the purpose of s 8 of the ICAC Act. This is because his conduct could have adversely affected, either directly or indirectly, the exercise of official functions by any public official or public authority reviewing the creation of the Mount Penny tenement or the grant of exploration licences over the Mount Penny tenement (including the circumstances surrounding the granting of such licences) or the official functions of any public official or public authority considering whether to grant a mining lease over the Mount Penny tenement and could involve company violations and therefore comes within s 8(2)(s) of the ICAC Act.

The Commission is satisfied for the purposes of s 9(1)(a) of the ICAC Act that, if the facts it has found in relation to the deliberate failure to disclose information to the IBC and relieving Mr Levi from having to answer Mr Cubbin's request for information about the Obeid family involvement in the Mount Penny tenement 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 John McGuigan committed criminal offences under s 184(1) of the *Corporations Act 2001*. This is because, as a director of White Energy, he was intentionally dishonest or, alternatively, reckless and failed to discharge his duties in good faith and in the best interests of that company or for a proper purpose by withholding information about the Obeid family involvement so that the value of his holding in Cascade would not be adversely affected.

The Commission is also satisfied for the purposes of s 9(1)(a) of the ICAC Act that, if the facts it has found, relating to authorising Mr Poole to arrange for the Obeids to be extracted from the Mount Penny joint venture so that the NSW Government would not become aware of their involvement in that tenement, 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 John McGuigan committed a criminal offence of obtain a financial advantage by deception contrary to s 192E(1)(b) of the *Crimes Act 1900*. The advantage was the removal of the risk to the retention of the exploration licence and the reduction in the risk that a mining licence might not be granted over the Mount Penny tenement.

The Commission therefore finds that John McGuigan engaged in corrupt conduct by:

a) deliberately failing to disclose to the IBC the fact of the Obeid family involvement despite knowing that the IBC was concerned with any such involvement,

b) telling Mr Levi that he (John McGuigan) would directly contact Mr Cubbin and thereby relieving Mr Levi from having to answer Mr Cubbin's request for information about the Obeid family involvement, and

c) authorising Mr Poole to arrange for the Obeids to be extracted from the Mount Penny joint venture through arrangements involving Coal & Minerals Group and Southeast Investments,

with the intention, in each case, of deceiving relevant public officials or public authorities of the NSW Government as to the involvement of the Obeids in the Mount Penny tenement.

Mr Atkinson

The Commission is satisfied that Mr Atkinson knew that, if the NSW Government found out that the Obeids had been involved in the creation of the Mount Penny tenement or in the allocation of the Mount Penny exploration licence or had a beneficial interest in the Mount Penny tenement, the NSW Government might take action to set aside the Mount Penny exploration licence or not grant a mining lease in which case the assets of Cascade, of which Mr Atkinson was an investor, would be jeopardised. He therefore intended to hide from the NSW Government and relevant public officials the Obeid family involvement. The Commission is satisfied that the steps he took to do this included:

a) deliberately failing to disclose to the IBC the fact of the Obeid family involvement despite knowing that the IBC was concerned with any such involvement

b) authorising Mr Poole to arrange for the Obeids to be extracted from the Mount Penny joint venture through Coal & Minerals Group and Southeast Investments.

The Commission is satisfied that a substantial purpose in taking these steps was to avoid public officials and public authorities from learning of the Obeid family involvement in the Mount Penny tenement and that Mr Atkinson thereby intended to deceive relevant public officials or public authorities of the NSW Government as to the involvement of the Obeids in that tenement.

Mr Atkinson's conduct as set out in a) and b) above with the intention in each case of deceiving relevant public officials or public authorities of the NSW Government as to the involvement of the Obeids in the Mount Penny tenement, is corrupt conduct for the purpose of s 8(2) of the ICAC Act. This is because his conduct could have adversely affected, either directly or indirectly, the exercise of official functions by any public official or public authority reviewing the creation of the Mount Penny tenement or the grant of exploration licences over the Mount Penny tenement (including the circumstances surrounding the granting of such licences) or the official functions of any public official or public authority considering whether to grant a mining lease over the Mount Penny tenement and could involve company violations and therefore comes within s 8(2)(s) of the ICAC Act.

The Commission is satisfied for the purposes of s 9(1)(a) of the ICAC Act that, if the facts it has found in relation to the deliberate failure to disclose information to the IBC 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 Mr Atkinson committed a criminal offence under s 184(1) of the *Corporations Act 2001*. This is because, as a director of White Energy, he was intentionally dishonest or, alternatively, reckless and failed to discharge his duties in good faith and in the best interests of that company or for a proper purpose by withholding information about the Obeid family involvement so that the value of his holding in Cascade Coal would not be adversely affected.

The Commission is also satisfied for the purposes of s 9(1)(a) of the ICAC Act that, if the facts it has found, relating to authorising Mr Poole to arrange for the Obeids to be extracted from the Mount Penny joint venture so that the NSW Government would not become aware of their involvement in that tenement, 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 Mr Atkinson committed a criminal offence of obtain a financial advantage by deception contrary to s 192E(1)(b) of the *Crimes Act 1900*. The advantage was the removal of the risk to the retention of the exploration licence and the reduction in the risk that a mining licence might not be granted over the Mount Penny tenement.

The Commission therefore finds that Mr Atkinson engaged in corrupt conduct by:

a) deliberately failing to disclose to the IBC the fact of the Obeid family involvement despite knowing that the IBC was concerned with any such involvement, and

b) authorising Mr Poole to arrange for the Obeids to be extracted from the Mount Penny joint venture through arrangements involving Coal & Minerals Group and Southeast Investments,

with the intention, in each case, of deceiving relevant public officials or public authorities of the NSW Government as to the involvement of the Obeids in the Mount Penny tenement.

Mr Kinghorn

The Commission is satisfied that Mr Kinghorn knew that, if the NSW Government found out that the Obeids had been involved in the creation of the Mount Penny tenement or in the allocation of the Mount Penny exploration licence or had a beneficial interest in the Mount Penny tenement, the NSW Government might take action to set aside the Mount Penny exploration licence or not grant a mining lease in which case the assets of Cascade, of which Mr Kinghorn was an investor, would be jeopardised. He therefore intended to hide from the NSW Government and relevant public officials the Obeid family involvement. The Commission is satisfied that the steps he took to do this included deliberately failing to disclose to the IBC the fact of the Obeid family involvement despite knowing that the IBC was concerned with any such involvement.

The Commission is satisfied that a substantial purpose in deliberately failing to disclose this information to the IBC was to avoid public officials and public authorities from learning of the Obeid family involvement in the Mount Penny tenement and that Mr Kinghorn thereby intended to deceive relevant public officials or public authorities of the NSW Government as to the involvement of the Obeids in that tenement.

Mr Kinghorn's conduct in deliberately failing to disclose information to the IBC about the Obeid family involvement in the Mount Penny tenement, with the intention of deceiving relevant public officials or public authorities of the NSW Government as to the involvement of the Obeids in that tenement, is corrupt conduct for the purpose of s 8(2) of the ICAC Act. This is because his conduct could have adversely affected, either directly or indirectly, the exercise of official functions by any public official or public authority reviewing the creation of the Mount Penny tenement or the grant of exploration licences over the Mount Penny tenement (including the circumstances surrounding the granting of such licences) or the official functions of any public official or public authority considering whether to grant a mining lease over the Mount Penny tenement and could involve company violations and therefore comes within s 8(2)(s) of the ICAC Act.

The Commission is satisfied for the purposes of s 9(1)(a) of the ICAC Act that, if the facts it has found were to be proved on admissible evidence to the criminal standard of beyond reasonable doubt and accepted by an appropriate tribunal, they would be grounds on which such a tribunal would find that Mr Kinghorn committed a criminal offence under s 184(1) of the *Corporations Act 2001*. This is because, as a director of White Energy, he was intentionally dishonest or, alternatively, reckless and failed to discharge his duties in good faith and in the best interests of that company or for a proper purpose by withholding information about the Obeid family involvement so that the value of his holding in Cascade would not be adversely affected.

The Commission therefore finds that Mr Kinghorn engaged in corrupt conduct by deliberately failing to disclose information to the IBC about the Obeid family involvement in the Mount Penny tenement, with the intention of deceiving relevant public officials or public authorities of the NSW Government as to the involvement of the Obeids in that tenement.

Mr Poole

The Commission is satisfied that Mr Poole knew that, if the NSW Government found out that the Obeids had been involved in the creation of the Mount Penny tenement or in the allocation of the Mount Penny exploration licence or had a beneficial interest in the Mount Penny tenement, the NSW Government might take action to set aside the Mount Penny exploration licence or not grant a mining lease in which case the assets of Cascade, of which Mr Poole was an investor, would be jeopardised. He therefore intended to hide from the NSW Government and relevant public officials the Obeid family involvement. The Commission is satisfied that the steps he took to do this included:

a) deliberately failing to disclose to the IBC the fact of the Obeid family involvement despite knowing that the IBC was concerned with any such involvement

b) telling the IBC that he was not aware of any payments having been made to Edward Obeid Sr or any entities associated with him

c) arranging for the Obeids to be extracted from the Mount Penny joint venture through arrangements involving Coal & Minerals Group and Southeast Investments.

The Commission is satisfied that a substantial purpose in taking these steps was to avoid public officials and public authorities from learning of the Obeid family involvement in the Mount Penny tenement and that Mr Poole thereby intended to deceive relevant public officials or public authorities of the NSW Government as to the involvement of the Obeids in that tenement.

Mr Poole's conduct as set out in a) to c) above with the intention in each case of deceiving relevant public officials or public authorities of the NSW Government as to the involvement of the Obeids in the Mount Penny tenement, is corrupt conduct for the purpose of s 8(2) of the ICAC Act. This is because his conduct could have adversely affected, either directly or indirectly, the exercise of official functions by any public official or public authority reviewing the creation of the Mount Penny tenement or the grant of exploration licences over the Mount Penny tenement (including the circumstances surrounding the granting of such licences) or the official functions of any public official or public authority considering whether to grant a mining lease over the Mount Penny tenement and could involve fraud and therefore comes within s 8(2)(e) of the ICAC Act.

The Commission is satisfied for the purposes of s 9(1)(a) of the ICAC Act that if the facts it has found, in relation to the deliberate failure to disclose information to the IBC and telling the IBC that he was not aware of any payments having been made to Edward Obeid Sr or any entities associated with him, 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 Mr Poole committed criminal offences under s 192E(1)(b) of the *Crimes Act 1900*. The advantage, in each case, was to prevent the loss in the value of his holding in Cascade should the sale to White Energy not proceed or if the NSW Government found out about the Obeid involvement and took steps to cancel the exploration licence or announced that it would not grant a mining lease.

The Commission is also satisfied for the purposes of s 9(1)(a) of the ICAC Act that, if the facts it has found, relating to Mr Poole arranging for the Obeids to be extracted from the Mount Penny joint venture so that the NSW Government would not become aware of their involvement in that tenement, 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 Mr Poole committed a criminal offence of obtain a financial advantage by deception contrary to s 192E(1)(b) of the *Crimes Act 1900*. The advantage was the removal of the risk to the retention of the exploration licence and the reduction in the risk that a mining licence might not be granted over the Mount Penny tenement.

The Commission therefore finds that Mr Poole engaged in corrupt conduct by:

a) deliberately failing to disclose to the IBC the fact of the Obeid family involvement despite knowing that the IBC was concerned with any such involvement,

b) telling the IBC that he was not aware of any payments having been made to Edward Obeid Sr or any entities associated with him, and

c) arranging for the Obeids to be extracted from the Mount Penny joint venture through arrangements involving Coal & Minerals Group and Southeast Investments,

with the intention, in each case, of deceiving relevant public officials or public authorities of the NSW Government as to the involvement of the Obeids in the Mount Penny tenement.

Section 74A(2) statements

In making a public report, the Commission is required by the provisions of s 74A(2) of the ICAC Act to include, in respect of each "affected" person, a statement as to whether or not in all the circumstances, the Commission

is of the opinion that consideration should be given to the following:

a) obtaining the advice of the Director of Public Prosecutions (DPP) with respect to the prosecution of the person for a specified criminal offence

b) the taking of action against the person for a specified disciplinary offence

c) the taking of action against the person as a public official on 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.

For the purposes of this chapter, the Commission is satisfied that the following are "affected" persons:

- Ian Macdonald
- Edward Obeid Sr
- Moses Obeid
- Paul Obeid
- Gerard Obeid
- Damian Obeid
- Rocco Triulcio
- Rosario (Ross) Triulcio
- Justin Lewis
- Paul Gardner Brook
- Travers Duncan
- Brian Flannery
- John Kinghorn
- John McGuigan
- John Atkinson
- Richard Poole
- Amanda Poole
- James McGuigan
- Gregory Jones
- Andrew Kaidbay
- Joseph Georges.

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

In each case, the Commission first considers whether there is any evidence of a criminal offence. If there is insufficient evidence capable of constituting a specified criminal offence, it follows that the Commission will not be of the opinion that consideration should be given to obtaining the advice of the DPP with respect to the prosecution of the person for that offence. If there is evidence capable of constituting a specified criminal offence, the Commission assesses whether there is or is likely to be sufficient admissible evidence to warrant the commencement of a prosecution for that offence. In undertaking this assessment, the Commission takes into account declarations made pursuant to s 38 of the ICAC Act. The evidence of a witness that is given subject to such a declaration cannot be used in evidence against that person in any criminal proceedings unless those proceedings are for an offence under the ICAC Act. In such cases, it is therefore necessary to consider whether there is sufficient other evidence that is admissible before stating an opinion that consideration should be given to obtaining the advice of the DPP with respect to the prosecution of the person for a specified criminal offence.

It is also relevant to consider s 14(1)(b) of the ICAC Act. That section provides that one of the Commission's functions is to furnish evidence to the appropriate authority of the jurisdiction concerned that may be admissible in the prosecution of a person for a criminal offence against a law of another state, the Commonwealth or a territory.

Where the Commission is satisfied there is admissible evidence of a breach of Commonwealth legislation, such as the *Corporations Act 2001*, it will also furnish the relevant evidence to the appropriate authority, being the Commonwealth DPP.

Mr Macdonald, Edward Obeid Sr and Moses Obeid gave evidence under a s 38 declaration and therefore their evidence is not admissible against them in criminal proceedings other than for an offence under the ICAC Act.

There is, however, other admissible evidence that would be available to the DPP. This includes evidence of the relationship between Mr Macdonald and Edward Obeid Sr, records of telephone contact between Mr Macdonald and Moses Obeid, evidence from DPI officers and Mr Gibson concerning the circumstances leading to the creation of the Mount Penny tenement and the confidentiality of information, the actual creation of the Mount Penny tenement, the evidence of Mr Cherry, the evidence of Mr Fang, the evidence of Mr and Mrs

Fitzhenry, the evidence of the Boyd brothers and evidence of Commission officers concerning the discovery of the DPI maps in the Obeid family offices. In addition, the evidence of Mr Rumore and Mr Skehan, including their notes of discussions with members of the Obeid family, would also be available. As a general rule, a legal adviser cannot be required or allowed without the express consent of his or her client to disclose communications passing between them in professional confidence. Such communications are subject to legal professional privilege. However, communications in furtherance of a fraud or a crime, whether the legal adviser was a party to, or ignorant of, the illegal object, are not protected (see for example *R v Cox and Railton* (1884) 14 QBD 153). The rationale for this exception to the general rule is that communications in furtherance of a fraud or crime are not made in the course of a professional relationship.

Mr Macdonald

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 Macdonald for the common law offences of conspiracy to defraud or misconduct in public office in relation to his conduct in agreeing with Edward Obeid Sr and Moses Obeid to act contrary to his public duty as a minister of the Crown by arranging for the creation of the Mount Penny tenement for the purpose of financially benefitting Edward Obeid Sr, Moses Obeid and other members of the Obeid family and his conduct in agreeing with Edward Obeid Sr and Moses Obeid to act contrary to his public duty as a minister of the Crown by providing Moses Obeid or other members of the Obeid family with confidential information for the purpose of financially benefitting Edward Obeid Sr, Moses Obeid and other members of the Obeid family.

The Commission is not of the opinion that consideration should be given to obtaining the advice of the DPP with respect to the prosecution of Mr Macdonald for the common law offence of misconduct in public office in relation to his reopening of the EOI process or his provision of confidential information to Mr Duncan. This is because there is insufficient admissible evidence to warrant a referral to the DPP in relation to those matters.

Edward Obeid Sr

Although Edward Obeid Sr gave evidence under a s 38 declaration other admissible evidence would be available to the DPP. This includes the evidence referred to above and the evidence that Edward Obeid Sr was involved in decision-making in relation to Obeid family business interests and derived financial and other benefits from those interests, including the transactions relating to the Mount Penny tenement.

In these circumstances, 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 conspiracy to defraud in relation to the agreement that Mr Macdonald would create the Mount Penny tenement.

The Commission is also of the opinion that consideration should be given to obtaining the advice of the DPP with respect to the prosecution of Edward Obeid Sr for the criminal offences of conspiracy to defraud in relation to Mr Macdonald's provision of confidential information, or aiding and abetting or conspiracy to commit the offence of misconduct in public office in relation to Mr Macdonald's provision of confidential information.

Moses Obeid

Although Moses Obeid gave evidence under a s 38 declaration there is, as is referred to above, other admissible evidence that would be available to the DPP.

In these circumstances, the Commission is of the opinion that consideration should be given to obtaining the advice of the DPP with respect to the prosecution of Moses Obeid for the criminal offence of conspiracy to defraud in relation to the agreement that Mr Macdonald would create the Mount Penny tenement.

The Commission is also of the opinion that consideration should be given to obtaining the advice of the DPP with respect to the prosecution of Moses Obeid for the criminal offences of conspiracy to defraud in relation to Mr Macdonald's provision of confidential information, or aiding and abetting or conspiracy to commit the offence of misconduct in public office in relation to Mr Macdonald's provision of confidential information.

Paul Obeid, Gerard Obeid and Damian Obeid

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 Paul Obeid, Gerard Obeid or Damian Obeid for any criminal offences.

Rocco Triulcio

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 Rocco Triulcio for any criminal offence.

Rosario Triulcio

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 Rosario Triulcio for any criminal offence.

Mr Lewis

The Commission is not of the opinion that consideration should be given to obtaining the advice of the DPP with respect to the prosecution of Mr Lewis for any criminal offence.

Mr Brook

The Commission is not of the opinion that consideration should be given to obtaining the advice of the DPP with respect to the prosecution of Mr Brook for any criminal offence.

Mr Duncan

Mr Duncan gave evidence under a s 38 declaration and therefore his evidence is not admissible against him in criminal proceedings other than for an offence under the ICAC Act.

There is, however, other admissible evidence, including documentary evidence and the evidence of Mr Brook, Mr Chalabian, Mr Cubbin, Mr Podzebenko, Mr Jones and James McGuigan.

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 Duncan for offences under s 192E of the *Crimes Act 1900* in relation to his relevant conduct set out in the corrupt conduct section of this chapter.

The Commission will also furnish to the Commonwealth DPP evidence that may be admissible in the prosecution of Mr Duncan for offences under s 184(1) of the *Corporations Act 2001* in relation to his relevant conduct set out in the corrupt conduct section of this chapter.

Mr Kinghorn

Mr Kinghorn gave evidence under a s 38 declaration and therefore his evidence is not admissible against him in criminal proceedings other than for an offence under the ICAC Act. There is, however, other admissible evidence, including documentary evidence and the evidence of Mr Brook, Mr Chalabian, Mr Cubbin, Mr Podzebenko, Mr Jones and James McGuigan.

The Commission will furnish to the Commonwealth DPP evidence that may be admissible in the prosecution of Mr Kinghorn for offences under s 184(1) of the *Corporations Act 2001* in relation to his relevant conduct set out in the corrupt conduct section of this chapter.

John McGuigan

John McGuigan gave evidence under a s 38 declaration and therefore his evidence is not admissible against him in criminal proceedings other than for an offence under the ICAC Act. There is, however, other admissible evidence, including documentary evidence and the evidence of Mr Brook, Mr Chalabian, Mr Cubbin, Mr Podzebenko, Mr Jones and James McGuigan.

The Commission is of the opinion that consideration should be given to obtaining the advice of the DPP with respect to the prosecution of John McGuigan for an offence under s 192E of the *Crimes Act 1900* in relation to his relevant conduct set out in the corrupt conduct section of this chapter.

The Commission will also furnish to the Commonwealth DPP evidence that may be admissible in the prosecution of John McGuigan for offences under s 184(1) of the *Corporations Act 2001* in relation to his relevant conduct set out in the corrupt conduct section of this chapter.

Mr Atkinson

Mr Atkinson gave evidence under a s 38 declaration and therefore his evidence is not admissible against him in criminal proceedings other than for an offence under the ICAC Act. There, is however, other admissible evidence, including documentary evidence and the evidence of Mr Brook, Mr Chalabian, Mr Cubbin, Mr Podzebenko, Mr Jones and James McGuigan.

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 Atkinson for an offence under s 192E of the *Crimes Act 1900* in relation to his relevant conduct set out in the corrupt conduct section of this chapter.

The Commission will also furnish to the Commonwealth DPP evidence that may be admissible in the prosecution of Mr Atkinson for an offence under s 184(1) of the *Corporations Act 2001* in relation to his relevant conduct set out in the corrupt conduct section of this chapter.

Mr Poole

Mr Poole gave evidence under a s 38 declaration and therefore his evidence is not admissible against him in criminal proceedings other than for an offence under the ICAC Act. There is, however, other admissible evidence,

including documentary evidence and the evidence of Mr Brook, Mr Chalabian, Mr Cubbin, Mr Podzebenko, Mr Jones and James McGuigan.

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 Poole for offences under s 192E of the *Crimes Act 1900* in relation to his conduct set out in the corrupt conduct section of this chapter.

Mrs Poole

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 Mrs Poole for any criminal offence.

James McGuigan

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 James McGuigan for any criminal offence.

Mr Jones

The Commission is not of the opinion that consideration should be given to obtaining the advice of the DPP with respect to the prosecution of Mr Jones for any criminal offence.

Mr Flannery

The Commission is not of the opinion that consideration should be given to obtaining the advice of the DPP with respect to the prosecution of Mr Flannery for any criminal offence.

Mr Kaidbay

The Commission is not of the opinion that consideration should be given to obtaining the advice of the DPP with respect to the prosecution of Mr Kaidbay for any criminal offence.

Mr Georges

The Commission is not of the opinion that consideration should be given to obtaining the advice of the DPP with respect to the prosecution of Mr Georges for any criminal offence.

Other matters

During the course of the investigation, the Commission obtained evidence that it has either referred to other agencies or will refer for their consideration.

The NSW Crime Commission

The *Criminal Assets Recovery Act 1990* provides that the NSW Crime Commission may apply to the Supreme Court of NSW for an assets forfeiture order. The Supreme Court of NSW may make such an order where it finds that a person has engaged in serious crime related activity, even if the person has not been charged or convicted of any criminal offence.

There was evidence before the Commission of the financial benefits accrued to the Obeid family as a result of the corrupt conduct the Commission has found to have been engaged in by Edward Obeid Sr and Moses Obeid. The facts establish that a substantial amount was received from the partial sale of the Obeid family interest in the Mount Penny tenement. The Obeid family retains the benefit of other assets, including the investment in the Yarrawa tenement.

The Commission provided relevant information to the NSW Crime Commission pursuant to s 16(3) of the ICAC Act for such action as the NSW Crime Commission considers appropriate.

The Australian Taxation Office

The Commission disseminated relevant information to the Australian Taxation Office (ATO) for such action as it considers appropriate. This referral was made because of the evidence obtained by the Commission concerning the conduct of Obeid family trusts, the practice of drawing upon loan accounts held by various trusts and the way in which records were maintained.

The Obeid family employed multiple family trusts through which it conducted business. There was evidence that these trusts were not properly administered or conducted. There was evidence from trustees of various trusts or from directors of corporate trustees to the effect that the individual was uncertain as to whether or not they were acting as trustee, were unaware of the obligations of trusteeship; were unaware of the terms of the trust, were unaware of the identity of the beneficiaries, and were unaware of the basis upon which distributions were made or withheld from beneficiaries. It would be open to the ATO to infer from the manner in which the trusts were operated that they were a sham.

In relation to the loan accounts, there was evidence that certain family members drew upon trust funds for everyday living expenses with the payments being treated as loans rather than taxable distributions. There was evidence suggesting the drawings were not loans. This evidence included the lack of loan agreements and the absence of repayment schedules and details of any interest rates payable upon outstanding balances. Some members of the family admitted to an inability to be able to repay outstanding loans while one member admitted to having no intention of repaying the loan. In the event that these payments were not properly characterised as loans but were in fact distributions, then they would be taxable.

As for recordkeeping, there were concessions that the current state of accounts was a "shambles". There was evidence of attempted reconstruction.

The Australian Securities and Investments Commission

During the course of the public inquiry, there was evidence of possible breaches of the *Corporations Act 2001*. This included evidence concerning the conduct Mr Duncan, Mr Kinghorn, Mr Atkinson and John McGuigan while they were directors of White Energy and of Mr Poole who participated in a decision that affected a substantial part of the business of White Energy. That evidence is referred to in the report. The Commission will disseminate relevant evidence to the Australian Securities and Investments Commission for such action as it considers appropriate.

ASX

There was evidence before the Commission of attempts by some directors of White Energy to evade a request from ASX for information concerning the calculation of Cascade's capitalised mining costs. The provision of such information would have identified the fact that a significant payment had been made to the Obeids and that the Obeids had had an interest in the Mount Penny joint venture. There was other evidence that a false announcement was made to ASX concerning the reason for terminating the proposed arrangement between White Energy and Cascade.

The Commission will refer this evidence to ASX.

Appendix 1: The role of the Commission

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

The Commission can also investigate the conduct of persons who are not public officials but whose conduct adversely affects or could adversely affect, either directly or indirectly, the honest or impartial exercise of official functions by any public official, any group or body of public officials or any public authority. The Commission may make findings of fact and form opinions based on those facts as to whether any particular person, even though not a public official, has engaged in corrupt conduct.

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

The Commission was created in response to community and Parliamentary concerns about corruption which had been revealed in, inter alia, various parts of the public service, causing a consequent downturn in community confidence in the integrity of that service. It is recognised that corruption in the public service not only undermines confidence in the bureaucracy but also has a detrimental effect on the confidence of the community in the processes of democratic government, at least at the level of government in which that corruption occurs. It is also recognised that corruption commonly indicates and promotes inefficiency, produces waste and could lead to loss of revenue.

The role of the Commission is to act as an agent for changing the situation which has been revealed. Its work involves identifying and bringing to attention conduct which is corrupt. Having done so, or better still in the course of so doing, the Commission can prompt the relevant public authority to recognise the need for reform or change, and then assist that public authority (and others with similar vulnerabilities) to bring about the necessary changes or reforms in procedures and systems, and, importantly, promote an ethical culture, an ethos of probity.

The principal functions of the Commission, as specified in s 13 of the ICAC Act, include investigating any circumstances which in the Commission's opinion imply that corrupt conduct, or conduct liable to allow or encourage corrupt conduct, or conduct connected with corrupt conduct, may have occurred, and cooperating with public authorities and public officials in reviewing practices and procedures to reduce the likelihood of the occurrence of corrupt conduct.

The Commission may form and express an opinion as to whether consideration should or should not be given to obtaining the advice of the Director of Public Prosecutions with respect to the prosecution of a person for a specified criminal offence. It may also state whether it is of the opinion that consideration should be given to the taking of action against a person for a specified disciplinary offence or the taking of action against a public official on specified grounds with a view to dismissing, dispensing with the services of, or otherwise terminating the services of the public official.

Appendix 2: Making corrupt conduct findings

Corrupt conduct is defined in s 7 of the ICAC Act as any conduct which falls within the description of corrupt conduct in either or both s 8(1) or s 8(2) and which is not excluded by s 9 of the ICAC Act.

Section 8 defines the general nature of corrupt conduct. Section 8(1) provides that corrupt conduct is:

a. *any conduct of any person (whether or not a public official) that adversely affects, or that could adversely affect, either directly or indirectly, the honest or impartial exercise of official functions by any public official, any group or body of public officials or any public authority, or*

b. *any conduct of a public official that constitutes or involves the dishonest or partial exercise of any of his or her official functions, or*

c. *any conduct of a public official or former public official that constitutes or involves a breach of public trust, or*

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

Section 8(2) specifies conduct, including the conduct of any person (whether or not a public official), that adversely affects, or that could adversely affect, either directly or indirectly, the exercise of official functions by any public official, any group or body of public officials or any public authority, and which, in addition, could involve a number of specific offences which are set out in that subsection.

Section 9(1) provides that, despite section 8, conduct does not amount to corrupt conduct unless it could constitute or involve:

a. *a criminal offence, or*

b. *a disciplinary offence, or*

c. *reasonable grounds for dismissing, dispensing with the services of or otherwise terminating the services of a public official, 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 section 9(1) only if satisfied that a person has engaged or is engaging in conduct that constitutes or involves an offence or thing of the kind described in that paragraph.

Section 9(4) of the ICAC Act provides that, subject to subsection 9(5), the conduct of a Minister of the Crown or a member of a House of Parliament which falls within the description of corrupt conduct in s 8 is not excluded by s 9 from being corrupt if it is conduct that would cause a reasonable person to believe that it would bring the integrity of the office concerned or of Parliament into serious disrepute.

Section 9(5) of the ICAC Act provides that the Commission is not authorised to include in a report a finding or opinion that a specified person has, by engaging in conduct of a kind referred to in s 9(4), engaged in corrupt conduct, unless the Commission is satisfied that the conduct constitutes a breach of a law (apart from the ICAC Act) and the Commission identifies that law in the report.

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

First, the Commission makes findings of relevant facts on the balance of probabilities. The Commission then determines whether those facts come within the terms of s 8(1) or s 8(2) of the ICAC Act. If they do, the Commission then considers s 9 and the jurisdictional requirements of s 13(3A) and, in the case of a Minister of the Crown or a member of a House of Parliament, the jurisdictional requirements of s 9(5). In the case of

s 9(1)(a) and s 9(5) the Commission considers whether, if the facts as found were to be proved on admissible evidence to the criminal standard of beyond reasonable doubt and accepted by an appropriate tribunal, they would be grounds on which such a tribunal would find that the person has committed a particular criminal offence. In the case of s 9(1)(b), s 9(1)(c) and s 9(1)(d) the Commission considers whether, if the facts as found were to be proved on admissible evidence to the requisite standard of on the balance of probabilities and accepted by an appropriate tribunal, they would be grounds on which such a tribunal would find that the person has engaged in conduct that constitutes or involves a thing of the kind described in those sections.

A finding of corrupt conduct against an individual is a serious matter. It may affect the individual personally, professionally or in employment, as well as in family and social relationships. In addition, there are limited instances where judicial review will be available. These are generally limited to grounds for prerogative relief based upon jurisdictional error, denial of procedural fairness, failing to take into account a relevant consideration or taking into account an irrelevant consideration and acting in breach of the ordinary principles governing the exercise of discretion. This situation highlights the need to exercise care in making findings of corrupt conduct.

In Australia there are only two standards of proof: one relating to criminal matters, the other to civil matters. Commission investigations, including hearings, are not criminal in their nature. Hearings are neither trials nor committals. Rather, the Commission is similar in standing to a Royal Commission and its investigations and hearings have most of the characteristics associated with a Royal Commission. The standard of proof in Royal Commissions is the civil standard, that is, on the balance of probabilities. This requires only reasonable satisfaction as opposed to satisfaction beyond reasonable doubt, as is required in criminal matters. The civil standard is the standard which has been applied consistently in the Commission when making factual findings. However, because of the seriousness of the findings which may be made, it is important to bear in mind what was said by Dixon J in *Briginshaw v Briginshaw* (1938) 60 CLR 336 at 362:

> *…reasonable satisfaction is not a state of mind that is attained or established independently of the nature and consequence of the fact or fact to be proved. The seriousness of an allegation made, the inherent unlikelihood of an occurrence of a given description, or the gravity of the consequences flowing from a particular finding are considerations which must affect the answer to the question whether the issue has been proved to the reasonable satisfaction of the tribunal. In such matters 'reasonable satisfaction' should not be produced by inexact proofs, indefinite testimony, or indirect inferences.*

This formulation is, as the High Court pointed out in *Neat Holdings Pty Ltd v Karajan Holdings Pty Ltd* (1992) 67 ALJR 170 at 171, to be understood:

> *...as merely reflecting a conventional perception that members of our society do not ordinarily engage in fraudulent or criminal conduct and a judicial approach that a court should not lightly make a finding that, on the balance of probabilities, a party to civil litigation has been guilty of such conduct.*

See also *Rejfek v McElroy* (1965) 112 CLR 517, the *Report of the Royal Commission of inquiry into matters in relation to electoral redistribution,* Queensland, 1977 (McGregor J) and the *Report of the Royal Commission into An Attempt to Bribe a Member of the House of Assembly, and Other Matters* (Hon W Carter QC, Tasmania, 1991).

Findings of fact and corrupt conduct set out in this report have been made applying the principles detailed in this Appendix.

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Appendix 3

In the opening chapter of this report, reference was made to the fact that, in closing submissions in reply, complaints were made concerning the way in which the public inquiry was conducted. In particular, specific complaints were made about the conduct of Senior Counsel Assisting.

At the outset, there is a fundamental problem with these complaints. They have been made too late to have any legal force. In particular, it is too late now to complain for the first time that aspects of the conduct of the public inquiry somehow interfered with procedural fairness. The point is that no objection was taken to the exchanges at the time they occurred. The Commission was not given the opportunity to consider or rule upon individual objections, or a broad complaint that questions went too far, or that conduct was inflicting any kind of unfairness.

It is not said, and it could not be said, that it was futile to make objections, or that reasonable objections were not treated with proper respect and consideration. The fact is that, frequently, when objections were made to a particular question asked by Counsel Assisting, Counsel Assisting – of his own accord – withdrew the question. The Commissioner often upheld objections against questions asked by Counsel Assisting. At times, the Commissioner, of his own motion, ruled against a question or foreclosed a particular line of questioning being followed by Counsel Assisting.

Had objection been taken in a timely fashion to the matters now raised for the first time, consideration would have been given to them and the objections ruled upon. It is not appropriate now, after sitting quietly for more than three months, and after 43 hearing days, to make a complaint long after the evidence is closed.

There is a particular significance in making these complaints, virtually at the last possible moment in the public inquiry. They are made in written submissions, in a form where the counsel making them are not compelled to defend them in public; that is, in the hearing room. And the complaints are made in reply from the safety of the chambers of the barristers concerned – so that there is no mechanism whereby their targets, Counsel Assisting, can answer them personally. It is hardly in the tradition of the Bar to launch attacks of this kind on colleagues at such a time and in such a way – so that those colleagues are not able to return their fire. The Commission refers specifically to the traditions of the Bar because Mr Hale (and his junior, David Mackay), and Mr Littlemore, have alleged that the conduct of Counsel Assisting has infringed the Bar rules. Two questions arise from this accusation. What is its relevance to this Commission (the accusation being made in closing submissions relating to possible findings of corrupt conduct) and why has it been made? If those who make it think that it is persuasive of any proposition relating to the merits of their client's version, they are wrong. There are possibly other reasons for making the accusation that are not relevant to the merits of the argument that the counsel concerned seek to advance. The Commission, however, will not speculate on this question.

Despite the fact that the delay in making the complaints is, in the Commission's view, fatal to their legal effectiveness, the Commission shall deal with them individually, although most of them hardly deserve such considered treatment. As will appear below, the Commission considers that they are baseless.

The principal complaints about Counsel Assisting have been made on behalf of Mr Macdonald, Edward Obeid Sr, and Paul Obeid and Gerard Obeid. The complaints made by Mr Hale and Mr Mackay on behalf of Mr Macdonald will be dealt with first.

Absence of jurisdiction

In the submissions of Mr Hale and Mr Mackay, it is said that the public inquiry is "fatally compromised" (apparently by the conduct of Counsel Assisting) and, for that reason, there is no jurisdiction for the Commission to make this report.

This submission is far-fetched and based on a misconception. It is not possible for the conduct on the part of Counsel Assisting to nullify, as it were, the jurisdiction of the Commission. It is theoretically possible that, if a Commissioner aligns himself or herself completely with one-sided and improper conduct on the part of Counsel Assisting, a perception of bias might arise. In the first place, however, the conduct of Counsel Assisting in this inquiry was appropriate and there is no basis for characterising it as "one-sided" or "improper". No such complaint was made during the adducing of evidence. In the second place, an argument in these terms was not raised in the submissions made on behalf of Mr Macdonald. Nor was any such point, or any point akin to it, raised by any party at any time in the proceedings. At no stage has a complaint been made involving bias or unfairness on the part of the Commissioner in the conduct of the proceedings.

Mr Hale's specific complaints on which this assertion is based will now be dealt with.

Are the duties of Counsel Assisting the Commission to be equated to those of a prosecutor?

Mr Hale submits that some kind of general standard applies to Counsel Assisting in all hearings, including criminal trials, royal commissions, other inquiries and ICAC hearings. He says that the duties of Counsel Assisting are the same as those imposed on a prosecutor at a criminal trial.

The Commission, however, rejects the notion that *all* commissions of inquiry are to be treated alike, or give rise to obligations and duties that are identical with those of prosecutors in criminal trials. The difficulties in equating the duties of Counsel Assisting, who is assisting the Commission in an inquisitorial and investigative public inquiry under the ICAC Act, with the duties of a prosecutor in an adversarial criminal trial, are self-evident. The Commission rejects the notion that the conduct of Counsel Assisting in this inquiry is to be adjudged by reference to some theoretical, all-embracing, general standard.

Corruption affecting public officials in NSW is an extremely serious matter. To this end, the NSW Parliament has given the Commission exceptional powers to investigate and expose corruption. The investigative powers permit the Commission to compel witnesses to answer questions where the answer could tend to incriminate them, or would otherwise be protected by a privilege recognised by the law. They enable the Commission to seize documents that otherwise would be subject to privileges. Those powers include the conduct of compulsory examination of witnesses in private. The NSW Parliament – and the people of NSW – would expect those exceptional powers would be utilised. The utilisation of those powers was particularly necessary in an investigation as difficult and as complex as Operation Jasper.

The Commission's unusual and specific statutory responsibilities, coupled with its exceptional investigative powers, show that it cannot be compared with an ordinary inquiry, let alone a criminal trial. The role of Counsel Assisting cannot be compared with that of a prosecutor in a criminal trial, or with counsel assisting in other kinds of inquiries.

The duties of Counsel Assisting are to be adjudged by reference to the ICAC Act, and the circumstances of the case.

There are obvious and important differences between the duties of Counsel Assisting and a prosecutor, and counsel assisting other bodies.

The Commission conducts a public inquiry as part of its investigation. It is not a stand-alone procedure. Typically, months of preliminary enquiries, as part of the overall investigation, are required before it can be determined whether or not a public inquiry should be held. If an investigation appears – within the criteria laid down

by the ICAC Act – to justify a public inquiry, a public inquiry may be held. The Commission can conduct a public inquiry only "if it is satisfied that it is in the public interest to do so": s 31(1) of the ICAC Act. That level of satisfaction can be arrived at only after the Commission has formed a provisional view as to the credibility of some of the witnesses and after a careful consideration of the facts, which at that stage have been uncovered. The prior investigations determine the approach to the public inquiry that the Commission decides is appropriate and necessary. That is, the general direction of the investigation is determined by the Commission by reference to the provisional views it has formed in consequence of all the material it has discovered before the inquiry commences. And, relevance of evidence, generally, is determined by reference to these provisional views and the direction that the Commission has determined when deciding to hold a public inquiry. Of course, that does not mean that exculpatory evidence is excluded, or that possible new lines of inquiry are eschewed. But the Commission will not allow questions to be asked directed to issues that it deems to be irrelevant. And, in this regard, it is Counsel Assisting who has a major responsibility in determining that the inquiry remains within reasonable bounds. The submissions suggesting that Counsel Assisting had a closed mind, fail to understand this feature of inquiries undertaken by the Commission.

Counsel Assisting, when commencing his or her role in assisting the Commission, is made aware of the provisional views the Commission has formed and the reasons for them. It is the duty of Counsel Assisting to bear these views in mind when conducting the inquiry. In particular, these views bear upon decisions that may be taken in determining what evidence is to be adduced. Of course, Counsel Assisting and the Commission must act fairly, and reveal any material that in their view is reasonably exculpatory.

The foregoing is a major point of difference between an ICAC public inquiry, on the one hand, and royal commissions, inquiries of a nature similar to royal commissions, and criminal trials, on the other.

Of course, nothing in what has been said so far implies that Counsel Assisting (or the Commission) is entitled to act unfairly. But fairness is a relative concept that can be determined only in its own context and circumstances and by reference to any relevant statute applicable. The context and circumstances involving an investigation by the Commission are unique. Within these boundaries, it is for the Commission, and not parties affected, to determine what questions are relevant and what lines of enquiry are to be followed.

The opening statement and a "closed mind"

Mr Hale criticises the opening statement by Counsel Assisting. He says that it showed that Counsel Assisting had a "closed mind" and he did not thereby identify the issues. The Commission rejects this contention.

At the stage the opening statement was delivered, the Commission had accumulated a mass of evidence after conducting an investigation with specially-provided additional resources over a period of over a year. The evidence, in the Commission's view, was arguably indicative of corruption of the most serious and insidious kind, going to the heart of good government in this state. By s 2A of the ICAC Act, a principal object of the Commission is to investigate and expose corruption. Section 31(2)(a) refers expressly to the "benefit of exposing to the public, and making it aware, of corrupt conduct". The facts of Operation Jasper called for those facts to be exposed to the public. If Counsel Assisting regarded it as his duty in his opening statement to put the evidence of possible corruption in this operation in forceful and even dramatic terms, then, in the Commission's view, he was justified by the circumstances.

One thing is clear; contrary to Mr Hale's submission, the opening statement was full and detailed and revealed the issues in a most emphatic way. Furthermore, throughout the questioning of witnesses, Counsel Assisting was careful to make clear what allegations were made against affected persons. Mr Macdonald was fully apprised in the clearest of terms of the allegations involving him. Significantly, no complaint about this issue was made during the hearing of evidence.

In regard to the submission that Counsel Assisting had a "closed mind," a reading of his opening statement as a whole reveals that he made it clear that, while there was startling evidence of corruption, it could only be said that corrupt conduct had in fact been committed if and when those matters supporting the existence of corruption had been proved.

Prior to the public inquiry, the Commission carefully assessed all the evidence it had so far obtained and from that material determined which of the potential witnesses from whom that material had been obtained could give relevant evidence at the public inquiry. That assessment has continued throughout the course of the inquiry. Counsel Assisting called all those witnesses so identified, irrespective of whether a witness' testimony supported the contention that corrupt conduct had been committed or whether that testimony exculpated any person.

Failure to investigate "all possible explanations"

Mr Hale goes on to submit specifically that the public inquiry "has been compromised by" a "blinkered approach" because it failed to have regard for "all possible explanations".

This submission, in its generality, is rejected.

Mr Hale provides specific examples of the so-called blinkered approach.

The first relates to whether someone other than Mr Macdonald could have leaked confidential information to the Obeid family. Counsel Assisting, however, were meticulous in asking all relevant witnesses whether they were responsible for leaking information to the Obeid family. Numerous witnesses were asked whether they were responsible for the dissemination of the relevant information and whether they had any idea who could have leaked such information. In particular, questions of this kind were asked in regard to the three specific documents referred to by Mr Hale (they being Ex J50, J17 and [MFI 5]) as being documents that could have been obtained by the agency of some unknown party and not Mr Macdonald. Relevant witnesses were asked whether they were responsible for allowing any of these documents to leave the possession of the DPI. Generally, the attempts to ascertain who could have been so responsible were exhaustive. They failed to identify anyone apart from Mr Macdonald who could have been the source of the leaked documents. During the inquiry, Mr Macdonald (and Mr Hale, on his behalf) did not identify any person, that was not called as a witness, who could have been the source of the leak. It was open to Mr Hale to request that particular witnesses be called, so as to investigate this issue further, but he made no such request.

Mr Hale goes on to submit that "no investigation" was carried out by Counsel Assisting in relation to who might have been the person who was Mr Duncan's "mate in the Department". The submission is factually incorrect. Mr Duncan denied he had such a "mate" but, nevertheless, Counsel Assisting closely questioned Mr Duncan and several other witnesses about who this "mate" could possibly be. Nothing was revealed by these questions.

Then, Mr Hale submitted that there was a failure to investigate the origins of a map of the North Bylong coal resources drawn by Ms Wiles on 30 May 2008 (figure 2), which was described in evidence as "the S map" because of the shape of the map. Contrary to Mr Hale's submission, the origins of figure 2, "the S map," and its use, were fully explored in the evidence.

It should also be noted that it was open to Mr Hale to ask whatever questions he thought would be exculpatory of his client in this regard. It was also open to him to ask that particular exculpatory witnesses be called. He did not do so.

Failure to call "all relevant witnesses"

Mr Hale made submissions complaining that "counsel assisting has failed to call relevant witnesses" and identified six witnesses in that category. Directions were made before the public inquiry, giving particulars how any party who wished to have a witness called, could arrange for that to be done. Mr Hale failed, in any way, whether in accordance with those directions, or simply on his feet in the hearing room, to request that any of these "relevant" witnesses be called. In light of Mr Hale's conduct of the proceedings, this is an extraordinary submission to make now, when the adducing of evidence has concluded. It is, in any event, totally without substance.

Given the timing of Mr Hale's complaint, the response to it can now only be dealt with in this report; that is to say, his complaint cannot now be dealt with by the adducing of further evidence – the Commission and Counsel Assisting were ignorant of this complaint when the leading of evidence closed. In respect of those six witnesses, however, the following should be noted.

- Mr Hale did raise during the conduct of the public inquiry the issue of calling the Hon Kristina Keneally and Patricia Madden. Counsel Assisting responded, giving reasons why those witnesses were not to be called. It was indicated, however, that, if a further application was made requiring those witnesses to be called, the matter would be given further consideration. No further application was made.
- In particular, the Commission understands that Mr Macdonald approached Ms Keneally to give evidence, but she declined to provide a statement. No application was made by Mr Macdonald for relief from compliance with that aspect of the pre-hearing directions. The matter was left to rest. In any event, the Commission has accommodated Mr Hale's complaint by not making any finding on the one issue about which Ms Kenneally's evidence might conceivably have been relevant.
- Ms Madden was called as a witness during Operation Acacia and she was cross examined by Mr Hale. There was a direction, made before operations Indus, Jasper and Acacia commenced, to the effect that the evidence in each of the

operations was to be regarded as evidence in the others. In Operation Acacia, Mr Hale could have cross examined Ms Madden about issues in Operation Jasper, but he did not attempt to do so. In any event, Ms Madden was not called in Operation Jasper because, after consultation with her, it was decided that her testimony could not add anything relevant to the inquiry involving that operation.

- The Commission's investigators attempted to speak to both Beres Lang and Percy Thompson. Mr Lang was undergoing intensive treatment for a terminal illness; enquiries indicated that it would be inhumane to approach him for information and the Commission determined not to summons him to testify. The Commission found Mr Thompson, but he repeatedly told Commission investigators that he had no recollection whatsoever of the contents of discussions during any meetings with Mr Macdonald or Edward Obeid Sr, and a notice requiring him to produce all relevant documents produced no documents at all. The Commission formed the view there was no utility in calling Mr Thompson.
- Anthony Cummings was interviewed by the Commission. He confirmed that he was present at a dinner at Credo Restaurant with Mr Macdonald and Moses Obeid. Mr Cummings could give evidence of the time and place of the meeting, and was issued with a summons to attend to given that evidence. The Commission decided, however, not to call Mr Cummings when it became clear that Mr Macdonald and Moses Obeid admitted that the occasion occurred. Mr Cummings had no additional evidence that could assist the public inquiry.
- Michael Costa was not interviewed for the purposes of Operation Jasper, although he was interviewed for the purposes of Operation Acacia. The Commission did not see Mr Costa as capable of shedding any light on issues relevant to Operation Jasper, and cannot see so now. If Mr Hale understood there was some particular evidence that Mr Costa could give that was relevant to the inquiry, then he could have made a timely application that Mr Costa be called.

Failure to produce "all relevant documents"

Mr Hale complains that Counsel Assisting failed to produce "all relevant documents". The submission carries with it an imputation that Counsel Assisting had, for some ulterior purpose, hidden or withheld documents.

This submission is factually incorrect.

The only example given by Mr Hale of the alleged failure is a group of documents that relate to a request for funding for a drilling program. There was evidence that the DPI had sought such funding and had submitted a draft minute to the minister to be submitted to Cabinet. Mr Hale alleges that documents surrounding this were, by implication, deliberately withheld.

The issue only arose during the course of the inquiry. Part way through his evidence, Mr Mullard produced these documents to the Commission. Until that moment, these documents were not in issue in Operation Jasper, and no party had suggested that they were relevant.

As it turns out, the documents had been seen and considered by Counsel Assisting, but on grounds of relevance not disclosed in Operation Jasper. Their relevance was only perceived part way through the evidence of Mr Mullard, when he volunteered information not previously remembered by him.

In any event, the same documents were regarded as relevant and disclosed in Operation Acacia (in which Mr Macdonald was centrally involved). The fact that the documents were provided to Mr Macdonald and to Mr Hale as part of Operation Acacia completely answers any suggestion that the Commission or Counsel Assisting were withholding or hiding documents. The late raising of a document for the reasons that manifested themselves in Operation Jasper is a concomitant of the conduct of an investigation.

No ground exists that could possibly justify this submission by Mr Hale.

Provisions of transcripts of compulsory examinations and witnesses statements

During the public inquiry, Mr Hale made two applications on two different bases for copies of compulsory examination transcripts. In the first application, Mr Hale sought compulsory examination transcripts that contained exculpatory material relating to Mr Macdonald. In the second application, Mr Hale sought copies of all transcripts of all compulsory examinations that the Commission undertook. Both applications were refused.

As regards the application in which Mr Hale sought compulsory examination transcripts that contained exculpatory material relating to Mr Macdonald, the Commissioner – after an exchange involving Mr Hale and Counsel Assisting – gave brief explanatory remarks for

refusing the application. This appears in the transcript at pages 3172 and 3173 and a copy of the relevant transcript is annexed marked Appendix 4.

Counsel Assisting went on to say:

> *"Can I assure Mr Hale that in our lead up to this we [were] very conscious of our responsibility to place before this inquiry any document which might be relevant, and we've done that, and if there are documents in there which are inculpating or exculpating so be it, but every relevant document has been put in the books [of evidence]. I don't know of any evidence that my learned friend may have been referring to, but the only thing that it could be might be oral evidence and in that respect, if there are witnesses who are capable of exculpating Mr Macdonald, then we are calling them. We are calling every witness who we understand can give relevant evidence about his activities"*.

Counsel Assisting's remarks in the statement quoted reflect his express instructions from the Commission.

The Commission would add that having regard to the fact that 95 compulsory examinations were held, the Commission would have to conduct a careful examination of thousands of pages of transcript to ascertain what parts of the compulsory examinations, if any, contained material that exculpates Mr Macdonald. Accordingly, apart from other considerations that militate against acceding to the application, this particular request was oppressive.

As Mr Hale, in his closing submissions, does not complain about the refusal of the application for copies of compulsory examination transcripts that contained exculpatory material relating to Mr Macdonald, there is no need for the Commission to say more about it.

As regards the application in which Mr Hale sought transcripts of all compulsory examination that were held, the Commissioner gave reasons for his decision. These are in the transcript at pages 4129–4133 (Appendix 5).

In his closing submissions, Mr Hale made no complaint about the refusal of the abovementioned applications. Rather, he complained only that Mr Macdonald was denied procedural fairness because he was refused access to a transcript of his own compulsory examination during which he referred to a "use it or lose it" policy. Such an application was not made in the course of the inquiry and on that ground alone the application fails. But the Commission shall proceed to deal with the complaint that Mr Hale makes once more at a very late stage, on its merits.

A key consideration behind the Commission's continuing practice in declining to provide such materials is to enhance the Commission's opportunities at getting at the truth, and to protect persons who assist in that regard. Witnesses are usually brought forward for compulsory examination upon a promise that their evidence will be kept confidential. It is the Commission's experience that this protection encourages persons to speak freely, and to volunteer information whereas they might otherwise be inhibited from doing so. In some instances, witnesses provide information that, if it was known it had been provided, could place their safety at risk.

The particular complaint that Mr Macdonald, in fairness, needed a copy of his own compulsory examination is without substance.

First, Mr Macdonald presumably remembered his own evidence.

Secondly, Mr Macdonald was represented by Mr Hale and a solicitor when he gave evidence at the compulsory examination. They were free to take notes of the evidence that was given. As his submissions demonstrate, Mr Hale was familiar with part of the evidence that Mr Macdonald gave relating to the "use it or lose it policy". The fact that Mr Macdonald did not refer to a "use it or lose it" policy in his evidence during the public inquiry might have reflected a deliberate change in his evidence. Furthermore, Mr Hale had the opportunity in the public inquiry to question Mr Macdonald on the issue if he felt it was important.

The Commission stands by its original rulings, and rejects the complaint.

The manner in which evidence was adduced

Mr Hale complains that there was a problem with Counsel Assisting asking "closed leading questions". For reasons discussed earlier, the Commission does not agree. The circumstances of an inquiry like this are obviously very different from those of a trial; for example, Counsel Assisting was required to call all the witnesses, not only independent witnesses, but also those persons who had been identified as suspected of corrupt conduct. On the Commission's observation, each witness was given an appropriate opportunity to tell his or her story in his or her own words. There was an opportunity for each witness to be examined by his or her own lawyer. On occasions, it was necessary for Counsel Assisting to put critical and specific propositions directly to witnesses, especially those suspected of corrupt conduct – this is a clear requirement of providing those witnesses with procedural fairness.

The complaint made by Mr Hale is demonstrably unsound for another reason. Mr Hale says that "the best illustration" of the unfairness inflicted by these kinds of questions were the questions asked of Edward Obeid Sr in which it was

suggested to him that he had spoken to Mr Macdonald in terms of his property being "next door" to the Anglo tenement. Not only is the complaint not made good by reference to the evidence cited by Mr Hale, but the complaint is completely undermined by the evidence on this issue of Edward Obeid Sr (this is dealt with above in the body of this report).

Mr Hale's submissions on this issue are rejected.

Complaints by members of the Obeid family

The Commission shall refer briefly to similar kinds of complaints made on behalf of Edward Obeid Sr, Paul Obeid and Gerard Obeid. It should be borne in mind that Edward Obeid Sr was represented by two senior counsel, a junior barrister and solicitors, while Paul Obeid and Gerard Obeid were represented by senior counsel and a solicitor.

Most of the complaints made on behalf of these particular members of the Obeid family are covered by the discussion above, and the Commission does not intend to repeat those reasons, except to point out that there are, at least, three major problems with these submissions.

The Commission now turns to particular submissions made by Mr Littlemore and Graham Turnbull SC.

Mr Littlemore criticised the conduct of Counsel Assisting in very strong terms. He submitted that Counsel Assisting had breached Bar Rules 82 and 84 in not seeking fairly to assist the Commission to arrive at the truth, in not seeking impartially to have the whole of the evidence placed intelligibly before the Commission, and in seeking to inflame or bias the Commission against any person whose conduct is in question.

The personal and pejorative criticism of Senior Counsel Assisting is unwarranted. Contrary to these submissions, the Commission considers that the conduct of Counsel Assisting was of great assistance to it in arriving at the truth.

The Commission considers that Counsel Assisting complied with Bar Rules 82 and 84 (albeit that the Commission does not consider this submission to be relevant, it has dealt with it, because the issue has been raised by Mr Hale and Mr Littlemore).

To speak of Counsel Assisting "inflaming" the Commission (and the Commissioner) is incongruous. The term (and Rule) is more apposite to a jury trial. While the evidence adduced, and the way it was adduced, certainly influenced the Commission to make the findings that it has made, those findings have not been made because of bias induced by Counsel Assisting.

Furthermore, these submissions by Mr Littlemore are not linked to any causal result. They are made in a vacuum, as it were, apparently for the sake of criticising rather than criticising to found a submission relating to the result of the inquiry. Indeed, they do not assert that the conduct of Senior Counsel Assisting was productive of procedural unfairness or any other detrimental consequence. The criticism was gratuitous. It should not have been made.

Mr Turnbull represented the four Obeid sons (those other than Moses Obeid). His submissions, although suffering to a degree from the lateness problem, were cast in appropriately moderate but pointed terms and no criticism is made of them. Some are covered by the remarks made above. In any event, no findings are made against his clients and no recommendations made in respect of them. It is not necessary to say anything more in this regard.

General remarks in response to the submissions in reply

The Commission has explained the background and context in which the public inquiry was held. There is no doubt that the public inquiry was conducted in a lively and, at times, robust fashion. The robustness was not one-sided. The stakes were high. There were many skilled and experienced lawyers involved, and virtually all demonstrated an energetic and healthy willingness to fight for their clients. At times, the atmosphere was tense and, at times, the exchanges were unusually blunt.

The inquiry went on for several months and hearing times were long. As explained in chapter 2, there was a degree of urgency in having the inquiry completed as soon as reasonably possible. Often witnesses evaded answering questions, some made speeches instead of giving direct answers and some became aggressive. It was difficult to get many to answer the questions they were asked. At times, especially towards the end of a day's hearing characterised by evidence of this kind, a degree of frustration crept in. Of course, it is the duty of all involved to control such frustration, but occasionally human fallibility takes over. This does not amount to procedural unfairness.

There is no doubt that Senior Counsel Assisting was hard on some witnesses, but this was justified as explained. The Commission heard the evidence of an unusually large number of difficult witnesses. Some witnesses were obviously highly skilled, others extremely intelligent. Many lies were told. The crucial persons involved were hardly likely to be intimidated in any way – including, as they did, former senior politicians of great experience, and successful and knowledgeable businessmen. Witnesses in these categories were often aggressive and combative. Getting to

the bottom of the facts proved to be a very difficult task. These matters all played a role in the atmosphere of the hearing room.

For the above reasons, the criticisms of Senior Counsel Assisting are rejected.

The Commission repeats that, in any event, it is much too late now to raise these complaints. Very few objections were taken at the relevant time. Those objections were ruled upon and are not now the subject of complaint. The current complaints are made in respect of matters where there was no objection at all while evidence was being adduced. If there was a perception that something was going wrong, an objection or complaint would be expected. If something was going wrong, a timely objection could fix it. The absence of a timely objection or complaint suggests there was no perception amongst those lawyers that something was going wrong.

Appendix 4

MR HALE: And the final, the final matter which [is] *even broader than the others which* [will] *no doubt receive a similar response as this. We would also be seeking access to those parts of the transcript of compulsory examination which may be exculpatory of Mr Macdonald and inconsistent with the allegations made against him.*

THE COMMISSIONER: Mr Hale, we've had this argument before. There is, there are decisions of four judges of the Supreme Court of New South Wales to the effect that the Commission is not obliged to reveal that kind of material.

MR HALE: All of which, I'm sorry to interrupt, all of which must depend upon the circumstances of the particular case rather than a general rule since all matters must be determined in their own context as I'm sure Commissioner, you would agree.

THE COMMISSIONER: Your application in this regard is refused, Mr - - -

MR WATSON: Could I also say this, Commissioner, in your answer to Mr Hale you have made an assumption that such material exists.

THE COMMISSIONER: Yes. I have no idea and - I have no idea whether there is any material in the compulsory examination transcripts which is exculpatory of Mr Macdonald. I personally cannot recall any such evidence, it might exist. On a very careful combing of the countless - when I say countless - I can't remember how many compulsory examinations there were, there were very, very many, I cannot recall one instance of any evidence exculpatory of Mr Macdonald but I accept that somewhere in there, there may be something that does exist. I am not going to look for it.

MR HALE: Commissioner, you may recall that similar applications were made in relation to Jarilo and, of course, the scope of that inquiry was somewhat more narrow - - -

THE COMMISSIONER: Yes

MR HALE: - - - and I accept all of that, but they did certainly ma[k]e a significant impact having regard to the additional information we were provided which otherwise we would not have been provided.

THE COMMISSIONER: And therefore?

MR HALE: Sorry?

THE COMMISSIONER: What point are you making?

MR HALE: The point I'm making it makes it difficult from the point of view of my client in dealing with the evidence if there is evidence which would be exculpatory to which he does not have access to in relation to the - - -

THE COMMISSIONER: I've given my answer.

MR HALE: I appreciate you've given a ruling and I, of course, must abide by it.

THE COMMISSIONER: And because Mr Watson has reminded me of a fact which is relevant to my answer I have detailed that to you, that is, I don't know of any such evidence. I'm not saying it doesn't exist, but I personally cannot recall any such evidence.

Appendix 5: Reasons delivered on 11 February 2013 for refusing Mr Macdonald's request for copies of compulsory examination transcripts

COMMISSIONER: On more than one occasion during this public inquiry, Mr Hale has applied for orders requiring the Commission to provide his client, Mr Macdonald, with copies of the compulsory examination transcripts that contain exculpatory material relating to Mr Macdonald or, if I have understood correctly, copies of all compulsory examination transcripts. I think it desirable to state now in full my reasons for refusing those applications.

These reasons will apply to any future such applications unless any new grounds are advanced.

In these inquisitorial proceedings it is the Commission's obligation to afford all persons who might be affected by its findings procedural fairness. I do not regard that obligation as requiring the Commission to provide Mr Hale with the transcripts he has sought. As background to Mr Hale's applications I point out that the Commission has held 92 [sic] *compulsory examinations, some involving several hours of questioning. These examinations have been undertaken over a period of approximately 20 months. Some witnesses have, over time, participated in more than one compulsory examination. The Commission has also interviewed in excess of 60 potential witnesses and many witnesses have participated in more than one interview. Virtually all of those interviews have been recorded. In addition, the Commission has obtained 12 witness statements.*

The material obtained in this way extends to many thousands of pages. I give these particulars to indicate the scale of the evidentiary material obtained by the Commission and the practical difficulties that would thereby arise if the Commission were to accede to Mr Hale's applications and like applications which other persons no doubt would be induced to make should Mr Hale's application be granted.

There is the additional consequence that with a very large number of counsel involved in this inquiry the disclosure Mr Hale seeks will probably cause the inquiry to extend immeasurably in length. The delay in itself is an important factor to be taken into account as given the seriousness of the allegations in this inquiry it is in the public interest that the Commission report its findings to Parliament as soon as possible.

Furthermore, the delay would cause large amounts of unnecessary costs to be incurred and inconvenience suffered. This would occur in circumstances in which the Commission has decided that the material sought is unnecessary and irrelevant as it would not advance the inquiry in any respect.

I appreciate that arguably these practical difficulties alone should not stand in the way of procedural fairness properly assessed. But in my view the practical difficulties are not without relevance in deciding what procedural fairness requires in this case.

The Commission has in any event decided that irrespective of these practical difficulties there are other compelling grounds that alone cause it to conclude that Mr Hale's applications should be dismissed. These are as follows:

(a) Before evidence was led in this public inquiry, the Commission carefully assessed all the evidence it had so far obtained, including all the compulsory examination transcripts, interviews and statements to which I have referred. Having considered all this material, the Commission determined which of the potential witnesses from whom that material had been obtained could give relevant evidence at the public inquiry. That assessment has continued throughout the course of the inquiry. The Commission has determined to call all those witnesses so identified irrespective of whether a witness's testimony supports the allegation that contention that corrupt conduct has been committed or whether that testimony is exculpatory of any person. By the end of the evidence in this inquiry all such witnesses will have been called.

That is the Commission's intention, and there is no reason to think that that intention will not be fulfilled. The Commission considers that through the leading of the evidence of these witnesses and the relevant questioning of them by others will lead to the discovery of the truth. Compare Australian Securities and Investments Commission v Hellicar (2012) HCA 17, at [241] et seq per Heydon, J.

(b) In the majority of instances the compulsory examination constitutes the first occasion when officers of the Commission are in a position to explore with potential witnesses the evidence they may be able to give. Thus, on such occasions, the Commission officers generally ask open-ended and wide-ranging questions. In this way, much irrelevant material is adduced. Before these witnesses are called to testify, Counsel Assisting the Commission and Commission officers sift through the material to identify evidence that is relevant. At the public inquiry, Counsel Assisting, having considered the compulsory examination testimony and the other preliminary evidence obtained, endeavours to adduce only those parts of such material as are relevant. It would be contrary to the public interest to disclose publicly, material that is irrelevant.

(c) Counsel Assisting gave a full and detailed opening address and, throughout the questioning of witnesses, has been at pains to make clear what allegations are being made, if any, against the persons concerned.

(d) I am satisfied that in this way all persons who have, who may be affected by any findings the Commission makes, have or will have been fairly apprised of the allegations against them. I do not understand it to be contended otherwise by anyone.

(e) I have invited any person who wishes to have testimony called to proceed in accordance with directions I have made in that regard.

(f) All persons who wish to reply to the allegations that have been made against them have been and will be given a full and fair opportunity of answering relevant evidence that might be adverse to them.

(g) As has elsewhere been noted, disclosure of the compulsory examination transcripts could compromise the investigation and inquiry or cause the investigation and inquiry to be less effective than it otherwise would have been. For the Commission to disclose its hand prematurely, "will not only alert suspects to the progress of the Commission, but may well close off other sources of inquiry". These words were spoken in National Companies & Securities Commission v News Corporation Ltd (1984) 156 CLR 296 *by Mason, Wilson and Dawson JJ at 323 – 4; see also Gibbs CJ at 316. Premature disclosure may allow corrupt witnesses to tailor their evidence dishonestly. Secrecy and silence are often effective means and indeed sometimes the only means of enabling the truth to be discovered.*

(h) Evidence given at compulsory examinations is virtually always given subject to a suppression order in terms of s 112 of the Independent Commission Against Corruption Act 1988. *Such a suppression order renders the evidence so given in effect secret. The Commission generally reserves the right to vary that order if it considers that the public interest requires it to do so. Such a suppression order is often an important factor in persuading witnesses to tell the truth. If an order for disclosure as sought by Mr Hale is made, otherwise than for the reason that it is in the public interest to do so, the benefits to the Commission and the state in holding the compulsory examination, and making the suppression orders, could to a material extent be lost. Moreover the disclosure of certain evidence contained in the transcripts, interviews and statements could lead to serious harm to witnesses and, indeed, to others mentioned by such witnesses. The Commission is of the view that it is not in the public interest to disclose the compulsory examination transcripts as Mr Hale seeks. The same applies to the interviews and statements the Commission has obtained.*

(i) The approach that the Commission has adopted is in accord with three first instance decisions of the Supreme Court of New South Wales, namely Aristodemou v Temby and the Independent Commission Against Corruption *(unreported) NSWSC 14 December 1989, per Grove J; Donaldson v Wood (unreported) NSWSC 12 September 1995, per Hunt CJ at CL (upholding a decision of Wood J, who was then acting as a Royal Commissioner);* Morgan v Independent Commission Against Corruption *(unreported) NSWSC 31 October 1995, per Sperling J. See also* Glynn v Independent Commission Against Corruption *(1990) 20 ALD 214 per Wood J. The judges who delivered these judgments were, with respect to their Honours, deeply experienced in the law relating to investigatory bodies such as the ICAC as well as the criminal law. The principles embodied in their decisions have led to a practice being adopted by this Commission that has remained unchallenged for at least 17 years.*

The practical considerations applicable to this inquiry, to which I earlier referred when opening my remarks on this issue, reinforce the conclusion to which the Commission has come.

For these reasons, the transcripts of the compulsory examinations will not be produced as Mr Hale requires.

I·C·A·C

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