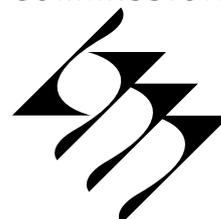


**REPORT ON AN INVESTIGATION
INTO THE ALLEGED MISUSE OF
PUBLIC MONIES, AND A FORMER
MINISTERIAL ADVISER**

December 2010

CRIME AND
MISCONDUCT
COMMISSION



QUEENSLAND

CMC vision:

That the CMC make a unique contribution to protecting Queenslanders from major crime, and promote a trustworthy public sector.

CMC mission:

To combat crime and improve public sector integrity.

ACKNOWLEDGMENTS

The CMC extends its appreciation to all those who took the time to assist this investigation by lodging public submissions.

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Dear Sirs

In accordance with section 69(1)(b) of the *Crime and Misconduct Act 2001*, the Crime and Misconduct Commission hereby furnishes to each of you its *'Report on an investigation into the alleged misuse of public monies, and a former ministerial adviser'*. The Commission has adopted the report.

Yours faithfully

A handwritten signature in black ink, appearing to read 'Martin Moynihan'. The signature is fluid and cursive, with a long, sweeping flourish extending to the right.

Martin Moynihan AO QC
Chairperson

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SUMMARY

This report describes an investigation by the Crime and Misconduct Commission (CMC) into a grant of \$4.2 million to the Queensland Rugby Union in 2008 and the role that Mr Simon Tutt, ministerial adviser to the then Minister for Police, Corrective Services and Sport, the Honourable Judy Spence MP, played in the awarding of that grant. During the course of that investigation, the CMC also considered more general concerns about the manner in which the then Department of Local Government, Sport and Recreation administered and awarded grants under its Major Facilities Program.

On 5 May 2009, the CMC received a letter from the Director-General, Department of Communities (formerly the Department of Local Government, Sport and Recreation), concerning a sporting grant of \$4.2 million awarded to the Queensland Rugby Union (QRU) in July 2008 (the rugby grants). Following receipt of that letter, the CMC commenced a misconduct investigation which centred upon two issues:

- the circumstances surrounding the department awarding the grant of \$4.2 million to the QRU; and
- the circumstances surrounding the use to which some of the grant monies were put by the QRU, including the transfer of \$200 000 to the University of Queensland Rugby Academy.

Chapters 1 to 3 of this report set out the background to the CMC's investigation. During that investigation the CMC obtained documents relating to the rugby grants, conducted interviews, undertook a series of closed hearings, held six days of public hearings, and at the close of the public hearings, invited public submissions on issues that emerged in the course of the investigation. The evidence obtained in the investigation of the rugby grants is outlined in Chapters 4 and 5 of this report.

Chapter 6 of the report contains the Commission's consideration of possible criminal prosecution or disciplinary action against any relevant party in relation to the rugby grants, in particular:

- disciplinary action (including for official misconduct) against Mr Tutt and/or Mr Matheson; and
- criminal prosecution of Mr Tutt and/or Mr Freer, the then CEO of the QRU, and/or the QRU.

Chapter 7 outlines the evidence about the Major Facilities Program grants.

Although no criminal or disciplinary action will be taken against any individual, the investigation has served to highlight several issues, including the need for procedural reform to prevent future misconduct and raise standards of integrity in the public sector. These issues and the Commission's recommendations are addressed in detail in Chapters 8 and 9 of the report.

The CMC's investigation brought to light a number of episodes where the interaction between a ministerial adviser and public servants ran contrary to established principles of good government. These events mostly occurred in 2008, and Queensland now has comprehensive provisions in place to prevent inappropriate interactions between ministerial staff and public servants, as a result of recent major reforms. The interaction is principally governed by and outlined in the *Ministerial and Other Office Holder Staff Act 2010* which came into effect on 1 November 2010; the Ministerial Staff Code of Conduct (which was being revised at the time this report went to press); and employment contracts.

However, in the CMC's view, consideration should also be given to creating a set of protocols to provide further and detailed administrative guidance to ministerial staffers and public servants. One of the most pressing reasons for developing such protocols is to provide continuity in times of transition when a minister or a CEO is replaced, and to make it clear that there is a right and appropriate way of doing business.

As far as possible, the protocols should be applicable uniformly across the entire Queensland public sector to ensure that the standards of integrity, transparency and accountability are uniform across all arms of government.

Recommendation 1

That Ministerial Services, Department of the Premier and Cabinet, conduct consultations to devise, introduce and monitor a set of protocols in accordance with the principles outlined in this report, governing communication between ministerial offices and public officials across the public sector.

The protocols should address the matters outlined herein, and include provision for monitoring and reviewing their operation, and allocation of responsibility for those tasks.

While the proposed protocols will apply to all ordinary dealings between the minister's office and departments, the CMC hearings indicated that there may be a particular need to make provision for communications which seek to influence the outcome of selection or evaluative processes, or which in effect amount to instructions from the minister's office as to what action a department should take, where that action may be contrary to the department's advice. A transparency process is needed to ensure that where a department's processes or advice are not followed or are overridden, the public can know that this has happened, know why it was done, and be given an explanation of why this was considered to be in the public interest.

Recommendation 2

That government departments and agencies be encouraged to introduce transparency measures, such as a statement of rationale, in respect of documenting their decision-making processes where a final decision by government overrides agency advice.

The conduct brought to light during this investigation highlighted the need for adequate training for all involved parties to ensure that the frameworks for ethical conduct are fully known and understood.

In recent times, with the creation of very large and diverse departments and complex portfolio arrangements, the management of staff and organisational tasks can be complex. Given that ministers are not elected or allocated to a portfolio on the basis of their office management skills, it would be unrealistic to expect all of them to be naturally gifted or widely experienced as people-managers. In terms of ministerial staff, both the evidence and the submissions in this investigation pointed to a clear need for training of ministerial staff which would specifically address the roles and accountabilities of ministers, staffers and public servants and the ethical obligations of positions in a minister's office. There is a similar need to train various departmental staff about what communications they should accept from ministerial staff, and for the actions they should take if they receive inappropriate communications.

In the CMC's view, measures to reassert and reinforce the independence of the public service should be accompanied by educational campaigns to remind senior public servants and politicians of their respective roles in this context.

Recommendation 3

That appropriate training in ethical and transparent communication between the minister's office and the agency be provided to:

- **ministers**
- **ministerial staff**
- **chief executive officers and senior managers**
- **departmental/agency staff.**

That appropriate training and support in staff recruitment and management be provided to:

- **ministers**
- **chiefs of staff.**

The evidence from the public hearings both in relation to the rugby grants and the 2009 Major Facilities Program demonstrates that it is imperative that the existing policies and guidelines be reviewed and where necessary tightened to remove risk and promote transparency in decision making and the documentation thereof. A minister has the right to overrule any process or departmental decision, but this should not occur clandestinely. A secondary process must be specified in the grants policies and guidelines so that when there is a departure from the usual assessment process the source of and authority for the change is clearly identified, verified and documented.

Recommendation 4

That the Department of Communities review its policies and guidelines relating to grants and other discretionary decisions, to ensure that there are adequate safeguards to prevent unauthorised or undocumented departures from due process.

The foregoing recommendations build on the reforms currently being implemented by government, and seek to address not only the possible incidence of misconduct, but also the underlying relationships and working cultures which in the past may have permitted misconduct to occur.

The CMC's recommendations are framed to contribute to the ongoing development of a culture of integrity in the public sector in which all participants can discharge their duty to the people and the state of Queensland freely, honestly and without fear.

ABBREVIATIONS

CM Act	<i>Crime and Misconduct Act 2001</i>
CMC	Crime and Misconduct Commission
Department	Department of Local Government, Sport and Recreation; as of 26 March 2009, Department of Communities
DPP	Director of Public Prosecutions
QRU	Queensland Rugby Union Limited
UQ Rugby Academy	University of Queensland Rugby Academy
UQ Rugby Club	University of Queensland Rugby Football Club

KEY FIGURES

Queensland Government (as at February 2008)

Hon. Judith Spence MP Minister for Police, Corrective Services and Sport 13 September 2007 – 26 March 2009; Minister of the Crown since June 1998.

Simon Tutt Senior Policy Adviser (also known as Chief of Staff) to the Minister for Police, Corrective Services and Sport, Ms Spence; four years experience as a ministerial adviser.

Michael Kinnane Director-General, Department of Local Government, Sport and Recreation; 25 years experience as a senior public servant.

Craig Matheson Acting Deputy Director-General of the Department of Local Government, Sport and Recreation; appointed to that role in December 2008; 20 years experience as a public servant.

Dianne Farmer Acting Executive Director, Sport and Recreation (in a job-share capacity) Department of Local Government, Sport and Recreation; five years experience as a public servant; an organiser for the Australian Labor Party prior to joining the Queensland Public Service.

Tracey O'Bryan Acting Executive Director, Sport and Recreation (in a job-share capacity).

Ben Klaassen Director, Program and Industry Development, Department of Local Government, Sport and Recreation; 17 years experience as a public servant.

Queensland Rugby Union (as at February 2008)

Kenneth Freer Chief Executive Officer of the Queensland Rugby Union (QRU).

Peter Lewis President of the QRU 2006–08.

Eric Anning Deputy Chairman of the University of Queensland Rugby Football Club; Chairman of the management committee of the University of Queensland Rugby Academy.

CHRONOLOGY

- 12 Feb 2008 At a meeting at Parliament House, Mr Peter Lewis and Mr Ken Freer of the QRU inform Minister Spence, Mr Simon Tutt and Mr Craig Matheson of plans for the redevelopment of facilities at Ballymore stadium.
- 10 May 2008 Mr Tutt and Mr Freer have a conversation at the Caxton Hotel where they discuss the possibility of a Queensland Government grant to the QRU.
- 03 Jun 2008 Mr Tutt and Mr Freer meet in Minister Spence's offices and discuss the QRU's financial situation and related issues. Mr Freer provides Mr Tutt with financial documentation.
- Early Jun 2008 Mr Tutt requests Mr Matheson to develop a list of possible funding proposals, one of which is redevelopment of the Ballymore stadium.
- 18 Jun 2008 Mr Freer contacts Mr Tutt by telephone.
- 19 Jun 2008 Mr Matheson emails Mr Tutt a list of future funding proposals, the first of which is the Ballymore stadium redevelopment.
- 24 Jun 2008 Mr Tutt and Mr Freer have a conversation about the grant.
- 25 Jun 2008 Mr Tutt arranges for the QR financial documents provided by Mr Freer on 3 June 2008 to be emailed to Mr Matheson.
- Early Jul 2008 Mr Eric Anning and Mr Tutt meet at a café in New Farm and discuss possible Queensland Government funding of \$200 000 for the UQ Rugby Academy.
- 02 Jul 2008 Mr Tutt, Mr Matheson and Mr Freer meet at Ballymore to discuss a grant to the QRU.
- 03 Jul 2008 Mr Freer emails Mr Matheson plans and costings, which indicate a total of \$4 million for the first three projects.
- 04 Jul 2008 Mr Matheson emails Mr Tutt a revised list of future funding proposals.
- 04 Jul 2008 Mr Matheson emails Mr Tutt a further revised list of future funding proposals.
- 08 Jul 2008 Mr Tutt and Mr Matheson have a conversation in which Mr Tutt tells Mr Matheson to complete a ministerial submission recommending a grant to the QRU in time for the minister to announce the grant at the Reds Gala Ball on 11 July 2008.
- 08 Jul 2008 Mr Matheson, Ms Tracy O'Bryan and Mr Ben Klaassen meet and Mr Klaassen is tasked with preparing a ministerial submission.
- 08 Jul 2008 Mr Freer emails Mr Matheson a draft letter to Minister Spence formally requesting government assistance to develop a new field and pool, and to upgrade the grandstand.
- 08 Jul 2008 Mr Klaassen emails Mr Matheson, Ms O'Bryan and Ms Dianne Farmer a three-page draft ministerial submission.

08 Jul 2008	Mr Matheson completes the ministerial submission (BN 487.08) recommending approval for \$4.2 million grant to QRU for two projects — a new pool and playing field.
10 Jul 2008	Minister Spence adopts and signs the ministerial submission.
11 Jul 2008	Mr Tutt telephones Mr Matheson requesting a copy of the ministerial submission of 8 July 2008.
11 Jul 2008	Mr Matheson emails Mr Tutt a copy of the ministerial submission at 11.04 am.
11 Jul 2008	Mr Matheson visits Mr Michael Kinnane at his home and advises him that Minister Spence plans to announce a grant for the Ballymore redevelopment at the Reds Gala Ball.
11 Jul 2008	Minister Spence announces a \$4.2 million grant to QRU during a speech at 7.00 pm at the Reds Gala Ball.
12 Jul 2008	Mr Tutt emails Minister Spence's media adviser informing him of the minister's announcement of the \$4.2 million grant.
12 Jul 2008	Mr Tutt emails Minister Spence referring to an article in that day's newspaper concerning the announcement of the \$4.2 million grant.
14 Jul 2008	Mr Anning emails Mr Freer regarding Academy scholarships and attaches the Elite Players Development Program.
14 Jul 2008	Mr Anning telephones Mr Freer and leaves a message. Mr Freer is not available and does not return the call.
18 Jul 2008	Mr Anning again telephones Mr Freer and leaves a message. Mr Freer is again not available and does not return the call.
21 & 22 Jul 2008	Ms O'Bryan, Mr Tutt, and Mr Freer exchange emails regarding a ministerial media release announcing the grant to the QRU.
22 Jul 2008	Mr Anning emails Rugby Academy officers regarding issues for discussion at a meeting with QRU on 25 July 2008.
23 Jul 2008	Rugby Academy officers and the QRU exchange emails regarding Academy scholarships and attaching Elite Players' Development Program.
25 Jul 2008	Mr Matheson takes leave from 25 July 2008 to 28 September 2008.
25 Jul 2008	Mr Freer, Mr Anning and others meet and refer to \$200 000 as the cost of scholarships to the Elite Players Development Program.
28 Jul 2008	The Department of Local Government, Sport and Recreation and Queensland Treasury exchange emails regarding the source of funds for the QRU grant.
30 Jul 2008	In a telephone conversation with Mr Freer regarding the QRU grant, Mr Tutt arranges a meeting between Mr Freer, Ms Farmer and Mr Klaassen.
30 Jul 2008 or 01 Aug 2008	Mr Tutt and Ms Farmer have a telephone conversation regarding facilitation of an up-front payment of \$1.4 million to the QRU.
31 Jul 2008	The governor-in-council approves expenditure of \$4.2 million by way of grant to QRU for the redevelopment of Ballymore stadium.

31 Jul 2008 Minister Spence convenes a media event at Ballymore stadium to formally announce Executive Council approval of QRU grant.

31 Jul 2008 UQ Rugby Academy and QRU exchange emails regarding scholarships to the UQ Rugby Academy.

01 Aug 2008 Meeting at the department between Mr Freer, Mr Klaassen and Ms Farmer regarding method of payment of grant monies.

04 Aug 2008 Email between UQ Rugby Academy and QRU regarding UQ Rugby Academy scholarships.

06 Aug 2008 Mr Klaassen tours Ballymore in the company of Mr Freer.

07 Aug 2008 Mr Klaassen emails Ms Farmer and another.

08 Aug 2008 Mr Klaassen emails Mr Freer a copy of a draft funding agreement for QRU grant.

08 Aug 2008 Mr Tutt emails departmental officers.

11 Aug 2008 Mr Klaassen and Mr Freer execute a funding agreement between the department and QRU.

12 Aug 2008 Mr Anning emails Mr Freer a formal proposal for scholarships with UQ Rugby Academy.

14 Aug 2008 Mr Anning emails UQ Rugby Club committee members (including Mr Tutt) regarding QRU's purchase of scholarship places.

14 Aug 2008 Departmental authority to pay QRU \$1.4 million issues.

15 Aug 2008 First instalment of \$1.4 million plus GST is transferred to QRU.

18 Aug 2008 UQ Rugby Academy and QRU exchange emails confirming scholarship arrangements.

26 Aug 2008 Mr Klaassen sends a letter to Mr Freer acknowledging receipt of signed funding agreement.

03 Sep 2008 Mr Scott Eisentrager (QRU) and Mr Anning exchange emails regarding payment of \$200 000 in two instalments; UQ Rugby Academy invoice 611 is attached.

05 Sep 2008 QRU pays \$100 000 to UQ Rugby Academy (invoice 611).

10 Oct 2008 Progress with the Ballymore redevelopment is discussed at a meeting between Mr Tutt and Mr Freer at Minister Spence's offices.

14 Oct 2008 UQ Rugby Academy emails various rugby clubs advising them of the scholarship arrangement with QRU.

24 Nov 2008 UQ Rugby Academy forwards invoice 627 in sum of \$100 000 to QRU.

01 Dec 2008 Media release announcing QRU scholarships at Rugby Academy.

12 Dec 2008 QRU pays further \$100 000 to the UQ Rugby Academy (invoice 627).

05 Feb 2009 From the minutes of QRU board meeting: CEO (Mr Freer) is to speak to the department about 'change in purpose' of grant.

05 Mar 2009	From the minutes of QRU board meeting: Audit advice is that grant money is to be maintained in a separate bank account. Mr Freer tasked to ask Mr Tutt to amend grant terms to reflect use of grant monies for operational expenditure.
26 Mar 2009	After the Queensland State Election on 21 March 2009: <ul style="list-style-type: none"> • the Hon. Phil Reeves MP is appointed the Minister for Sport • Ms Linda Apelt is appointed Director-General of the Department of Communities • Mr Tutt's appointment as a ministerial adviser ceases (on expiry of the notice period).
16 Apr – 08 May 2009	Numerous email attempts to arrange a meeting between QRU and the new Minister for Sport.
30 Apr 2009	At a meeting between Mr Freer and Mr Matheson, Mr Freer reveals that grant monies have been used for operational expenditure with Mr Tutt's knowledge.
05 May 2009	Mr Matheson sends a letter to QRU requesting financial report.
05 May 2009	Ms Apelt, Director-General of the Department of Communities acting on information from Mr Matheson, notifies the CMC of a matter which may involve official misconduct concerning the grant of \$4.2 million to the QRU.
15 May 2009	QRU emails Mr Matheson a summary of costs incurred to date.
25 May 2009	Briefing notes prepared for a meeting between Mr Freer and the new Minister for Sport.
01 Jun 2009	Ms Apelt sends letter to Mr Freer.
17 Jun 2009	QRU sends letter to Ms Apelt detailing spending of first instalment.
17 Aug 2009	QRU sends letter to UQ Rugby Club and UQ Rugby Academy requesting the return of \$200 000.
17 Aug 2009	UQ Rugby Academy's legal representatives send a letter to the QRU declining to return \$200 000.

INTRODUCTION

The Westminster system of parliamentary democracy is based on the proposition that government is answerable to the people to decide policy and public servants implement it.

...

Politicians have neither the time nor the qualifications and skills to make informed judgments upon the numerous complex issues which they confront. They are dependent on their advisers. Of course, politicians are entitled to political advice from staff appointed for that purpose. But that is not the job of the bureaucracy. Its role is to provide independent, impartial expert advice on departmental issues. Public officials are supposed to be free to act and advise without concern for the political or personal connections of the people and organisations affected by their decisions.¹

This report primarily describes an investigation by the Crime and Misconduct Commission (CMC) into a grant of \$4.2 million to the Queensland Rugby Union in 2008 (the rugby grants) and the role that Mr Simon Tutt, ministerial adviser to the then Minister for Police, Corrective Services and Sport, the Honourable Judy Spence MP, played in the awarding of that grant.

The funds for the rugby grants were sourced from a government program known as the Major Facilities Program, administered by the Department of Local Government, Sport and Recreation.² In 2009 the CMC also received specific but separate complaints about the administration of that program, essentially alleging that substantial amounts of public funding had been allocated without due process and regard to appropriate principles, and perhaps to advance personal or political ambitions. The CMC also considered concerns about the administration of the Major Facilities Program during its investigation into the rugby grants.

This investigation revealed that senior and very experienced public servants had been unduly influenced by a ministerial adviser. As a result, the advice the department ultimately delivered to the minister was neither impartial nor in accordance with applicable policy and guidelines. Although the minister was empowered to make the relevant grant of money regardless of the advice given by her department, the actions of senior public servants in recommending that she take certain action, when they did not necessarily believe such a course of action to be sound or in line with departmental policy, are concerning.

The CMC's investigations into these matters have resulted in its making a number of recommendations for procedural and administrative reform to prevent future misconduct and promote public confidence in government decision making.

-
- 1 Commission of Inquiry into Possible Illegal Activities and Associated Misconduct & Fitzgerald, Tony 1989, *Report of a Commission of Inquiry pursuant to orders in Council, dated 26 May 1987, 24 June 1987, 25 August 1988, 29 June 1989*, Commission of Inquiry into possible Illegal Activities and Associated Police Misconduct, Brisbane (hereafter referred to as the Fitzgerald Report), pp. 129-30
 - 2 Department of Communities, as of 26 March 2009.

Part 1:

Background to the CMC's investigation

THE ROLE OF THE CMC

Misconduct functions of the CMC: jurisdiction and principles

As stated in section 33 of the *Crime and Misconduct Act 2001* (the CM Act), the CMC's misconduct functions are:

- to raise standards of integrity and conduct in units of public administration; and
- to ensure a complaint about, or information or matter involving, misconduct is dealt with in an appropriate way, having regard to the principles set out in section 34.

Those principles are:

- Cooperation
 - To the greatest extent practicable, the commission and units of public administration should work cooperatively to prevent misconduct.
 - The commission and units of public administration should work cooperatively to deal with misconduct.
- Capacity building
 - The commission has a lead role in building the capacity of units of public administration to prevent and deal with cases of misconduct effectively and appropriately.
- Devolution
 - Subject to the cooperation and public interest principles and the capacity of the unit of public administration, action to prevent and deal with misconduct in a unit of public administration should generally happen within the unit.
- Public interest
 - the commission has an overriding responsibility to promote public confidence
 - in the integrity of units of public administration and
 - if misconduct does happen within a unit of public administration, in the way it is dealt with
 - the commission should exercise its power to deal with particular cases of misconduct when it is appropriate having primary regard to the following
 - the capacity of, and the resources available to, a unit of public administration to effectively deal with the misconduct
 - the nature and seriousness of the misconduct, particularly if there is reason to believe that misconduct is prevalent or systemic within a unit of public administration
 - any likely increase in public confidence in having the misconduct dealt with by the commission directly.

In relation to the allegation of official misconduct discussed in this report, the CMC determined that it should exercise its power to investigate the matter itself, rather than referring it back to the department.

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 means '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.

Hold an appointment means hold an appointment in a unit of public administration.

Conduct may be official misconduct even though –

...

- (c) a person involved in the conduct is no longer the holder of an appointment.

Sections 14, 15 and 16 of the CM Act

At the time the CMC received the complaint regarding the alleged conduct of Mr Tutt, ministerial advisers were appointed and employed pursuant to a contract of employment with the premier, through the Department of the Premier and Cabinet representing the State of Queensland.³ Ministerial advisers hold appointment in a unit of public administration, namely the Department of the Premier and Cabinet.

For that reason, the CMC may investigate conduct by former office holders, such as ministerial advisers, where it is alleged that they engaged in official misconduct while holding an appointment.

Conduct of the investigation

As part of the investigation, the CMC held public hearings and invited public submissions on related issues. This report makes recommendations for policy and operational improvements to assist in the prevention of future misconduct in the public sector.

Under section 69 of the CM Act, reports of the CMC on a public hearing must be given to the Speaker of the Legislative Assembly (and others) and tabled in parliament.

³ This changed with the commencement of the *Ministerial and Other Office Holder Staff Act 2010*, which came into effect on 1 November 2010, as will be discussed later in this report.

ADVISING THE MINISTER: MINISTERIAL ADVISERS AND PUBLIC SERVANTS

As applied in the State of Queensland, the Westminster system of government dictates that:

- ministers are accountable to the parliament for the administration of their portfolios
- the government of the day is ultimately accountable to the electorate
- each director-general of a government department is responsible to his or her minister for the delivery of the department's services and is ultimately answerable to the government.

The role of public servants

The expectation is that public servants will provide objective and impartial advice that is accurate and responsive, using their knowledge and experience to inform decisions by the government about issues and policy objectives. Public servants are then responsible for giving effect to the policies and decisions of the government of the day, regardless of its political complexion.

Good public administration demands that, as governments change, the executive can have confidence in the impartiality and professionalism of the permanent public service.

Until about forty years ago, ministers took their advice almost exclusively from the heads of department⁴ and senior public servants,⁵ and their administrative and secretarial requirements were largely met by departmental staff.

The role of ministerial advisers

The pace and growth of modern government in Australia has seen a surging rise in the volume and complexity of the ministerial workload, and ministerial advisers are now considered essential to the efficient conduct of the business of government. Although their role is, in theory, advisory and supportive, 'the ministerial staffing system has evolved to become a powerful new political institution within the Australian core executive'.⁶

In a recent communiqué to the Queensland Public Service, the Premier of Queensland identified her government's expectations of ministerial staff, in part, in the following terms:

Ministerial Staff. The practical realities of the Ministerial workload require that Ministers receive support to manage portfolio responsibilities, control policy direction and negotiate the political arena. This is the primary purpose of employing Ministerial staff; they support and assist Ministers to meet their broad responsibilities and provide advice which takes account of political considerations and complements the advice of the public service.

Ministerial staff do not have any executive power or other legal authority to direct public service officers in their own right. However, they perform a critical role in facilitating communication of Ministerial priorities to departments and acting as a conduit between Ministers and public service officers, for example by communicating a direction on behalf of their Minister.

4 Formerly referred to as 'permanent heads'

5 A Tiernan, 'Overblown or overload? Ministerial staff and dilemmas of executing advice', *Social Alternatives*, vol. 25, no. 3, third quarter 2006, p. 8

6 A Tiernan, 'Ministerial staff under the Howard Government: problem, solution or black hole?', Ph D thesis, Griffith University, Brisbane, pp. ii

Positive and productive interaction between the administrative and political arms of government is central to good government. Together, the work performed by Ministerial staff and the public service contributes to a robust system that allows Ministers to receive information and analysis that enable them to make informed decisions.⁷

The concept of the ministerial adviser (sometimes called the ministerial policy adviser) is a comparatively recent development in Westminster-style governments, which historically have been built on the complementary roles of the parliament and the executive, served by an apolitical public service. The formal provision of politically aligned advisers to ministerial staff was initiated federally in Australia by the Whitlam Government (1972–75). The number steadily increased over time, and by 2007 there were more than 370 ministerial advisers serving the Australian Government — an average of 12.5 per minister.⁸

Queensland was slower than other states to employ ministerial advisers and they did not appear in significant numbers until the period of the Goss Government (1989–95). However, there were more than 220 serving Queensland's ministers by 2007 — an average of 9.5 per minister. In contrast, at the same time in the United Kingdom there were 3.4 per minister, and in New Zealand, 2.0.⁹

After the machinery-of-government changes that followed the 2009 general election, the 18 Queensland ministers now have 217 ministerial staff — an average of 12 staff members per minister.¹⁰

This increase in the number of ministerial advisers has raised concerns about the appropriateness of this additional tier in government hierarchy. One risk, highlighted by this investigation, is that public servants can be confused as to the true role of the ministerial adviser, and thus give effect to the wishes of the adviser, who may not be acting at the behest of the minister.

7 Department of the Premier and Cabinet, *Premier's Communiqué*, 2010. The full communiqué is replicated in the Appendix of this report.

8 Office of the Public Sector Standards Commissioner, 2007, p. 64

9 *ibid*, pp. 63–4

10 Queensland, *Parliamentary debates*, Legislative Assembly, 18 August 2009, 1591 (Hon. A M Bligh, Premier) Electronic <www.parliament.qld.gov.au>.

RELEVANT LEGISLATION, POLICY AND PROCEDURE

In 2008 and 2009, when the Department of Local Government, Sport and Recreation was considering a grant of funding to the QRU, the following legislation, policies and procedures were in place to govern the disbursement of funds for sport and recreation, and the conduct of public servants, including ministerial advisers.

Legislation

Under the *Financial Administration and Audit Act 1977* in force in 2008,¹¹ the treasurer was obliged to prepare and table in parliament a 'charter of social and fiscal responsibility' based on the principles of:

- transparency and accountability in developing, implementing and reporting on the government's social and fiscal objectives
- efficient and effective allocation and use of resources in achieving the objectives
- equity relating to the raising of revenue, delivery of government-funded services and allocation of resources, and between present and future generations
- prudent management of risk.

As at 1 July 2008, all public servants, including ministerial advisers, were employed pursuant to the *Public Service Act 2008*.¹² The purposes of that Act are to:

- establish a high performing apolitical public service that is
 - responsive to government priorities
 - focused on the delivery of services in a professional and non-partisan way
- promote the effectiveness and efficiency of government entities.¹³

The *Public Sector Ethics Act 1994*, as in force in 2008, set in legislation the ethical principles for public officials in Queensland, which were:

- respect for the law and the system of government
- respect for persons
- integrity
- diligence
- economy and efficiency.

The Act required each department to establish its own code of conduct, which was approved by the relevant minister, and which reflected these ethics principles. At the time of the investigation, the department had such a code of conduct.

The *Public Records Act 2002* imposes a statutory obligation on a 'public authority' to make and keep full and accurate records of its activities, and expressly defines a minister and a department as a 'public authority'.

¹¹ That Act was repealed and replaced by the *Financial Accountability Act 2009*.

¹² Prior to 1 July 2008, public servants were employed pursuant to the *Public Service Act 1996*, which imposed similar duties and obligations on them.

¹³ See section 4 of the *Public Service Act 2008*.

Departmental procedures

Major Facilities Program 2009

From time to time the department implemented various grant programs such as:

- the Major Facilities Program 2009 which, from 1 August 2008, applied to all requests for funding in excess of \$100 000 to create or improve sport and recreation facilities in Queensland
- the Minor Facilities Program 2009, which applied to requests for funding of less than \$100 000.

From the \$30 million allocated for the Major Facilities Program, eligible parties could apply for grants of up to 50 per cent of the total cost of 'approved projects' (i.e. construction of new and/or improvement of existing sporting and recreational facilities).

In general, the written procedure for assessing these applications required that the department:

1. call for formal applications (in a prescribed form with detailed documentation attached establishing the cost of construction) from interested parties
2. assess the applications according to established criteria.¹⁴

Between February and July 2008 (the period during which requests for funding by the QRU were considered) there was no formal written procedure on how to assess ad hoc submissions for grants — such as the QRU request for funding — outside the period set aside for this purpose. This meant that there were no specified criteria against which applications could be assessed; nevertheless, public servants were still required to comply with the department's code of conduct and the basic principles and obligations set out in the legislation described above.

See Chapter 7 of this report for further detail on administration of the Major Facilities Program 2009.

14 The guidelines for this program were tendered as exhibit 23 in the CMC's public hearing to investigate alleged misuse of public money. Transcripts of evidence, exhibits and submissions to this hearing are available on the CMC website at <www.cmc.qld.goc.au>.

Part 2:

The CMC investigation

INVESTIGATION OF ALLEGATIONS OF MISCONDUCT

This section outlines the events leading up to the CMC's investigation of the rugby grants and the allegations against Mr Simon Tutt, and explains how the investigation was conducted.

Events leading up to the investigation

Complaint received in February 2009

In February 2009, just before the March 2009 state general election, the CMC received an initial complaint from an anonymous source concerning Mr Simon Tutt, senior policy adviser to the then Minister for Police, Corrective Services and Sport, the Honourable Judy Spence MP. That complaint alleged that in 2008, Mr Tutt, as the minister's senior policy adviser:

- had orchestrated the payment of a sporting grant to the University of Queensland Rugby Football Club; and
- was a member of the Executive Committee of the UQ Rugby Club at the time the payment was made to the club.

In response to inquiries made by the CMC regarding the allegation about Mr Tutt, the department informed the CMC that though the UQ Rugby Club had made five applications for grant funding since 2004, none of these had been successful. As a result of this information, the CMC closed the complaint because it did not raise a reasonable suspicion of official misconduct.

Complaint received in May 2009

On 5 May 2009, the CMC received new information from the department concerning a sporting grant of \$4.2 million that it had awarded to the QRU in July 2008.¹⁵ The formal funding agreement entered into by the Queensland Government and the QRU stated that the money had to be used as specified, that is, for constructing a pool and rugby field at Ballymore, in Herston, an inner Brisbane suburb.

Based on information it had received from Mr Ken Freer, Chief Executive Officer of the QRU, the department sent a letter to the CMC setting out the following issues of concern:

At a meeting on 30 April 2009, the Chief Executive Officer of the QRU informed Mr Craig Matheson, Deputy Director-General, Sport and Recreation Services in this Department that:

- the QRU had paid \$200 000 of the grant funds to the University of Queensland Rugby Club for an education scholarships program, as Mr Freer had been advised to do by Simon Tutt, former senior adviser to the former Minister for Sport. According to the website for the University of Queensland Rugby Football Club, Mr Tutt is a member of its Executive Committee
- as the original intention of the grant (as discussed between himself, Mr Tutt and the former Minister for Sport prior to the awarding of the grant) had been to provide funding to the QRU to assist it to meet current costs, he was seeking agreement for the QRU to use the grant funds in this way — at least for this year.¹⁶

¹⁵ Under section 38 of the CM Act, a chief executive officer of a unit of public administration must notify the CMC of a complaint or information that involves, or that may involve, official misconduct.

¹⁶ Letter, Director-General Department of Communities to the CMC, 5 May 2009.

In assessing this further information, the CMC considered that the alleged conduct, if proven, was capable of amounting to official misconduct because:

- at the relevant time, Mr Tutt held an appointment in a unit of public administration (the Department of the Premier and Cabinet)
- the conduct allegedly involved the performance of Mr Tutt's functions or the exercise of his powers in a way that was not honest or impartial; and/or
- the alleged conduct involved a breach of the trust placed in Mr Tutt as a senior policy adviser; and/or
- the alleged conduct involved a misuse of information or material acquired in connection with the performance of Mr Tutt's functions as a senior policy adviser, whether that misuse was for Mr Tutt's benefit, or the benefit of someone else; and
- the conduct, if proven, may have amounted to either a criminal offence or a disciplinary breach providing reasonable grounds for terminating Mr Tutt's services, as senior policy adviser.

The CMC investigation

Following receipt of the Director-General's letter, the CMC commenced a misconduct investigation into the rugby grants. The investigation centred upon two issues:

- the circumstances surrounding the department awarding a grant of \$4.2 million to the QRU; and
- the circumstances surrounding the use to which some of the grant monies were put by the QRU, including the transfer of \$200 000 to the UQ Rugby Academy.

In addition, the investigation extended beyond possible criminal and disciplinary action and encompassed a consideration of broader public policy issues raised by the information referred to the CMC. As the CMC has a statutory function to prevent misconduct, it has used this misconduct investigation to consider more broadly what principles should govern the role of ministerial advisers and the relationship between ministerial staff and public servants.¹⁷

During its investigation the CMC obtained documentation relating to the rugby grants, conducted interviews and then undertook a series of closed hearings.

Between 23 November and 6 December 2009, the CMC held six days of public hearings into this matter. The transcripts and exhibits tendered during the public hearings are available on the CMC's website at <www.cmc.qld.gov.au>.

At the conclusion of the public hearings, the CMC invited written submissions from interested parties, with specific attention to the following three questions:

- What protocols, procedures or constraints should be in place to guide ethical and mutually respectful interactions between a minister's office and public servants?
- How may public servants be empowered to challenge or question a request or direction from the minister's office that they consider to be inappropriate?
- What needs to be done to ensure that public servants at all levels of government understand their obligation to provide independent, apolitical and impartial advice, and to maintain the freedom to do so?

In response the CMC received 26 submissions. These will be discussed in Chapters 8 and 9.

¹⁷ See Part 1 of Chapter 2 of the CM Act.

OUTLINE OF ALLEGATIONS AND EVIDENCE

This chapter provides an overview of events for the period under investigation and outlines the evidence gathered during the investigation.

Background

Simon Tutt

Mr Tutt holds a degree in Law, and prior to the CMC's investigation had worked within the Queensland political environment for most of his professional life.

In April 2002, he worked as an electorate officer in the electoral office of a member of Parliament. In February 2004, Mr Tutt commenced employment as a policy adviser (at classification A06.1) to the Honourable Judy Spence MP (then the Minister for Police and Corrective Services). In February 2006, he was promoted to senior policy adviser (A08.4) and again in October 2006 to classification SO1.1 (senior officer). From October 2006, Mr Tutt was the 'chief of staff' to Minister Spence, although his title remained 'senior policy adviser'.

At all material times, Mr Tutt was a member of the executive committee of the University of Queensland (UQ) Rugby Club.

Craig Matheson

Mr Matheson commenced employment in the Queensland Government in June 1989 in the Department of the Premier and Cabinet. Mr Matheson worked in various positions within DPC until 1994, when he moved to the Department of Housing, Local Government and Planning. By 2001, that department was titled the Department of Innovation, Information, Economy, Sport and Recreation.

In October 2002, Mr Matheson was appointed the Executive Director, Sport and Recreation — a senior executive service (SES) position. In this role, he was responsible for providing policy advice to the director-general and minister and for overseeing programs and services that were the responsibility of Sport and Recreation Queensland.¹⁸ Mr Matheson had responsibility for sporting and recreation grants.¹⁹

In April 2007, Mr Matheson was appointed acting deputy director-general of the department, while the deputy director-general went off-line to work on the local government reform and council amalgamation process.

In December 2008, Mr Matheson was appointed to the position of Deputy Director-General, Department of Local Government, Sport and Recreation.

Queensland Rugby Union (QRU)

The Queensland Rugby Union (QRU) is the body responsible for the administration of rugby union in Queensland.

From July 2006 until October 2009, its chief executive officer was Mr Ken Freer.

¹⁸ Evidence of Mr Matheson, day 3, p. 240

¹⁹ Evidence of Mr Matheson, day 3, p. 240

In July 2007, the Federal Coalition Government announced a grant of \$25 million to be awarded to the QRU. This sum was earmarked to assist a \$60 million plan to redevelop Ballymore stadium at Herston, the traditional headquarters of the QRU and, until recent years, the principal playing field for rugby in Queensland.

Following the federal funding announcement, the QRU prepared a development application to obtain the Brisbane City Council's formal approval for the planned redevelopment of Ballymore stadium, and incurred significant costs in the process.²⁰

However, in early 2008, the newly elected Federal Labor Government withdrew the promised \$25 million grant. Faced with the loss of its federal funding and, having already incurred costs associated with the planned redevelopment, the QRU decided to approach the Queensland Government for funding.

Outline of relevant events

12 February 2008 — QRU approach to the Queensland Government

On 12 February 2008 at Parliament House, Mr Peter Lewis, Chairman of the QRU and Mr Freer, then CEO of the QRU, met with Minister Spence, Mr Tutt, her senior policy adviser, and Mr Craig Matheson, then Acting Deputy Director-General of the Department of Local Government, Sport and Recreation.²¹

Part of that discussion involved Mr Lewis outlining in general terms the QRU's plans for redevelopment of Ballymore Stadium;²² the federal government's promise of financial assistance which had been revoked; and a request for the Queensland Government's assistance with funding for the redevelopment.²³

No party attending the meeting made any record of the discussion at that meeting.²⁴ While it is common ground that Minister Spence was sympathetic but non-committal, there is little consensus among the witnesses as to the information conveyed to Minister Spence about the QRU's financial state at the time.

According to Mr Freer, as at 12 February 2008, the QRU was losing between \$1 million and \$1.2 million annually. The major component of that loss was depreciation expenses and expenses for maintenance of the Ballymore facilities.²⁵

Mr Freer's memory of the 12 February 2008 meeting is that he made mention of the QRU's poor financial state.²⁶ However, Mr Tutt maintains he was not left with the perception that the QRU was facing financial difficulty.²⁷

Whether or not the precise details of the QRU's then financial predicament were canvassed, it is accepted by all who were present that the catalyst for the approach to the minister had been the withdrawal of federal funding.

20 Evidence of Mr Freer, day 1, p.51 — the amount was in excess of \$500000

21 Evidence of Mr Freer, day 1, p. 53; see also evidence of Mr Tutt, day 4, p. 347

22 Evidence of Mr Freer, day 1 p. 53, evidence of Mr Matheson, day 3, p. 243

23 Evidence of Mr Matheson, day 3, p. 243

24 Evidence of Mr Freer, day 1, p. 53; see also evidence of Mr Matheson, day 3, p. 244

25 Evidence of Mr Freer, day 1, p. 54

26 Evidence of Mr Freer, day 1, pp. 53–4

27 Evidence of Mr Tutt, day 4, p 374

May – June 2008

According to Mr Freer, throughout the first half of 2008, Mr Tutt was involved in efforts to secure state government financial support for the QRU.

Mr Freer asserts that at an after-game function held at the Caxton Hotel on or about 10 May 2008, Mr Tutt told him that he (Mr Tutt) and Minister Spence had been talking about the QRU and that they were looking to assist it with a grant of a million dollars over three years, the purpose of which was to meet the costs of depreciation for Ballymore stadium (which were then around \$1 million per year).²⁸

Mr Tutt's recollection of this conversation with Mr Freer at the Caxton Hotel was that the conversation was a general discussion, held in a social context, in which:

- Mr Tutt asked Mr Freer how things were going
- Mr Freer informed Mr Tutt that the QRU's further discussions with the federal government had not been fruitful
- Mr Freer indicated that the QRU would like to reopen discussions with the Queensland Government to fund the redevelopment of Ballymore stadium
- Mr Tutt suggested that Mr Freer give him a call to arrange a meeting
- no sums of money were discussed.²⁹

Following his conversation with Mr Tutt, Mr Freer collated documentation concerning QRU's financial position and made an appointment to meet with Minister Spence.

On 3 June 2008, Mr Freer attended the minister's office and met with Mr Tutt (in the minister's absence). Mr Freer provided Mr Tutt with the QRU strategic plan, an update on the Ballymore redevelopment, and a suite of QRU financial statements which he discussed with Mr Tutt.³⁰

Mr Matheson claims that at about the same time (i.e. in early June 2008), Mr Tutt spoke to the director-general and Mr Matheson, and tasked them with developing a list of 'concept proposals' which Minister Spence could consider as 'potential announcements or opportunities'. Mr Matheson recalled that Mr Tutt flagged some items which included \$4 million for the QRU and 'something equivalent for cricket'. 'He also asked us to look at some of the other sports as well' and '... I think he also said to look more broadly ... in the physical activity, recreation sort of area.'³¹

On 19 June 2009, Mr Matheson emailed Mr Tutt a list which included, as the first item, a single-line entry identifying the possibility of grant funding to the QRU in the sum of \$4 million over three years.³²

In relation to the list compiled by Mr Matheson, Mr Tutt stated that:

- He certainly had input into the list, as did other policy advisers within the minister's office and that departmental officers were the main drivers of the ideas on the list.
- It was feasible that he had suggested that Mr Matheson include the QRU's request for funding on the list, and that he (Mr Tutt) had suggested the figure of \$4 million, but that Mr Matheson was well aware of the QRU's desire to receive a funding commitment from the Queensland Government, at the time he prepared the list.³³

Mr Freer initially claimed that on 24 June 2008 (by reference to a notation in his diary) he had a conversation with Mr Tutt in which Mr Tutt:

28 Evidence of Mr Freer, day 1, p. 55

29 Evidence of Mr Tutt, day 3, p. 350

30 Evidence of Mr Freer, day 1, p. 56

31 Evidence of Mr Matheson, day 3, p. 244

32 That email with attached list was tendered as exhibit 26 in the public hearing.

33 Evidence of Mr Tutt, day 3, p. 353

- informed him that while the Queensland Government had not yet approved any grants, Mr Tutt thought that a \$4 million grant was to be awarded to the QRU
- said that the UQ Rugby Academy was in similar financial difficulty to the QRU and that he was going to give the QRU a \$4 million grant but he was actually going to advance it \$4.2 million and he wanted Mr Freer to transfer \$200 000, (the 'extra \$200 000') to the UQ Rugby Academy. He also said that Mr Freer should contact Mr Eric Anning and work with him to develop a program to use those funds appropriately for the benefit of rugby
- was adamant that Mr Freer not talk to the QRU board about the proposal, which Mr Freer understood was because the grant had not yet been approved and because the QRU board allegedly had a history of leaking information.³⁴

As at 24 June 2008, Mr Eric Anning was the deputy president of the UQ Rugby Club and chairman of the management committee of the UQ Rugby Academy.

Mr Freer, on cross-examination, recalled that his conversation with Mr Tutt about the issue of the extra \$200 000 was 'face to face'.³⁵

Mr Tutt's version differs from Mr Freer's. Mr Tutt recalled having a telephone conversation (as opposed to a meeting) with Mr Freer on 24 June 2008 and that the substance of that conversation was that:

- Mr Tutt apologised for not having done anything with the QRU financial documents Mr Freer had given him on 3 June 2008 because it was a very busy time for the Queensland Government, with the budget and estimates hearings.
- Mr Tutt informed Mr Freer that he would forward the documents to the appropriate departmental officer and convene a meeting, perhaps in a week's time, once the officer had read the documents.³⁶

Mr Tutt also stated that following this telephone conversation with Mr Freer, he arranged for another officer in Minister Spence's office to scan the financial documents Mr Freer had given him, and to send them to Mr Matheson within the department.³⁷

2 July 2008: the meeting at Ballymore

The QRU was hosting the Queensland Reds Gala Ball, on Friday, 11 July 2008. Minister Spence and Mr Tutt had been invited to attend that ball.

According to Mr Freer, on 2 July 2008, he received a telephone call from Mr Tutt, who informed him that:

- the grant to the QRU looked very promising
- Minister Spence was considering making the announcement at the Reds Gala Ball
- for the purpose of the announcement, the funding needed to be targeted at 'some bricks and mortar' that were part of the redevelopment
- that Mr Freer would need to send in a letter formally requesting a grant.³⁸

Mr Freer consulted with Mr Lewis, the QRU Chairman, about the 'bricks and mortar' projects to which the grant could be applied. Mr Freer prepared a letter which he forwarded by email to Mr Matheson at 12.55 pm on Thursday, 3 July, 2008, enclosing drawings of the proposed redevelopment and costings as follows:

34 Evidence of Mr Freer, day 1, p. 57

35 Evidence of Mr Freer, day 1, p. 109

36 Evidence of Mr Tutt, day 4, p. 356

37 The email of 25 June 2008 from a ministerial officer to Mr Matheson enclosing the financial documents was exhibit 9 tendered during the CMC hearing.

38 Evidence of Mr Freer, day 1, pp. 60, 61

Ballymore Redevelopment

Preliminary Costing For Total Development
(July 2008)

New Rugby Field	\$1.5M
Indoor Heated Swimming Pool	\$1.6M
New Corporate Facilities West Stand	\$0.9K
New Public Gymnasium	\$2.3M
New QRU Club Function & Catering Facility	\$2.9M
100 room player village accommodation	\$14.6M
New Sports Medicine Building (Stage1)	\$9.0M
New Sports Medicine Building (Stage 2)	\$6.4M
Landscape, Services, Roads, Fees	\$4.0M
Repairs, Maintenance, Upgrades and Demolitions	\$2.0M
TOTAL ESTIMATED COSTS	\$45.2M³⁹

The first three items of those costings (new rugby field, indoor heated swimming pool and new corporate facilities in the western stand) totalled \$4 million.

Mr Freer's diary recorded a meeting with Mr Tutt on 2 July 2008.⁴⁰ He had no recollection of Mr Matheson also attending that meeting.⁴¹

Mr Tutt and Mr Matheson recalled travelling to Ballymore on 2 July 2008 to meet with Mr Freer.

According to Mr Matheson, while driving to Ballymore, Mr Tutt said 'We want to provide funding to start the Ballymore redevelopment'. He also said that Mr Matheson's role at the meeting was to outline to Mr Freer what documentation the QRU would need to provide to support the grant, and that Minister Spence wanted to announce the commitment at the QR Reds Gala Ball.⁴²

Mr Matheson interpreted these comments as suggesting that the minister wanted to provide a grant to the QRU.

During the course of the meeting between Mr Tutt, Mr Matheson and Mr Freer at Ballymore, which Mr Matheson thought lasted 20 to 30 minutes, Mr Matheson recalled that:

- he informed Mr Freer of the type of information that the department would require to process the grant, including detailed costings, plans and a quantity surveyor's report estimates⁴³
- Mr Freer indicated he had that information and would be able to get it to Mr Matheson
- Mr Matheson gave Mr Freer his contact details.⁴⁴

Mr Tutt similarly recalls the meeting at Ballymore with Mr Freer on 2 July 2008.⁴⁵ Mr Tutt did not believe he would have used the term 'bricks and mortar' but conceded it was feasible that he would have said words to the effect that the government funded sporting infrastructure as a priority.

39 Mr Freer's letter to Mr Matheson was exhibit 10 tendered at the CMC hearing

40 Evidence of Mr Freer, day 1, p. 110

41 Evidence of Mr Freer, day 1, p. 110

42 Evidence of Mr Matheson, day 3, pp. 249–50

43 Evidence of Mr Matheson, day 3, p. 250

44 Evidence of Mr Matheson, day 3, p. 252

45 Evidence of Mr Tutt, day 4, p. 361

Increase in the grant from \$4m to \$4.2m

At 1.00 pm on 4 July 2008, Mr Matheson emailed to Mr Tutt an updated list of 'Possible Future Commitments/announcements'. The description attributed to the Ballymore stadium redevelopment was expanded to read:

POSSIBLE FUTURE COMMITMENTS ANNOUNCEMENTS

Queensland Rugby Union

\$4 million over three years to progress the first phase of the redevelopment of Ballymore. This would involve a contribution over three years towards the development of a new rugby field, an indoor heated swimming pool and corporate facilities in the western stand.

There are also potential linkages between the development and the needs of Queensland cricket in developing the next stage of the Cricket Australia Centre of Excellence.⁴⁶

At 1.24 pm on 4 July 2008, Mr Matheson sent another email to Mr Tutt enclosing an amended list of possible future commitments/announcements 'updated as we discussed a few minutes ago'.⁴⁷ The only change to the enclosed document was an increase in the proposed QRU grant from \$4 million to \$4.2 million.

According to Mr Matheson, a short time after sending his 1.00 pm email to Mr Tutt, he was telephoned by Mr Tutt, who explained that the minister wanted to say the government was providing 'in excess' of \$4 million to the QRU and asked Mr Matheson to amend the grant to \$4.2 million. Mr Matheson justified the increase as attributable to contingency considerations such as the indoor pool, because the estimate for that project was, in his experience, low.⁴⁸

According to Mr Tutt, the increase from \$4 million to \$4.2 million came about after discussions with Mr Matheson about whether the QRU's calculations had included contingency considerations. On 4 July 2008, Mr Tutt received a telephone call from Mr Matheson, and they discussed the QRU's documentation in support of a grant. Mr Tutt states that Mr Matheson informed him that they were good preliminary documents. Mr Matheson had indicated it would be a good idea to provide for a contingency amount, and an additional five percent was added to the total grant figure.

Mr Tutt's evidence is that he does not recall nominating the figure \$4.2 million when speaking with Mr Matheson, but it is feasible he said something about the minister wanting to announce something in excess of \$4 million.

As set out above, Mr Freer asserts that in a face-to-face conversation with Mr Tutt, on a date he initially thought was 24 June 2008, but now cannot say which day, Mr Tutt informed him that:

- he was going to give the QRU \$4 million, but the grant would be in the amount of \$4.2 million to the QRU and he wanted the QRU to give \$200 000 to 'UQ Rugby'.⁴⁹
- Mr Freer should get in contact with Mr Anning at UQ Rugby, and work with him to develop a program to use those funds appropriately for the benefit of rugby.

At the time of this conversation, Mr Freer did not know that the UQ Rugby Academy was distinct from the UQ Rugby Club.⁵⁰

Mr Tutt denies the \$200 000 increase to the proposed grant was to accommodate a payment by the QRU to the UQ Rugby Academy. Mr Matheson says that there was no mention of \$200 000 of QRU grant monies being given to UQ Rugby Academy at any time during his discussions with Mr Tutt and Mr Freer.

46 This email was tendered as exhibit 27 at the CMC hearing.

47 Mr Matheson's email of 1.47 pm on 4 July 2010 is exhibit 28 tendered at the CMC hearing.

48 Evidence of Mr Matheson, day 3, p. 270

49 Evidence of Mr Freer, day 1, p. 109

50 Evidence of Mr Freer, day 1, p. 58

8–11 July 2008: preparation of the ministerial submission; announcement of the grant

It is largely common ground that Minister Spence would announce the grant to the QRU at the Reds Gala Ball which was to be held on Friday 11 July 2008.

According to Mr Matheson, on Tuesday 8 July 2008, Mr Tutt and Mr Matheson had a conversation. Mr Matheson claims that he informed Mr Tutt that the department was having difficulty getting detailed information from the QRU. In response to this advice Mr Matheson stated that Mr Tutt reminded him that Minister Spence wanted to announce the QRU grant that Friday night (11 July 2008) and said words to the effect, ‘you need to get this moving’.⁵¹ Mr Matheson’s evidence was that despite his advice about his difficulties in getting information from the QRU Mr Tutt was ‘quite direct’ in reminding him of the minister’s wish to make an announcement at the upcoming ball.⁵² Mr Matheson was asked by counsel assisting the CMC’s hearings how he would get the matter moving when he did not have what he considered to be sufficient information. His answer was as follows:

I formed the view that we would have to get a briefing note or — sorry, ministerial submission, prepared as quickly as possible based on the information that we had. It was my understanding that this was a matter that the minister wanted to happen, and that we would have to go with what we had, that we would need to point out some of the risks in the briefing note around the proposal and I guess the lack of information. And, and those risks would have to be — they would have to be managed.⁵³

Mr Tutt recalled having a conversation with Mr Matheson on 8 July 2008, in which he asked Mr Matheson how the QRU application for a grant was progressing. Mr Matheson said that he was still waiting on some documents from the QRU. Mr Tutt then said that if it were possible, it would be good if the grant could be announced on Friday (at the Gala Ball).⁵⁴ He also gave evidence that he asked Mr Matheson ‘if it was feasible’ that there could be an announcement by the end of the week.⁵⁵ However, Mr Tutt denied any suggestion that he had placed undue pressure on Mr Matheson to progress the grant:

Well, I certainly accept that I said to Mr Matheson that it would be good to, to have an announcement. But there was never any suggestion I would want due process bypassed for that announcement.⁵⁶

Mr Matheson treated Mr Tutt’s request as an ‘instruction from the minister’.⁵⁷ As noted above, Mr Matheson’s view was that to get the process moving, a ministerial submission had to be prepared for Minister Spence, which highlighted the risks in awarding the grant, which would have to be managed⁵⁸. In turn, Mr Matheson instructed senior officers to urgently prepare a submission, pursuant to his understanding of what Mr Tutt had asked of him.

51 Evidence of Mr Matheson, day 3, p. 257

52 Evidence of Mr Matheson, day 3, p. 257

53 Evidence of Mr Matheson, day 3, p. 258

54 Evidence of Mr Tutt, day 4, p. 365

55 Evidence of Mr Tutt, day 4, p. 366

56 Evidence of Mr Tutt, day 4, p. 396

57 Evidence of Mr Matheson, day 3, pp. 262–3

58 Evidence of Mr Matheson, day 3, p. 258

The initial preparation of the draft submission fell to Mr Ben Klaassen, the Director, Program and Industry Development of the department. Mr Klaassen recalled that Mr Matheson told him that he had one hour to prepare a ministerial briefing note to recommend that Minister Spence approve a \$4.2 million grant for a pool and a field at Ballymore stadium.⁵⁹ According to Mr Klaassen, Mr Matheson informed him that it was still fine for it to be announced prior to governor-in-council approval, as this had happened before.⁶⁰

Mr Klaassen said it normally took him from three hours to a day to assess an application for a grant.⁶¹ It took him slightly longer than the hour to produce a ministerial submission, three pages in length. According to Mr Klaassen, there was no real assessment of the QRU application for a grant and he was not given the opportunity to undertake one. His view is that there was inadequate information to permit a full assessment of the application.⁶²

Mr Klaassen also explained that the previous program guidelines related to grants received in 2007. The QRU application for a grant was received in June 2008. The 2009 Major Facilities Program only applied from August 2008.⁶³ The QRU application for grant funding was therefore not assessed against the detailed written guidelines for the 2009 Major Facilities Program. In effect, the department had no written guidelines to assess ad hoc or 'out of round' funding applications. Mr Klaassen gave evidence about his view as to what should happen in those circumstances:

... there was no funding round open at that particular point in time. So, it was, it was what we would term an 'out of round application', which is not unusual in itself. But the normal process would be we would expect an organisation to submit material to demonstrate the value of the project, and an assessment process would be followed and then a recommendation developed for consideration.⁶⁴

The only knowledge Mr Klaassen had at that time of the QRU's financial position was through media reports, and he was not aware that they had significant financial issues.⁶⁵

At 1.11 pm on 8 July 2008, Mr Klaassen emailed his draft ministerial submission to Mr Matheson, who later that day set about making substantial amendments to it.⁶⁶ Mr Matheson says he amended the ministerial submission to reflect the risks of proceeding with the grant.⁶⁷

After Mr Klaassen had prepared his draft ministerial submission, Mr Matheson received an email from Mr Freer at 1.30 pm attaching a letter addressed to Minister Spence. The letter formally requested financial assistance from the Queensland Government to initiate the redevelopment. The letter said that the assistance would allow the QRU to proceed with three key elements of the total plan:

- the development of a new full-size football field (estimated at \$1.5 million)
- construction of a new indoor heated swimming pool (estimated at \$1.6 million)
- a badly needed upgrade to the western stand facilities (estimated at \$0.9 million).

59 Evidence of Mr Klaassen, day 2, p. 148; also p. 152

60 This evidence was given by Mr Klaassen in closed hearings before the CMC.

61 Evidence of Mr Klaassen, day 2, p. 148

62 Evidence of Mr Klaassen, day 2, p. 152

63 Evidence of Mr Klaassen, day 2, p. 163

64 Evidence of Mr Klaassen, day 2, p. 148

65 Evidence of Mr Klaassen, day 2, p. 150

66 Mr Klaassen's email was tendered as exhibit 9 at the CMC hearing.

67 Evidence of Mr Matheson, day 3, p. 266

The final version of the ministerial submission (recommending that the minister approve the grant of \$4.2 million for two of the three proposed projects) was presented by Mr Matheson to Ms Tracey O'Bryan, the Acting Executive Director, Sport and Recreation, who was asked to sign the document. Ms O'Bryan — who was relieving in Mr Matheson's substantive role — told the CMC she was aware the document had been prepared on the instruction of Mr Tutt. She conceded that she read the document but otherwise did not consider or value-add to the process.

The final ministerial submission recommended that Minister Spence:

- i. approve grant funding of \$4.2 million (GST exclusive) payable over three years to the Queensland Rugby Union to initiate the first stage of the Ballymore development with the funding targeted at supporting the development of the new rugby field and heated swimming pool
- ii. approve that funding for the grant to the Queensland Rugby Union be redirected from the budget of the Major Facilities Program
- iii. agree for the Executive Director, Sport and Recreation to develop and execute an appropriate funding agreement with the Queensland Rugby Union to support the grant commitment and to accommodate the risks and requirements outlined in this brief
- iv. note that the Department of Local Government, Sport and Recreation will prepare an Executive Council Minute for approval of the expenditure prior to the execution of the funding agreement.⁶⁸

On the afternoon of 11 July 2008, Mr Matheson and two departmental officers went to the residence of Mr Michael Kinnane, the director-general of the department.⁶⁹ At the time, Mr Kinnane was on extended sick leave while recuperating after hospitalisation, and was preparing to return to work. It became Mr Matheson's practice to visit Mr Kinnane at home to keep him abreast of relevant matters.

Mr Matheson asserts that during his visit to Mr Kinnane on 11 July 2008, he informed the director-general of Minister Spence's intention to announce the QRU grant during the Reds Gala Ball. He also claims that he told Mr Kinnane that the department had received limited information from the QRU; that it had been given a tight deadline — 'we had to go with what we had'; that there were risks for the department; and that 'we'd have to manage those risks'.⁷⁰

According to Mr Matheson, Mr Kinnane indicated he had read the ministerial submission and that it was a 'balanced brief'.⁷¹

Mr Kinnane did not recollect Mr Matheson's visit to his home on 11 July 2008.⁷² His evidence is that he was aware that there was a QRU function coming up in the near future and that Minister Spence was keen on making an announcement at that particular function. He was aware in the most general terms of the grant but had no recollection of Mr Matheson speaking to him about any concerns he had about the grant to the QRU.⁷³

Following the hearings, Mr Matheson drew the attention of the CMC to the explanatory memorandum that accompanied the Executive Council Minute formally approving the expenditure associated with the QRU grant. That memorandum set out information about the circumstances relating to the grant. It was signed by the minister and also by Mr Kinnane.

68 Ministerial submission to Minister Spence, 8 July 2008, tendered as exhibit 2 at the CMC public hearing.

69 Evidence of Mr Matheson, day 1, p. 273

70 Evidence of Mr Matheson, day 3, p. 273

71 Evidence of Mr Matheson, day 3, p. 273

72 Evidence of Mr Kinnane, day 3, p. 333

73 Evidence of Mr Kinnane, day 3, p. 325

Mr Kinnane also gave evidence that he was of the view that a public servant should give to a minister a recommendation that he or she believes is the appropriate recommendation to make, not a recommendation that he or she understands the minister wants to receive.⁷⁴

Mr Kinnane also commented on whether public servants were permitted to say ‘no’ to ministers and their advisers:

I’ve had the experience as a director-general for a long period of time where there have been some instances with different ministers I’ve had to say ‘no’. I don’t think that’s an uncommon practice within the public sector at any level of government in any jurisdiction. There are some stages, there are some times when it’s not possible to actually implement an instruction by the minister or feedback from the minister and in those circumstances, given our separation of powers and the Public Sector Ethics Act and things that I hold very dear to my heart there is no choice but to say ‘no’. So I think that public servants are empowered to say ‘no’. It’s whether they feel it’s their comfort zone in saying ‘no’ in a very tough environment.⁷⁵

Ministerial approval for the QRU grant

In her evidence, Ms Spence recalled that the ministerial submission put before her for the QRU grant was a very strong one endorsing the paying of the money to the QRU.⁷⁶ Favourable aspects and some risks were identified in the ministerial submission.

She acknowledged that the submission did not contain information indicating that the QRU was in a poor financial position, and conceded that such information would have been an important consideration for her. She also said that she expected public servants to include such information which indicated one of the risks to be considered when deciding whether or not to approve a grant.⁷⁷

The minister made the announcement notwithstanding the fact that the Executive Council had to endorse the grant by recommending that it be approved by the governor-in-council. By convention, Executive Council Minutes are approved in a cabinet meeting and subsequently by the governor-in-council. Ms Spence believed she could announce the QRU grant in these circumstances.⁷⁸

The formal funding agreement

In compliance with the ministerial submission approved by Minister Spence, an ‘appropriate funding agreement with the QRU to support the grant commitment and to accommodate the risks and requirements outlined in this brief’ had to be prepared.⁷⁹

Mr Matheson was on annual leave from 25 July 2008 until 28 September 2008. In his absence, Ms Dianne Farmer and Mr Klaassen handled the contractual negotiations with Mr Freer.

The department used a standard form agreement for such grants, which provided that:

- the recipient (QRU) acknowledges that retainment of the funding conditional on the QRU expending it only on the approved projects (clause 4.1)
- ‘approved projects’ were defined as the Ballymore redevelopment incorporating the construction of a 25-metre indoor heated swimming pool and an additional rugby union field (Schedule A).

74 Evidence of Mr Kinnane, day 3, p. 327

75 Evidence of Mr Kinnane, day 3, p. 329

76 Evidence of Ms Spence, day 1, p. 21

77 Evidence of Ms Spence, day 5, p. 445

78 Evidence of Ms Spence, day 1, p. 22

79 Approved recommendation contained in the ministerial submission which was tendered as exhibit 2 at the CMC public hearing.

- The funding provided by the State was not to be disbursed to (or otherwise applied for the direct benefit of) any other projects, a member of the QRU or any other third party, without the prior written approval of the state (clause 4.6)
- If any of the funds were used for a purpose or during a period of time other than for the approved project the State may, in its absolute discretion, give the QRU notice for repayment of the funds. (clause 16.1)
- The funds were to be used for reimbursement of expenditure on items directly attributable to the delivery of the approved projects.⁸⁰

The standard form agreement did not meet the QRU's needs as viewed by Mr Freer. Mr Freer states that 'the way that we'd always discussed the grant was that we were able to use it to assist with the cost we'd already expended on the — on the development application'. The reference to 'we' was to Mr Tutt and Mr Freer.⁸¹ The QRU had already spent about \$0.5 million submitting a development application to the Brisbane City Council.

Mr Freer's evidence is that on 30 July 2008, he telephoned Mr Tutt to discuss progress with the grant. Mr Tutt said he would arrange a meeting with departmental officers Ms Farmer and Mr Klaassen.

On 1 August 2008, Mr Freer met with Ms Farmer and Mr Klaassen. The meeting focussed on the standard funding agreement, the terms of which were explained to Mr Freer. Mr Freer was presented with a pro forma document which contained no particulars, and the relevant schedules were blank.

Mr Klaassen and Ms Farmer claim that:

- The standard terms and conditions of funding were explained, which included the fact that the grant monies were to be used for the purposes identified in the schedule, namely construction of a swimming pool and new playing field.
- Mr Freer complained that the arrangements outlined were not consistent with his discussions with Mr Tutt.⁸²
- Mr Klaassen and Ms Farmer informed Mr Freer that they were not privy to any information that suggested the terms of agreement were to be contrary to the standard process routinely applied for the type of grant.

At some time (it appears) after meeting with Mr Klaassen and Ms Farmer, Mr Freer states that he said to Mr Tutt that the QRU required the funding as part of its operating funding because at that time of the year, cash flow was tight as the QRU still had to pay players, but did not receive income from either matches or sponsorships.⁸³

There is evidence that Mr Tutt telephoned Ms Farmer on or about 1 August 2008, although there is some dispute as to the precise time of the call. (On Mr Klaassen's account, it occurred about an hour or so after the meeting with Mr Freer. As a matter of logic, it followed the meeting with Mr Freer.) Whenever it was that she took the call from Mr Tutt, Ms Farmer was, together with Mr Klaassen, then in the process of finalising the preparation of the funding agreement in respect of the QRU grant.

Ms Farmer informed Mr Tutt that an up-front payment was not the normal way of doing things, and that the department would prefer to stage contractual payments on a reimbursement basis.

80 See the agreement ultimately signed by QRU and the State which was tendered as exhibit 17 at the CMC public hearing

81 Evidence of Mr Freer, day 1, p. 80

82 Evidence of Mr Klaassen, day 2, p. 159

83 Evidence of Mr Freer, day 1, p. 81

Ms Farmer described the conversation with Mr Tutt this way:

I recall discussing in a couple of different ways why the, why the contract should be made in a staged way. But he made it very clear to me that he wanted the payment made up front and it was, yeah, 'just do it'. He wanted me to do it and he wasn't going to brook any further discussion about it.⁸⁴

The telephone conversation between Mr Tutt and Ms Farmer was partially overheard by Mr Klaassen, in the sense that he was present in the same office as Ms Farmer and could hear her. He could also hear Mr Tutt's voice over the phone, although he could not hear or recall exactly what Mr Tutt was saying.⁸⁵ Mr Klaassen corroborates Ms Farmer's account.

It is Mr Klaassen's recollection that:

- about an hour or so after the meeting with Mr Freer, Ms Farmer received a telephone call from Mr Tutt
- Mr Klaassen could hear Mr Tutt's voice on the phone to Ms Farmer. The conversation was somewhat animated, and Mr Tutt was very forceful in his instructions to Ms Farmer
- there were certainly discussions about how that was not normal practice but that was not something that Mr Tutt was wanting to listen to at that point in time
- Ms Farmer basically said, 'We need to adjust the payment schedule to reflect that \$1.4 million gets paid up front with subsequent annual payments to be made'.⁸⁶

Mr Klaassen's evidence is that it was a highly unusual payment arrangement, and that the size of the initial up-front payment was also something that concerned him given the then current status of the project (i.e. nothing had actually been done). Other than grants to local authorities, Mr Klaassen was not aware of another grant out of the Major Facilities Program of this magnitude where there had been up-front funding.⁸⁷

Mr Tutt's evidence was that:

- On 30 July 2008 he was telephoned by Mr Freer. They discussed the media announcement planned for Ballymore the following day, and the fact that Mr Freer was still to be contacted by the department regarding progress on the grant.
- In the course of that conversation, Mr Freer asked if the QRU could receive funding up front.
- Mr Tutt called Ms Farmer and asked her to make contact with the QRU. In addition, he told her the QRU wanted an up-front payment. It is possible Ms Farmer told Mr Tutt that up-front payments are not normally made. Because he had no previous involvement in funding agreements and was not interested, Mr Tutt 'actually didn't have a view' and told Ms Farmer to 'just sort it out'.⁸⁸

Mr Tutt specifically denies that he:

- gave Ms Farmer an instruction to alter the funding agreement to facilitate up-front payments; or
- acted in an intimidatory way. His evidence was that he was not intending to intimidate Ms Farmer, although he acknowledged 'I was certainly putting my point across' and 'I certainly may have been very clear in terms of my voice'.⁸⁹

84 Evidence of Ms Farmer, day 2, p. 219

85 Evidence of Mr Klaassen, day 2, p. 161

86 Evidence of Mr Klaassen, day 2, p. 162

87 Evidence of Mr Klaassen, day 2, p. 179

88 Evidence of Mr Tutt, day 4, p. 369

89 Evidence of Mr Tutt, day 4, pp. 370, 407

By 6 August 2008, Mr Klaassen attended Ballymore to view the development site and to discuss the funding agreement with Mr Freer. By that date, Mr Klaassen had also amended the funding agreement to reflect the up-front payment of \$1.4 million.⁹⁰

On 8 August 2008, Mr Freer received an email from Mr Klaassen with the funding agreement attached.⁹¹ Mr Freer saw there were no changes to that agreement from the one that Mr Klaassen had shown him on 6 August 2008.

Mr Freer did not further discuss the grant with Mr Tutt, but signed the agreement on 11 August 2008.⁹² A formal agreement was eventually executed over 11 and 12 August 2008 in terms that provided for:

- an immediate up-front payment of one-third of the grant (\$1.4 million) to the QRU
- a further \$1.4 million payment a year later
- a further \$1.2 million payment a year later
- \$200 000 on receipt of 'project compliance material'.

On 15 August 2008, the first instalment of the grant monies (\$1.4 million plus GST) was deposited into the QRU's bank account. The next day the same sum was transferred by the QRU into another account, which was operated as a line of credit. (The line of credit was heavily drawn upon at the time.)

Transfer of \$200 000 to the UQ Rugby Academy

Mr Freer asserts that before the grant to the QRU was announced, Mr Tutt informed him that \$200 000 would be added to the sum sought by the QRU, with the additional money to be paid by the QRU to the UQ Rugby Academy.⁹³

According to Mr Tutt, at the meeting with Mr Anning over coffee sometime in the week of 7 July 2008:

- Mr Anning was seeking information about securing funding for the Rugby Academy; and
- Mr Tutt advised Mr Anning he could either make application directly to the state government, or approach a peak body, such as the QRU.⁹⁴

Mr Freer says Mr Tutt instructed him to make contact with Mr Eric Anning in this regard.⁹⁵ He did not do so, but Mr Anning later made contact with him.

On Monday 14 July 2008, the first working day after Minister Spence's announcement of the grant to the QRU, Mr Freer received an email from Mr Anning seeking a meeting.⁹⁶ Attached to Mr Anning's email was information pertaining to the Elite Player Development Program, run by the UQ Rugby Academy.

The UQ Rugby Academy is a venture conducted jointly by the University of Queensland, UQ Sports and Recreation Association, and the UQ Rugby Club. At material times, Mr Tutt was a member of the committee of the UQ Rugby Club.

90 Evidence of Mr Klaassen, day 2, p. 160

91 This document was tendered as exhibit 17 at the CMC public hearing.

92 The signed agreement was tendered as exhibit 17 at the CMC public hearing.

93 Mr Freer's recollection is that Mr Tutt referred to the 'UQ Rugby Club'. Mr Freer stated that he was not aware that the UQ Rugby Club and the UQ Rugby Academy were separate entities.

94 Evidence of Mr Tutt, day 4, pp. 357, 358

95 Evidence of Mr Freer, day 1, p. 57

96 That email was tendered as exhibit 20 at the CMC public hearing.

For his part, Mr Anning asserts he had earlier met with Mr Tutt and had inquired about the possibility of government funding for the UQ Rugby Academy. That meeting culminated in Mr Tutt advising Mr Anning that steps were then under way to secure Queensland Government funding for the QRU, and that Mr Anning should approach the QRU with a request for funding.⁹⁷

There is some difference in the recollections of the witnesses as to the timing of the meeting between Mr Tutt and Mr Anning. Mr Anning says he met with Mr Tutt in early July 2008, and Mr Tutt also gave evidence that it took place during the week commencing Monday, 7 July 2008. On the other hand, Mr Freer suggests that Mr Tutt made mention of the \$200 000 figure during a conversation on 24 June 2008 — that is, before Mr Tutt's meeting with Mr Anning — but he was not sure.

Mr Anning does not believe that Mr Tutt suggested the figure of \$200 000 and he acknowledges that he was seeking funding in that sum and had that figure in his mind when he approached Mr Tutt.⁹⁸

Mr Freer did not immediately respond to Mr Anning. On 14 July and again on 18 July 2008 Mr Anning telephoned Mr Freer who was not available to take the calls, so Mr Anning left messages. Mr Freer did not return the calls.

On 23 July 2008, emails were exchanged between Mr Freer, Mr Anning and others, concerning the Elite Player Development Program.⁹⁹

The first relevant face-to-face meeting between Mr Freer and Mr Anning did not take place until 25 July 2008, when Mr Anning and other representatives of the UQ Rugby Club and the Rugby Academy attended at Ballymore. During that meeting, there was discussion concerning the QRU's involvement in a scholarship program as part of the Elite Player Development Program. A consensus was reached that the QRU would pay \$200 000 to the UQ Rugby Academy for places on the program.

Although unsaid, Mr Freer considered this arrangement would meet Mr Tutt's objective of having \$200 000 transferred from the QRU grant to the Rugby Academy. Mr Freer was comfortable about the scholarship arrangement because all local rugby clubs stood to gain some benefit from the \$200 000.

Mr Freer conceded being aware that \$200 000 would be transferred to the UQ Rugby Academy at the time he signed the formal funding agreement for the \$4.2 million grant. He stated that he signed the agreement — 'I believe in good faith in the way that we talked about it, that I talked about it with Simon Tutt and that he had the authority'.¹⁰⁰

Consistent with the consensus reached at the meeting of 25 July 2008, about six weeks later — on 3 September 2008, the QRU received an invoice from the UQ Rugby Academy seeking payment of \$100 000 as an 'Academy Fee.' The invoice was paid by way of electronic transfer of funds two days later.¹⁰¹

On 24 November 2008, the QRU received a second invoice from the UQ Rugby Academy seeking a further instalment of \$100 000. The invoice referenced the sum claimed as 'Grant'. The invoice was paid with an electronic transfer of funds on 12 December 2008.

In summary, the QRU made two \$100 000 payments to the UQ Rugby Academy for a specified number of scholarship places in the Academy's Elite Player Development Program.

97 Evidence of Mr Anning, day 2, pp. 129–30

98 Evidence of Mr Anning, day 2, p. 130

99 These emails were tendered as exhibit 14 at the CMC public hearing.

100 Evidence of Mr Freer, day 1, p. 120

101 The invoices requiring these payments were tendered as exhibits 18a and 19 at the CMC public hearing.

Mr Tutt denies that he instigated the additional \$200 000 grant to the QRU so that it could be transferred to the UQ Rugby Academy. Certainly, he denies telling Mr Freer that \$200 000 should be so transferred. According to Mr Tutt, he and Mr Anning met over coffee in the week of 7 July 2008. At that time Mr Anning was seeking information about securing funding for the Rugby Academy, and Mr Tutt says he advised Mr Anning that application could be made either directly to the state government, or to a peak body such as the QRU.

Mr Tutt was asked about why the QRU, in its strained financial position, would transfer monies to the Rugby Academy. The following passage is from Mr Tutt's evidence and sets out his position on this issue:

COUNSEL ASSISTING¹⁰²: Given what you know today can you offer to me one logical reason why the QRU would give away \$200 000?

MR TUTT: In what sense?

COUNSEL ASSISTING: In the sense that we've been exploring this week, the \$200 000 that's found its way from the QRU to the University of Queensland Rugby Academy? Can you offer me one logical reason why the QRU would give away \$200 000?

MR TUTT: I deny having anything to do with that, with that situation.¹⁰³

Mr Tutt's relationship with key public servants

The public servants who gave evidence at the CMC hearings made a number of criticisms concerning Mr Tutt's conduct towards them. In particular, it was said to be his practice to purport to 'direct' or 'instruct' them in their duties. The CMC's investigation concentrated on two conversations Mr Tutt had with public servants that were said to constitute directions.

Mr Tutt denied that he gave any such directions or instructions, and asserted that he never intended that anything he said to public servants should be so perceived. In fairness to Mr Tutt, when the words he allegedly used (such as 'get it moving' and 'just do it') are examined, of themselves they do not appear to convey a direction. However, on each occasion, the senior and experienced public servants to whom the comments were made believed that the words used were in effect the sentiments of a Minister of the Crown and, were therefore a direction from the minister.

It is the atmosphere in which such words are said that makes the difference.

To put the conflicting versions in context, set out below is a summary of the evidence given by the various witnesses in relation to Mr Tutt's alleged conduct.

Ms Diane Farmer told the CMC she had day-to-day contact with Mr Tutt on a range of issues. She claimed that Mr Tutt possessed a very strong personality and spoke his mind very strongly and very forcefully. Ms Farmer said she had a good working relationship with Mr Tutt, but at times found him to be intimidating, frustrating and upsetting.

According to Ms Farmer, she expressed her frustration directly to Mr Tutt on a couple of occasions. She had also raised Mr Tutt's conduct, expressing her frustration, with the director-general and deputy director-general on a number of occasions, although she had not raised a formal complaint.

She explained that there had been at least one or two occasions when she had not agreed with what Mr Tutt wanted done.¹⁰⁴

102 Mr Russell Pearce

103 Evidence of Mr Tutt, day 4, p. 375

104 Evidence of Ms Farmer, day 2, pp. 221, 222

Ms Farmer gave evidence about her interaction with Mr Tutt on the QRU matter.

I recall discussing in a couple of different ways why the, why the contract should be made in a staged way but he made it very clear to me that he wanted the payment made up front and it as — yeah, just do it. He just wanted me to do it and he wasn't going to brook any further discussion about it.¹⁰⁵

Later, she gave the following evidence, during her examination by counsel assisting:

COUNSEL ASSISTING: In terms of the conversation you had with Mr Tutt, to what level would you ascribe perhaps the demand or the instruction or the request of you? How would you describe it?

MS FARMER: Very strong.

COUNSEL ASSISTING: Was it a request?

MS FARMER: No.

COUNSEL ASSISTING: How would you describe it?

MS FARMER: It was an instruction.

COUNSEL ASSISTING: You endeavoured to put your point of view?

MS FARMER: Yes.

COUNSEL ASSISTING: How was that met?

MS FARMER: It was not — my, my opinion was not accepted and I was told to just do it, or words to that effect.

COUNSEL ASSISTING: Words to that effect.

MS FARMER: Yes.

COUNSEL ASSISTING: What did you do?

MS FARMER: I then asked Ben Klaassen to stage the contract accordingly.

COUNSEL ASSISTING: Were you comfortable about doing that?

MS FARMER: No.

COUNSEL ASSISTING: Why not?

MS FARMER: I guess the, the policy or the concept behind staging a contract is that you ensure that the money being paid to a recipient is being used to achieve the end result. And I think I had come to learn that over a number of years of funding, particularly major facilities, that organisations often got themselves into trouble and the department may have paid them money and then they wouldn't have had enough left necessarily to actually develop the facility for which the department had funded them. It was really just considered good policy to make sure that they were actually following the chain of events to achieve the outcome.¹⁰⁶

Mr Ben Klaassen was present when Mr Tutt telephoned Ms Farmer, allegedly telling her to 'just do it' and amend the funding agreement with the QRU. He described his understanding of that conversation in the following terms:

MR KLAASSEN: It was a somewhat animated discussion and I, I believe that he was very forceful in his instruction to Ms Farmer.

COUNSEL ASSISTING: That's your belief. Is that based upon what you could hear of Mr Tutt?

MR KLAASSEN: Based on —

COUNSEL ASSISTING: Did you hear both parties or —

MR KLAASSEN: Based on the tone of the conversation from Ms Farmer's perspective and also the volume of Mr Tutt's voice.¹⁰⁷

105 Evidence of Ms Farmer, day 2, pp. 218–19

106 Evidence of Ms Farmer, day 2, pp. 219–20

107 Evidence of Mr Klaassen, day 2, p. 162

Mr Craig Matheson gave evidence that, as the minister's senior policy adviser, Mr Tutt was the principal communication channel between the minister and the department. Mr Tutt regularly asked for things from the department and made requests in relation to a wide range of matters that he wanted done. Mr Matheson described his working relationship with Mr Tutt as 'good' but gave evidence of some occasions when he had experienced difficulties.¹⁰⁸

On some occasions Mr Matheson voiced his frustrations about Mr Tutt with the director-general, Mr Kinnane, but had been mindful of the director-general's goal of having things run smoothly with the minister's office.¹⁰⁹ It was also Mr Matheson's understanding that he was, in large measure, obliged to follow instructions issued to him by a ministerial adviser.

Mr Matheson confirmed that Ms Farmer had relayed to him her frustrations with the manner in which Mr Tutt spoke to her, but that she did not want to make a formal complaint.¹¹⁰

Mr Michael Kinnane confirmed to the CMC that his endeavour was to try to ensure a good working relationship between the minister's office and the department. He recalled that, in 2008, this relationship was one in which there was a lot of 'meddling' from the minister's office. This was particularly the case with Mr Tutt, whose practice it was to go directly to Mr Matheson and less senior officers (such as Ms O'Bryan and Ms Farmer). Mr Tutt would routinely bypass the director-general.¹¹¹

When asked to comment on how Mr Tutt performed his role as a senior policy adviser, in terms of working with the department, Mr Kinnane said the following:

Well, look, there's no question that Mr Tutt is a highly intelligent human being, very active, very hard-working, very committed to his minister. The fundamental issue that I had with Simon Tutt was that I believed he interfered too much with the affairs of the department. He was a very intimidating person to officers of the department and he would bully, in my view, officers of the agency. And certainly would show his exasperation at times and lose his temper to members of the department. And I think that was a fundamental challenge that we all faced in the agency at that time.¹¹²

Mr Kinnane believed that some officers in the department allowed themselves to be intimidated by Mr Tutt. Mr Kinnane said that he had spoken directly with Mr Tutt about his conduct on several occasions, and had counselled Mr Tutt against dealing directly with departmental officers. He had also spoken to Mr Tutt about these matters by telephone on occasions:

I would speak to him on the phone. It only happened on a small number of occasions, however, because the concern of the staff concerned was to let the issue go, that it wasn't worth a war between the department and the minister's office. There was a great deal of concern about the pressure cooker atmosphere between the minister's office and the department.¹¹³

However, Mr Kinnane never raised with the minister his concerns about Mr Tutt dealing directly with departmental officers, nor the reports of Mr Tutt's alleged bullying behaviour. Mr Kinnane gave evidence that this was because he considered the relationship between the minister and Mr Tutt to be extremely close, and therefore had no confidence that any action would result had he approached the minister with a complaint:

COUNSEL ASSISTING: Did you ever bring to the minister's attention that you were concerned about Mr Tutt's practice in going directly to officers in your department?

MR KINNANE: Nothing that I can recall.

108 Evidence of Mr Matheson, day 3, pp. 241–2, 314

109 Evidence of Mr Matheson, day 3, p. 290

110 Evidence of Mr Matheson, day 3, p. 314

111 Evidence of Mr Kinnane, day 3, particularly p. 322

112 Evidence of Mr Kinnane, day 3, p. 320

113 Evidence of Mr Kinnane, day 3, p. 324

COUNSEL ASSISTING: Why did you not do that?

MR KINNANE: I didn't think it would be very fruitful.

COUNSEL ASSISTING: Why not?

MR KINNANE: Because the relationship between the minister and the minister's senior policy adviser was extremely close and I had no optimism that any action would be taken.

COUNSEL ASSISTING: Likewise did you raise with the minister your concerns about Mr Tutt behaving in a bullying fashion?

MR KINNANE: Not directly.

COUNSEL ASSISTING: Indirectly?

MR KINNANE: No.

COUNSEL ASSISTING: Again, would that be for the same reason?

MR KINNANE: Indeed.¹¹⁴

For his part, **Mr Tutt** gave evidence that he had never intended to intimidate departmental officers.¹¹⁵ He explained that he had been the senior policy adviser to a minister with responsibility for two of the highest pressure portfolios — Police and Corrective Services. The manner in which he conducted himself had much to do with the workload and to ensure expediency. He said the following in his evidence, when examined by his counsel (Mr Devlin SC):

MR DEVLIN: She [Ms Farmer] suggests that you were intimidatory in your approach. What do you say about that?

MR TUTT: Well, I mean, I — I've been here this week and listened to the statements made by the witnesses. And I, I now understand they might have perceived me to be, to be like that. I certainly had no intention to come across as intimidating. Just to contextualise it. I was the senior policy adviser to a minister who had certainly two of the highest pressure portfolios in government, being Police and Corrective Services. And three of the highest profile portfolios. And the way I conducted myself was, was, was something I thought appropriate. I didn't consider that I was being intimidating. It certainly wasn't raised with me. And I now know that Ms Farmer might have perceived it to be that way but I had no view on how the funding was allocated but I certainly had a view on perhaps having departmental staff resolve the issue.

MR DEVLIN: The effect of the evidence seems to be or something that's to be made of it is that you pushed your view onto the public servants about how the funding arrangement was to be made.

MR TUTT: Well, I didn't know how the funding agreements worked to start with. And in any event I would have expected as part of funding agreements, which as I say I asked them to make contact with Freer and explain, would have had various compliance and acquittal clauses built into them.

MR DEVLIN: You say that you've never had your conduct called into question. Have you had situations with Ms Farmer, though, where she did complain to you about the manner in which you were approaching her?

MR TUTT: I have no doubt she may have raised it with me. No particular moment comes to mind. I've heard what Ms Farmer had to say this week and I have no doubt that if she had felt that I was short or abrupt that I would have apologised to her for that. It certainly was nothing in my opinion to do with the issue in particular that I may have been discussing with her. It was more to do with the — with, I suppose, the workload and the nature of my interaction with public servants in the, in the interests of expediency.

114 Evidence of Mr Kinnane, day 3, pp. 323–4

115 Evidence of Mr Tutt, day 4, particularly pp. 372, 394

I certainly never received any complaints from anybody in the Police Service or from the Corrective Services Department. And I don't actually recall any specific examples where I, I was even rude, to use Ms Farmer's words to her. But if she did feel I was short and abrupt I would have apologised. I certainly can understand that she may have perceived me that way and I'm disappointed that she did and I am sorry that she did.

Similarly, Mr Tutt said he did not recall Mr Kinnane ever raising concern over his conduct or alleged interference in the work of the public servants. Nor had the minister ever questioned him about his conduct towards public servants and, so far as Mr Tutt is aware, no complaint about his behaviour had ever been made by any public servant within either the Department of Corrective Services or the Queensland Police Service.

MR DEVLIN: Do you recall Mr Kinnane taking you to task about your conduct?

MR TUTT: I don't recall Mr Kinnane ever raising my conduct with me. I met with him on a regular basis, probably three out of four Fridays of a month, face-to-face for about an hour. And I don't recall him ever raising my conduct with me.

MR DEVLIN: Did the minister raise those matters with you?

MR TUTT: I don't recall her ever raising anything with me about it, either.

MR DEVLIN: Do you see how — well, I'll put it to you this way. You heard Mr Kinnane yesterday talk about you interfering in the department at the lower levels of the department and not going through the director-general.

MR TUTT: Well, it was accepted practice that ministerial advisers, and I think Mr Kinnane mentioned that as well, could deal with the director-general, the deputy director-general and the two job share executive directors. I certainly did that. I think, once again to contextualise it, the director-general and even the acting deputy director-general were responsible for two government departments, Local Government and Sport and Recreation. The first, Sport and Recreation, specific public servant was the executive director's position. So, I, I don't necessarily believe that I was interfering in lower levels of the department but it was accepted practice, that Mr Kinnane approved of as well, to deal with the director-general the acting deputy director-general and the executive directors. And I know the minister would have done that as well on occasion. In fact, she would have attended meetings with external organisations that included one of those three levels of the public service of that department.

MR DEVLIN: Anyway, did Mr Kinnane ever speak to you about your interfering in the lower levels of the public service?

MR TUTT: I don't believe he did. I met with him every Friday and I thought he and I had a very good working relationship where we could have a free flow of ideas, discuss the week that was, the week that was coming up, and there was ample opportunity to discuss things like that with me at our Friday morning meetings, and I don't, I don't believe it was ever raised.

MR DEVLIN: Has anybody accused you from within the public service of bullying conduct or intimidating conduct?

MR TUTT: No, no-one, no-one has ever accused me of that. In fact, since those suggestions were made by the, by Ms Farmer, I've asked other public servants who I had dealt with what they thought and they said they never had felt intimidated by me.¹¹⁶

Given the evidence, Mr Tutt was asked by the presiding officer¹¹⁷ to offer a view about how misunderstandings between ministerial advisers and public servants might be avoided in future:

PRESIDING OFFICER: ... I'm interested in the future interests of these sorts of things not occurring again, Mr Tutt. Are you able to give us any guidance as to how we could ensure that these, what you would put as being unfortunate misunderstandings that seem to have ensued in this case, that you don't intend to give directions but public servants take them as directions; how can we ensure that young, eager, perhaps without meaning to be,

116 Evidence of Mr Tutt, day 4, pp. 371–2

117 Mr Robert Needham, CMC Chairperson

slightly overbearing ministerial advisers don't cause public servants to make these errors, see things the way that they are not intended; how do you think we can avoid this happening in the future?

MR TUTT: Well, in terms of making suggestions at this stage I could have a think about that. However, I think, I think it's incumbent upon people, whether it's ministerial staff or public servants to, I suppose, understand that due process for these sorts of things prevail. I know the point you are making, Mr Chairman, is that there may be a perception that people are applying undue pressure, to use your term. How do we overcome that happening? Well, I think public servants, particularly senior public servants, in my opinion would have had extensive experience to be able to not, shall I say, feel that they are being pressured by ministerial staff to, to perform something that they themselves may not think accords with due process.

PRESIDING OFFICER: It's what I said yesterday, they need to be empowered to say 'no'.

MR TUTT: Exactly right. And I think on that point –

PRESIDING OFFICER: How do we do that?

MR TUTT: On that point, I certainly have the impression that until obviously hearing the statements this week that both public servants involved in this matter, in terms of Mr Matheson and Ms Farmer, were comfortable to say 'no' to me on a regular basis. In fact, I remember some examples where that happened. So, I think how do you empower public servants to have the ability to say 'no' to ministerial requests, as I would say it, but as it appears to have been perceived as ministerial directions, I think there needs to be some sort of reporting mechanism for that, that if people perceived ministerial requests, particularly considering the executive director level is effectively third highest in the chain of command for that department, that there could be some reporting mechanism, if they felt they were being issued with an instruction, that there could be some direct reporting mechanism to the director-general, might be a possible suggestion to the question you've posed.

PRESIDING OFFICER: And who would he then report it to?

MR TUTT: He could either report that directly to the minister responsible. And if, as I heard the evidence yesterday from the former director-general, that he felt that was not a possibility for him, it could perhaps be raised with the director-general of the Premier's Department to be further, further considered.¹¹⁸

Finally, **former Minister Spence** gave evidence that she was unaware of Mr Tutt issuing instructions to junior public servants. Her evidence was that she would have expected that had Mr Tutt acted in that way, his conduct would have been brought to her attention through the chain of command. Ms Spence said she did not know that there had been a general concern in the Department of Local Government, Sport and Recreation about Mr Tutt approaching individual public servants directly and issuing instructions.¹¹⁹

118 Evidence of Mr Tutt, day 4, pp. 385–6

119 Evidence of Ms Spence, day 1, particularly pp. 14, 16, 18

OUTCOME OF THE INVESTIGATION: CONSIDERATION OF PROSECUTION OR DISCIPLINARY PROCEEDINGS

There is little dispute about what happened in the process that led to Minister Spence approving the \$4.2 million grant to the QRU, nor is there doubt that \$200 000 from that grant found its way from the QRU to the UQ Rugby Academy.

At the time the ministerial submission recommending the \$4.2 million grant to the QRU was prepared, the material available to the department was not sufficiently detailed to permit a proper assessment of the matter. That was reflected in the draft submission hurriedly prepared by Mr Klaassen at Mr Matheson's direction.

Mr Matheson set about 'improving' the submission, and identified that the proposed projects were not without risk. Nonetheless, the final submission speaks for itself.

On the evidence presented during the hearings, there can really be no argument that the approval process was rushed to enable Minister Spence to announce the grant at the Reds Gala Ball on 11 July 2008.

Whether or not it was actually Mr Tutt's intention to improperly influence the assessment process, there is little doubt that was the effect his representations had on Mr Matheson. In his closing submissions, Mr Matheson's counsel (Mr Hunter SC) said the following:

The other matter, though, about Mr Matheson's account is this. His account was effectively that he was being bent to what he perceived to be the ministerial will. His evidence involved him implicitly and in the end explicitly accepting that he did not display fearless impartiality.¹²⁰

During negotiations for the funding agreement, Mr Freer made clear his request for an up-front payment, which was contrary to the standard form agreement. When Mr Tutt informed Ms Farmer (according to her evidence) to 'just do it' and change the standard format, neither Ms Farmer nor Mr Klaassen informed any superior of the unusual circumstances that had arisen.¹²¹

Consideration of further action

The CMC, in reporting on its investigation, considered whether any of these areas of concern supported recommendations, under the CM Act, for either criminal prosecution or disciplinary action against any relevant party; in particular:

1. disciplinary action (including for official misconduct) against Mr Tutt and/or Mr Matheson; and
2. criminal prosecution of Mr Tutt and/or Mr Freer and/or the QRU.

No submissions were made as to possible criminal or disciplinary action against any other person who appeared at the hearings.

¹²⁰ Submissions of Mr Hunter SC, day 6, p. 478

¹²¹ This is Ms Farmer's version, as set out earlier in this report in Ch 4. Mr Tutt's version of the conversation differs, and has also been set out in Ch 4, pp. 28–32.

Possible disciplinary recommendations

When considering recommendation of disciplinary action against Mr Tutt or Mr Matheson, the following factors were taken into account.

- Neither Mr Tutt nor Mr Matheson remain as public servants.
- Mr Tutt's employment ended in April 2008, prior to the CMC's hearings. For that reason, a recommendation for possible disciplinary action was no longer open at that time.
- Mr Matheson was still a public servant at the time of final submissions. Accordingly, counsel assisting addressed the possibility of a recommendation for disciplinary action against him. Mr Matheson's counsel in turn submitted, in the context of possible official misconduct proceedings, that having regard to all of the evidence, particularly that about the relevant working relationships, it was difficult to see that what Mr Matheson did was conduct of a type that warranted his dismissal from his position.
- In 2009 the *Public Service Act 2008* was amended to empower a director-general to make a disciplinary finding (known as a 'disciplinary declaration') against a former public servant within two years of the end of the officer's employment. However, the amendments — which were not retrospective — took effect from 2 November 2009, well after the events concerning the QRU grant.
- Subsequent to the hearings, Mr Matheson's employment in the public service ceased on 28 May 2010.

Consideration of prosecution for 'misconduct in public office'

Section 92A (1)(c) of the *Criminal Code* — Misconduct in relation to public office — makes it an offence for a public officer to do an act in abuse of the authority of office with intent to dishonestly gain a benefit for the officer or for another person or to dishonestly cause a detriment to another. The offence carries a maximum penalty of imprisonment of seven years.

The offence came into effect from 24 September 2009. It was not in existence at the time of the conduct under investigation, is not retrospective, and was therefore not available when considering any possible prosecution action.

Consideration of criminal proceedings

In closing submissions, counsel assisting advanced submissions that the CMC needed to decide whether to formally refer any briefs of evidence to the Director of Public Prosecutions (the DPP) to consider whether or not criminal proceedings against any person were warranted. Final submissions in the CMC's hearings referred to the possibility of criminal proceedings against Mr Tutt, Mr Freer and the QRU (the bases for such proceedings being offences of fraud against s. 408C of the *Criminal Code*). In summary, two aspects in the investigation that gave rise to these potential outcomes were:

- i. the circumstances surrounding the awarding of the grant of \$4.2 million to the QRU
- ii. the circumstances surrounding the use to which some of the grant monies were put, including the transfer of \$200 000 to the UQ Rugby Academy.

In light of those circumstances, it arose for consideration whether Mr Tutt might have committed criminal offences, on the basis of his alleged actions in facilitating the awarding of the grant, and in procuring the transfer of the \$200 000; and by either Mr Freer or the QRU, or both, on the basis of Mr Freer's alleged actions in making false representations in order to secure the grant, and of directing the misapplication of those monies.

In order to deliver some finality on these issues, on 19 February 2010 the CMC resolved to report to the DPP pursuant to section 49(2)(a) of the *Crime and Misconduct Act 2001* for the purpose of any prosecution proceedings the DPP may consider warranted.

In particular, the CMC asked the DPP to focus on any criminal offence arising from Mr Tutt's and Mr Freer's involvement in respect of the transfer of \$200,000 to the UQ Rugby Academy. In reporting to the DPP, the CMC provided relevant evidentiary material and draft witness statements (including draft statements for Mr Tutt and Mr Freer). The legal representatives of Mr Tutt and Mr Freer/the QRU were apprised of this information and afforded the opportunity to make further submissions directly to the DPP, which they did.

The CMC also set out at length its views on what evidence might be admissible in any criminal prosecution of any of the above parties, and when it might be open to a tribunal of fact to accept such evidence to the criminal standard. In this regard, the CMC noted that not all of the 'evidence' gathered in its investigation would be admissible in a prosecution. For example, during his testimony at the public hearing, Mr Tutt objected to answering questions on the basis of privilege against self-incrimination. He was then directed to answer questions, with the effect that by virtue of section 197 of the CM Act, virtually nothing of his evidence is admissible against him in any subsequent criminal proceedings.

Whether or not the evidence was capable of establishing *prima facie* criminal offences, the CMC also recognised, in reporting to the DPP, that there were substantial obstacles to any successful prosecution. In short, any criminal prosecution of either Mr Tutt or Mr Freer would be dependent, to a significant extent, on the evidence that one would be required to give against the other, posing difficulties in the absence of any grant of indemnity. The CMC also made observations, based on all of the available evidence, about the respective credibility of each witness and the challenges made to their credibility in the hearings.

In addition to those issues impacting on the consideration of prosecuting Mr Tutt and Mr Freer, in reporting to the DPP the CMC addressed other considerations which might affect the likelihood of a conviction, or have an effect on the exercise of discretion about whether or not to prosecute. For example, this is not a case in which — with the exception of the QRU as an entity — any individual secured any personal financial gain. Moreover, in the case of the grant to the QRU, it is not contended that the grant was one which did not have merit, or would not otherwise have met with approval.

Added to the above, the then existing bureaucratic processes of the department went a considerable way to encouraging the conduct of all of the parties involved, and this needed to be considered in the context of any prosecution. Also relevant was the fact that the allegations about the conduct of Mr Tutt and Mr Freer had already been thoroughly and publicly explored through the CMC's public hearing.

After considering the material, the DPP advised that before final advice could be given confirmation was required about some evidentiary issues and whether the potential witnesses would be available to give evidence if required, and that those witnesses who claimed privilege against self-incrimination in the CMC's hearings (Mr Tutt and Mr Freer) no longer maintained those claims. Officers of the CMC subsequently met with the DPP to discuss these matters. It was confirmed that in the circumstances no indemnity would be considered for any person.

In all of the circumstances, the Commission determined that it would not proceed to pursue any possible prosecution action in light of the factors noted above; especially the inherent difficulty of prosecuting either of the two main parties, in the absence of an indemnity and given the likelihood of either party maintaining a claim of privilege at any trial.

EXAMINATION OF ADMINISTRATION OF THE MAJOR FACILITIES PROGRAM 2009 BY THE DEPARTMENT OF LOCAL GOVERNMENT, SPORT AND RECREATION

As noted earlier, independent of the rugby grants matter, the CMC received other complaints about the administration of grant funding under the Major Facilities Program 2009. In 2009 the CMC received specific but separate complaints essentially alleging that substantial amounts of public funding had been allocated without due process or regard to appropriate principles, and perhaps to advance personal or political ambitions.

Therefore, in addition to examining the grant of \$4.2 million in funding to the QRU, the CMC also examined the department's administration of the Major Facilities Program 2009.

It was from the \$30 million budgeted for that program that money was diverted to fund the \$4.2 million grant to the QRU. The grant itself did not fall within the Major Facilities Program, and the guidelines applicable to the program do not fit the terms of the grant to the QRU. For instance, the Major Facilities Program allowed for up to 50 per cent contribution to approved projects, whereas the QRU grant represented a 100 per cent contribution to the cost of the nominated projects.

In this regard, evidence given during the CMC's public hearings revealed that while the department was assessing applications for funding under the Major Facilities Program, Mr Matheson met with Minister Spence and Mr Tutt and discussed at least some of the applications. As a result of these discussions, the schedule that was recommended, and went up with the briefing note dated 3 February, reflected the views and preferences of the minister.¹²²

The 2009 Major Facilities Program

Process for the assessment and approval of grants

Approval of grants as part of the Major Facilities Program occurred in two distinct stages.

In the first stage, the department called for expressions of interest from eligible sporting and community bodies inviting them to provide certain basic information and limited documentation (to spare them needless time and expense preparing proposals not eligible to progress to the next stage). Departmental officers assessed and categorised all expressions of interest received.

A moderation exercise was conducted by departmental officers with a view to selecting projects suitable to proceed to the next or second stage, where an invitation would issue seeking a more detailed application. Those more formal applications were then assessed,

¹²² Evidence of Mr Matheson, day 3, p. 280

and successful applicants were ultimately awarded grant funding. The moderation exercise was geared towards determining which matters ought to be invited to proceed to the next stage of assessment. For instance, determinations were made as to:

- eligible projects which were recommended by the department to proceed to the second stage
- eligible projects which were not recommended by the department to proceed to the second stage
- ineligible projects.

Eligible projects were assessed against three criteria:

1. need
2. project priorities
3. ability to deliver.

From this process, eligible projects were then further categorised in terms of risk, so as to identify projects which were both eligible for funding and likely to succeed.

To obtain the department's most favourable recommendation — and therefore be invited to proceed to the next stage — the initial expression of interest had to demonstrate that:

- the project in question met eligibility criteria
- the applicant organisation had the capacity to complete the project within the relevant timeframe.

Projects which met eligibility requirements were not recommended if it was considered that the applicant did not have the capacity to complete the project in the timeframe, or in other words, if they carried a high risk of non-completion.

In late 2009, at the request of the CMC, the Internal Audit Services unit of the department conducted a review of the administration of the Major Facilities Program 2009.¹²³

The audit report flagged certain anomalies in the administration process, but no adverse conclusion was reached.

However, in the CMC's view, it would be open to conclude — on the basis of the evidence contained in exhibit 31, and otherwise adduced during the CMC's public hearing — that the administration of stages 1 and 2 lacked adequate transparency.

Evidence of Minister Spence

During the public hearing, Minister Spence conceded that the Major Facilities Program 2009 had not been well administered. In particular, she agreed that the multi-staged assessment process 'wasn't a good process'.¹²⁴

Counsel assisting asked Minister Spence about the administration of the program:

COUNSEL ASSISTING: You will see towards the centre of each page there is a column headed 'State Electorate'. What I suggest to you and you can check it if you wish, is that in the case of each category of the schedule the applications are listed in alphabetical order according to the state electorate in which they fall. What do you say to this proposition? That that would indicate that a principal concern for the department was the electorate in which the application pertained as opposed to the merits of the application. Do you accept or reject that?

MS SPENCE: It's not a system that I put into place. It was something that I inherited. I did not ask the department to put these categories together with the state electorate. In my experience, and I've been a minister for probably six or seven departments, some

123 The report of the Audit Services Unit was exhibit 31 tendered at the CMC public hearing.

124 Evidence of Ms Spence, day 5, p. 436

departments do this and some don't. I've never asked a department to do it. I suspect that the reason they do it is because — it's probably from their point of view an easy one because from time to time they are asked to collate information about regions, areas or electorates around the state. You know, did you ask — I don't know why they do it but some departments do it and some don't.

COUNSEL ASSISTING: Is it of any benefit to you as minister when you are considering matters like this to know which electorate the matter pertains to?

MS SPENCE: It's not anything I've ever been comfortable with when I've seen it quite honestly. Most departments I think I have worked with haven't done it but sport may not be the only department that does that. I have seen it, I think, in other departments. It's actually something that has never made me that comfortable.

COUNSEL ASSISTING: I'm not suggesting to you that it influenced your decision making because, as I said to you on Monday, there are decisions that you have made both ways in terms of approving matters and not approving matters where they involve Coalition electorates and Labor electorates so it doesn't appear on the face of the document to have influenced you, but what I want to know is, firstly, do you acknowledge that that's the way these matters are listed?

MS SPENCE: Yes.

COUNSEL ASSISTING: And do you acknowledge that that tends to indicate that the public servants have acted according to the electorate?

MS SPENCE: I don't think you should jump to that conclusion, I really don't. I think that there are — you really need to ask the public service this more than me because they have put this list together, not me. But I think that there may be reasons why they include this because from time to time they are asked by premiers under short notice to collate information on an electorate basis.¹²⁵

Discussion

In the CMC's view, there was nothing intrinsically wrong with the assessment and approval process devised by the department. The problem lay more in the way the process was undertaken — and for that blame must be shared between the departmental officers and the minister's office. This was all compounded by the lack of adequate recordkeeping. These issues combined to seriously undermine the transparency of the assessment process.

The CMC does not suggest there was anything improper in the minister being apprised of the nature of the expressions of interest received in the first stage of applications, and of the department's preliminary views of the projects identified in those expressions of interest. The minister was also entitled (either directly, or through her adviser) to indicate her support for particular projects, and to suggest the basis or bases on which assessment decisions might be made.¹²⁶ Ultimately, she had an absolute discretion to accept or reject the department's advice to her as to the public funding of particular projects. As Mr Matheson said in evidence '... the minister has the prerogative to accept, reject or disregard the department's advice'.¹²⁷

The difficulty in the present case was the department's failure to preserve any proper record of the assessment process as it progressed through the respective stages. What official written records do exist suggest nothing about the initial assessments being altered to reflect the minister's observations or priorities. The only official document to survive is the final ministerial submission, which represented to the minister that projects listed in an accompanying spreadsheet had been assessed by the department as suitable to go forward to the next stage — an invitation to develop a detailed application for funding. To the extent that there was no record that particular

125 Evidence of Ms Spence, day 5, pp. 440–41

126 The minister suggested, for instance, that she wished priority to be given to sporting projects 'west of the Dividing Range'.

127 Evidence of Mr Matheson, day 3, p. 311

projects were promoted or demanded in order of priority to reflect the minister's wishes, the final ministerial submission obviously misrepresents the true state of affairs.

The CMC's investigation of these matters was assisted by the fact that, whether by accident or design, an individual departmental officer saw fit to preserve a number of working spreadsheets which evidence the evolving assessment process. The survival of the earlier versions of the spreadsheets confirms the changes in priority accorded to various expressions of interest (and later applications).

On one view, the lack of proper records has deprived Minister Spence of the ability to defend her ultimate decision making, leaving her exposed to at least the perception (reflected in the complaints made to the CMC about these grants), that awarding (or refusing to award) public funding was, in particular cases, driven by political motivations. Similarly, the absence of proper records has hampered the ability of public servants involved in the assessment process to explain their decision-making process.

There is absolutely nothing in the final version of the ministerial submission and accompanying spreadsheets to indicate that, in some instances, the ultimate recommendations to the minister reflected her own views and preferences, which had caused the department to depart from its independent and impartial assessment.

The minister was entitled to an independent and impartial assessment. She was also entitled to exercise her own discretion. She was entitled to accept or reject the department's recommendations and indeed to substitute her own views for those of the department. That was the minister's prerogative and that is what the people of Queensland would expect her to do. However, good public administration requires that the process should have been transparent. It was not.

Outcome of examination: disciplinary proceedings not warranted

Having regard to the evidence arising from the investigation, and particularly the outcome of the Audit Unit's review, these broader aspects of the administration of the Major Facilities Program do not support a recommendation by the CMC for the consideration of further action (in the nature of disciplinary or criminal proceedings) against any person. For the same reasons the CMC does not intend to further investigate any specific grant allocation which was the subject of comment in the complaints made about the administration of this scheme.

However, it is evident that steps must be taken to enhance the transparency of the system, and consequently public confidence in its proper administration. These issues are discussed in Chapter 9.

Part 3:

Misconduct prevention issues and reform

ISSUES RAISED BY THE INVESTIGATION

This investigation brought to light a number of episodes where the interaction between a ministerial adviser and public servants ran contrary to established principles of good government. Although no criminal or disciplinary action will be taken against any individual, the investigation has served to highlight several issues, including the need for procedural reform to prevent future misconduct and raise standards of integrity in the public sector.

The episodes demonstrated that:

- the respective roles of ministerial staff and public servants must be better understood, clarified and articulated, as necessary, to establish and maintain mutually effective and appropriate working relationships
- public servants must be empowered to understand their role in our system of government and give apolitical advice that reflects the ethical principles and obligations enshrined in the legislative framework.

At the close of the public hearings, the CMC invited written submissions on the following three questions related to the interaction between ministers, ministerial staff and public servants:

- What protocols, procedures or constraints should be in place to guide ethical and mutually respectful interactions between a minister's office and public servants?
- What needs to be done to ensure that public servants at all levels understand their obligation to provide independent, apolitical and impartial advice, and to maintain the freedom to do so?
- How may public servants be empowered to challenge or question a request or direction from the minister's office that they consider inappropriate?

The 26 individual submissions received are available on the CMC website at <www.cmc.qld.gov.au>. Their tenor generally confirmed the CMC's view that the relationship between politically aligned ministerial staff and an independent public service was insufficiently defined and understood, and that the potential existed for conduct that was incompatible with the ideals of transparency and accountability.

Ministerial responsibility

Our system of government depends on responsibility. The public's ability to know who is responsible for a particular action or decision of government is central to their ability to use their voting power in an informed way. To this end, government systems and delegations must be structured to provide clear and unambiguous delegations and lines of responsibility.

As it is the minister who is ultimately responsible to the parliament and the people, his or her right to make decisions and to give instructions on matters affecting the ministerial portfolio is clear. Such decisions may, depending on the situation, conform with, adjust or override departmental advice.

As the public is entitled to know who is responsible for a particular departmental decision or action, it is important that the process of making the decision is accurately recorded. In the case of the Major Facilities Program 2009, the official record of the assessment process has been shown to be misleading, in that it contains no reference to the influence of Minister Spence and her office.

Proper attribution of responsibility is possible only where processes are open and transparent. This means that for any process there must be an accessible and easily intelligible record of how decisions came to be made, and by whom. As an example, the United Kingdom green paper on the governance of Britain seeks to clarify decision making 'by clearly distinguishing the sources of political and non-political advice'.¹²⁸

The emergence of ministerial advisers has to some extent muddied the waters of ministerial accountability and, it may be said, has given rise to the concept of 'plausible deniability' — an assertion that a ministerial staffer withheld information or acted without the minister's knowledge, and that therefore the minister cannot be held accountable. In a number of cases, the media and other parties have been highly sceptical of the outcome. Ministerial advisers are sometimes seen as 'politically dispensable, convenient scapegoats who will take the bullet for their ministers and protect them from political fallout'.¹²⁹

The role of ministerial advisers

With the rise of ministerial advisers in recent decades, a number of issues have arisen about the appropriateness of this additional tier in the government hierarchy. On the one hand, it can be argued that policy-making and decision-making processes are enhanced where the minister has this additional level of contrasting (and sometimes competing) advice: 'In theory staff and public servants provide distinct but complementary advice to ministers, based on their respective skills and expertise'.¹³⁰ On the other hand, there are concerns that over-zealous involvement by advisers can have a 'funnelling effect' on departmental advice, stifling or diverting viewpoints which do not accord with the adviser's political agenda.¹³¹

As far back as 1973, Liberal Senator John Carrick railed at: 'the "insidious" development whereby advisers — influential, faceless and largely unaccountable — prevent the department from giving its authentic and responsible view to the minister'.¹³²

As Tiernan recommends:

Ministerial staff play important and necessary roles in supporting ministers. Better ways must be found for accommodating their presence. Safeguards must be put in place to ensure that potential problems do not damage political institutions and processes.¹³³

At the time of the CMC's investigation, ministerial staff in Queensland were employed under section 147 of the *Public Service Act 2008*, and their conduct was subject to disciplinary action under that Act and to scrutiny by the CMC.¹³⁴ They also have their own code of conduct; however, they are appointed on the personal recommendation of the minister, frequently without any open, competitive or merit-based process. While they are nominally in the employ of the Department of the Premier and Cabinet, they are in practice under the management of, and answerable principally to, their minister.

128 HMSO, CM7170, Section 45, p. 22, quoted in N Abjorensen, 'Delegatus non potest delegare; defining the role of ministerial advisers', *Democratic Audit of Australia*, discussion paper 12/07, Australian National University, Canberra, 2007, p. 4.

129 P. Weller, *Don't tell the prime minister*, Scribe publications, Melbourne, 2002, p. 72

130 A. Tiernan, 'Overblown or overload? Ministerial staff and dilemmas of executive advice', *Social Alternatives*, vol. 25, no. 3, 2006, p. 10

131 J Walter, 'Ministers, minders and public servants; changing parameters of responsibility in Australia', *Australian Journal of Public Administration*, vol. 65(3), 2006, p. 26

132 Hansard 1973: 2147–48 quoted in L Briggs, *A passion for policy*, ANZOG/ANU Public Lecture Series, Australian National University Canberra, 2005, p. 4).

133 A Tiernan 2006, op. cit., p. 11

134 This changed with the commencement of the *Ministerial and Other Office Holder Staff Act 2010* on 1 November 2010. It provides for the employment and conduct of staff of ministers and other particular members of parliament, as discussed in Chapter 9.

Independence of the public service

The independence of the public service from undue influences — be they political, cultural or commercial — is a fundamental principle of good democratic government. The duty of government employees to serve the best interests of the public as a whole, rather than the narrower interests of specific groups, companies or individuals, is paramount and undisputed: 'Liberal democracy is characterised by the balancing and sharing of power, designed in theory to prevent the dominance of overweening individuals and collusive groups.'¹³⁵

This independence is of particular importance in Queensland, where it is arguable that the unicameral parliament leaves government with fewer checks and balances. It has to be acknowledged, however, that the state has other accountability mechanisms such as a comprehensive parliamentary committee system and various integrity bodies such as the CMC, the Ombudsman, and the Integrity Commissioner. In this setting, a public service that is not politically aligned and which may at times question or provide an alternative perspective to politically aligned advice is a valuable resource for the government of the day.

The ability of government agencies in general, and their senior managers in particular, to give what is conventionally called 'frank and fearless' advice is one of the tests of this independence. Importantly, the 'frank and fearless advice' which is given also needs to be helpful and efficient, demonstrably guided by the public interest, and not adversarial or obstructive.¹³⁶

Efficient, accurate advice, free of undue influence, is the basis on which the public service can command the trust of the elected government it serves, and of the public which is the ultimate employer of both.

Smooth transitions of government

The public service is intended to serve successive governments with equal efficiency, responsiveness and impartiality. So far as possible, it should be structured and operated in a manner which enables it to operate with the least disruption to the routine business of providing services during periods of transition. Continuity and experience are of critical importance.

Keeping the upper levels of the public service as apolitical as is practicable clearly contributes to this continuity. It is clearly not in the interests of an incoming government to remove large numbers of experienced senior executives, so long as their impartiality and competence can be trusted.

A proper relationship

What relationship should properly exist between a minister (and his or her staff) and the department or other agency for which the minister is responsible?

The CMC sets out the following as a summary of the proper relationships, as currently laid down by the *Public Service Act 2008* and the *Public Sector Ethics Act 1994*, and in accordance with the Westminster conventions and the widely accepted principles of open and accountable government:

135 J Walter, 'Why Howard goes too far; institutional change and the renaissance of groupthink', Refereed paper presented to the *Australasian Political Studies Association Conference*, University of Adelaide, 29 September – 1 October 2004, p. 13

136 R Mulgan, 'Politicisation of senior appointments in the Australian public service', *Australian Journal of Public Administration*, vol. 57(3), 1998, p. 9

- The minister may direct the CEO and, through the CEO, any agency employee, in respect of conducting the public business of the agency, but not in ‘making decisions about particular individuals’, as per section 100 of the Public Service Act.¹³⁷
- The CEO and the agency have an obligation to provide apolitical and independent advice to the government and the minister.
- While CEOs and agencies should give due consideration and weight to the needs and interests of various political, business, community, factional and individual interests in the framing of their advice, they should not be subjected to undue pressure or influence from any party.
- CEOs and agencies have an obligation to be responsive to the wishes and instructions of the elected government. The obligations of independence and responsiveness must be balanced, and independence must not be obstructive, even when the government chooses to act in a manner contrary to departmental advice.
- The minister and the decisions made by a minister are not legally bound or constrained in any way by any advice which may be given by an agency.
- The minister may not direct the CEO or any agency employee as to the content of any advice which the agency may give, but may request advice and information on any topic within the purview of the agency.
- The minister and the minister’s staff may not, by requests, argument or other means attempt to influence the content of any advice which the agency may give.
- The minister’s staff do not have the power in their own right to give directions or attempt to give directions to CEOs, ministerial liaison officers, or any other agency staff. If they are conveying instructions on the minister’s behalf, their authority to do so must be clearly defined and specific to the matter in hand.
- CEOs and public servants must be satisfied as to the authority behind any request or direction, and must take positive steps to satisfy themselves if the authority is in anyway unclear or questionable.
- Ministers and CEOs have an obligation to ensure that all decisions and actions (including about matters such as those listed above) are documented in sufficient detail to ensure that the processes involved are both accountable and transparent.

There is good reason to believe that the majority of interactions between ministerial advisers and public service departments are conducted in these terms. It is, however, the exceptions which give grounds for concern, because ministerial staff have the capability:

... to intervene in departmental processes; to mediate between the political and administrative domains; to drive, sieve and skew advice; to insist upon what the minister wants as opposed to the public interest or the integrity of government ... ¹³⁸

137 Section 100 provides that a chief executive is subject to the directions of the departmental minister in managing the department. However, in making decisions about particular individuals, the chief executive—

- must act independently, impartially and fairly; and
- is not subject to direction by any minister.

(Also, subsection (1) is subject to another Act—

- that provides that the chief executive is not subject to the directions of the departmental minister about particular matters; or
- that otherwise limits the extent to which, or circumstances in which, the chief executive is subject to directions of the departmental minister.

138 J. Walter 2004, op.cit., p. 17

Kathy MacDermott of the Australian National University examined a series of annual surveys of Commonwealth public servants conducted from 2003 to 2006, and found that each year about a third of public servants who have dealings with ministers and their advisers consistently reported experiencing a 'challenge' in balancing impartiality, responsiveness and accountability.¹³⁹

The people working at these interfaces are constantly subject to pressures of time, of public and media advocacy, and of parliamentary schedules and constraints when dealing with significant issues of considerable interest to both individuals and the general public. Under such pressures, it would be unreasonable to expect that every officer would infallibly behave coolly and rationally. The risk of hasty, ill-conceived or self-interested actions is ever present.

The following discussions and recommendations have been framed to take the risk out of exceptional circumstances when they arise, and to ensure that all parties are able to discharge their duty to the people of Queensland. To be effective in changing practices and cultures across the whole of the public sector, they should be implemented in the broadest possible way.

139 K MacDermott, 'Whatever happened to frank and fearless? The systems of new public management and the ethos and behaviour of the Australian public service; *Democratic Audit of Australia*, discussion paper 20/07, Australian National University, Canberra, 2007, p. 4

DISCUSSION AND RECOMMENDATIONS

Good government rests on transparent, thorough processes that guide ministers, their advisers, and professional public servants in the effective completion of their duties.¹⁴⁰

The issues of concern identified in the previous chapter fall into the following categories:

- the ethical framework for employment and conduct of both public servants and ministerial staff, and for interactions between the two groups
- the ability of public servants to resist inappropriate influence
- the provision of adequate training to all parties to ensure that the frameworks for ethical conduct are fully known and understood.

This chapter will discuss measures which are already in place to guide conduct and interactions, and make recommendations for possible measures to close any gaps.

Policies, guidelines and practices for grants will also be discussed, as these issues all arose in the context of the grants process in the then Department of Local Government, Sport and Recreation.

Ethical framework

The concern most frequently expressed in public submissions was that the framework surrounding the conduct of, and interactions between, ministerial staff and public servants, was either inadequate or insufficiently understood.

Measures already in place

Queensland already has comprehensive provisions in place to prevent inappropriate interactions between ministerial staff and public servants, particularly in light of recent major reforms. The interaction is principally governed by and outlined in:

- the *Ministerial and Other Office Holder Staff Act 2010*
- the *Ministerial Staff Code of Conduct*
- employment contracts.

Ministerial and Other Office Holder Staff Act 2010

The *Ministerial and Other Office Holder Staff Act 2010*, which commenced on 1 November 2010, creates a:

... stand alone framework for the employment of staff members to support ministers, the leader of the opposition and, where necessary, other non-government members of parliament, separate to the *Public Service Act 2008* ...¹⁴¹

140 Department of the Premier and Cabinet 2010, *Queensland Ministerial Handbook*, Foreword, p .1

141 Ministerial and Other Office Holder Staff Bill 2010: Explanatory Notes, p. 1

This Act arose from the government's response to the Integrity and Accountability green paper, which committed to the enactment of new legislation governing the employment of ministerial staff (similar to the Commonwealth Act), and other reforms.¹⁴² The Explanatory Notes to the Ministerial and Other Office Holder Staff Bill state that:

Introducing new legislation will create a discrete framework for the employment of ministerial staff distinct from the public service, thus reflecting the differing roles of ministerial staff and public servants.

In January 2010, the government made a submission to the Crime and Misconduct Commission's inquiry into the interactions between ministers, ministerial staff and public servants. This submission emphasised the government's commitment to ensuring that appropriate frameworks are in place to guide the interactions between ministerial staff and public service employees. A number of measures have been implemented in this respect, including amending standard employment contracts and issuing a communiqué setting out clearly that ministerial staff do not have the power to direct public servants. Additional to these administrative measures, this Bill will create strong legislative parameters around the employment, powers and expectations of conduct of ministerial staff.¹⁴³

Turning to the content of the Act, the Explanatory Notes state the following as to how the Bill proposes to achieve its objectives:

The Bill implements a stand alone framework for the employment of ministerial staff, staff of the Leader of the Opposition and staff of other non-government Members of Parliament (as determined to be necessary based on the composition of the Legislative Assembly). The employer for these staff members will be the Director-General of the Department of the Premier and Cabinet (the chief executive), who will make appointments upon recommendations from the Premier, the Leader of the Opposition or relevant Member of Parliament respectively.

The Bill includes a specific provision that ministerial staff are not empowered to direct public servants in their own right, thus acknowledging the limitations on powers of ministerial staff members. To ensure that appropriate ethical standards are clearly set and maintained, the Bill includes work performance obligations to supplement the requirements of the *Public Sector Ethics Act 1994* and which require that interactions with public service employees be undertaken collaboratively and with respect. The Bill also amends the *Public Service Act 2008* to ensure that reciprocal obligations apply to public service employees in their dealings with ministerial staff.

The Bill allows the chief executive to issue directives or guidelines about employment matters such as standards of conduct, and to apply rulings made under the *Public Service Act 2008* to staff members employed under the Bill. This will ensure that the employment regime for staff members continues to reflect public service conditions. As a transitional arrangement, the Bill will carry over current public service rulings applying to general employees under the *Public Service Act 2008* to staff members for a period of three months.

Further matters dealt with in the Bill include codes of conduct and the provision of statements of interests by staff members, which continue current administrative practice as established under the *Ministerial Handbook* and *Opposition Handbook*. The Bill will also continue the existing jurisdiction of the Crime and Misconduct Commission and Ombudsman and amend the Criminal Code to ensure that corruption and abuse of office offences continue to apply to ministerial and Opposition staff.¹⁴⁴

The Explanatory Notes and the Act are available at <www.legislation.qld.gov.au>.

142 Department of the Premier and Cabinet 2009, *Response to Integrity and Accountability in Queensland*, Queensland Government, Brisbane.

143 Ministerial and Other Office Holder Staff Bill: Explanatory Notes, pp. 1–2

144 *ibid.*, pp. 2–3

The *Ministerial Staff Code of Conduct* has long been in place, and is currently being revised as part of the government's integrity and accountability review. The revised version will

... reiterate that ministerial staff do not have executive power or legal authority to direct public service officers unless the direction is made on behalf of the minister...¹⁴⁵

Complementary provisions have also been included in ministerial staff contracts and in the new Queensland Public Service Code of Conduct (effective from 1 January 2011).

In Queensland, ministerial staff are provided with a detailed induction. CMC enquiries suggest that in the past this has placed little emphasis on their role in relation to the public service, and in particular has made little mention of the impropriety of ministerial staff attempting to give directions to departmental staff. This appears to have been improved in recent times.

With the commencement of the *Ministerial and Other Office Holder Staff Act 2010*, the basis for disciplinary action against relevant staff will flow from their employment contracts¹⁴⁶ and those staff will remain subject to the CMC's jurisdiction.¹⁴⁷

Defining the employment conditions of ministerial staff

The CMC supports a legislative framework similar to that in the *Commonwealth Members of Parliament (Staff) Act 1984* for the terms and conditions of employment for ministerial staff.

It is noted that the Commonwealth Act does not make any provisions in relation to the performance management or discipline of relevant employees, other than whatever terms may be set out in their contract, and makes provision only for their termination.

In section 10, the new Queensland Act states that the basis of a person's employment as a staff member is to be on the terms and conditions stated in their contract of employment. These may relate to remuneration, term of employment, cessation of employment before the expiration of that term, and suspension from duty or other disciplinary action.¹⁴⁸

As ministerial staffers hold positions of significant sensitivity, influence and responsibility, the CMC is of the view that there must be a clearly defined management framework for them, which provides adequately for issues such as disciplinary action. As a point of comparison, public servants and members of the Queensland Police Service, for example, are subject to disciplinary processes that are enshrined in legislation, which provides a significant degree of transparency and accountability about the applicable processes and potential outcomes.

The current form of the Act reflects the government's view that the disciplinary regime for ministerial staff will be most effectively addressed through contracts of employment, rather than placing provisions about matters such as disciplinary action in legislation.

In that case, in the CMC's view, it is essential that individual contracts of employment make detailed provision for matters of this type. In his submission, Integrity Commissioner David Solomon expressed a hope that the legislation would 'go into detail about the terms and conditions of employment'.¹⁴⁹

145 Submission received for the *CMC review of Ministerial Office and Public Servant Interaction*, Department of Premier and Cabinet, p. 16. All subsequent submissions, unless otherwise stated, are those received for this review. They are available on the CMC website at <www.cmc.qld.gov.au>.

146 See s. 10 of the *Ministerial and Other Office Holder Staff Act 2010*.

147 *ibid.* s. 31

148 The matters that may be dealt with in the stated terms and conditions are not limited to those set out in subsection 10(3) of the Act.

149 Submission, Solomon, p. 2

Protocols for communication

The rules and the conventions governing communication between the minister and the minister's staff, and the department CEO and other delegated staff need to be clearly defined. The starting point is to make provision in legislation for this.

Section 15 of the Act is entitled *Staff members not empowered to direct public service employees*, and provides that:

- (1) A public service employee is not subject to the direction of a staff member.
- (2) Subsection (1) does not prevent a staff member giving a direction to a public service employee on behalf of a person who may lawfully give the direction.

The Explanatory Notes to the Bill comment, on what is now subsection (2), that:

[T]he primary mechanism through which this would occur would be a direction from a minister to the chief executive of their department under the *Public Service Act 2008*.¹⁵⁰

The notes further provide that:

This clause is not intended to preclude communications between ministerial staff and public service employees that would usually occur in the course of normal day-to-day interactions necessary for the administration of government business. Ministerial staff perform a critical role in facilitating communication of ministerial priorities to departments and acting as a conduit between ministers and public service employees, including communicating ministerial views and decisions or requesting advice or other work to be undertaken to assist the minister in the performance of their duties and responsibilities. For example, it would be appropriate for ministerial staff to request that briefing notes be prepared on particular issues or by specific timeframes, but not appropriate to give directions on matters that could affect the giving of objective and accurate advice, such as the nature of the content or recommendations in the advice.

Clause 15 reiterates the commitment outlined in the government's response to the Crime and Misconduct Commission's inquiry into the issue of interactions between ministers, ministerial staff and public servants. Consistent with this response, the premier issued a communiqué on 2 August 2010 setting out expected standards of conduct in interactions between ministers, ministerial staff and public service employees.

Contracts of employment have also been amended to clearly stipulate that ministerial staff do not have the power or authority to direct public service officers. This clause ensures that the government's commitment is enshrined in legislation as well as being contained in individual contracts.¹⁵¹

In the CMC's view, consideration should also be given to creating a set of protocols to provide further and detailed administrative guidance to ministerial staffers and public servants. Such protocols would need to be both convenient and efficient, while maintaining the clear separation between departmental and ministerial functions. The administrative protocols could provide practical guidance, supplementing the broader instruments of the legislative framework that will be in place now with the passage of the Act, and the premier's recent communiqué providing direction about standards of conduct for interactions between ministerial staff and public service employees.¹⁵² For ease of reference, it may be appropriate to incorporate some of the content of the communiqué into the protocols.¹⁵³

150 Ministerial and Other Office Holder Staff Bill 2010, Explanatory Notes, p. 8

151 *ibid.*, pp. 8–9

152 See Appendix

153 For example, the communiqué contains a number of statements of principle but also sets out in detail the expected actions in situations such as expressions of concern relating to interactions between public servants and ministerial staff.

The *Ministerial and Other Office Holder Staff Act 2010* provides for the power to make directives,¹⁵⁴ about matters relating to the employment of staff members, including, for example, 'a directive about standards of conduct applying to staff members.'¹⁵⁵ There is a similar power to make guidelines about matters relating to the employment of staff members.¹⁵⁶ These provisions present some options for how the proposed administrative protocols might be instituted and made applicable to staff members. In particular, the potential use of the public service directive mechanism appeals as a way of ensuring that the protocols also apply to both ministerial staffers and public servants.

One of the most pressing reasons for developing a specific set of administrative protocols is to provide a level of continuity (rather than relying on the development of new positive relationships each time a minister or a CEO is replaced), and to make it clear that there is a right and appropriate way of doing business. This helps to counteract the development of 'back-door' cultures where the practitioners and the public seek to find ways — usually based on contacts, 'mates', and reciprocal favours — of circumventing the accountabilities of the system.

This set of administrative protocols should include the following:

- Guiding principles that accountable government depends on the public being able to clearly know how a decision was made and by whom, and that
 - all decisions and actions should be documented or recorded in such a way that this information is included in the records directly relating to the decision
 - this information is readily accessible to authorised parties.
- A clear statement (consistent with the Explanatory Notes) that the minister's power to give direction to a CEO does not include the power to compel the CEO to give particular advice or to change departmental advice. This does not diminish the minister's right to direct the department to act in a manner which is contrary to its own advice.
- A formal written process by which ministers may instruct departments to implement particular policies. This must be augmented by a convention for noting verbal instructions from the minister or the minister's staff in diaries, minutes or file notes, and attaching these notes to relevant files. A process by which ministers can provide written comments and explanations relating to their reasons for supporting, modifying or refusing various elements of a briefing note or submission is also desirable.
- A process, when a minister has instructed that certain action be taken contrary to departmental advice, whereby the department can provide information and advice as to how it proposes to implement the instruction.
- Inclusion of a file reference in all submissions to or replies from the minister to assist in proper recordkeeping.
- A clear statement, consistent with the legislation and the contracts of employment of ministerial staff, that such staff do not have the power to direct employees of government agencies or to make policy or agency administrative decisions in their own right without specific and direct authorisation from the minister.
- A corollary statement that public servants and other employees of government agencies are not subject to the direction of ministerial staff and should not accept any such direction.
- Guidelines to clearly establish when a ministerial staffer is speaking on behalf of the minister. Such guidelines should place the onus on the public servant to directly ask the ministerial staffer whether an instruction has the minister's authority, to obtain confirmation of this authority if there is any reason to doubt it in a particular case, and to document the instruction and the authority in an appropriate and accessible way. The government has already indicated its support for this onus: 'If there is any doubt about the authority of a

154 Under the *Public Service Act 2008*

155 See *Ministerial and Other Office Holder Staff Act 2010*, s. 26

156 *ibid.*, s. 29

direction conveyed by a ministerial adviser, public service officers are expected to confirm that the direction has ministerial authority'.¹⁵⁷

- Channels by which exceptions can be approved and documented where urgency or other factors necessitate departures from the normal protocols.
- A framework by which breaches or perceived breaches of the protocols may be addressed and managed through internal processes, and through which staff are empowered and encouraged to report inappropriate conduct.

The protocols to shape and regularise the communication between ministerial staff and public servants should be developed, preferably by the Ministerial Services branch of the Department of the Premier and Cabinet, and with material input from the Public Service Commission and other stakeholders. As far as possible, they should be applicable uniformly across the entire Queensland public sector to ensure that the standards of integrity, transparency and accountability are uniform across all arms of government.

The development process should include open consultation with the various interested bodies, including the public sector unions, major and minor political parties, the Integrity Commissioner, the Queensland Ombudsman, and the Integrity, Ethics and Parliamentary Privileges Committee.

The framework and protocols should be implemented across the sector with appropriate information and training provided to all ministerial staff and to all public servants who may have dealings with ministerial offices. Requirements to observe and conform to the protocols should be incorporated into the relevant codes of conduct, employment contracts and agency policies and procedures. A system for monitoring and reviewing the operation of the protocols should be developed at the same time, and responsibility for doing so allocated to an appropriate agency.

Recommendation 1

That Ministerial Services, Department of the Premier and Cabinet, conduct consultations to devise, introduce and monitor a set of protocols in accordance with the principles outlined in this report, governing communication between ministerial offices and public officials across the public sector.

The protocols should address the matters outlined herein, and include provision for monitoring and reviewing their operation, and allocation of responsibility for those tasks.

Communication and decision making: the need for transparency

While the proposed protocols will apply to all ordinary dealings between the minister's office and departments, the CMC hearings indicated that there may be a particular need to make provision for communications which seek to influence the outcome of selection or evaluative processes, or which in effect amount to instructions from the minister's office as to what action a department should take, where that action may be contrary to the department's advice.

In the current investigation, changing the conditions of the \$4.2 million grant to a one-third up-front payment rather than the usual acquittal-and-reimbursement of expenditure, and the changing of the status of the assessment of grant applications from two specific schools suggest that ministerial staff gave instructions (whether directly or indirectly) to departmental staff which ran contrary to the way the department would have proceeded independently. To an extent, the source of these instructions is disputed on the evidence. Nonetheless, decisions were made

¹⁵⁷ Submission, Department of the Premier and Cabinet, p. 13.

which contravened the established guidelines and understanding of the usual process for making those decisions, with no clear record of why the guidelines were not followed.

In these instances, at least, the department's formal records in relation to the decisions were inadequate. There was no formal documentation of any instructions, nor of the variation of decisions, and no documentation reflecting how the changes came to be made.

In other instances unrelated to the investigations addressed in this report, the CMC has noted similar circumstances, and this lack of evidence about the making of decisions has at times impeded investigations. In its *Response to the Green Paper on Integrity and Accountability*, the CMC recommended that:

... the announcement of all major government decisions which are at variance with official departmental or agency advice, including the awarding of large contracts and all policy or administrative decisions having a material impact on the livelihood or well-being of any citizen, must be accompanied by a comprehensive statement of the rationale for the decision.

Each rationale statement should be framed in terms of the reasons why this particular outcome is more in the public interest than the outcome recommended by the department or agency, should provide as much detail of the financial, environmental and social factors which determined the outcome as possible, and should be composed by the persons responsible for making the decision.¹⁵⁸

It should be noted that under the *Judicial Review Act 1991* (s. 32) and the *Ombudsman Act 2001* (s. 50), there are already legal provisions which require a minister or a CEO to provide a written statement of the reasons for a decision. Under the *Public Records Act 2002* public authorities must make and keep full and accurate records of their activities. The *Right to Information Act 2009* gives a right of access to information in the government's possession or under the government's control unless, on balance, it is contrary to the public interest to do so. Accordingly, where there are shortfalls in the documentation of decisions, it is the responsible ministers and CEOs who must accept the resultant suspicion.

A minister's right to make decisions — and to accept responsibility for them — is not in question here. However, a transparency process is needed to ensure that where a department's processes or advice are not followed or are overridden, the public can know that this has happened, know why it was done, and be given an explanation of why this was considered to be in the public interest. One of the functions of transparency measures is to prevent inappropriate conduct from occurring in the first place. Few officers should be willing to put their name to an instruction or decision that does not comply with policy and procedure. There is clearly a need for a defined process to ensure that adequate and accurate records are made and retained.

To some extent, the communication protocols will address the problem where ministerial staff interact with public servants, but departments and other public agencies need to develop and implement their own policies and procedures to ensure they document decisions to make them fully transparent, and identify the responsible officer. As suggested above, such processes might usefully include the creation of a rationale statement for relevant decisions.

158 Crime and Misconduct Commission 2009, *CMC's response to the green paper on Integrity and Accountability: recommendation #16*, CMC, Brisbane.

Recommendation 2

That government departments and agencies be encouraged to introduce transparency measures, such as a statement of rationale, in respect of documenting their decision-making processes where a final decision by government overrides agency advice.

The ability of public servants to resist inappropriate influences

Seventeen of the public submissions expressed concern that political influences have an undesirable effect on departmental advice and actions, and ten submissions expressed a belief that the independence and expertise of the public service had been diminished by politicisation of the upper levels of the service. These views were expressed by, among others, two former judges, several former senior executive service officers and a former director-general.

While the CMC acknowledges that it is almost impossible to prove or disprove empirically that politicisation has occurred, such a prevalent and widespread perception must reflect on the integrity of the service, and this needs to be examined and addressed.

Measures already in place

The requirement that the public service be non-partisan and apolitical is clearly set out in section 3 of the *Public Service Act 2008*:

The main purposes of this Act are to—

- establish a high performing apolitical public service that is—
 - responsive to government priorities; and
 - focused on the delivery of services in a professional and non-partisan way; ...

As a comparison, the Commonwealth *Public Service Act 1999* lists as first among its ‘values’ that the Australian Public Service ‘is apolitical, performing its functions in an impartial and professional manner’,¹⁵⁹ and also requires that it provide the government with ‘frank, honest, comprehensive, accurate and timely advice’.¹⁶⁰

Quite clearly, for Queensland public servants many of the concerns identified in the previous chapter revolve around the delicate process of balancing the requirements of section 3 above — to be responsive to the wishes of government, while remaining non-partisan and professional.

For the overwhelming majority of government and departmental business, this balance is attained with little difficulty; but it is necessary to look at the mechanisms or guidelines available to assist staff on either side on the infrequent occasions when there are inappropriate attempts to disturb the balance.

The *Public Sector Ethics Act 1994* and recent amendments

If public servants are to value and assert their independence, it is important that the legislative framework within which they work should be strongly supportive.

The independence of the public service is a vital convention of the system of government, but until recently the *Public Sector Ethics Act 1994* referred to independence and impartiality only once. The matter is essential to the public perception of government and public service integrity, and deserves prominence and a clear commitment from government.

¹⁵⁹ *Public Service Act 1999* (Cwlth), s. 10(1)a

¹⁶⁰ *ibid.*, s. 10(1)(f).

In December 2009 the CMC made detailed recommendations for the review of the *Public Sector Ethics Act 1994* which included the following:

The Act needs to include a statement (in the light of the recent CMC hearings) which clearly enunciates the duty of a public official to provide independent and impartial advice to the executive, in accordance with the 'free and fearless' convention. In particular, it should be clear that advising the executive does not include telling the executive only what the executive has indicated that it wants to hear.

This does not impact on the minister's right to make decisions and have them implemented, but is an accountability issue: that the ministers are accountable for their decisions, and the public officials are accountable for their advice, and that it must at all times be possible to distinguish which is which ...

It is important that Codes of Conduct show that breaches of the separation between the executive and administrative arms are a breach of the Code and that there is an obligation to report such breaches to an appropriate authority (noting that in the recent CMC inquiry, two senior civil servants indicated that they were reluctant to report improprieties, the director-general even stating that raising concerns with the minister would be fruitless).¹⁶¹

The *Integrity Reform (Miscellaneous Amendments) Act 2010* was passed on 16 September 2010 and commenced on 1 November 2010. It made significant reforms to the *Public Sector Ethics Act 1994* which included:

- the insertion of new ethics principles, including one of 'integrity and impartiality'
- the provision for ethics values to apply to public sector agencies, entities and public officials. These values, while not being legally enforceable, are to provide a basis for codes of conduct.¹⁶² They include 'integrity and impartiality', 'promoting the public good', 'commitment to the system of government', and 'accountability and transparency.'

For example, the Act explains the ethics value of 'integrity and impartiality' in the following terms:

In recognition that public office involves a public trust, public service agencies, public sector entities and public officials seek to promote public confidence in the integrity of the public sector and—

- (a) are committed to the highest ethical standards; and
 - (b) accept and value their duty to provide advice which is objective, independent, apolitical and impartial; and
 - (c) show respect towards all persons, including employees, clients and the general public; and
 - (d) acknowledge the primacy of the public interest and undertake that any conflict of interest issue will be resolved or appropriately managed in favour of the public interest; and
 - (e) are committed to honest, fair and respectful engagement with the community
- the requirement that codes of conduct are to provide for standards of conduct for public sector agencies, entities and officials, consistent with the ethics principles and values.

The CMC notes that the government's new single code of conduct contains a specific section dealing with the need for public officials to maintain appropriate relationships with ministerial staff. The provision notes that ministerial staff are not empowered to direct public service employees in their own right, and that employees may be able to challenge any directions or instructions by raising them with senior managers.

161 Letter, Robert Needham to Public Service Commissioner, 22 December 2009. See also footnote 114.

162 *Integrity Reform (Miscellaneous Amendments) Act 2010*, Clause 5(3).

Perceived politicisation of the public service

Calls for the de-politicisation of the public service were made in 35 per cent of the submissions received. In those submissions the term 'politicised' is loosely used, and seems to have two main facets. First, it is argued that the appointment of agency CEOs and senior executive service officers is controlled by ministers and other politically appointed managers (particularly the premier, the premier's staff and chief of staff). The perceived consequence is that these appointments tend to go to people who are politically aligned with or, at the least, in political sympathy with the government of the day. The perception is that this practice can lead to cronyism and significantly erodes the independence and impartiality of the public service.

On the other hand, the term also refers to the fact that senior executives in the public service are not tenured like the staff they manage. Instead they are employed on limited-term contracts which can be terminated readily, with no specific reasons required, and with restricted redundancy arrangements. This is perceived as implying that the executive's livelihood depends on their pleasing the incumbent minister and government — 'security of employment is based on acceding to ministerial instructions in order to curry favour and pay back favours'¹⁶³ — and that this dependency inhibits the executive's ability to give independent, free and fearless advice to the government.

It is sometimes argued that CEOs 'should act to protect the integrity of our government system, usually by reminding ministers of the requirements for due process'.¹⁶⁴ However, the contrary view is that when CEOs are perceived to be beholden to their political masters for their jobs, these ethical obligations may not have primacy in their thoughts and conduct, and there must be:

[s]ome doubt as to whether [they] are always willing and able to insist on their right to control the quality of departmental advice that the minister should receive ... on occasions their dismissal appears to have been capricious ... the threat of dismissal with little or no explanation is affecting the capacity of at least some [CEOs] to do their jobs.¹⁶⁵

The submissions received by the CMC establish that there is little doubt that insiders accord at least some basis to the fear of political repercussions for excessive independence.

Former Judge Michael Forde notes that 'a person on a contract may not want to upset his or her political masters' and that 'job security and the willingness to offer fearless advice to a minister do not necessarily go hand in hand'.¹⁶⁶ A senior Queensland public servant advises 'this submission is anonymous because I have witnessed occasions where staff have been either moved sideways or sacked because of conflict between that staff member and the office of a minister'.¹⁶⁷ Another submission observes that 'Directors-general who have a poor working relationship with a minister can on occasions suffer an unfortunate fate'.¹⁶⁸ One senior public servant asserted that it has become a 'Public Service Joke: When they introduced SES contracts, the first people to go were Mr Frank and Mr Fearless'.¹⁶⁹

The number of senior public officials who requested anonymity for their submissions to this inquiry also underlines that this fear, whether or not it is founded in reality, exists in the public sector community.

163 Submission received for the CMC review of ministerial office and public servant interaction, Confidential #5, p. 1.

164 M Keating, 'In the wake of "a certain maritime incident": ministerial advisers, departments and accountability', *Australian Journal of Public Administration*, vol. 62(3), 2003, p. 94

165 *ibid.*, p. 95

166 Submission, Forde, pp. 2,7

167 Submission, Confidential #4, p. 1

168 Submission, Flavell, p. 3

169 Submission, Confidential #5, p. 2.

Twenty years ago, the Fitzgerald report made the following suggestions:

3.5.4 Special Appointments

In a further attempt to develop administrative impartiality, it might be desirable to make special conditions apply to the appointment of officials with independent functions, such as the chief executives of government departments and instrumentalities (and perhaps their immediate subordinates), statutory and Parliamentary officers such as the Auditor-General, the Ombudsman, the Commissioner of Police and the Clerk of Parliament, and members of tribunals, government bodies and other organizations to which, by law or convention, the Governor in Council or a minister has a right of appointment.

Appropriate appointment procedures for senior positions could be made in a way that not only ensures that talented people apply for those positions, but that public scepticism is reduced.

A reasonably practical compromise may be the public adoption of guidelines to govern all senior public appointments. Such guidelines might observe the following principles:

- all eligible persons of whom the minister is aware should be accorded proper and impartial consideration and evaluation;
- extraneous considerations, including personal and political associations or donations should not be regarded. The appointment should be based on professional selection and recruitment processes where merit is the underlying criterion for appointment;
- appropriate qualifications for appointment should be formulated and publicly notified; and advertised where appropriate; and
- there should be appropriate consultations with 'Opposition Shadow ministers', professional associations and other relevant bodies and people, with reference to all potentially relevant circumstances, including any personal or political connections which the appointee has with the government or any of its members or their political party.

There are some positions such as some members of minister's personal staff which may call for such close personal contact and confidence that the community accept that appointments be properly influenced by purely personal considerations. Where personal connections or political affiliations are valid considerations, however, that fact, and the reasons, should be openly acknowledged.¹⁷⁰

Some relevant measures are now in place. The *Public Service Act 2008* (s. 100) specifies that CEOs cannot be directed by ministers in respect of 'decisions about particular individuals' which is generally taken to refer to appointments, transfers, and disciplinary measures. This inhibits the minister from filling the department with personal or political appointees, and reduces the ordinary public servant's fear of dismissal or removal to a departmental wasteland.

A specific Public Service Commission Directive regarding the employment conditions of officers of the senior executive service (SES) includes a provision that other than in 'exceptional circumstances determined by the Commission Chief Executive', SES vacancies are to be advertised in accordance with the recruitment and selection directive applying at the time.¹⁷¹

Other policies and directives now require chief executives of government departments, SES officers and equivalent employees, including statutory office holders, to declare their interests on an annual basis. The interests to be declared include shareholdings and other property investments, other substantial sources of income and so on. While organisational memberships must be declared, interests in the nature of memberships of industrial organisations and/or political parties are exempted.¹⁷²

170 T. Fitzgerald 1989, op.cit., section 3.5.4

171 Public Service Commission 2009, *Directive 05/09* at 6.3, PSC, Brisbane

172 Public Service Commission 2009, *Directives 2 and 3/10* and accompanying *Policy and Frequently Asked Questions* material.

SES contract system

All tiers of government have now moved away from the traditional British model in which heads of departments were tenured career public servants who had risen, often over many years, through the ranks of the department. The changes towards contractual employment of senior public servants were generally promoted as modernising measures to improve efficiency and responsiveness. In Queensland these changes were foreshadowed in the 1989 Labor policy document *Making Government Work* and implemented following the election of the Goss government in December of that year.¹⁷³

Similar changes were made around the same time by the Greiner (NSW 1988–92) and Kennett (Victoria 1992–99) governments. ‘The consensus from the literature is that the effect of these changes was to centralise and entrench political power relative to the public service.’¹⁷⁴ Viewed less charitably, contract employment was perceived by some as ‘not so much as an efficient and flexible system of public management, but as a further and very blunt attempt at politicisation’.¹⁷⁵

However, although the Public Service Act allows Queensland Government CEOs a five-year contract, a substantial number are on three-year contracts, which creates an obvious link to the standard electoral cycle.

The contract system for senior executives was initially proposed as a way of improving public service efficiency by introducing new staff with modern management skills, and greatly increasing the mobility of management specialists. In so far as the greater mobility attracts better skilled applicants, there seems to be a consensus that it has been effective. However, if the contracts are allowed to become a vehicle for politicisation, this benefit is to some extent undermined, as ‘politicisation also reduces the incentive for able and ambitious people to join the public service in the first place or continue in it’.¹⁷⁶

The broad consensus view from the submissions is succinctly stated by former Justice Carter: ‘Senior public service positions should be filled only after a due advertisement and selection process which is entirely independent of government and in which political influence has no place’.¹⁷⁷

The CMC cannot make any finding or comment on whether there is, in fact, any politicisation of the public service, or its extent. However, it is of concern that there continues to be a perception within the public sector community, as reflected through the submissions made to the CMC, that politicisation is associated with the employment of senior executives in the Queensland Government.

No easy answer

Beyond ensuring open, fair and merit-based selection processes, the submissions made to the CMC suggest there is no ‘easy’ answer to addressing such perceptions and, in time altering them. Nevertheless, as such perceptions can only undermine the confidence of the public and public servants themselves in the independence and impartiality of the public service, the CMC recommends that government consider additional steps that might be taken in relation to the terms and conditions of the employment of senior executives.

173 J Walker, *Goss: a political biography*, University of Queensland Press, Brisbane 1995, pp. 134–5.

174 J Stewart, *Public service independence and responsiveness: striking a balance*, Occasional paper 2/2008, policy paper #8, 2008, p. 3

175 P. Coaldrake, *Working the system*, University of Queensland Press, Brisbane, 1989, p. 76

176 R. Mulgan 1998, op. cit., p. 10

177 Submission, Carter, p. 6–7

The challenge for the government is to strike the appropriate balance between:

- protecting the political and other civil rights of the individual (by specifying grounds of discrimination which are unlawful); and
- acting in the public interest, by ensuring that the Queensland public service provides apolitical advice to ministers, which is not tainted by the perception that there is a conflict of interest between public servants' personal interests (in pleasing the government of the day), and their public duty to provide independent advice.

Training

The conduct brought to light during this investigation highlighted the need for adequate training for all involved parties to ensure that the frameworks for ethical conduct are fully known and understood.

Ministers and chiefs of staff

There are a number of dimensions to the training that should be provided for ministers. Like their staff, they need to be fully informed about their roles and responsibilities, their powers and the democratic constraints under which those powers operate.

In addition, some of the submissions and commentators raised doubts about the capacity of ministers — and sometimes their chiefs of staff — to manage staff in a high-pressure situation. According to Tiernan, 'As ministerial offices became larger and there were greater demands on ministers, questions arose about their capacity to manage and supervise their ministerial staff.'¹⁷⁸ Walter notes that 'Given staff numbers, and the many competing demands on ministers, appropriate management is often lacking'.¹⁷⁹

In recent times, with the creation of very large and diverse departments and complex portfolio arrangements, the management of staff and organisational tasks can be complex. Ministers are not elected or allocated to a portfolio on the basis of their office management skills, and it is unrealistic to expect all of them to be naturally gifted or widely experienced as people-managers. Assistance and basic skills should be offered through ministerial inductions, specialised training courses (especially following a change of government) and an advisory/mentoring service.

Another relevant factor is the way ministerial staff are selected and appointed. Some submissions have claimed that the persons appointed to ministerial staff positions on occasion lack the necessary skills, experience and knowledge of the agency's activities to provide effective liaison and communication between the agency and the minister. Tiernan notes:

Many staff are selected on the basis of their loyalty to the minister, as a reward for political service, or in the expectation they will soon contest a pre-selection for political office, rather than because they have specific skills or expertise.¹⁸⁰

There is a perception that many appointees to ministerial staff:

are the children, partners or relatives of prominent politicians or party members, who actively seek and obtain patronage from relatives or friends in the power elite. This is a major attack on the merit principle and on the ability to express diverse opinions (when you owe someone a favour for getting you the job).¹⁸¹

It is argued in the submissions that staff appointed for these reasons often lack knowledge of the workings of government and of the business of the department, as well as the experience and interpersonal skills required to interact effectively with the public and the department.

178 A Tiernan 2005, op.cit., p. ii

179 J Walter, 'Ministerial staff and the "lattice of leadership"', *Democratic audit of Australia*, discussion paper 13/06, Australian National University, Canberra, 2006, p. 4

180 Submission, Tiernan p. 4

181 Submission, Confidential #5, p. 3

This can place an additional burden on public servants, as well as on the minister's office.

When the Goss Labor government took office in 1989 after 32 years in opposition:

Goss told his ministers to desist from hiring personal staff. A ministerial staff unit and specialised selection panels would be established for that purpose. As Goss explained, this was as much for the protection of individual ministers as it was for the government as a whole. 'I told them, "If your branch secretary or drunken uncle wants a job it's a good mechanism for you to be able to say, sorry, it has to go through the panel"'.¹⁸²

There is obviously a tension between the distance offered by this approach and the protection it offers against perceptions of cronyism, and the reality as noted by Fitzgerald that:

[T]here are some positions such as some members of minister's personal staff which may call for such close personal contact and confidence that the community accept that appointments be properly influenced by purely personal considerations.

However, as Fitzgerald recognised, '[W]here personal connections or political affiliations are valid considerations, however, that fact, and the reasons, should be openly acknowledged'.¹⁸³

Training should be structured to emphasise the techniques and desirability both of merit-based selection, and of resisting the social and private pressures towards nepotism and cronyism, to ensure that the best informed decisions are made about recruiting staff.

Ministerial staff

Former minister Judy Spence indicated at the public hearings that training for ministerial staff was provided 'on a fairly regular basis' through the Department of the Premier and Cabinet.¹⁸⁴ Anecdotal evidence available to the CMC indicates that this training is not well attended and that significant numbers of ministerial staff have deliberately avoided attending.¹⁸⁵

Examination of the Ministerial Staff Induction program (sample, as delivered on 11 April 2008), shows that 25 of a total 185 minutes were devoted to the topic 'The ministerial office/department interface'. The *Ministerial Staff Code of Conduct* was dealt with — along with other employment conditions including salary, leave, superannuation, study assistance and pecuniary interests and declarations — in just five minutes.

The development of an ethical workplace culture depends in part on the availability of adequate information and the explanation of key principles and obligations. Both the evidence and the submissions point to a clear need for training of ministerial staff which specifically addresses:

- the roles and accountabilities of ministers, staffers and public servants
- the ethical obligations of positions in a minister's office
- the protocols for dealing with departmental staff
- identification and prevention of bullying and other harassment
- the ways in which the minister's views or opinions are to be communicated to departments
- the giving of directions to departmental staff
- the various codes of conduct in addition to their own, which impact on their work (e.g. codes for ministers, lobbyists, whole-of-government, and industry).

Regular refresher training should be included in the training plans for these staff.

182 J. Walker 1995, op. cit., p. 141

183 T. Fitzgerald 1989, op. cit.

184 Evidence, Ms Spence, day 1, p. 13

185 Crime and Misconduct Commission 2009, op. cit., *Recommendation #25*.

Departmental staff

There is a similar need to train various departmental staff about what communications they should accept from ministerial staff, and for the actions they should take if they receive inappropriate communications. As Tiernan suggests:

... [r]eforms that have sought to make the career public service more responsive to political direction and more attuned to the priorities and preferences of the government of the day have challenged the role conceptions of public servants.¹⁸⁶

The *Public Sector Ethics Act 1994* places 'a positive ethical obligation on the public servant not to allow himself or herself 'to be improperly used,' and this should be an important focus of the training.¹⁸⁷

The measures already described to reassert and reinforce the independence of the public service should be accompanied by educational campaigns to remind senior public servants and politicians of their respective roles in this context. The enactment of specific legislation and the implementation of the proposed communication protocols, as discussed above, would provide an ideal platform for such training, but thereafter it should become a routine part of inductions and a topic of periodic refresher training in work areas exposed to risk. Topics to be given attention should include:

- the independent role of public servants
- the ethical obligations of public servants
- the protocols for dealing with ministerial offices
- the processes for dealing with inappropriate or unauthorised directions
- identification and prevention of bullying and other harassment
- management skills for handling complaints from staff about inappropriate conduct.

This training should be provided (perhaps together with the Ethical Decision Making training delivered by the Public Service Commission) to all SES officers on a regular basis, to targeted groups of other senior managers, and to all staff who are likely to have dealings with a ministerial office. Employees of non-departmental agencies such as statutory authorities and government-owned corporations should be included if they have contact with the minister's office.

Recommendation 3

That appropriate training in ethical and transparent communication between the minister's office and the agency be provided to:

- **ministers**
- **ministerial staff**
- **chief executive officers and senior managers**
- **departmental/agency staff.**

That appropriate training and support in staff recruitment and management be provided to:

- **ministers**
- **chiefs of staff.**

186 Submission, Tiernan, p. 1

187 Submission, Forde, p. 3

Policies, guidelines and practices regarding grants

The administration of the Major Facilities Program 2009, discussed in chapters 3 and 7 of this report, provided another example of how departmental officers interacted with the minister and ministerial officers, the influence of the minister and her officers on departmental advice, and the failure to document all decision making.

The internal audit of the Major Facilities Program 2009 found that the administration process was generally sound, however it noted that there were deficiencies in the moderation process at stage 1, including the fact that no 'overarching policy or methodology was in place'.¹⁸⁸ The audit also identified a number of instances where documentation was lacking, particularly the explanations for changes to the initial assessment by the department. The audit report concluded that the reasons for any such changes should be documented.¹⁸⁹

The evidence from the public hearings both in relation to the QRU grant and the 2009 Major Facilities Program reflects the preparedness of senior public servants to meet the apparent wishes of the minister at the expense of their obligation to provide full and independent advice.

It is imperative that the existing policies and guidelines be reviewed and where necessary tightened to remove risk and promote transparency. Arguably, the policies and guidelines for grant applications are adequate in principle and — when they are adhered to — serious problems should not occur. What appears to be missing is a clear commitment to follow them in all cases and to provide independent advice despite outside interference, such as the perceived will of the relevant minister. The problem in the instances investigated by the CMC was further compounded by failure to record the relevant assessment processes.

As noted, the minister has the right to overrule any process or departmental decision, but this should not occur clandestinely. A secondary process must be specified in the grants policies and guidelines, so that when there is a departure from the usual assessment process the source of and authority for the change is clearly identified, verified and documented. Alternatively, the minister could be removed from the decision-making process but continue to provide input on proposals by submitting his or her view in writing.

Mr Matheson, in his submission to the CMC, made a number of detailed suggestions on how to improve the transparency of the grants assessment and decision-making process. He stated that:

[t]hese adjustments would require a reconsideration of current processes, impose a clear separation of the department from the portfolio minister in decision making and provide greater evidence of the application of endorsed assessment frameworks.¹⁹⁰

The CMC recommends that the department give due consideration to Mr Matheson's suggestions when it reviews the policies and guidelines relating to grants as recommended below.

The measures recommended in this report requiring clear protocols for communication and a clear definition and understanding of the respective roles of public servant and ministerial officer; transparency in decision making; and a culture where public servants can resist improper influence, will all go to addressing the deficiencies and concerns that this report has identified.

However, given the particular context in which these concerns arose, it is considered that a specific recommendation should be made dealing with the administration of grants.

188 The audit report was tendered as exhibit 31 at the CMC public hearing, see p. 14

189 *ibid.*, p. 4

190 Submission, Matheson, p. 1

Recommendation 4

That the Department of Communities review its policies and guidelines relating to grants and other discretionary decisions, to ensure that there are adequate safeguards to prevent unauthorised or undocumented departures from due process.

Conclusion

The foregoing recommendations build on the reforms currently being implemented by government, and seek to address not only the possible incidence of misconduct, but also the underlying relationships and working cultures which in the past may have permitted misconduct to occur.

It is critical to bear in mind that when ministerial staff behave inappropriately, the ultimate responsibility for their actions lies with the minister. When public servants behave inappropriately, the ultimate responsibility lies with their CEO. In both cases, the evasion of 'plausible deniability' can be legitimately applied only where there has been a clear-cut attempt to conceal the actions from the responsible CEO or minister. Accordingly, the solutions and the culture changes which are needed must emanate from the top. The onus is on the ministers and the CEOs to take positive and energetic action to ensure that the relationships and the business conducted between their offices are ethical, professional and transparent.

To assist with this, it is important that the concepts and changes be applied equally across the entire public sector in Queensland, with no double standards and no 'special-case' exemptions. Integrity reforms have slim hopes of success if there are circumstances (beyond the truly exceptional), in which they are not applicable.

The CMC's recommendations are framed to contribute to the ongoing development of a culture of integrity in the public sector in which all participants can discharge their duty to the people and the state of Queensland freely, honestly and without fear.

APPENDIX

PREMIER'S COMMUNIQUÉ

Premier's Communiqué

Interaction between ministerial staff and public servants

The purpose of this Communiqué is to provide clear direction on the expected standards of conduct for interactions between Ministerial staff and public service employees.

Ministerial staff and public servants must have a clear understanding of their respective roles and responsibilities within the broader context of our Westminster system of government:

Ministers. The Westminster system dictates that, as elected representatives, Ministers are individually responsible to Parliament for the administration of their portfolios, and that governments are collectively accountable to the community through the electoral process.

Public Servants. The public service gives effect to the policies and decisions of the government of the day, regardless of its political complexion, and provides advice that is objective and impartial as well as responsive, accurate and comprehensive. Directors-General are responsible for the delivery of their department's services and are ultimately accountable to the Premier, although they report to their responsible Minister on a day-to-day basis.

Ministerial Staff. The practical realities of the Ministerial workload require that Ministers receive support

to manage portfolio responsibilities, control policy direction and negotiate the political arena. This is the primary purpose of employing Ministerial staff; they support and assist Ministers to meet their broad responsibilities and provide advice which takes account of political considerations and complements the advice of the public service.

Ministerial staff do not have any executive power or other legal authority to direct public service employees in their own right. However, they perform a critical role in facilitating communication of Ministerial priorities to departments and acting as a conduit between Ministers and public service employees, for example by communicating Ministerial views or decisions. Ministerial staff must not ask a public service employee to take any action which would be inconsistent with that person's duties and obligations under the *Public Service Act 2008* or under the *Public Sector Ethics Act 1994*.

Positive and productive interaction between the administrative and political arms of government is central to good government. Together, the work performed by Ministerial staff and the public service contributes to a robust system that allows Ministers to receive information and analysis that enable them to make informed decisions.

All interactions between Ministers, Ministerial staff and public servants are subject to a comprehensive framework of laws, policies and codes of conduct that establish legal obligations and expected standards of behaviour.

Within the context of this framework, the Queensland Government expects that:

- Ministerial staff and public service employees must, at all times, behave honestly and with integrity in the course of their employment, treating each other with respect and courtesy.
- Ministerial staff must act on the understanding that they do not have the capacity to direct public servants in their own right and that public service employees are not subject to their directions unless those directions are being communicated to a Director-General on behalf of the responsible Minister.
- Directions given by Ministerial staff to the public service on behalf of a Minister should be provided directly to Directors-General in accordance with the public service management and accountability framework set out in the *Public Service Act 2008*.
- Directors-General should provide ongoing support to staff (including reinforcing among senior executives their responsibility to provide support to their staff) in managing their interactions with Ministers and Ministerial staff.
- Directors-General should be openly available to senior executives and other staff to answer questions or provide advice if any actions of Ministerial staff are considered to be unreasonable (or potentially unlawful).

- Where concerns have been raised relating to interactions with Ministerial staff, the Director-General should raise the matter with the appropriate Minister for resolution. The Minister should work cooperatively with their Director-General to achieve resolution of matters as they arise.
- Where a matter can not be adequately resolved, it should be referred to the Director-General of the Department of the Premier and Cabinet for resolution with the Premier's Chief of Staff or the Premier directly.
- Where a direction or action could potentially be unlawful, the matter should be referred to the relevant Director-General to determine whether to notify the Crime or Misconduct Commission or the police.
- Ministerial staff and public service employees should be aware of and comply with their roles, responsibilities and obligations as contained in their respective codes of conduct.
- Ministerial staff and public service employees should also be aware of each other's roles, responsibilities and obligations, and the context and environment within which they operate.

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PREMIER OF QUEENSLAND**



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