

THE TUGUN BYPASS INVESTIGATION

JULY 2004



CMC Vision:

To be a powerful agent for protecting Queenslanders from major crime and promoting a trustworthy public sector.

CMC Mission:

To combat crime and improve public sector integrity.

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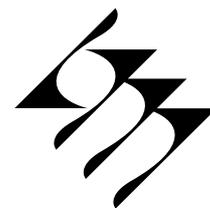
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Dear Sirs

In accordance with section 69 of the *Crime and Misconduct Act 2001*, the Crime and Misconduct Commission hereby furnishes to each of you its report, *The Tugun Bypass investigation*.

The Commission has adopted the report.

Yours faithfully

BRENDAN BUTLER SC
Chairperson

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SUMMARY

On 5 February 2004 the Honourable Peter Beattie MP, Premier of Queensland, announced a proposal for the route of a road commonly referred to as 'the Tugun Bypass'. He made the announcement during the campaign period preceding the state election held on 7 February 2004. The proposal entailed the acquisition or resumption of 14 houses in Adina Avenue, Bilinga, on the eastern edge of the Gold Coast Airport.

On the same day, officers from the Department of Main Roads hand-delivered a letter to each of the residents who would be affected directly by the proposal. The letter drew attention to the Premier's proposal and to the fact that it would have an impact on the resident's property.

On 9 February 2004, the CMC received a complaint from the Leader of the Opposition, Mr Lawrence Springborg MP, alleging that the circumstances surrounding the announcement of the proposal involved a breach of 'both the spirit and the letter' of the caretaker conventions set out in the *Queensland Cabinet handbook*. Additionally, Mr Springborg complained that senior officers of the Department of Main Roads, in writing to the residents affected by the proposal, had acted in a politically partisan way.

Mr Springborg further alleged that officers of the department had refused to supply information to his office during the caretaker period, and that the Tugun Bypass matter had not been mentioned to him as an issue of concern when he received a briefing during the caretaker period from the Director-General of the Department of the Premier and Cabinet.

After examining all of Mr Springborg's complaints, the CMC has determined that no official misconduct occurred, as defined in the *Crime and Misconduct Act 2001* — that is, there was no evidence that any person committed a criminal offence nor any government official committed a disciplinary breach providing reasonable grounds for dismissal. However, the CMC found that the letter delivered by officers of the Department of Main Roads in relation to the Tugun Bypass proposal was in its wording in breach of the proper practice of departments, as set out in the *Queensland Cabinet handbook*. The handbook proscribes official partisanship during an election campaign.

Accordingly, the CMC has made four recommendations designed to achieve full compliance with the accepted conventions for how officials of the state public service should behave during caretaker periods. The recommendations and the reasons for them are given in Chapter 5 of this report.

THE COMPLAINT TO THE CMC

BACKGROUND

On 5 February 2004 the Honourable Peter Beattie MP, Premier of Queensland, announced a proposal for the route of a road commonly referred to as 'the Tugun Bypass'. This announcement was made during the election campaign leading up to the state election of 7 February 2004. The proposal entailed the acquisition or resumption of 14 houses in Adina Avenue, Bilinga, on the eastern edge of the Gold Coast Airport.

On the day of the Premier's announcement, officers from the Department of Main Roads hand-delivered a letter, on departmental letterhead, to each of the residents affected directly by the proposal. That letter read as follows:

5 February 2004

Dear Resident

TUGUN BYPASS PROPOSED ROUTE

As you are aware, in late 2003 the New South Wales Government withdrew support for the proposed C4 option, largely on environmental grounds, despite extensive studies being undertaken which had shown that environmental impacts were manageable.

The Queensland Government has maintained its commitment to finding a solution to the congestion in the Tugun and Bilinga area and has been reviewing alternative routes, including those to the east of the airport.

The Premier has today announced a proposed route which has the least impact on the broader community. This route will run from Stewart Road Currumbin, on the eastern side of the airport connecting to the Tweed Bypass.

Following the Premier's announcement, I advise that the proposed route will have an impact on your property.

You may wish to discuss this further with us. We invite you to contact Kate Gilmore on (07) 5583 8328.

Your sincerely

Colin Jensen

A/District Director South Coast Hinterland

If a resident was not at home when the departmental officers called, an identical letter was left in the resident's letterbox, with the exception that the final two paragraphs read:

Following the Premier's announcement, I advise that the proposed route will have an impact on your property. We attempted to contact you today but missed you.

We invite you to contact Kate Gilmore on (07) 5583 8328 to arrange a briefing where we will outline the proposed route and answer any questions you may have.

For ease of reference, both forms of the letter will simply be referred to as 'the letter' in this report. In the context of the issues investigated by the CMC, nothing turns on the different wording used in the two forms of the letter.

Planning for a bypass in the area had been under way for many years, and various proposals had been considered. Given the degree of public interest in the issue and the timing of the Premier's announcement (just before an election), considerable media attention was given to the proposal and its possible ramifications.

THE COMPLAINT TO THE CMC

On 9 February 2004 the CMC received a complaint from the Leader of the Opposition, Mr Lawrence Springborg MP, alleging that the circumstances surrounding the announcement of the proposal involved a breach of 'both the spirit and the letter' of the caretaker conventions set out in the *Queensland Cabinet handbook*. These conventions require governments in caretaker (election) periods to avoid making significant appointments, implementing new policies or entering into major contracts or undertakings. (See Chapter 2 for details about the caretaker conventions.)

Mr Springborg complained that the actions taken in relation to the proposal:

required the active participation of senior officers, of at least the department ... and potentially other arms of Government, in acting in a politically partisan manner to implement a major Government decision during an election campaign.

After the CMC had started investigating the matter, Mr Springborg further alleged that officers of the department had refused to supply information to his office during the caretaker period. Mr Springborg also expressed concern that the Tugun Bypass matter had not been mentioned to him, as an issue of concern, when he received a briefing during the caretaker period from the Director-General of the Department of the Premier and Cabinet. The CMC investigated all of Mr Springborg's complaints.

LEGISLATIVE BASIS FOR CMC INVESTIGATION

Under the *Crime and Misconduct Act 2001*, the CMC has primary responsibility for continuously improving the integrity of, and reducing the incidence of misconduct in, the public sector. 'Misconduct' is defined in Schedule 2 of the Act as 'official misconduct or police misconduct'. Only the former — official misconduct — is relevant here. A definition is given in section 15 of the Act:

15 Meaning of 'official misconduct'

'Official misconduct' is conduct that could, if proved, be—

- a) a criminal offence; or
- b) a disciplinary breach providing reasonable grounds for terminating the person's services, if the person is or was the holder of an appointment.

'Conduct' is defined in section 14 as:

- a) for a person, regardless of whether the person holds an appointment—conduct, or a conspiracy or attempt to engage in conduct, of or by the person that adversely affects, or could adversely affect, directly or indirectly, the honest and impartial performance of functions or exercise of powers of:
 - (i) a unit of public administration; or
 - (ii) any person holding an appointment; or
- b) for a person who holds or held an appointment—conduct, or a conspiracy or attempt to engage in conduct, of or by the person that is or involves—
 - (i) the performance of the person's functions or the exercise of the person's powers, as the holder of the appointment, in a way that is not honest or is not impartial; or
 - (ii) a breach of the trust placed in the person as the holder of the appointment; or
 - (iii) a misuse of information or material acquired in or in connection with the performance of the person's functions as the holder of the appointment, whether the misuse is for the person's benefit or the benefit of someone else.

Section 14 also provides that to ‘hold an appointment’ means to hold an appointment in a unit of public administration. A person holds an appointment in a unit of public administration if the person holds any office, place or position in the unit, whether the appointment is by way of election or selection (s. 21). Section 20 defines a unit of public administration as including the Legislative Assembly and public sector departments.

In the case of an elected holder of an appointment, such a person can only commit misconduct where the conduct could, if proved, amount to a criminal offence — the first part of section 15. This is because members of parliament do not have a code of conduct or disciplinary regime, breach of which might properly be characterised as a ‘disciplinary breach’. In the absence of such a disciplinary breach, the possibility of terminating an office holder’s services on that basis cannot arise.

Accordingly, allegations of misconduct against anyone who holds an appointment as a member of the Legislative Assembly, such as were made here, can only fall within the CMC’s jurisdiction where the alleged conduct could, if proved, be a criminal offence.

Sub-section (a) of the definition of conduct applies to anyone, whether they hold an appointment or not. However, for the purposes of sub-section (b) of the definition of conduct, there must be a connection between the relevant conduct of the person and their appointment in a public office, as it refers to conduct of a person ‘who holds or held an appointment’. Three types of conduct are described:

- Paragraph (i) is concerned with the honest and impartial discharge of an office holder’s official functions and exercise of powers.
- Paragraph (ii) concerns breaches of the trust ‘placed in the person as the holder’ of an office.
- Paragraph (iii) is broadly concerned with the misuse of information or material acquired in connection with the performance of official functions.

Section 34 of the Act charges the CMC with ensuring that a complaint about, or information or matter involving, misconduct is dealt with in an appropriate way. Section 46 of the Act gives the CMC the authority to investigate a complaint when it is in the public interest to do so.

The CMC also has an important role in helping prevent misconduct. Under section 24 of the Act, the CMC can fulfil this role in many ways, including by making recommendations to public sector agencies and reporting on ways to prevent misconduct.

Finally, section 64(1) of the Act provides that the CMC may report on its investigations, and that such reports may contain recommendations. The Act also provides various means as to how the CMC can report on an investigation, including by way of a public report, as is the case here, where under section 69 an appropriate direction has been obtained from the Parliamentary Crime and Misconduct Committee.

LEGISLATIVE ISSUES APPLYING TO THIS INVESTIGATION

Possible criminal liability on the part of the Premier

As the caretaker conventions have no legal standing (see Chapter 2), their breach can not on its own constitute a criminal offence. There may be circumstances where conduct that breached the conventions could also amount to a criminal offence; for instance, where a public servant acted in breach of the conventions for a corrupt purpose. However, unless there exists a related criminal offence of such a type, a mere breach of the conventions does not in itself attract criminal liability. Accordingly, an alleged breach of the conventions by a member of parliament, as was alleged here by Mr Springborg against Mr Beattie, is not a matter within the investigative or official misconduct jurisdiction of the CMC.

Possible official misconduct on the part of a departmental officer

A different standard applies to public servants. A public servant who acts in breach of the conventions can potentially be said, in the language of the *Crime and Misconduct Act 2001*, to be performing their functions or exercising their powers, as the holder of a position in a department, in a way that is not impartial (s. 14[b][i]). However, for that conduct to be capable of amounting to official misconduct, again it must also constitute either a criminal offence or a disciplinary breach so serious as to warrant, on an objective test, the person's dismissal (s. 15).

In relation to a possible disciplinary breach, the *Public Service Act 1996* (Qld) provides for the administration of the public service and the management and employment of public service employees. One of the stated main objects of the Public Service Act is to establish the public service as an apolitical entity responsive to the government's needs and competent to provide services in a professional and nonpartisan way (s. 3[a]).

Similarly, section 25 of the Public Service Act contains a statement of principles of work performance and personal conduct for public servants. It provides:

In recognition that public service employment involves a public trust, a public service employee's work performance and personal conduct must be directed towards—

- (a) achieving excellence in service delivery; and
- (b) ensuring the effective, efficient, economical and appropriate use of public resources; and
- (c) giving effect to Government policies and priorities; and
- (d) providing sound and impartial advice to the Government; and
- (e) improving all aspects of the employee's work performance; and
- (f) carrying out duties impartially and with integrity; and
- (g) observing all laws relevant to the employment; and
- (h) ensuring that the employee's personal conduct does not reflect adversely on the reputation of the public service.

While section 25 states an expectation that public servants will act impartially in the performance of their duties [paragraph (f)], there is also an expectation [in paragraph (c)] that public servants will give effect to government policies and priorities.

Similarly, section 7 of the *Public Sector Ethics Act 1994* (Qld) is entitled 'Respect for the law and system of government' and provides that:

- (1) A public official should—
 - (a) uphold the laws of the State and Commonwealth; and
 - (b) carry out official public sector decisions and policies faithfully and impartially.
- (2) Subsection (1)(b) does not detract from a public official's duty to act independently of government if the official's independence is required by *Public Sector Ethics Act 1994* legislation or government policy, or is a customary feature of the official's work.

The code of conduct adopted by the Department of Main Roads is based upon the five broad ethics principles set out in the Public Sector Ethics Act, which are:

- 1 Respect for the law and the system of government
- 2 Respect for persons
- 3 Integrity
- 4 Diligence
- 5 Economy and efficiency.

Under principle 4, 'diligence', departmental employees are required to:

- carry out their duties effectively and to the best of their ability and within agreed time frames;
- act responsibly, competently and professionally and be able to justify decisions when required;
- diligently apply themselves to maintaining a current knowledge of legislation, policies, procedures and operations manuals which apply to their work area;
- recognise their duty of care towards the public, particularly where members of the public rely upon the advice which is provided to them;
- recognise their duty of care to observe occupational health and safety requirements and their obligation to avoid causing harm to any person through negligence or incompetence; and
- uphold and maintain professional standards expected within professional associations.

Also, under the same section of the code of conduct, departmental managers are required to 'ensure that staff are fully aware of the requirements expected in their positions, through supervision, feedback and access to information, resources and training'.

Turning away from this formal framework, it is accepted that there will be differing views held in the community as to the extent to which any public service is truly 'apolitical', in modern times. Nevertheless, notwithstanding the fact that the caretaker conventions do not have any formal legal standing, they are accepted practice within Australian parliamentary systems and all statements of the conventions refer, at least to some extent, to the desirability of relevant public services remaining apolitical during election periods.

A contravention of the Public Service Act or a departmental code of conduct can operate as a ground for the employing authority to discipline an officer (s. 87). Disciplinary action can also be taken against officers on other grounds, which include misconduct and contravening, without reasonable excuse, a direction given to an officer by a person with authority to give the direction. In this context, 'misconduct' means 'disgraceful or improper conduct in an official capacity' (s. 87[2]).

The evidence arising in this matter establishes that advice was given in relation to the operation of the conventions by the Director-General of the Department of the Premier and Cabinet at the time of the dissolution of the Legislative Assembly. Further internal instructions were circulated by the department. A deliberate breach of those instructions, and the conventions, by any departmental officer could conceivably amount to:

- official misconduct, if the facts objectively supported imposition of a sanction of dismissal, or
- grounds for possible disciplinary action under the Public Service Act.

THE STANDARD OF PROOF APPLIED BY THE CMC

The CMC does not determine criminal or disciplinary guilt. It may sometimes be necessary for it to reach conclusions about factual matters, for the purpose of reporting on an investigation; however, the CMC is not a criminal court or a disciplinary tribunal and it has no adjudicative role.

As to the proper standard of proof to be applied in reaching any such conclusions about factual matters, there are two standards known to the common law: proof beyond reasonable doubt, which is the criminal standard, and proof on the balance of probabilities, which is the civil standard. The latter is the appropriate standard to be applied by the CMC, but always bearing in mind the considerations raised by the relevant authorities.

In that respect, regard must be had to the judgment of Dixon J (as he then was) in the case of *Briginshaw v. Briginshaw* (1938) 60 CLR 336, and the decisions of the High Court in *Rejtek v. McElroy* (1965) 112 CLR 517 at pages 520–521 and in *Neat Holdings Pty Ltd v. Karajan Holdings Pty Ltd and Others* (1992) 67 ALJR 170. The first report of the *Parliamentary Judges Commission of Inquiry* (1989), which examined the alleged conduct of the former Mr Justice Angelo Vasta QC, is instructive on the point of the standard of proof to be applied during an inquiry. The authors of that report — the Right Honourable Sir Harry Gibbs, formerly Chief Justice of the High Court, the Honourable Sir George Lush, formerly a Judge of the Supreme Court of Victoria, and the Honourable Michael Helsham, formerly the Chief Judge in Equity of the Supreme Court of New South Wales — said the following (at para. 1.6.9):

The Commissioners considered that the civil standard of proof on the balance of probabilities was the proper standard to apply. When this standard is used as the measure of proof, it is sufficient if a fact is proved to the reasonable satisfaction of the tribunal evaluating the evidence. However, since the High Court decision in *Briginshaw v. Briginshaw*, it has been recognised that the degree of persuasion necessary to establish facts on the balance of probabilities may vary according to the seriousness of the issues involved. In that case, Dixon J expressed this proposition in the following words (at p. 362):

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.

Subsequent High Court decisions have approved His Honour’s statement. In *Rejtek v. McElroy* the court stated unequivocally that ‘the degree of satisfaction for which the civil standard of proof calls may vary according to the gravity of the fact to be proved’. The Commissioners were of the opinion that, in conformity with the High Court’s approach to the degree of proof, due regard to the seriousness of the issues must be had in applying the civil standard to the evidence adduced.

In the *Briginshaw* case, Dixon J also said the following (at p. 361):

The truth is that, when the law requires the proof of any fact, the tribunal must feel an actual persuasion of its occurrence or existence before it can be found. It cannot be found as a result of a mere mechanical comparison of probabilities independently of any belief in its reality.

Dixon J also said, in comparing the criminal standard of proof to the civil standard:

Fortunately, however, at common law no third standard of persuasion was definitely developed. Except upon criminal issues to be proved by the prosecution, it is enough that the affirmative of an allegation is made out to the reasonable satisfaction of the tribunal. But reasonable satisfaction is not a state of mind that is attained or established independently of the nature and consequence of the fact or facts to be proved.

That statement of Dixon J was followed by that part of his judgment which has been quoted above by the Commissioners in the *Parliamentary Judges Commission of Inquiry*. Dixon J continued:

Everyone must feel that, when, for instance, the issue is on which of the two dates an admitted occurrence took place, a satisfactory conclusion may be reached on materials of a kind that would not satisfy any sound and prudent judgment if the question was whether some act had been done involving grave moral delinquency ... this does not mean that some standard of persuasion is fixed intermediate between the satisfaction beyond reasonable doubt required upon a criminal inquest and the reasonable satisfaction which in a civil issue may, not must, be based upon a preponderance of probability. It means that the nature of the issue necessarily affects the process by which reasonable satisfaction is attained. When, in a civil proceeding a question arises whether a crime has been committed, the standard of persuasion is, according to the better opinion, the same as upon other civil issues.

The last commentary of the High Court upon this issue was in the case of *Neat Holdings Pty Ltd v. Karajan Holdings Pty Ltd and Others* (supra). There, the majority (Mason CJ, Brennan, Deane and Gaudron JJ) said (at pp. 170–171):

The ordinary standard of proof required of a party who bears the onus in civil litigation in this country is proof on the balance of probabilities. That remains so even where the matter to be proved involves criminal conduct or fraud. On the other hand the strength of the evidence necessary to establish a fact or facts on the balance of probabilities may vary according to the nature of what it is sought to prove. Thus, authoritative statements have often been made to the effect that clear, or cogent, or strict proof is necessary 'where so serious a matter as fraud is to be found.' Statements to that effect should not, however, be understood as directed to the standard of proof. Rather, they should 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.

The majority then cited that part of Dixon J's judgment in *Briginshaw*, as set out above in the excerpt from the report of the *Parliamentary Judges Commission of Inquiry*.

ASSESSMENT

After examining all of Mr Springborg's complaints, the CMC has determined that no official misconduct occurred, as defined in the *Crime and Misconduct Act 2001* — that is, there was no evidence that any person involved committed a criminal offence nor that any government official committed a disciplinary breach providing reasonable grounds for dismissal.

As already stated, the caretaker conventions have no legal standing; so the conduct of the Premier and the relevant minister would not constitute a criminal offence, even if a breach of the conventions could be proved. Their conduct could not, therefore, amount to official misconduct. Also, the announcement by the Premier appears consistent with the conventions in that it amounted to no more than a new policy promise made during an election campaign.

Accordingly, the CMC investigation was limited to the possible misconduct by officers of the department. The CMC's inquiries centred upon two possible breaches of the conventions. Firstly, whether the actions of the officers amounted to implementation of a policy decision. Secondly, whether the terms of the department's letter of 5 February 2004 (as set out on page 1 of this report), or the other alleged actions about which Mr Springborg complained, amounted to departmental officers using their official position to act in a partisan manner.

The wording of the letter appears to assume that the current Labor Government would again form government after the election. The letter does not qualify the statement by the Premier as being a pre-election policy announcement, subject to the Beattie Government being re-elected. Additionally, two specific parts of the department's letter were clearly open to the interpretation that they were expressed in partisan political terms, favouring the current state government. The two parts of the letter were:

- In the second paragraph, the use of the words 'The Queensland Government has maintained its commitment to finding a solution to the congestion in Tugun ...'
- In the third paragraph, the words 'The Premier has today announced a proposed route which has the least impact on the broader community ...'

The first quoted section could be interpreted as an expression of support for the current government's perceived commitment to resolving the Tugun traffic issues. It appears to promote the apparent commitment of the Beattie Government to resolving those issues. The second passage implies that the author is endorsing the merits of the proposal announced that day by the Premier, at least in terms of the proposal's impact, compared to that of others, upon the community.

THE DECISION TO ISSUE A PUBLIC REPORT

Although the Commission considers that the evidence arising from the investigation does not support the view that any person has committed official misconduct or any other disciplinary breach, the evidence does reflect a degree of uncertainty (at least on the part of some of the public servants in this matter) about the scope of the conventions.

As noted above, one of the CMC's important functions is to prevent misconduct in the public sector. The CMC can do this by making recommendations to public sector agencies and by providing information to the general community. Additionally, the CMC has an overriding responsibility to promote confidence in the Queensland public sector.

Successive governments of the Commonwealth and Australian states have all accepted the caretaker conventions in our parliamentary systems, which are based on the Westminster model. Relevant handbooks and similar documents produced by these parliaments note that the practice of governments assuming a 'caretaker' role during election campaigns recognises that:

- with the dissolution of parliament, the executive cannot be held accountable for its decisions in the usual manner, and
- every election carries with it the possibility of a change of government.

Hence, the primary caretaker conventions are aimed at ensuring that the actions of an incumbent government do not bind an incoming government and limit its freedom of action.

Associated with the major conventions are established practices that are of particular relevance to the operation of the public service during election campaigns, and are thus relevant to this complaint. The rationale for these practices is expressed in the Commonwealth Department of Prime Minister and Cabinet's publication *Guidance on caretaker conventions* as follows:

There are also established practices associated with the caretaker conventions that are directed at protecting the apolitical nature of the public service and avoiding the use of [Government] resources in a manner to advantage a particular party. The conventions and practices also aim to prevent controversies about the role of the public service distracting attention from the substantive issues in the election period.¹

Accordingly, the Commission has decided to issue a public report upon this investigation in order to note the conventions and make recommendations for better public sector training and guidelines about the operation of the conventions.

¹ *Guidance on caretaker conventions*, Department of the Prime Minister and Cabinet, September 2001, p. 2.

THE CARETAKER CONVENTIONS

Consistent with the practice of other parliamentary systems in Australia, Queensland state governments have accepted that special ‘caretaker’ arrangements should apply during election campaigns, from the time that the Legislative Assembly is dissolved. Such arrangements recognise that, once the Legislative Assembly is dissolved, there is no popular chamber to which the executive government can be responsible and, with the calling of an election, there is an obvious possibility of a change of government.

Accordingly, basic caretaker conventions require governments to avoid implementing major policy initiatives, making appointments of significance, or entering into major contracts or undertakings during the caretaker period. This is so a caretaker government does not act to bind an incoming government and limit its freedom of action.

QUEENSLAND CABINET HANDBOOK

The Queensland caretaker conventions are contained in Chapter 9 of the *Queensland Cabinet handbook*; the most recent (sixth) edition of which was published in 2003. The handbook states specifically that the basic conventions apply to the making of decisions and not to policy announcements, and that the conventions do not apply to new policy promises that a government may announce during an election campaign. The basic convention about significant appointments is not relevant to the matters investigated here. The basic convention about ‘Major new policy implementation, contracts or undertakings’ is explained in the handbook in the following way:

9.5 Major new policy implementation, contracts or undertakings

The broad rule is that governments should avoid implementing new policies, or entering into major contracts or undertakings during the caretaker period. This includes commitments which could bind an incoming government. Major contracts or undertakings should not be considered only in terms of monetary commitment but should also take into account other relevant factors such as the nature of the undertaking and the level of bipartisan support.

Consistent with this requirement, major project approvals within government programs are normally deferred by Ministers.

The handbook also covers other established practices designed to ensure that departments avoid partisanship during election periods. These practices include matters such as the nature of requests that ministers may make of their departments, procedures for consultation by the Opposition with departmental officers, travel by ministers and their opposition counterparts, and the continuation of government advertising campaigns. As some of these practices are of particular relevance to the complaints made by Mr Springborg, they are set out in full below.

The handbook also states that the conventions and practices have no formal legal standing and that adherence to them is ultimately the responsibility of the Premier.

The caretaker period

The caretaker period, during which the conventions operate, extends from the dissolution of the Legislative Assembly, which in this case occurred on 13 January

2004, until the date the election result is clear or, if there is a change of government, until the new government is appointed.

Notification

The handbook requires that, shortly after the announcement of an election, the Premier is to write to all ministers, summarising the conventions. The Director-General of the Department of the Premier and Cabinet will write to all chief executive officers (such as directors-general of public service departments) in similar terms, and advising when the conventions commence.

Operations of departments

Specific advice is contained in the handbook about how departments should undertake their activities during an election campaign. The relevant commentary in this section, in full, provides:

The general rule during the caretaker period is that the normal business of government continues until the incoming government's wishes are known. Several aspects of a department's usual activities are, however, affected.

While departments are concerned at all times to avoid partisanship, the circumstances of an election campaign require special attention to the need to ensure the impartiality of the Public Service and its ability to serve whatever Government is elected.

During the election period, Ministers would usually sign only necessary or routine correspondence. It is desirable that judgment be used in determining whether correspondence of significance should be signed in this period by the Minister or by the Chief Executive Officer. Care is taken when preparing departmental replies not to assume that one party or another will form the government after the election. References to post-election action are in terms of the 'incoming government'.

During an election period, Ministers may not request the development of new policy initiatives but may request factual material from departments. Departmental officers should not use their official position to act in a partisan manner.

Departmental officers who feel there is a difficulty with a particular request from a Minister may raise the matter with the Chief Executive Officer of the Department who may, if necessary, consult with the Director-General of the Department of the Premier and Cabinet.

Consultations with the Opposition

The handbook provides a number of guidelines for pre-election consultation by the Opposition with departmental officers. The guidelines, which are directed towards ensuring a 'smooth transition in the event of a change of government' are as follows:

These guidelines may come into operation before the caretaker period, and apply as soon as the election announcement has been made or two months before the expiry of the term of the Legislative Assembly, whichever date occurs first. Like the practice in all other Australian jurisdictions, consultations during the caretaker period are conducted through informal discussions:

- Consultations with departments are initiated by the Opposition spokesperson making a request for access to the relevant Minister, who will notify the Premier as to the nature of the request and as to whether it has been granted.
- The subject matter of the discussion between officers and the Opposition spokespersons relates to the machinery of government and administration and the resources generally available in the portfolio area as they would relate to the implementation of Opposition policy. Officers are not authorised to discuss the merits of policies of either the government or the Opposition.
- Officers are to inform Ministers when the discussions are taking place and Ministers are entitled only to seek assurances that the discussions are kept within the agreed purposes. The content of the discussion is confidential to the participants.

- Departments will be represented in such discussions by the Chief Executive Officer and an appropriate officer with relevant expertise from the Department of the Premier and Cabinet.
- For the purpose of facilitating consultation, the Chief Executive Officer should seek details of the likely topics for discussion so that relevant information can be made available during the deliberations. Information should only be presented in the form in which it exists at the time of the consultation (e.g. annual reports, program statements etc.). Alternatively, information can be communicated orally.
- The creation of documents for, or records of, consultations should be avoided. The confidentiality of matters raised during discussions should remain insulated from partisan political debate during an election period. Specific material generated for, or notes taken during, the meeting would form an official record of the proceedings and seriously undermine the requisite confidentiality of the consultation particularly if the records subsequently became public.
- Departments will be expected to prepare two sets of briefing documents for the incoming government. One set will be drafted on the basis that the current government is returned, the second set on the basis that a new government is elected. Both sets of briefing documents should aim to provide the incoming Minister with a comprehensive statement of the organisation, structure, budget, functions and major current issues facing the department.
- Queries about approval of particular requests for consultation should be handled between a Minister and the Premier. Requests which involve an unreasonable amount of work by the department may properly be denied.

THE INVESTIGATION

OFFICERS INTERVIEWED

In the course of investigating this matter, CMC officers interviewed the following people in this order:

Mr Colin Jensen

Former Acting District Director
South Coast Hinterland District, Department of Main Roads
Mr Jensen's substantive position is Executive Director of Strategic Policy. He was Acting District Director for the department's South Coast Hinterland District from 5 January 2004 to 13 February 2004.

Mr Steve Golding

Director-General, Department of Main Roads
Mr Golding has been the director-general of the department since 2000.

Ms Kate Gilmore

Public Consultation Officer
Nerang Road Tek Consulting
(a commercial arm of the Department of Main Roads)
At the time of the investigation, Ms Gilmore had been in this position only six months.

Mr Bob Drew

Executive Director
South East Queensland Region, Department of Main Roads
At the time of the investigation, Mr Drew had been an executive director for four years.

Ms Louise Foley

Former Senior Media Adviser for the Honourable S D Bredhauer,
the former Minister for Transport and Minister for Main Roads.
At the time of the 7 February state election, Ms Foley had been employed in this position for a little over two years.

The officers appeared to have a basic understanding of the caretaker conventions. With the exception of Ms Gilmore, they have been employed in the public sector for many years and have worked in their respective roles during previous caretaker periods.

Additionally, documents were obtained from the Department of Main Roads, including letters and copies of e-mails.

The Leader of the Opposition (Mr Lawrence Springborg MP), two of his policy advisers (Mr Jake Smith and Mr Neil Hamilton-Smith) and the Director-General of the Department of the Premier and Cabinet (Dr Leo Keliher) were interviewed in relation to the Opposition's consultations with the public service during the caretaker period. The interview with Dr Keliher also covered procedural issues relating to the public sector and the caretaker conventions and practices.

The CMC acknowledges that the department, and all witnesses, cooperated promptly and fully with the investigation.

BACKGROUND TO THE B4 TUGUN BYPASS PROPOSAL

A bypass in the Tugun area had been in the planning for approximately twenty years. The clear preferred option by the Department of Main Roads and most stakeholders was the 'C4 option', which was a bypass to the west of the Gold Coast Airport. However, that option required the agreement of the New South Wales Government, as the route was predominantly in New South Wales, and in November 2003 the NSW Government withdrew its support. In December 2003, three options to the east of the airport were submitted by the Department of Main Roads to the Queensland Government. These were described as:

- B1 — this proposed bypass, immediately adjacent to the Gold Coast Highway, would create 12 lanes of traffic and would involve the resumption of approximately 40 residences
- B3 — this proposed bypass would go through the middle of the area between the Gold Coast Highway and the Gold Coast Airport, and would involve the resumption of all (approximately 150) residences between the highway and the airport
- B4 — this proposed bypass would skirt the northern end of the airport, necessitating the acquisition of airport land and the resumption of 14 residences in Adina Avenue.

The director-general, Mr Golding, advised that the B4 proposal was clearly the preferred option of the three. His department was waiting for an announcement about the direction of the project when the election was called. In the caretaker period the department continued to develop the three proposals as part of its normal planning and business.²

On 14 January 2004 (the day after the election was announced), a government policy statement was released headed 'Linking South East Queensland: The Beattie Government's Vision for Smart Transport'. In part, that statement read:

The government has been reviewing and refining the eastern options since New South Wales decided to withdraw its support for the preferred western option. We have been consulting with the Gold Coast Airport and the options need to be further refined to a stage where we can consult the community to develop a preferred option. Public consultation should commence in a few months time.

Mr Golding said that this statement was consistent with the decisions that had been made to that point. Later, on 5 February 2004, the Premier issued a media release entitled 'Beattie Government Ends Tugun Impasse' (see next page for full text). In addition, the Premier sent the residents a letter, in similar vein to the media release.

The media release is expressed in terms of the Beattie Government being re-elected. It is in the form of a new policy promise, announced as part of an election campaign. Accordingly, as noted earlier, there is nothing in this announcement that breaches the conventions.

Mr Golding advised the CMC that the content of the Premier's announcement was not a surprise to him; however, the timing of the announcement was not anticipated. He said he had expected that a further Cabinet Budget Review Committee submission would be made to seek approval as to the way the department would implement the process, including a communication strategy.

² During the CMC investigation it was announced (on 24 May 2004) that the New South Wales and Queensland Governments (the Queensland Beattie Government had by then been re-elected) had reached agreement on a route for the bypass to the west of the Gold Coast Airport. Media articles about the announcement noted that Mr Beattie had advised that, as a result of this agreement, work on the proposed eastern route would halt, and that no homes would be resumed.

Premier's media release: Beattie Government Ends Tugun Impasse

Gold Coast: A re-elected Beattie Government will double its financial commitment to the Tugun Bypass to \$240 million, Premier Peter Beattie announced today.

Mr Beattie said the Government had identified a new eastern corridor including Gold Coast Airport land as the alternative to the western option scuttled by New South Wales in November.

"This project will be a top priority for my Government, if we are re-elected on Saturday", he said.

"I will be directing my new Roads Minister to make this road happen.

"Our original commitment was for \$120 million, matched by the Commonwealth last year. As of today, we've doubled our commitment and will now contribute \$240 million."

Mr Beattie said the new corridor will require the resumption of 14 houses on the eastern edge of the airport.

"I know this will be difficult for residents who face having to move, but I assure them that if we are re-elected my Government's door will be open. They will be able to talk to my new Roads Minister, Member for Currumbin Merri Rose, or me," he said.

"I promise the residents they will be properly compensated and that we will offer them a range of assistance, including help to find another home.

"This was not an easy decision but the New South Wales Government when it reneged on its agreement left us with few alternatives if there is to be a Tugun Bypass. The western road would have been predominantly in NSW and they will not permit us to build it on their land.

"If re-elected we will immediately start consultation with residents and negotiations with the Federal Government and the Gold Coast Airport Corporation to acquire the airport land.

"I know how much disruption this issue has caused and I know traffic is one of the key issues for Gold Coast residents.

"I have listened to what the people have had to say. This corridor will cause the least disruption while at the same time providing a long-term solution to traffic problems in this area.

"It will also allow us to keep the Pacific Highway open during construction".

Mr Beattie said the corridor ruled out potential routes further east of the airport, including widening the Gold Coast Highway, and removed uncertainty for several hundred residents who live between the Gold Coast Highway and the Airport.

"Construction will begin next year, with the completion date to be finalised once we've finalised the engineering plan," he said.

"This new corridor is the best possible result for local residents and the Gold Coast.

"Only my Government has a solution for the Tugun Bypass. We will fix this issue once and for all."

ISSUES RELATED TO THE 5 FEBRUARY ANNOUNCEMENT

Contact between the departmental officers

Account by Mr Golding, Director-General, Department of Main Roads

Mr Golding said he became aware of the pending announcement the night before it was made. At approximately 7.30 pm on Wednesday 4 February 2004, he received a telephone call from the then Minister for Transport and Minister for Main Roads, the Honourable Steve Bredhauer. The minister told him that the Premier was expected to make an announcement the next day about the government's proposed route for the Tugun Bypass. Mr Bredhauer also passed on a request from the Premier's office for departmental officers to inform the affected residents of Adina Avenue, Bilinga, of the announcement, and that it would affect their properties.

Later that evening Mr Golding telephoned the department's Executive Director, South East Region, Bob Drew, and told him of the announcement. Mr Golding also made arrangements with the department's Director of Property Services for three property officers to attend the Nerang office for a briefing the next morning. It was intended that those officers would team up with officers associated with the project (into three groups of two) for the purpose of visiting the residents. It was thought that, between them, they would be properly qualified to answer any questions from the residents.

Account by Mr Drew, Executive Director, South East Region

On receiving the phone call from Mr Golding, Mr Drew telephoned Mr Jensen, the Acting District Director for the department's South Coast Hinterland District.

Account by Mr Jensen, Acting District Director, South Coast Hinterland District

Mr Jensen said he contacted Ms Kate Gilmore, the Public Consultation Officer for the Nerang office, and arranged to meet her at that office at 8.30 the following morning, Thursday 5 February 2004.

At that meeting, Mr Jensen told the six officers that the Premier would be making an announcement as to the proposed bypass, and that it would involve the acquisition of 14 houses. Mr Jensen also asked that the residents be advised by the officers as to how the department would proceed with the acquisition process, if the government was re-elected.

Account by Ms Louise Foley, Senior Media Advisor to the Minister for Transport and Main Roads

Ms Louise Foley contacted Mr Golding on the morning of the announcement to advise him of the Premier's pending announcement. She was unaware that her minister had already contacted the director-general.

She did not personally ask any departmental officers to do anything; however, she was told by Mr Golding that departmental officers were going to go and talk to the affected residents. This was the first time she had heard this. She later spoke by phone to Mr Jensen, who confirmed that departmental officers would be going to Adina Avenue. Mr Jensen read to her the contents of a letter (a draft of the one set out on page 1 of this report), which was proposed to be hand-delivered to the residents.

The Premier's media release was not given to any departmental officers before the Premier's announcement of the proposed bypass.

The officers' knowledge of the caretaker conventions

Account by Dr Keliher, Director-General, Department of the Premier and Cabinet

Dr Leo Keliher informed the CMC that, on 13 January 2004, the day the Legislative Assembly was dissolved, the Premier wrote to his ministers and he (Dr Keliher) wrote to all of the chief executive officers in the public service, advising of the operation of the caretaker conventions — as required by the *Queensland Cabinet handbook*.

E-mail to departmental staff

The investigation also established that on 13 January 2004 an e-mail was sent from the Director (Cabinet and Executive Services) of the Department of Main Roads to the department's director-general, executive directors, general managers and other directors. It was posted to the departmental message centre, which is received by all staff. That e-mail advised that the government was in caretaker mode and asked that all relevant officers be made aware of the caretaker conventions and matters relating to the operation of the department in the election period. It then provided approximately a page of basic explanation about the major conventions and the rationale for their existence, along with an outline of the procedure for dealing with requests from the Opposition during the caretaker period. The e-mail also provided contact details, if

further information or clarification was required about the caretaker period and its conventions.

The e-mail was considerably shorter than Dr Keliher's letter to the CEOs. Some further information about the content of the e-mail, compared to what is relevantly stated in the *Cabinet handbook*, appears in Chapter 5 of this report.

Account by Mr Golding, Director-General, Department of Main Roads

Mr Golding said that the e-mail was transmitted to all staff and that, at a senior management team meeting, there was discussion as to how to act in the caretaker period. This meeting involved district directors.

Mr Golding recalled having other contact with the minister's office about the Tugun Bypass prior to the events of 4 and 5 February 2004. This earlier contact involved requests made of his department for the following information and material:

- confirmation of the cost of the B4 option
- provision of a smaller-scale plan, including an electronic version, and
- information as to the consultation with the community that had occurred in 1999.

This information and material were provided, as it was considered that the requests were for factual information already known to the government. Accordingly, Mr Golding saw no possible breach of the conventions.

On 20 January 2004, Mr Drew and Mr Jensen met with Jack Noye, the minister's chief policy adviser, and Louise Foley, the minister's media adviser. Mr Drew and Mr Jensen briefed Mr Noye and Ms Foley on the impact of the three bypass options. Once again, Mr Golding said he considered the provision of this information was no more than an explanation of information that had been submitted to the government before the election period commenced, and no breach of the conventions arose. Copies of plans were used for the briefing but were retained by the departmental officers. All other contact in the election period between the department and the minister's office was over the telephone.

Account by Mr Drew, Executive Director, South East Region

Mr Drew said the general terms of the conventions were discussed at a regional management meeting involving regional advisers and district directors, including Colin Jensen.

Account by Mr Jensen, Acting District Director, South Coast Hinterland District

Mr Jensen said he ensured that everyone in his district received a copy of the e-mail alerting them to the operation of the caretaker conventions.

Account by Ms Gilmore, Public Consultation Officer, Nerang Road Tek Consulting (a commercial arm of the Department of Main Roads)

Ms Gilmore said that she had received the e-mail mentioned above and a further e-mail from Mr Drew on 15 January 2004.

The second e-mail attached another e-mail message dealing with arrangements for the handling of ministerial correspondence during the caretaker period. The attached e-mail advised that such correspondence was to continue to be sent to business groups/regions for the preparation of replies, but was to be prepared on departmental letterhead and under the signature of the director-general, until further advised. The e-mail noted that these arrangements were to extend to all ministerial responses that were under preparation. A set form of wording — advising the recipient that, due to the caretaker period, the director-general was responding on behalf of the minister — was to be used to commence responses on 'routine issues'.

Another form of wording was suggested for situations 'where the correspondence relates to issues of government policy or requires direction at a ministerial level'. The e-mail suggested that responses should be 'along the lines of':

I refer to your [letter/e-mail/ ...] of [date] to the Minister for Transport and Minister for Main Roads concerning [subject matter]. By convention, the government has assumed a caretaker role during the election period which precludes the current Minister responding to your issue prior to the election. You may care to write to the duly appointed Minister once the outcome of the upcoming state election on 7 February is known.

The covering e-mail noted that:

there are some Ministerials currently awaiting responses which will be deemed as 'government policy'. These Ministerials will not need a response but will be closed off as per advice below. [i.e. the attached e-mail, as described above]

This e-mail stated that the executive director of the region had confirmed that the Tugun Bypass was one of the 'policy' matters that could not be responded to.

Letter of 29 January 2004

Mr Drew gave the CMC a copy of a letter dated 29 January 2004 and addressed to a member of the public who had written to the minister about the bypass. That letter was on departmental letterhead and signed by the then acting director-general, Mr Don Muir. The letter nominated Mr Drew as the departmental officer to whom inquiries should be directed. It contained an opening paragraph noting the caretaker period. The letter then advised that the current government's position on a bypass in the Tugun area was as outlined in a statement released by the Premier on 14 January 2004 and headed 'Linking South East Queensland: The Beattie Government's Vision for Smart Transport'. The letter then quoted from that statement. The wording of the letter and the use of quotation marks made it clear that the letter reflected the current government's position and not that of the department.

The wording of that letter also demonstrated that care had been taken in the drafting process, in view of the election period and the conventions.

Account by Mr Golding, Director-General, Department of Main Roads

When asked by the minister to involve departmental officers in informing Adina Avenue residents of the proposal, Mr Golding 'quickly' reflected on the conventions. However, he considered that his department would not be 'implementing a policy' as further processes needed to be conducted before any implementation could start, and this would necessarily have to include a further government decision being made. He thought that, providing the officers' conduct was limited to informing the residents that an announcement had been made about the proposal, and that the proposal would have an impact on them, this action would not breach the conventions and would be a responsible action by the department, given that the Premier's announcement was going to be made. He did not see that advising the residents of a departmental contact officer would be a breach of the conventions.

In his discussion with Mr Drew, they did not talk specifically about the caretaker conventions; however, they spoke of doing the proper thing and keeping the involvement of the departmental officers limited to that discussed with the minister and that, if this was done, there should be no concern. He instructed Mr Drew that if there was any media or political activity the officers were to withdraw.

Mr Golding told the CMC that the Premier was publishing an authoritative planning proposal, which the department had prepared. Under normal operations of his department, the people who were to be affected by the proposal would have been contacted. He also said that the residents of Adina Avenue would not have been previously contacted by his department. He explained his officers' actions in terms of being a simple 'equity issue or ethical issue' in relation to those affected, who he thought were 'entitled to some decency'. Accordingly, it was proposed that a planning

officer and property officer from the department would call on each residence, to advise the owners that the proposal was being announced, how it would affect them, and then to leave details of departmental contacts. This action would put the property owners in the same state as other stakeholders.

Account by Mr Drew, Executive Director, South East Region

Mr Drew said he did consider the caretaker conventions, although they were not specifically discussed with Mr Golding. He considered the proposed actions as not committing a future government, but he was concerned that he and the other senior officers had been requested to use departmental resources to make contact with the affected residents and offer them support. He thought that this was 'borderline' in terms of the conventions; however, he also considered that if the announcement was going to be made, then it was better for the residents who would be affected to find out from the department than by any other way. He was concerned that this notification was to be done in such a way that the department was not drawn into the political campaign.

He had a similar discussion with Mr Jensen and recalled Mr Jensen saying to him that it was better the people find out from the department than from the media. He and Mr Jensen believed they should go ahead, for that reason. Mr Drew also stated that, in his view, the department was in the best position to undertake this action, as it had the people with the appropriate knowledge and skill to inform the residents. These officers were required to visit each residence to:

- advise that the Premier had made an announcement as part of the election campaign
- inform them that the proposal would affect their property
- acquaint them with departmental procedures
- provide a departmental contact.

Account by Mr Jensen, Acting District Director, South Coast Hinterland District

Mr Jensen said he had discussed with Mr Drew whether the proposed action would comply with the caretaker conventions. Mr Jensen said he felt comfortable it would not breach the conventions and would be a 'compassionate response to those 14 households'. Media reports, he felt, might be misleading and damaging, and the residents needed to be assured as to the processes. Departmental staff were there to reduce the impact on the residents.

Account by Ms Gilmore, Public Consultation Officer, Nerang Road Tek Consulting (a commercial arm of the Department of Main Roads)

Ms Gilmore recalled that the issue of a possible breach of the caretaker conventions was raised at the meeting on Thursday 5 February. However, she was not directly involved in the discussion, given her level and as the District Director and Project Director were present. On moral grounds, she did not want the residents to find out about the proposal through the media first. She did not believe she was doing anything wrong. Out of courtesy, and morally and ethically, it was the department's job to tell the residents face to face about the announcement.

Ms Gilmore noted that the actions of the officers, in advising the residents, had to coincide with the Premier's announcement so that the exercise was completed before any members of the media arrived at Adina Avenue. Ms Gilmore attended Adina Avenue and confirmed that she had advised the residents that the Premier had made an announcement and it would have an impact on their property. She advised the residents as to their rights as property owners and advised them how the acquisition process would work. Ms Gilmore stressed that it was clearly stated by her during these discussions that any decision was subject to the obtaining of all of the necessary approvals and also subject to the government being re-elected. Further appointments were organised for a time after the election. A number of residents, she said, thanked the departmental officers for coming to talk to them face to face.

The drafting of the department's Letter

The letter of 5 February 2004 was signed by Mr Jensen, Acting District Director, South Coast Hinterland. As noted, two passages of that letter could be interpreted as partisan political statements. Also, the letter does not specifically state that the proposal was in the form of a pre-election announcement, and that its likely impact upon the residents was subject to the re-election of the current government.

Accordingly, the CMC investigated the circumstances that surrounded the drafting of the letter, in order to establish whether there was any evidence of official misconduct by any person involved.

Account by Mr Golding, Director-General, Department of Main Roads

Mr Golding could recall speaking with Mr Drew about writing to the affected residents. He agreed that a letter be prepared, providing it only mentioned the fact that the Premier had made an announcement and did not canvass the merits of the announced proposal, and also provided departmental contact details. He told Mr Drew that the letter should 'not say much at all'. He thought that a letter to the residents would at least provide evidence of an accountable process, and would show that the announcement was not a hoax. He felt that in the shock of the announcement the residents may forget the detail, so the letter was to reinforce what they had been told.

Account by Mr Drew, Executive Director, South East Region

Mr Drew said that the idea for providing a letter to the residents came from Mr Jensen. He instructed Mr Jensen to keep the letter simple and to advise the recipients that the Premier had made an announcement, that it affected their property and that the department would support them. The letter was also to provide contact details.

Mr Drew thought those residents affected by the proposal would be shocked, angry and upset, and that the situation would be made worse if departmental officers went to see them and left nothing with them.

Mr Drew had a telephone discussion with Mr Jensen at about 9 am on 5 February 2004. During this call Mr Jensen read out part of a letter he had prepared. Mr Drew told Mr Jensen that it was too much and to keep the letter simple.

Mr Drew also told Mr Golding that he gave Mr Jensen that instruction and that he would send Mr Golding a copy of the draft letter when it was received. Mr Drew then went to a meeting relating to other urgent, unrelated business, and when he got back to his office Mr Jensen rang him. As a result of this call, Mr Drew then read another draft of the letter that Mr Jensen had prepared and e-mailed to him. After reading this draft he said to Mr Jensen that the letter was still too long and said too much. He put the time of this conversation at around 11 am.

Mr Drew explained to the CMC that at this time he understood that the Premier's announcement was imminent. He was concerned that the letter was not finalised, and that Mr Jensen had advised him that the departmental officers were still in the office, rather than being at the residences that would be affected by the proposal. He told the investigation that essentially he was faced with a choice of undertaking major surgery on the letter, which would delay the exercise, or 'letting it run'. As he thought delay would be undesirable, he decided to proceed with the letter in its then form. He did not forward the draft letter to the director-general, as initially intended, because, in view of the short timeframe, he did not think that the director-general could have intervened anyway. Mr Drew said the following about the letter:

I take responsibility for letters even though they weren't quite as I would have expressed it ... but in the end I just ran out of time.

There was nothing in them, I mean putting myself in the mind of the people, the residents who were getting those letters, there was nothing in them that would have been, I suppose, influential or political from their perspective. The thing that worried me more than that was that they weren't, they were cold hearted

and bureaucratic to a certain extent, rather than understanding and sympathetic. They were just, weren't simply the facts, just a simple expression of the facts was what I asked for ... in retrospect I should have probably drafted, had a go at drafting them myself but you know just normal processes took over and I don't draft those things normally, they normally come up to me and I do surgery on them if I have to.

Account by Mr Jensen, Acting District Director, South Coast Hinterland District

In Mr Jensen's view, handing a business card to the residents would not have been a compassionate message for the department to give. He said that in a stressful situation a resident may not remember what the person was told and provision of a departmental contact was necessary. Mr Jensen described the letter as a 'common courtesy of government trying to be actually more compassionate in the face of what is otherwise a very disruptive announcement'.

Mr Jensen stated that the letter was 'crafted very quickly', and he was not afforded what he considered would have been proper time for the drafting. He said that Ms Gilmore prepared the first draft of the letter. The first two paragraphs were copied from other existing letters. He discussed the letter's terms with the team of six officers that had been assembled. Ordinarily he would have taken care over such a letter, but in the circumstances the immediate issue was putting officers on site at the location of the residents who would be directly affected by the Premier's forthcoming announcement. He read the letter to Mr Drew over the phone, who told him it was 'close enough'. There was no other input into the terms of the letter.

Mr Jensen also recalled receiving a telephone call from Ms Foley, during which he was asked what was to happen if the officers could not meet all of the residents. He told her that a letter would be left. She asked him what the letter said and he read an early draft of the letter to her. He could not recall Ms Foley making any comment about the draft, nor him making any amendment to the draft as a result of that phone call.

Mr Jensen advised that it was an oversight that the letter was not qualified by containing reference to the event of re-election of the government (as being necessary for the proposal to proceed), although that was an issue stressed in the briefing given to his staff. If this oversight had been brought to his attention, appropriate wording would have been inserted in the letter. In his view, however, the contingency of re-election was reflected, to an extent, in the use of the word 'proposed'. He would have preferred to have had the draft letter referred to the director-general; however, time did not permit that to occur.

Account by Ms Louise Foley, Senior Media Advisor to the Minister for Transport and Main Roads

Ms Foley confirmed that Mr Jensen had read parts of the letter to her over the telephone. She said she had concerns about it, but did not say anything because she considered that it was not her place to have an opinion on the letter. She added that she considered the reference to the announcement should have been qualified. She could not recall suggesting any changes and noted that the first she heard about a letter was when Mr Jensen told her about it during this conversation. In conclusion, Ms Foley said that she thought the letter was 'maybe a little naïve'.

Account by Ms Gilmore, Public Consultation Officer, Nerang Road Tek Consulting (a commercial arm of the Department of Main Roads)

Ms Gilmore was asked about the purpose and drafting of the letter. She stated that, as the announcement would be a shock to the residents, the letter was to be given so that they had, in writing, the information that the departmental officers had come to tell them, as well as departmental contact details. Ms Gilmore commented that the residents might not remember detail and the letter would let them digest what was happening. The letter was never meant to politicise what was happening. Rather, the intention was to leave the residents with something to go back to and read, and to give them a contact in the department, if they wished to discuss the matter further.

Ms Gilmore agreed that she had prepared a first draft of the letter. Mr Jensen made some changes to it, which she incorporated into a new draft.

The first two paragraphs of this revised draft are identical to the final form of the letter.³ However, the next two paragraphs of the draft read as follows:

The Department of Main Roads has identified three possible options and from this analysis to date, it appears that option B4 has the least impact on the broader community. This route will run from Stewart Road Currumbin, east of the airport running parallel to the Gold Coast Highway. Land will be taken from Coolangatta Airport to minimise the impact on houses in Adina Avenue.

We have identified the preferred option will have an impact on your property and project staff today outlined the acquisition process.

Ms Gilmore stated that this draft of the letter was then further amended, following discussions with the team of officers that would be attending the site. Ms Gilmore clearly recalled Mr Jensen telling her to change the words 'preferred option' to 'proposed option', as appears in the final form. Ms Gilmore was uncertain as to who suggested the specific change from the use of the words 'it appears that option B4 has the least impact on the broader community' to 'the Premier has today announced a proposed route which has the least impact on the broader community'.

Standard responses to letters

Both Ms Gilmore and Mr Drew said in their interviews that they considered that the first two paragraphs of the letter were similar to other standard responses sent by the minister to interested parties, prior to the election period.

The CMC obtained copies of such letters for the purpose of comparison. The first paragraph of the final draft of the letter sent to the affected residents does appear to be in similar terms to these earlier ministerial responses. The phrase appearing in paragraph two of the draft letter, 'the Queensland Government has maintained its commitment ...', does not appear in any pre-election correspondence. However the earlier ministerial does refer to the Queensland Government recognising the issues, the minister asking the department to review alternative options and the minister being confident that a solution would be found.

Influence of Premier's media release and letter

The evidence from all of the departmental witnesses was that none of them saw the Premier's media release prior to the department's letter being drafted and delivered, nor did they see a letter that the Premier sent to the residents (on the day of his announcement), until some time after the election. There is nothing in the terms of the department's letter that would suggest either the Premier's release or his letter was used by the officers in the drafting process.

All of the witnesses stated that no person external to the department had contributed to the drafting of the department's letter or had any influence on the terms of that letter.

Other issues

Departmental officers and Member for Currumbin

On Tuesday 10 February 2004, the *Courier-Mail* reported:

It also is understood that Main Roads officials accompanied Labor's former Currumbin MP Merri Rose when she told residents they would have to move to make way for the road.

Before losing her seat at the 7 February election, Ms Merri Rose was the Member for Currumbin. The Currumbin electorate includes the properties that stood to be directly affected by the B4 route.

³ During the CMC investigation, the department gave the CMC a copy of the revised draft.

The evidence gathered in the investigation disclosed that the departmental officers were unaware that Ms Rose was going to be at Adina Avenue. Ms Gilmore was among the officers who went to Adina Avenue on the morning of 5 February 2004. She said that one of the residents told her that Ms Rose had visited that morning, but had since left. Ms Gilmore informed Mr Jensen, who instructed the officers to leave if Ms Rose was there. This instruction was given as a result of the earlier instruction from the director-general, which was communicated down the line, that officers were to withdraw if there was any political or media activity at Adina Avenue. The officers continued to visit the residents and there was no report made to them of Ms Rose being seen by any departmental officer at Adina Avenue. There is no evidence to suggest that Ms Rose and the departmental officers were at Adina Avenue at the same time.

It is clear that Ms Rose was with the Premier at the time of his announcement. Ms Foley confirmed (as one would have expected) that as the local member Ms Rose knew of the impending announcement through the Premier and his office; that the minister briefed Ms Rose prior to the election; and that the department was not involved in any briefing of Ms Rose during the election period.

The distribution of a map

The *Courier-Mail* article further stated that 'information distributed by Labor included a map of the proposed route prepared by the department'.

Ms Foley (Senior Media Adviser to the Minister for Transport and Main Roads) said that on the day of the Premier's announcement she had requested her office to obtain an electronic copy of the map from the department, and that a map was obtained and then distributed to the media. She further advised that this same map was the subject of a submission by the department, prior to the election being called.

Having regard to the evidence, the provision of the map in those circumstances is not inconsistent with the conventions, which permit the provision by departments of factual material (but not the development of new policy initiatives). The evidence on this point also discloses that the map had already been in the possession of the minister's office, although not in electronic form.

CONSULTATIONS WITH THE OPPOSITION

On 4 May 2004, the CMC received correspondence from the Leader of the Opposition, Mr Lawrence Springborg MP, indicating that he had some further information relevant to the investigation. Specifically, Mr Springborg advised that there had been a refusal by officers of the department to supply information to him during the caretaker period.

The CMC interviewed Mr Springborg and his Senior Policy Adviser, Mr Jake Smith. Both told the CMC that Mr Springborg had a briefing with Dr Leo Keliher during the caretaker period and that the Tugun Bypass matter was not mentioned as an issue of concern in that briefing.

Account by Mr Smith, Senior Policy Adviser to the Leader of the Opposition

Mr Smith telephoned the director-general, Mr Golding, on 6 February (the day after the Premier's announcement and the day before the election), and requested to be provided with the information that had been prepared for the Premier for the announcement. Mr Smith also asked Mr Golding whether that information had been prepared before the election was called. He asked for an assurance that no officers were involved in the project once the election had been announced. Mr Smith said that Mr Golding directed him to speak to the Director-General of the Department of the Premier and Cabinet, Dr Leo Keliher.

Account by the Leader of the Opposition, Mr Springborg

The Leader of the Opposition said that, later that same day, he went to the office of Mr Golding; however, no-one was available to talk to him. Mr Springborg said he left and coincidentally met Dr Keliher. Mr Springborg said that he raised with Dr Keliher his view that the events discussed above involved a breach of the caretaker conventions. Dr Keliher assured him that he would look into the matter and let him know the outcome. Mr Springborg said that he had received no further response from Dr Keliher.

The Leader of the Opposition also expressed a concern that, in his view, the Tugun Bypass matter should have been raised by the department during formal briefings between shadow ministers and directors-general held during the caretaker period. However, further inquiries by the CMC (with Opposition Policy Adviser Neil Hamilton-Smith) established that the Shadow Minister for Transport and Main Roads had decided not to hold a formal briefing with the Director-General of the Department of Main Roads during the election period.

Account by the Director-General of the Department of the Premier and Cabinet, Dr Keliher

Dr Keliher confirmed that he conducted a briefing with Mr Springborg. This briefing, held in Townsville on 27 January 2004 at the offices of the Department of the Premier and Cabinet, occurred in response to a request from the Opposition, and concerned issues such as the resources, the administration and the positioning of his department, should there be a change of government.

Dr Keliher also confirmed that there was no mention made of the Tugun Bypass issue during this briefing. He explained that he was not aware of the Premier's announcement about the proposed route of the bypass until the announcement was made and publicised on 5 February 2004. He was not aware of any officer in his department having any involvement in the announcement, or the preparation for it. Dr Keliher said that he was aware that the government was looking at options to have a bypass constructed, and in that sense he was not surprised by the Premier's announcement, although he was not consulted about the specific announcement or its timing.

Dr Keliher advised that at the time of his briefing with the Opposition, the Tugun Bypass matter was not a 'live' issue and, in any event, he considered that what the Premier subsequently announced was in the nature of a policy statement. For that reason, Dr Keliher was of the opinion that, even had he then been aware of the Premier's pending announcement, it would not have been appropriate for him to raise it at the briefing as it was a policy matter, rather than an administrative one. He described the announcement in the following terms:

The statement regarding the Tugun Bypass is a statement of policy intent of an existing policy made by a government during the course of an election. There is absolutely nothing wrong with that and it would only be a problem if the government or the department had signed contracts or entered into some new policy development during the course of the caretaker convention period. My understanding was that this was a very clearly existing policy program. There were a series of options and the government had announced an intended or proposed course of action that could or could not have been changed at any stage in the future. So there was no binding nature to this.

Dr Keliher also agreed that he had spoken with Mr Springborg on the day before the election (6 February 2004). This discussion was short and unplanned. He said that at the time he was having a meeting with another director-general over coffee when the Leader of the Opposition arrived, together with a media contingent. Dr Keliher said that Mr Springborg spoke to him and claimed that the caretaker conventions had been breached, although the alleged breaches were not, to Dr Keliher's recollection, specified by Mr Springborg. Dr Keliher also said that Mr Springborg demanded to know what he was going to do about that. Dr Keliher advised the CMC that his response was to the effect that he would look into the issue. He did so by making

inquiries of his department and concluded, for the reasons set out above, that there had been no breach. The inquiries undertaken by Dr Keliher at that time did not extend to considering the actions of the departmental officers. Upon later learning that officers had visited residents in the affected area, Dr Keliher advised that he considered such actions to be appropriate:

I didn't see that as grossly irresponsible or in any way breaching the caretaker process because what they were doing were, they were relating factual information, to the best of their ability, to the people who were affected. So they were explaining to them what this option meant and where the road would go under the preferred option. Some people might see that as improper. I think it is proper and it's a part of our duty to communicate with our clients. The Premier has been very forthright about the need for better communication from civil servants and I don't think you can do better than go and actually stand at the front door and talk to someone about an issue. So, I didn't have a problem with that. There were to my understanding maps also handed around or distributed. I followed up on that and I'm led, I'm told that there were existing maps, large maps and they photocopied them down to a smaller size or reduced the size of those maps. Again, as far as I'm concerned that's a factual thing. There is an existing document that's been photocopied down. I don't have a problem with that in terms of information, existing information and the way it's presented. So, from my brief analysis of the allegation that there had been a breach of the caretaker convention, I was satisfied that there'd been no such breach [breach] and I didn't even bother responding to Mr Springborg. He never followed up with me. He never called me. So I just assumed that it was a matter that he was satisfied with — that he had decided to let drop.

Dr Keliher stated that, in considering issues relating to Mr Springborg's assertion that the caretaker conventions had been breached, he was not aware of the departmental letter to the affected residents of 5 February 2004.

DISCUSSION OF THE EVIDENCE AND THE COMMISSION'S CONCLUSIONS

This chapter examines the evidence relating to the allegations that:

- 1 departmental officers had implemented a policy initiative contrary to the caretaker conventions
- 2 the departmental letter of 5 February 2004 was expressed in politically partial terms
- 3 there were improper refusals by the public service to supply the office of the Leader of the Opposition with relevant information about the Tugun Bypass.

THE IMPLEMENTATION-OF-POLICY ALLEGATION

There was a direct allegation by Mr Springborg that the conduct of the departmental officers amounted to the making and implementation of a major policy initiative, contrary to the conventions. The same allegation was also made against the Beattie Government; however, as noted above, even if a breach of the convention by an elected member could be substantiated, no issue of official misconduct could arise in respect of a politician.

Statement by Mr Golding, Director-General, Department of Main Roads

Mr Golding pointed out that, before any final decision about the B4 proposal was made, there had to be a review of environmental factors and that a detailed impact management plan, involving consultation, had to be prepared. Mr Golding said that it did not occur to him that the department was implementing or assisting to implement a policy during the caretaker period. He believed that the process of implementation could not begin until the above steps were taken.

Statement by Mr Drew, Executive Director, South East Region

Mr Drew also noted that the B4 option required the acquisition of airport land, which necessitated consultation and negotiation with Gold Coast Airport Limited (in relation to issues about the operation of the airport) and the Commonwealth Government, including the Department of Transport and Regional Services.

Mr Drew noted that it would be necessary for departmental officers to talk to the elected representatives of all significant stakeholders before embarking on a wider community consultation process. He stated that the department's letter was not a letter of notice of intention to resume, nor was it intended to be considered to be any step towards resumption or acquisition of the affected properties. Rather, its purpose was to provide information to the residents. In Mr Drew's view, the actions undertaken by the department were necessary as a result of the announcement and could not amount to an implementation of the policy.

Commission's conclusions

As already noted in Chapter 1, the terms of the announcement by the Premier were consistent with the conventions. The announcement amounted to no more than a new policy promise released during an election campaign. It would not have bound an incoming government, which could simply have announced, on being elected, that it

would not take any notice of the earlier proposed route, or advisory letter, and would make up its own mind about the Tugun Bypass route.

The department's letter reflected the Premier's announcement. The reasons as to why the letter was written have already been set out. In summary, it was drafted for provision to the residents who stood to be directly affected by the proposed route. It was not intended for wider circulation (although it might be thought that, given the imminent election and the public interest surrounding the bypass issue, the potential for wider circulation of the letter was obvious). While the letter did not contain any qualification as to the ultimate implementation of the B4 route being contingent upon the taking of further steps (such as those noted above by the senior departmental officers) and also did not specifically note the contingency of the Beattie Government being re-elected, it did twice make reference to the nature of the route as being 'proposed'.

Obviously, the department had no control over the fact that the Premier intended to make a major policy announcement on an important issue relevant to the department's operation. The department was only given short notice of the intended announcement. As noted, the issue of the Tugun Bypass and possible alternative routes had been under examination and development for some time.

The Commission considers that the evidence is insufficient to support a view that the actions of any of the relevant departmental officers involved an implementation of policy in breach of the conventions.

Accordingly, the Commission considers that the available evidence is insufficient to support a view in relation to this allegation that any such officer has engaged in official misconduct or otherwise acted in a manner that could now sustain disciplinary action against them. This allegation cannot be substantiated.

THE LACK-OF-IMPARTIALITY ALLEGATION

As explained above, two passages of the department's letter are clearly open to an interpretation that they are expressed in partial political terms. This raises the issue whether those passages (or consequently the letter itself) breaches the conventions.

In the Commission's view, on any objective reading of the letter it must be accepted that the abovementioned interpretation is open; that is, the 'partial political' interpretation is an obvious one on the face of the letter. That being the case, the wording of the letter has breached the practice, noted in the *Cabinet handbook* as being usually regarded as part of the conventions, that departments should avoid any partisanship during an election campaign.

Given the evidence as to how this wording came about, the issue now becomes one of whether there is any basis for the Commission to recommend any disciplinary action (including for official misconduct) against any departmental officer. As a general proposition, if there was reliable evidence that any officer had deliberately sought to breach the conventions or had otherwise sought to act in this matter for party political purposes, a sufficient basis would exist to warrant the Commission recommending the taking of disciplinary action.

Statement by Mr Golding, Director-General, Department of Main Roads

Mr Golding conceded that, in reviewing the letter after the event, he would have made some alterations, although he categorised these as minor. In his view, the statement in the letter that the option had 'the least impact on the broader community' was in some respects canvassing the merits and should not have been made. He did, however, assert that the statement was 'a true fact' and did not affect the impartiality of the letter. He would also have said in the letter that the route was a proposal and that any implementation would have to await the imprimatur of an incoming government. He thought such a statement would have been helpful to reinforce impartiality. In

summation, Mr Golding said, however, that the letter did represent quite fairly what should have been said to the residents, in his view. As noted, the evidence is that Mr Golding did not see the drafts of the letter, or the final version before its delivery, and his direct involvement did not extend beyond some general instructions about the letter and its suggested content.

Statement by Mr Drew, Executive Director, South East Region

Mr Drew stated that the letter was inappropriate, given the caretaker period. He acknowledged that the letter should have referred to an election announcement, which he said might have put it in a 'slightly better context'. He said he would not have approved the letter (in the form in which it was published) had it been given to him with time for proper consideration and without being under any time pressure.

Statement by Mr Jensen, Acting District Director, South Coast Hinterland District

Mr Jensen stated that he was satisfied he was doing the correct thing with the letter, both legally and morally. If the letter had been in breach of the conventions, he would not have signed it. He said that the contents of the letter were truthful, in his view, and that there was no intent to endorse the Premier's actions. He said that he has never been a member of any political party or had any specific political associations.

Statement by Ms Gilmore, Public Consultation Officer, Nerang Road Tek Consulting (a commercial arm of the Department of Main Roads)

Ms Gilmore stated that the letter was not meant to promote or support the government, but to give background and a rationalisation for the decision.

Commission's conclusions

In determining issues about the intent of the parties involved in preparing the letter, the Commission has noted the evidence as to the way the letter was created and, in particular, the tight timeframes operating on the departmental officers. Those time constraints — caused by the Premier's imminent announcement and the need to inform the residents affected — ultimately resulted in there being insufficient time for the director-general to review the letter or for Mr Drew to edit it further. In the Commission's view, the collective effect of the evidence as to how the letter was created is that its final terms resulted from inadvertence and a lack of available time to take sufficient care in the drafting process, rather than from any deliberate attempt to adopt a political stance favourable to the Beattie Government.

Further, the Commission notes that several officers were involved in the drafting process. There is no direct evidence of any collusion by these officers to attempt to achieve any political purpose; nor is there evidence that any officer sought to improperly influence their colleagues as to what the letter should contain.

All of the officers have explained, at length, why they considered it necessary for written advice to be given to the residents who stood to be directly affected by the Premier's intention to implement the B4 proposal, which carried with it the ultimate consequence of property resumptions. Dealing with those residents would be the responsibility of the department, as part of its normal business operations. In the circumstances, it is understandable that the department wanted to ensure that the residents heard about the proposal from the department, rather than via the media, and that contact details should be given for inevitable further inquiries. On that basis, the Commission considers that the furnishing of an advisory letter to the residents and the accompanying attendances by departmental officers were not, in themselves, inappropriate actions for the department to instigate, despite the existence of the election period.

For all of these reasons, it is considered that the evidence is insufficient to support a view that in preparing the letter any officer deliberately sought to flout the conventions or to otherwise act with the intention of advancing a political agenda. It follows that

the evidence could never support a finding of misconduct against any person. The weight of the evidence compels the conclusion that the contentious wording that ultimately appeared in the letter arose from two central causes:

- 1 an apparently inadequate understanding by those who drafted the letter of the scope and rationale of the conventions
- 2 the pressing timeframe that resulted in more senior officers having insufficient time to properly review the letter and give the relevant issues the consideration that the circumstances required.

It will be clear from the above discussion that the Commission agrees with the views expressed by Mr Golding and Mr Drew to the effect that the letter should have been drafted with more care. While it is accepted that the letter was drafted for a legitimate purpose, it was inappropriate, in the Commission's view, for it to contain any passages that were open to the interpretation that they were an expression of politically partial views. The reason for this is as succinctly expressed in the *Cabinet handbook*:

While departments are concerned at all times to avoid partisanship, the circumstances of an election campaign require special attention to the need to ensure the impartiality of the Public Service and its ability to serve whatever government is elected.

The fact that a complaint about the actions of the department was made to the CMC by the Leader of the Opposition itself underlines the sensitivity that attaches to the actions of the public service during caretaker periods, and the care that public servants must take to ensure that proper departmental business is transacted in a manner that is not suggestive of political partiality.

The letter was signed by the acting district director after only limited consideration by the executive director. The importance of the letter, coupled with the clear likelihood that it would quickly come to the attention of the media, warranted its fuller and careful consideration by Mr Drew and probably also review by the director-general. It is regrettable that the timeframe did not permit this. The Commission accepts, however, that the timing of the Premier's announcement put the department in a difficult position, in that little time was available to its officers to take the action that they deemed necessary in the interests of the residents.

As stated, the Commission is satisfied that the act of advising the relevant residents of the announcement about the possible effect of the proposed route on their property did not amount to an implementation of policy. However, the previously identified passages in the letter can be construed as being in breach of the conventions. It would have been appropriate for the letter to contain a suitable qualification, in the form of a clear statement that the proposed route was being announced as intended policy, contingent on the completion of relevant processes and also the result of the election.

THE POOR-CONSULTATION-WITH-OPPOSITION ALLEGATION

The first incident complained of by Mr Springborg involved the Director-General of Main Roads, Mr Golding, responding to the request for information made to him on 6 February by Mr Springborg's policy adviser, Mr Smith. Mr Smith said that Mr Golding informed him that he should speak to Dr Keliher (the Director-General of the Department of the Premier and Cabinet).

Complaints were also made about the fact that the Opposition had not been briefed about the Tugun Bypass issue during the caretaker period.

Commission's conclusions

In the circumstances, Mr Golding's response to Mr Smith cannot be considered to have been improper in any way. The *Cabinet handbook* prescribes how consultations between the Opposition and the public sector should be arranged during caretaker

periods, and states specifically that 'consultations with departments are initiated by the Opposition spokesperson making a request for access to the relevant Minister ...'. Additionally, Dr Keliher noted that he was the usual point of contact in the public service for queries that arose about the application of the conventions, and that his department had a central responsibility for ensuring that the public sector adhered to the conventions.

In relation to the alleged failure of the department to brief the Leader of the Opposition about the Tugun Bypass matter, the Commission does not consider that these complaints raise any possibility of official misconduct. The investigation has established that no specific portfolio briefing was sought from the department by the Shadow Minister for Main Roads. Dr Keliher advised that he did not refer to the Tugun Bypass matter during his briefing with the Opposition because he was unaware of any pending announcement. He also stated that, in any event, he considered the matter to be one of policy, rather than an administrative or resourcing matter.

SUMMARY

In relation to the first allegation, the Commission does not consider that any officer attempted to implement a policy in breach of the caretaker conventions.

In relation to the second allegation, the Commission is satisfied that the inappropriate passages contained in the letter resulted from a lack of understanding of precisely what was required by the conventions, exacerbated by the urgent timeframe associated with the drafting exercise. The evidence is that the officers were motivated not by political considerations, but by a desire to be of assistance to a small group of residents who were going to be directly affected by the Premier's announcement. There is also evidence indicating that the operational officers did not have a comprehensive understanding of the conventions. Hence, the Commission considers that there is a need to more effectively promulgate advice about the conventions when elections are called. The following and final chapter of this report makes some recommendations in this regard.

In relation to the third matter, the Commission considers Mr Springborg's allegations that there had been improper refusals by the public service to supply his office with relevant information about the bypass cannot be substantiated.

In all of those circumstances, it is thought that there is no proper basis to warrant the recommendation of formal disciplinary action against any officer. The failings that have generated criticism in this report are of a nature that would ordinarily be dealt with throughout the public service by way of an appropriate manager providing guidance to the responsible officers as to the proper performance of their duties and the need to be mindful to the specific sensitivities attaching to situations such as arose here. Accordingly, with the publication of this report, it is now a matter for the director-general to determine if any further action is necessary.

RECOMMENDATIONS

The *Queensland Cabinet handbook* provides that adherence to the caretaker conventions is ultimately the responsibility of the Premier. As such, the Director-General of the Department of the Premier and Cabinet has an important role in, first, notifying all directors-general of the operation of the caretaker conventions, and, second, in responding to any queries about the possible application of the conventions during the caretaker period. Accordingly, during the interview with Dr Keliher some general issues were raised for comment about the current form of the handbook, the training available to relevant officers and the promulgation of advice to the public service about the conventions. Having regard to the evidence arising from the investigation, the Commission has formulated four procedural recommendations for consideration by the public service. These and the rationale for each are given below.

THE PUBLIC SERVICE AND THE CONVENTIONS

Dr Keliher noted that his department would have had a significant role in developing the current statement of the caretaker conventions and practices, as contained in the handbook. As stated above, the conventions do not have the force of law. Dr Keliher observed that the conventions are ‘always subject to interpretation’, and described the relevant chapter in the handbook in the following terms:

I think that what we have there in the handbook is a fairly comprehensive, plain English spelling out of what the government believes the convention entails. And I think that by leaving it at a more broadened strategic level, you allow people the flexibility to be able to continue to operate. If you bind things down and define things more and more and give more and more examples, you really tie yourself in knots. You close off a lot of options. So I think that the system we’ve operated in the recent past has shown itself to be reasonably robust and, in light of the fact that I haven’t seen any major problems with it, I don’t see a need for major surgery. These sorts of things — I think every few years — you should pull them out of the drawer and have another look at them and see whether times have changed and whether some of things are still relevant. But I really don’t think the convention, as stated there in that chapter of the handbook, is in need of major surgery.

In the course of this investigation, the CMC has considered other statements of the caretaker conventions adopted by similar parliamentary systems, such as those of the Commonwealth, other Australian states and the United Kingdom. Some contain more details, some less. Relevantly, some statements are more expansive about how public servants are expected to act during election campaigns.

In Queensland, the *Cabinet handbook* is the definitive statement of the conventions and their application; there is no corresponding directive or specific policy material to guide public servants (beyond general statements of duties and obligations as contained in documents such as departmental codes of conduct).

In his interview, Dr Keliher noted that the conventions do not have a great deal of influence on rank-and-file staff, as the relevant issues (such as the making of significant appointments and the briefing of shadow ministers) are of a type that are generally dealt with at a strategic level in the public service. For that reason, he was confident

that directors-general would inform their senior staff, on a regular basis, of the importance of the issues dealt with in the conventions when an election was imminent. Dr Keliher noted that he had personally mentioned the matter at a regular CEOs' meeting prior to the election being called. From there, he saw that it was the responsibility of each agency to filter this awareness of the conventions down to appropriate levels.

When asked about the potential need for more focused training or instruction within agencies, Dr Keliher stated that he expected that every officer of senior executive (SES) level should have a very clear understanding of what the conventions require. However, he also stated that it would be a good idea to expose people at the level of middle management, such as Administrative Officer (AO) 7 and (AO) 8, and Senior Officer (SO) 1 and (SO) 2, to issues about the caretaker conventions, and that this might readily be done through relevant executive development courses.

In the Commission's view, it would be advantageous for all public sector agencies to ensure that relevant staff received adequate training and instruction about the existence of the conventions and their operation during caretaker periods. The identification and salary/responsibility level of such staff may vary between agencies, depending on an agency's size and functions. However, it should ultimately be the responsibility of each CEO to implement an appropriate program, and to decide which staff should receive such training. Staff should be selected on the basis of their duties and how the conventions would apply to those duties.

Recommendation 1

That all public sector agencies have an adequate training mechanism to ensure that staff are fully aware of the caretaker conventions and how they operate during election periods.

Recommendation 2

That CEOs of public sector agencies identify which staff should receive such training, having regard to their duties and how the conventions apply to those duties.

PROMULGATION OF INITIAL ADVICE ABOUT THE CONVENTIONS

The letter sent by Dr Keliher to the CEOs on the day the election was announced was over five pages long. Under the obligation imposed by the handbook, the letter advised of the main conventions and the time from which they were to start.

By contrast, the advisory e-mail circulated internally in the Department of Main Roads, although accurate in what it said, was much shorter and correspondingly less comprehensive than either Dr Keliher's letter or the relevant handbook chapter. For example (relevant to this case), the e-mail did not refer directly to the need to ensure the impartiality of the public service and the need to avoid partisanship during the caretaker period, beyond saying '... it is important to note that the incumbent should not be advantaged in the election period by taxpayer resources'. On the issue of preparing departmental correspondence, the e-mail stated that 'Care should be taken when preparing departmental replies not to assume that one party or another will form the Government after the election'. While the e-mail nominated a contact officer, it did not refer to the *Cabinet handbook* as being a source of further information about the conventions.

In the Commission's view, the understanding of the conventions by relevant public servants may be assisted if more detailed advice was to be provided within departments, summarising the conventions, at the time when caretaker periods start.

Recommendation 3

That CEOs of public sector agencies ensure that, as soon as caretaker periods begin, all relevant internal officers receive advice summarising the conventions.

THE AVOIDANCE OF POLITICAL PARTISANSHIP

All of the statements of caretaker conventions examined by the CMC make some reference to the desirability of the public service avoiding partisanship during caretaker periods. The *Queensland Cabinet handbook* puts this aim in the following terms:

While departments are at all times concerned to avoid partisanship, the circumstances of an election campaign require special attention to the need to ensure the impartiality of the Public Service and its ability to serve whatever government is elected.

As noted in Chapter 1, the Commonwealth publication entitled *Guidance on caretaker conventions*, states:

There are also established practices associated with the caretaker conventions that are directed at protecting the apolitical nature of the public service and avoiding the use of [Government] resources in a manner to advantage a particular party. The conventions and practices also aim to prevent controversies about the role of the public service distracting attention from the substantive issues in the election period.

In a document entitled '2001 General Election Guidance', the United Kingdom Cabinet Office noted that elections have a number of implications for the work of departments and civil servants and stated, in similar terms to those employed in the *Queensland Cabinet handbook*, that:

The basic principle for civil servants is not to undertake any activity which could call into question their political impartiality or could give rise to the criticism that public resources are used for Party political purposes.

However, in an accompanying note, more detailed explanation is provided as to how civil servants should deal with inquiries, briefings and requests for information. The guidance note extends to the preparation of 'constituency' correspondence, and says:

During the Election period replies to constituency letters received from members of Parliament before the Dissolution, or to similar letters from Parliamentary candidates, should take into account the fact that if they become public knowledge they will do so in the charged atmosphere of an Election and are more likely to become the subject of political comment ...

... it is quite possible that a personal case may become politically controversial during the Election campaign. Departments should therefore make particular efforts to ensure, so far as possible, that letters are simple, straightforward and give no room for misrepresentation.

While the contentious letter sent to the residents of Adina Avenue by the Department of Main Roads in this matter was not precisely in the nature of a 'constituency letter', as described above, the comments contained in the British guidance note are clearly relevant to the complaints made to the CMC and the circumstances investigated.

Obviously, one can speculate now as to what, if any, effect the existence of any further explanatory material may have had, in terms of providing guidance to the relevant departmental officers about what the conventions required and the likelihood that their actions, albeit well-intentioned on the evidence, would become politically controversial.

Accordingly, the Commission raises for consideration the possible benefit of providing further guidance to the public sector about this aspect of the conventions. There are several ways this could be done, such as through the inclusion of some more explanatory statements in the *Queensland Cabinet handbook*, or through internal departmental communications about the application of the conventions, or in the training and instruction programs mentioned above.

Recommendation 4

That additional ways be found to reinforce the requirement on all public servants to avoid any appearance of political partiality during caretaker periods.