CRIME AND MISCONDUCT COMMISSION

TRANSCRIPT OF PUBLIC INVESTIGATIVE HEARING

CONDUCTED AT LEVEL 2, NORTH TOWER, 515 ST PAULS TERRACE, FORTITUDE VALLEYAT LEVEL 2, NORTH TOWER, 515 ST PAULS TERRACE, FORTITUDE VALLEY WITH RESPECT TO

File No: MI-09-1057

HEARING NO: 08/2009

DAY 6 – WEDNESDAY, 16 DECEMBER 2009
(DURATION: 1 HR 19 MINS)

LEGEND

Presiding Officer – Robert NEEDHAM, Chairperson, CMC
Counsel Assisting – Russell PEARCE, Director, Misconduct Investigations
Hearing Room Orderly – Alicia VIEIRA
Mr DEVLIN (instructed by Gilshenan and Luton) for Mr Tutt
Mr HUNTER (instructed by Bell Miller) for Mr Matheson
Mr FARR (instructed by Guest Lawyers) for Ms Farmer and Mr Kinnane

THE HEARING CONVENED AT 10.04 AM

THE PRESIDING OFFICER: Good morning, everyone. Yes, Mr Pearce?

MR PEARCE: Mr Chairman, in the course of my opening remarks some two and a half weeks ago I explained why the CMC had seen fit to finalise its investigation in this matter by way of public examination of the witnesses. I indicated then that the Commission saw a public hearing in this matter as an ideal platform by which to examine the roles played by the public servants, on the one hand, and the ministerial advisers on the other.

I suggested that public ventilation of the allegations and the evidence, followed by publication of a report, would serve to heighten awareness of the inappropriateness of certain types of conduct and would assist the Commission to achieve one of its statutory functions, namely, to raise standards of integrity and conduct in units of public administration.

As predicted, the subsequent public hearing resulted in public ventilation of the evidence and indeed the wider or systemic concern. The public hearing process with the consequent public exposure was possible because the Commission elected to exercise its coercive, or special, powers. The Commission is armed with those coercive powers because the legislature considers that in some circumstances there is greater value in exposing the truth or getting to the bottom of the matter than there is in conducting an investigation by the traditional means.

While the exercise of coercive powers assists the Commission to identify the truth, there are restrictions upon the use that can then be made of that evidence. In short, there is a balancing exercise. A balance is struck between taking away a witness's right to silence and the use that can then be made of that witness's testimony.

We will recall that some witnesses in the public hearing objected to answering questions on the grounds of privilege against self-incrimination, as they were entitled to do. Those witnesses were then directed to answer. Pursuant to section 197 of the Crime and Misconduct Act, upon being directed to answer questions, the evidence given by a witness is not admissible against the witness in any civil, criminal or administrative proceedings, and I should add an administrative proceeding would include a disciplinary proceeding.

Therefore, it is one thing that the CMC is now armed with the evidence of a particular witness, but it is another thing entirely to be able to make use of that evidence in other proceedings.

I go further. We have heard evidence from certain witnesses which, while exposing misconduct, also incriminates the witness who gave the evidence. The most obvious example is Mr FREER. Mr FREER's evidence incriminates Mr TUTT in various ways, but it is also self-incriminatory. Indeed, Mr FREER is potentially a party to any offence that might on his own evidence have been committed by Mr TUTT.

While section 197 prevents Mr FREER's evidence from being used against him, it does not preclude its use in proceedings against Mr TUTT. However, if Mr FREER was required to repeat his evidence outside these walls, say, for example, in criminal proceedings against Mr TUTT, he would be at risk of having his testimony used against him. He would not have the protection that section 197 provides. Therefore, while we know what Mr FREER is able to say, he is not immediately in a position to repeat those accusations in a Court of law because if he does, he incriminates himself.

This problem, if I can call it that, can be overcome. For example, if there is sufficient other admissible evidence against him, Mr FREER might himself be prosecuted. He could, when those proceedings were at an end, be called to give evidence against Mr TUTT. Alternatively, Mr FREER could be indemnified against prosecution and called as a witness against Mr TUTT. However, the question of indemnification is not one for the Commission.

Now, just as I have outlined the difficulties that might attach to Mr FREER giving evidence in proceedings against Mr TUTT, the reverse would also apply in the case of proceedings that might be brought against Mr FREER. For example, if Mr FREER were to be charged with an offence, for instance, a charge alleging he had committed fraud by misapplying part of the moneys paid to the QRU, it would be, more likely than not, necessary to call Mr TUTT as a prosecution witness. Like Mr FREER in the first example, Mr TUTT could legitimately decline to answer questions on the basis that his answers might incriminate him, just as he did here.

Again, Mr TUTT might be indemnified, but as I have already said, that is not a call that the Commission can make. In any event, I offer the observation that the circumstances of this matter do not easily lend themselves to the indemnification of either Mr TUTT or Mr FREER. Moreover, there exist in this matter issues that might justify the exercise of the prosecutorial discretion not to prosecute, even if a prima facie case were found to exist. For example, it might be considered relevant that no individual person achieved any personal financial gain and, further, that a significant level of personal embarrassment has been occasioned by the public exposure of this matter. Again, however, the exercise of a prosecutorial discretion not to prosecute is not a matter for the Commission.

At the end of the day, what the Commission must determine is this: where there is evidence that may be capable of establishing an offence or an act of official misconduct, should that evidence be referred for consideration of criminal or disciplinary proceedings? Nothing I have just said should be taken as suggesting that the Commission will or should refer any particular aspect of the evidence. It certainly should not be taken as an indication that one or either of Mr TUTT or Mr FREER is or are likely to be referred to the Director of Public Prosecutions. Equally, it should not be taken to mean that they won't be so referred. It may well be that, when it reports publicly on this matter, the Commission will think it appropriate to refer some aspects of the evidence for consideration of criminal or disciplinary action. Equally, it is possible the Commission will determine that for any one or more reasons it is not appropriate so to do.

I say these things by way of introduction both to allay any expectation that criminal or disciplinary proceedings must necessarily follow, and to highlight how a prosecution arising out of this investigation is likely to be problematic. I say no more at this point other than that the question of what proceedings might follow this investigation is a complex and challenging one. Analysis of the evidence is continuing. The Commission needs to take time and care in its deliberations and will need to consider the submissions that are likely to follow mine.

A further important point to be made is this: whether or not the Commission refers aspects of the evidence to other agencies is not the gauge by which to measure the investigation, and that brings me back to where I've started. As I said, the reason the Commission embarked upon the public hearing was to publicly ventilate the allegations in order to heighten awareness of the inappropriateness of certain types of conduct. If the Commission had been minded above all else to achieve a prosecution, say of Mr TUTT, the process followed would have been different. For instance, Mr TUTT would not have been given access to the evidence before he was interrogated. Instead, the Commission's primary concern has been, and remains, to see that the lessons that flow from this matter are used to raise standards of integrity and conduct in units of public administration. Criminal prosecution and disciplinary action are an important but are not the primary consideration.

The focus of this investigation initially fell upon the events that led to and culminated in the execution in August of 2008 of the funding agreement between the department and the QRU. The CMC's attention was drawn to the major facilities program because it was from the $30 million budgeted for that program that the money was diverted to fund the grant to the Queensland Rugby Union. Although not the focus of investigation, it was instructive, and later became necessary, to also have regard to the circumstances in which the major facilities program subsequently came to be administered, particularly the events of January and February of this year.

The QRU grant did not form part of the major facilities program. It could not. It did not meet the guidelines applicable to the program. For a start, the grant to the QRU represented a 100 per cent contribution to the cost of the proposed projects. The major facilities program allowed only for a 50 per cent contribution to such projects. Nor was the QRU grant awarded as a consequence of any application made to the Department, or any assessment conducted in accordance with the guidelines to the major facilities program.

Despite the fact that the administration of the major facilities program largely postdates the events that affected the QRU grant, the investigation of the major facilities program is nonetheless relevant and it is useful to have regard to it when assessing the evidence in respect of the earlier QRU matter. In fact, what we now know of the administration of the major facilities program, at least in those early stages, provides a useful starting point for my further submissions. That is because the evidence not only offers an insight into the wider or systemic issue being investigated by the CMC, but it provides an example of the way Mr MATHESON interacted with the minister, with Mr TUTT and with his own subordinates.

We will recall what we heard of the process adopted during Stage 1 of the major facilities program. That oral testimony, together with the evolving spreadsheets, provides the only record of the decision-making process. Having been confronted with the evidence, the former minister conceded that the major facilities program had not been well administered. She has suggested in that regard that the staged assessment process developed by the Department was flawed. We recall that the staged process involved a call for expresses of interest followed by invitations to preferred applicants to proceed to the second stage.

With due respect to Ms SPENCE, there is nothing intrinsically wrong with the process devised by the Department. The problem lies with the execution, and for that the blame must be shared between Mr MATHESON and the minister's office. Again, I submit that there was nothing wrong per se in the Department's soliciting the minister's views as part of the early assessment stage. The mischief occurred when Mr MATHESON took the minister's views as gospel and instructed his subordinates to make alterations that were at odds with the assessments that had otherwise been made in accordance with the applicable guidelines.

The further mischief is the lack of proper record keeping in respect of those alterations. In fact, it would appear that but for those spreadsheets which survived the exercise there was no record keeping at all save for the final ministerial submission with the accompanying spreadsheets that went to the minister. The final ministerial submission misrepresents the true state of affairs.

All that is left for us to examine is the trail of evolving spreadsheets with some handwritten scribbling. They are the spreadsheets that one public servant preserved. Otherwise, no-one claims to have any clear recollection of what may or may not have been said by Ms SPENCE or Mr TUTT. On one view, the lack of proper records has unfairly deprived the former minister of the ability to defend her ultimate decision making. This leaves her exposed to criticism that she was driven by political motivation. There is absolutely nothing in the final version of the spreadsheets to indicate that the recommendations contained therein reflect the minister's own views and preferences, nor that those views and preferences caused the department to depart from its independent and impartial assessment.

The minister was entitled to an independent and impartial assessment. She did not receive it. The minister 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 we would expect her to do. However, good public administration requires that the process should have been transparent. It was anything but.

One can have a degree of sympathy for the minister. She ought to have been able to withstand criticism by saying, "These are the areas in which I merely followed the department's independent advice and these are the areas in which I exercised my own discretion", and she gave a very valid example where she indicated she told the department to look for projects west of the Dividing Range. Because of the manner in which the assessment process was finalised, the minister has been deprived of the

opportunity to say those things to us and thus to defend her actions. What the minister was ultimately presented with was a recommendation that in part merely reinforced her own preliminary views, yet there is nothing on the face of the documents to alert her to that fact. A cynic might say that the minister ought to have known that the final submission conveyed to her merely her own suggestions to the department, but equally the minister was entitled to presume that her earlier suggestions had been assessed and tested by the department.

It is no answer to say, as was suggested during the course of the public hearing, that the assessment of the expressions of interest was subject to later assessment and that the matters initially favoured by the minister or her office were ultimately not successful in receiving funding. Stage 1 applied a threshold test. It resulted in applicants being excluded from further participation. Manipulation of the assessments in the way that occurred doubtless excluded otherwise worthy applicants from consideration.

It is not going too far to say that what occurred with the major facilities program is analogous to the celebrated "sports rorts" affair of the mid-1990s. There are obvious similarities. The major facilities program involved the awarding of grants to sporting organisations totalling $30 million, less of course the grant that had already been made to the QRU. The federally run Community, Cultural, Recreational and Sporting Facilities Program, which I'll call the sporting facilities program, also involved the awarding of $30 million in grants to sporting organisations. In December 1993 the Commonwealth Auditor-General delivered a report critical of the administration of the sporting facilities program. In a subsequent parliamentary inquiry it transpired that the then federal Minister for Sport was unable to account for the decisions she had made to award government grants to sporting bodies. The accusation was that the then minister had distributed money disproportionately to marginal government electorates. There is no obvious evidence of that occurring here, at least in respect of those alterations that were affected by the minister's intervention.

Like the 1990s sporting facilities program, the major facilities program has attracted adverse comment in an audit report and raises the spectre of poor record keeping and questionable public administration. In the earlier case there was a "great big whiteboard" situated in the minister's office where notes about decisions were made but subsequently erased. The minister claimed she had assessed nearly 3,000 submissions for funding on the basis of the advice provided to her but for which there was no lasting record. In the present case decisions were noted as ticks and crosses on the changing array of spreadsheets, a copy of which, as I've said, fortunately was kept by a departmental officer.

As I have already submitted, there is no obvious evidence of an intention by the minister in voicing her opinions to Mr MATHESON to disproportionately or improperly favour government-held electorates. That is why I say that in some measure one can have sympathy for the position in which Ms SPENCE has now found herself. There is, of course, some evidence that two applications, the Warrigal Road State School matter and the Macgregor High School matter, received invitations to proceed to the next stage when arguably they should not. Both projects were in the

minister's own electorate.

In the case of Warrigal Road State School, the allegation from Mr MATHESON is that he was instructed by Mr TUTT to include the project, and in respect of the Macgregor State High School matter there is a suggestion that the matter was discussed with the minister and Mr TUTT.

In the end result neither project received funding, but we do not know whether as a result of the progression of those projects into stage 2 other perhaps more deserving projects missed out. Leaving the issue of Warrigal State School to the side for a moment, it is my submission that the state of the evidence in respect of the major facilities program is such that it would not be possible to conclude that the minister or her staff improperly interfered with the assessment process. It is certainly common ground that the minister and perhaps Mr TUTT expressed opinions. It is also apparent that, armed with those opinions, Mr MATHESON went away and dictated that alterations be made to the spreadsheets. Those alterations ultimately made their way back to the minister as recommendations of the Department. In my submission, it is difficult to see how, in the circumstances, Mr MATHESON could reasonably have felt compelled to act in this way, or for that matter how he was in any way under duress.

The evidence suggests one of two things: Either the culture within the Department was so dysfunctional that every request of the minister was satisfied -- that is the classic "Yes, Minister!" response -- or that Mr MATHESON had no real appreciation of his role as a public servant. The latter possibility is consistent with Mr MATHESON's evidence in both the closed and public hearings. In the closed hearing Mr MATHESON said in part, "The department operates and exists to support the minister." Further, in response to the question, "Are you obliged to follow instructions issued to you by a ministerial adviser", Mr MATHESON said, "Well, generally yes. That's my understanding."

During his evidence in the public hearing Mr MATHESON was asked whether he considered it reasonable to have demanded from his subordinates their preparation of the ministerial submission recommending the $4.2 million grant to the QRU. His reply suggested that he thought it was reasonable, because the advice and instructions he had received gave him "every reason to believe that this was what the minister wanted to do". That answer was followed by this exchange -- question from yourself, Mr Chairman: "Is it the situation that, as you understand it within the department, that if you receive an instruction from the ministerial office that you are to provide particular advice, say in this case an advice recommending approval of something, then you must provide that advice even if you don't think it's the right advice?" Mr MATHESON said, "That's largely, yes, largely the case." You then posed this question, "In this case did you have sufficient material to be able to assess the matter properly and advise the minister to -- and recommend to the minister to approve the grant of $4.2 million?" Answer, "There was not sufficient material to assess the request as would ordinarily be the case." Question: "But even in those circumstances you still felt that you were constrained to give the advice to the minister that you understood the minister wanted?" Answer: "That's correct, because it was, it was my

understanding this was something the minister wanted to do."

There is, of course, also the evidence of Mr KINNANE'S general intimation to his staff encouraging a cooperative relationship with the minister's office. However, no-one suggests that Mr KINNANE urged his people to be totally subservient, and there is clear evidence that some departmental officers were prepared to, and did, complain when demands made of them were considered to be unreasonable. Of course, any lack of appreciation or misunderstanding on Mr MATHESON's part must logically also affect his evidence as to the QRU grant and in particular his assertion that Mr TUTT instructed the preparation of the ministerial submission of the 8th of July. For that reason alone what took place in respect of the major facilities program in January and February this year is relevant to the events some six months earlier. In other words, it is relevant to look at the major facilities program when assessing the cogency of Mr MATHESON's evidence concerning the conversations he claims to have had with Mr TUTT about the QRU grant.

What this may indicate, as will no doubt be suggested on behalf of Mr TUTT, is that Mr MATHESON was quick to elevate as an instruction or a direction what might merely have been a suggestion or indeed an inquiry. On the other hand, what took place with respect to the major facilities program might be viewed as demonstrating the ease with which Mr TUTT was able to bring influence to bear upon Mr MATHESON.

At the end of the day, the evidence concerning the major facilities program is instructive, but is not of itself determinative of the primary issue in this investigation, namely, whether Mr TUTT acted improperly in respect of the events of July 2008. However, it does raise, I suggest, a strong suspicion that the relationship between the minister's office and the department was not as it should have been.

I turn now briefly to some aspects of the evidence. Mr FREER's evidence, if accepted, is damning of Mr TUTT. Mr FREER's evidence would demonstrate that Mr TUTT was generally aware of the poor financial situation of the QRU as at July 2008. It would demonstrate that Mr TUTT counselled Mr FREER to submit a request for bricks and mortar funding when he understood full well what the funding was required for and what it was likely to be applied against, namely, operational or recurrent expenses. It demonstrates that Mr TUTT's understanding in this regard was also reflected in his endeavour to have the funding agreement altered to permit an upfront access to those funds, and it also demonstrates that Mr TUTT informed Mr FREER that the grant moneys had been increased to $4.2 million but that the additional $200,000 was to be provided by the QRU to another entity. And albeit there's some confusion about what Queensland University entity it was, the direction was that Mr FREER was to contact Mr ANNING. I will return to Mr FREER.

Mr MATHESON's evidence, if accepted, is also damning of Mr TUTT and is supportive of Mr FREER's account, at least in so far as Mr MATHESON suggests, that the figures of 4 million and 4.2 million came from Mr TUTT, that the ministerial submission of the 8th of July 2008 was prepared because Mr TUTT demanded Mr MATHESON progress the grant with the added demand that it be completed in

time for the Reds gala ball, and finally that the project relating to the Warrigal Road State School had been prioritised because Mr TUTT had issued a not dissimilar instruction.

I've already spoken about the cogency of Mr MATHESON's claims in light of what we know of his conduct in respect of the major facilities program. I do not propose to repeat those comments. Furthermore, it cannot be overlooked that Mr MATHESON's assertion that he identified the QRU matter to his Director-General was something that was not supported by Mr KINNANE. The other consequence of Mr MATHESON's evidence is that it implicates Mr FREER in the commission of one or more possible offences. For example, Mr MATHESON'S evidence would be admissible against Mr FREER in respect of proceedings for fraud based upon the QRU's misleading request for funding, and the subsequent misapplication of funds to both operational expenditure and to the University of Queensland Rugby Academy.

Ms Dianne FARMER'S evidence, supported as it is by Mr KLAASSEN, is in my submission not only cogent, but is also generally consistent with the claims made against Mr TUTT by both Mr FREER and Mr MATHESON. Further, it may be observed that any misgiving one may harbour as to whether Mr TUTT's words to Mr MATHESON constituted an instruction is substantially allayed by Ms FARMER's account of how she was told by Mr TUTT to "just fix it" in respect of the funding agreement, and I will return to the issue of the funding agreement in a moment.

Ms SPENCE's evidence is that she provided the $4.2 million grant on the basis of the ministerial submission put before her. There is no evidence to challenge her assertion on this point and no reasonable basis exists to suspect otherwise. Thanks to Mr MATHESON's intervention, by the time the ministerial submission reached the minister it was in a form that suggested the application had been assessed and was supported by the department. The document was therefore misleading, and to that extend at least Ms SPENCE may claim to have been duped.

Ms SPENCE said she was satisfied as to the quality of the ministerial briefing. Opinions may vary in that regard, but the content of the document will speak for itself.

What is plain is that Mr MATHESON had gone to considerable effort to do whatever needed to be done so that the minister might make it to the ball on time. Again, there is no impropriety in attaching urgency to the matter so that the minister, for example, could take advantage of the opportunity to announce her funding decision. It may be a matter for comment in other places, but it does not give rise to official misconduct.

Similarly, the fact that the grant was announced before Executive Council approval and seemingly before the Premier had been made aware of it, might also attract comment, but it is not official misconduct.

I've already spoken of Ms SPENCE's position with respect to the major facilities program. In that regard it is common ground that Ms SPENCE suggested changes to the spreadsheets. She was entitled so to do. However, while Ms SPENCE might say

that she acted on the ultimate advice of her department, it is apparent that she had input into the formulation of that advice. To that extent the advice given to her was neither independent nor impartial.

While it might be said that she ought to have realised that the dish she was being served had been cooked to her own recipe, the minister was entitled to presume the final spreadsheets represented the work of the department. There was nothing on the face of the documents to suggest otherwise.

Mr KLAASSEN's evidence is essentially unchallenged. It is clear Mr KLAASSEN, at Mr MATHESON's direction, produced a draft ministerial submission that was not to the standard expected or required of him. However, for that he cannot reasonably be criticised. He had neither the time nor sufficient information to do otherwise. Similarly, Ms FARMER did only as instructed, albeit that she was instructed by Mr TUTT rather than Mr MATHESON. She did as instructed, but she did it under protest.

I turn to the question of possible criminal offences. Section 92A(1)(c) of the Criminal Code makes it an offence for a public officer who, with intent to dishonestly gain a benefit for the officer or for another person or to dishonestly cause a detriment to another, to do an act in the abuse of the authority of office. The offence, titled misconduct in relation to public office, carries a maximum penalty of imprisonment of seven years. The offence was not in existence at the time of these events. Section 92A only took effect on the 24th of September this year. That offence provision might well have covered the conduct that has been variously alleged of Mr TUTT, namely, his alleged role in compelling the compilation of a favourable ministerial submission, his alleged demand that Ms FARMER alter the terms of the funding agreement, and his alleged instruction that Mr FREER pay $200,000 to the University of Queensland Rugby Academy.

I therefore turn to the offence of fraud. In my submission there are several aspects of the evidence that may be capable of giving rise to an offence against section 408C of the Criminal Code. The Commission must determine in respect of each of the following occurrences whether a brief of evidence ought to be referred to the Director of Public Prosecutions for consideration of possible criminal proceedings. In that regard the following questions are posed: firstly, whether the evidence, if accepted, could establish that the QRU's representation to the minister and the department seeking a $4 million grant was misleading. The letter and supporting information sent by Mr FREER to the minister falsely represented that funding, if granted, would be earmarked for certain projects. The bricks and mortar representation, if I can call it that, was merely a mechanism to achieve the funding. The real intention was that the funding would be used for other purposes.

The evidence in this regard includes the disclosures Mr FREER made to Mr MATHESON earlier this year which gave rise to the complaint to the CMC, and also the subsequent written correspondence from Mr FREER to the current Director-General. Mr FREER was interviewed by the CMC. It appears much of what he said in that interview is admissible against him. In addition, consideration needs to

be given to what aspects of his evidence in the public hearing are able to be adduced against him. Further, consideration will need to be given to whether liability for any such offence, if indeed an offence was committed, rests solely with Mr FREER or the QRU or both.

The second question is whether Mr TUTT might be criminally responsible for the process culminating in the $4.2 million grant, and if Mr FREER's account is accepted, whether Mr TUTT is a principal or a party to that offence; additionally, if Mr MATHESON's account is accepted, whether Mr TUTT dishonestly induced Mr MATHESON to prepare the ministerial submission recommending the awarding of the grant because this was an action Mr MATHESON was lawfully entitled to abstain from doing.

Thirdly, a similar consideration exists with respect to the form of the funding agreement, particularly if Ms FARMER's evidence is capable of establishing that Mr TUTT dishonestly induced her to prepare the document in a form that required the upfront payment, something she was lawfully entitled to abstain from doing.

Fourthly, I observed section 408C is quite wide in scope such that it is possible for a single dishonest act to constitute the offence of fraud on more than one basis. I have highlighted the issue of whether Mr TUTT's alleged conduct induced Mr MATHESON and Ms FARMER to perform acts that they were entitled to abstain from performing. Another issue to be determined is whether his actions in each instance dishonestly gained a pecuniary benefit or advantage for the QRU and thus on that basis constitutes fraud.

Fifthly, consideration needs to be given to whether the offence, if an offence was committed, was committed by Mr FREER, the QRU or both. This is because the funding agreement executed by Mr FREER on behalf of the QRU imposed conditions upon how the $1.4 million in funding could be applied. There is evidence that upon its receipt by the QRU that money was placed into an account which was operated as a line of credit and was used to meet operational expenses. The use of the funds in that way was contrary to the conditions upon which the money was being held by the QRU and thus may constitute a fraud.

This would also include, but is not necessarily limited to, the two payments each of $100,000 which were directed to the University of Queensland Rugby Academy.

Finally, with respect to the $200,000 paid by the QRU to the academy, the question is whether Mr TUTT dishonestly induced the QRU, through Mr FREER, to make that payment, an act which the QRU might otherwise have lawfully declined to do. Of course, it might also be that this dishonest act gained a pecuniary benefit or advantage for those entities operating the academy. Additionally, consideration will need to be given to whether Mr FREER, the QRU or both are parties to this offence, if an offence was committed.

I refrain at this point from submitting that the Commission ought to refer these matters to the Director of Public Prosecutions. To do so now would, in my

submission, be premature and unfair. The evidence is still being collated and terms of what evidence is admissible against what witness, and of course we are yet to hear the submissions of the various witnesses. As I have already pointed out, quite apart from the issue of whether there is sufficient admissible evidence, any criminal prosecution arising from this investigation is likely to be problematic given the logistical impediments that clearly exist. The Commission needs to give careful consideration to all of those issues before determining whether and how to report upon those particular aspects of the matter.

Criminal offences to one side, the Commission must also determine whether there is evidence capable of supporting a finding of official misconduct and whether with respect to any particular aspect of the evidence a report ought to be referred to the Director-General, Department of Communities, for consideration of disciplinary action either for official misconduct or less serious conduct. Official misconduct is defined by way of a number of constituent parts.

Firstly, "conduct" means conduct by any person that adversely affects or could adversely affect, directly or indirectly, the honest and impartial performance of the functions or exercise of powers of a unit of public administration. For example, the Department of Local Government, Sport and Recreation, or any person holding an appointment in a unit of public administration, for example, Mr TUTT, the public servants or indeed the former minister.

In the case of a person who holds an appointment in a unit of public administration, we are concerned with conduct that is or involves the performance of that person's functions or the exercise of that person's powers in a way that is not honest or impartial or is a breach of the trust placed in that person. To amount to official misconduct the conduct in question must either be a criminal offence or a disciplinary breach providing reasonable grounds to terminate the person who holds the appointment.

In the case of a member of parliament, there is no mechanism by which to terminate an MP's appointment short of the member not being re-elected. It follows then that to amount to official misconduct a member of parliament's conduct must constitute a criminal offence.

Finally, it does not matter whether the persons involved in the relevant conduct are no longer the holders of an appointment in a unit of public administration. An act of official misconduct is an act of official misconduct. Mr TUTT, for example, may no longer be employed as a senior ministerial adviser, but that means only that he cannot be disciplined. It does not mean that his conduct, if it constituted official misconduct, was anything less.

So far as disciplinary action is concerned, the brackets of evidence I have already identified might also constitute official misconduct. Of course, in practical terms that is rather meaningless because in the case of Mr TUTT and Mr FREER, Mr TUTT is no longer a ministerial adviser and Mr FREER was not a public servant. As against Mr MATHESON --

THE PRESIDING OFFICER: Mr PEARCE, there's been an amendment either proposed, or it's perhaps in, that allows charges of official misconduct to be brought against people even after they cease being in a unit of public administration. Has that come in yet?

MR PEARCE: No.

THE PRESIDING OFFICER: So, that wouldn't apply in this circumstance?

MR PEARCE: I should correct that. I'm not sure whether it's in force. It's only recently been enacted.

THE PRESIDING OFFICER: Certainly would apply here.

MR PEARCE: It would fall into the same category as that offence provision, section 92A that I referred to earlier.

THE PRESIDING OFFICER: Thank you.

MR PEARCE: As against Mr MATHESON, the following aspects of the evidence are relevant: his instruction to subordinates on the 8th of July 2008 to prepare a ministerial submission recommending the approval of a $4.2 million grant. Implicit in that instruction was that there was to be no opportunity for staff members to properly assess the application, and indeed Mr MATHESON has conceded that the information in support of the application was inadequate, in any event. Secondly, there is his role in re-drawing, finalising and delivering to the minister the final ministerial submission in circumstances where he now claims he was merely complying with Mr TUTT's instructions.

Finally, his instruction to subordinates arising out of his preliminary meetings in respect of the major facilities program. In my submission in respect of both the QRU grant and the later major facilities program the ministerial submissions delivered to the minister by Mr MATHESON were in each instance misleading. The final ministerial submission recommending the $4.2 million grant was misleading because it suggests the concurrence of various departmental officers. The inference is open that the course proposed to the minister did not in fact have the support of those officers, and to that extent the document was designed either to mislead the minister or to hide the true state of affairs, or both.

Similarly, the ministerial submission put before the minister in respect of Stage 1 of the major facilities program might also be said to be misleading, again in the sense that it suggests the concurrence of various departmental officers. The inference is open that the course proposed to the minister did not in fact have the actual support of those officers and to that extent the document was designed to hide the true state of affairs.

In both these instances there is a strong inference that Mr MATHESON was merely

doing his best to give effect to the minister's wishes, at least as he understood them to be, and there was no obvious benefit to Mr MATHESON. Certainly there is no basis to suspect he was setting out to deceive his minister, and for this reason the Commission would, in my submission, be loath to recommend anything other than consideration of disciplinary action against him.

However, public servants need to understand that being party to the production of a misleading document, especially a document such as a ministerial submission, could well in some circumstances constitute the new offence of misconduct in public office and may, in some circumstances, meet the statutory definition of fraud. It would not necessarily be a defence for the public servant to say, "I was merely doing the minister's bidding."

Inherent in what I've just said is the danger of using template documents, such as we saw in this case, which automatically continue to convey the implied support or imprimatur of the individual officers.

In my submission, apart from Mr MATHESON's conduct, and subject to the submissions yet to be received, there is no single aspect of the evidence that needs to be referred for consideration of disciplinary action.

THE PRESIDING OFFICER: Before you go on on that, you point out about that submission -- this is in respect to the 4.2 million being misleading because it suggests the concurrence of the various departmental officers, I wouldn't cavil with that, but isn't it also misleading because it -- on the face of it it suggests -- and I think you've made this point, that the minister from it would assume that a proper consideration and assessment had been made of the application, whereas in fact it was clear that it hadn't, and it didn't point out the obvious fact that the Department did not have material which it would have required to enable a proper assessment to be made. So in that regard isn't it misleading in a more substantial way than what you've referred to?

MR PEARCE: That point is a valid one. What I've tried to do in my submissions is focus on the strongest aspects of the evidence, but certainly there's an argument there that the document was misleading by omission.

THE PRESIDING OFFICER: Yes.

MR PEARCE: And also misleading in the form in which the arguments were developed by Mr MATHESON.

THE PRESIDING OFFICER: And your warning to public servants about they need to understand that they could be a party to the production of misleading documents and therefore of an offence would certainly relate to those aspects that I refer to.

MR PEARCE: Absolutely, and if I can refer to a very good example in this case, the final ministerial submission that went to the minister was in fact under the hand of Ms O'Bryan who, on her own evidence, had no role to play in the production of the document and she signed it merely because it was placed in front of her and she was

invited by Mr MATHESON to sign it.

THE PRESIDING OFFICER: Yes, all right. Thanks.

MR PEARCE: It is, in my submission, no part of the Commission's function to make findings of fact. In other words, it is not necessary for me to argue that the word of one witness should be accepted over the word of another. However, that does not mean that the Commission should not, in its ultimate report, point to the obvious strengths and weaknesses in the evidence.

It is relevant, therefore, to offer some observations about Mr TUTT's position. I propose only to paraphrase the evidence. It has been alleged that having been approached by Mr FREER on behalf of the QRU, Mr TUTT orchestrated the approval of the $4.2 million grant, most obviously by directing Mr MATHESON to produce a ministerial submission recommending the grant, and that he did so in circumstances where he ought to have been aware of the parlous state of the QRU's finances, and in the face of Mr MATHESON's statement that there was inadequate information.

If Mr FREER's evidence is accepted, Mr TUTT knew, or at the very least ought to have known, that the QRU required funding to assist with operational expenses. Further, it has been alleged that Mr TUTT was instrumental in increasing the amount of the grant sought by $200,000, and that he directed Mr FREER that this sum was to find its way to the Academy.

The minister, it seems clear, had no knowledge of these alleged events, and for his part Mr TUTT denies any misconduct. However, for Mr TUTT's denials to be truthful, Mr FREER is lying, because it is very hard to say that he is merely mistaken. Mr MATHESON is mistaken because he thought, mistakenly, Mr TUTT was giving him instructions. Ms Farmer and, by extension, Mr KLAASSEN are mistaken or lying, and Mr KINNANE is lying because Mr KINNANE says that he had discussed staff complaints with Mr TUTT.

Yet perhaps with the exception of Mr FREER, in respect of none of those witnesses can Mr TUTT point to a motive for the witness to falsely implicate him in misconduct. How extraordinarily fortunate it is, therefore, for Mr FREER if, as Mr TUTT would have us believe, it is Mr FREER who is misrepresenting what occurred. How extraordinarily fortunate it was for Mr FREER that he found an incompetent Acting Deputy Director-General who not only mistakenly thought he was being instructed by Mr TUTT, but was also prepared to direct his subordinates to recommend the grant without proper scrutiny, and Mr FREER's good luck did not end there. He was extraordinarily fortunate that Ms Farmer misunderstood Mr TUTT's request that she sort out the funding agreement, and that permitted the upfront payment Mr FREER was always chasing.

To the extent Mr FREER was extraordinarily lucky, Mr TUTT was extraordinarily unlucky. Similarly, Mr TUTT could offer no logical explanation for why the QRU would simply give away $200,000. You might recall my attempts to get him to comment on that possibility and his efforts to avoid the question.

The confluence of circumstances conspiring against Mr TUTT on this point is just as extraordinary. Mr ANNING was seeking $200,000, although there is no evidence he specifically mentioned that figure to Mr TUTT, but that is the figure he was looking for. Mr ANNING was told by Mr TUTT to contact the QRU, and he did so.

There is evidence that within the space of 21 minutes the grant to the QRU went from $4 million to $4.2 million, and that this occurred at Mr TUTT's instigation. Mr FREER, who could not have had any knowledge of any of those circumstances, alleges that Mr TUTT instructed him as to what was to happen with the additional $200,000, and finally, Mr TUTT's intervention with Ms Farmer made all of this possible.

On top of all this, the QRU was an organisation on the bones of its backside, yet having received $1.4 million in government funding, it immediately entered into discussions as to how to deliver $200,000 of that sum to the Academy. I might point out the evidence suggests that there was no negotiation as to whether it might happen. The negotiations were about how it would happen.

Finally, when the money is given away, the invoices generated by the Academy also appear to link the payments back to the QRU grant. With the very greatest of respect to Mr TUTT, one requires a considerable level of naivety to accept his denials.

I said at the outset that one of the benefits of coercive powers is that they permit a search for the truth. As a result of the exercise of coercive powers in this matter, we now know that the process that occurred in respect of the $4.2 million grant, and subsequently with respect to the major facilities program, occurred in the way that has been identified to us. We know, for example, that corners were cut with the QRU grant. Whether or not it was a worthwhile cause, and I'm certainly not arguing it was not worthwhile, it is clear that there was no proper assessment of Mr FREER's request for funding. Mr KLAASSEN was given less than one hour, not to assess the matter, but to produce a submission recommending that the minister approve the grant.

Mr MATHESON may have improved upon that submission, but with respect to those who have suggested he produced a balanced document, one would certainly hope that considerably greater diligence is normally applied by the department than occurred in this instance.

We also know that the funding agreement was anything but routine and that this permitted the QRU to access the grant moneys, which were then used in ways that were contrary to what the minister had approved.

Finally, in respect of the major facilities program, we now know that the department, via Mr MATHESON's instructions, gave effect to the minister's wishes in the assessment stage.

These matters have been exposed and the lessons may be learned from them by reason

of the fact the exercise of our coercive powers. However, knowing what took place is one thing. Having the evidence in a form that it may be used in criminal or disciplinary proceedings is quite another.

The Commission must now embark upon its own assessment and must make determinations as to whether the admissible evidence warrants referral to other places for consideration of criminal or disciplinary action.

As to the wider systemic issues, the Commission has made a public call for submissions. Those submissions are to be received by 22 January 2010. A report will issue some time after that date. They are my submissions.

THE PRESIDING OFFICER: Thank you, Mr PEARCE. All right. Where do we go now?

MR DEVLIN: I have some brief submissions.

THE PRESIDING OFFICER: Do you want to go next?

MR DEVLIN: I have no trouble with that.

THE PRESIDING OFFICER: I would indicate that, if anyone else makes any comment that would affect your client, of course I would be happy to have you come back after that.

MR DEVLIN: Chairman, the first brief submission I would like to make is that Counsel Assisting, in my respectful submission, rightly recognises that the primary role of these investigative hearings is to get at the truth and to enable the Commission to report and recommend appropriate reforms to the relevant administrative processes and accountabilities in order to prevent future misconduct. And he rightly recognises that a secondary purpose of such a public process is to gather evidence to prosecute individuals.

It seems entirely appropriate that 20 years after the creation of this statutory body, as they say as a creature of the Fitzgerald process, such a public statement has been made on this occasion. As a Counsel Assisting Mr Fitzgerald, you yourself -- and it seems in the closing stages of your own time with the Commission -- would appreciate that Mr Fitzgerald's approach even as a Commissioner in those days was that the process under the Commission of Inquiry Act, as it then stood, was primarily just that, to get at the truth and to educate the public as much as anything else.

One of the things that I have often privately speculated myself is that pursuant to that overall aim, for example, had the Commissioner of Police of the day been completely forthcoming in the way that Mr Herbert was, whether indeed he would have been indemnified in order to get at the truth. A high price can sometimes be paid for the overall public good.

Now, those things might be self-evident to those of us who had the privilege to

participate 20 years ago in that process, including yourself, but it is entirely appropriate, in my respectful submission, that Counsel Assisting today recognises those important principles. And it will colour the other brief submissions that I wish to make.

A general submission about Mr FREER is this, with respect, that Mr FREER is a pivotal figure in these matters and would appear to be an unreliable historian on important matters and at times demonstrably untruthful on critical matters. I would like to draw your attention just to one example of it, which has a degree of subtly about it and yet the Commission would be all too aware of it. I simply wish to make one example.

In his account of an alleged conversation with Mr TUTT at the Caxton Hotel in May Mr FREER used these words -- and I think I'm quoting from transcript 55; this is in the pub after a Rugby game: "We sort of, the rationale was around trying to nullify the effects of our depreciation, which was around a million dollars a year, and that's why the 3 million kind of resonated with me, so $1 million over three years, and so I said that I would prepare some financial documents and make an appointment with he and the minister to take them through that to begin the process of applying for a grant."

The fact that Mr FREER gratuitously hinted without saying it that discussions of the problems of the QRU with recurrent liabilities such as depreciation occurred in a smoky bar after a Rugby game defy logic and colour Mr FREER's usefulness as a witness of truth and as a reliable historian. I simply make that one submission about the evidence to highlight that Mr FREER himself of course had good reason to colour his evidence in that way because he himself must explain the use to which certain funding was put to indeed cure the QRU's existing financial difficulties.

The next submission I'd like to make is this, that the process for developing the concept proposal list -- I think they are variously Exhibits 26, 27 or thereabouts -- was wide ranging and somewhat informal. Counsel Assisting has already referred to this in his own submissions. The development of the assistance package, if we can put it that way, for the QRU therefore has to be understood against the background of such other concept proposals as those for the Rugby League and AFL. In those circumstances, as this inquiry has revealed, it is my submission that it would be a considerable stretch to label the process of the development of the $4.2 million QRU proposal as one engineered by acts of criminal dishonesty. The way in which the proposal was developed is simply not as clear as that.

You might recall that one of the documents that I tendered was a communication concerning the AFL proposal which just suddenly appeared within days, and the Rugby League one suddenly appeared within days. So that part of what the Commission is no doubt all too aware is that there seem to have been some informal means by which these things got on to a concept paper and it ran from there. So that when the Commission is considering whether it will report to the DPP no doubt it will be keenly aware of those kinds of background matters, which have rightly been fully exposed here in this investigative hearing.

Similarly, to characterise the change to the standard funding agreement payment provisions as being brought about by acts of criminal dishonesty would mean that the independent role of public servants would have to be put aside and ignored for the purpose of the exercise. If Mr TUTT's behaviour can be described as being brusque or even bullying, it would, it is submitted, be a big step to label such behaviour criminal, especially given the nature of the grants process as it is supposed to work and the fact that objectively the QRU was as deserving a recipient as any other sporting body, and that there was no personal gain to any individual.

Next, as to the matter of the $200,000 allocation to the Rugby Academy -- the evidence relies fundamentally on the veracity of Mr FREER. Where timing of alleged events is crucial, the narrative is vague and imprecise, and again there was no gain to any individual.

Next, this submission is made on behalf of Mr TUTT, that by virtue of this process, a highly useful process but not very useful to him, his personal reputation will be detrimentally affected for some time into the future by the public process. The public interest, it is submitted, will be served by the Commission issuing a detailed report with all the appropriate recommendations. Criminal proceedings would be a blunt instrument for securing the public interest in this matter. Firstly, the lessons learned can be reflected in an appropriate administrative reform and education of the public service. That education has already begun. Secondly, the public interest would not be served by the indemnification of Mr FREER, for example, to give evidence against Mr TUTT in some criminal proceeding or even vice-versa -- the Commissioner of Police instead of Mr Herbert.

Similarly, the deficiencies in the exercise of independence of the senior public servants may mean that they too may have to be indemnified or given letters of comfort where a degree of dereliction or fault might be attributed to one or other of them in some material aspect.

Mr Chairman, the new Criminal Code offence of abuse of public office, which came into effect only some months ago, was brought about after the 2008 CMC investigation into the Department of Education and Training, and the new section, one might observe, is somewhat vindicated by the current proceedings, though the new section cannot apply to the events that have been canvassed here. So, it remains, however, in the public interest that the chance is taken to educate the public and the public service in the context of the new offence. To say that Mr TUTT himself has been educated by this investigative process and severely chastened by it is an understatement.

THE PRESIDING OFFICER: Yes, thank you, Mr DEVLIN. Mr HUNTER.

Mr HUNTER: May it please, Mr Chairman. It is accepted for present purposes that the Commission doesn't definitively need to make findings of fact.

THE PRESIDING OFFICER: Well, not "need not necessarily", it is that we don't

have the power to.

Mr HUNTER: Yes. But for the purposes of reporting on this matter and in terms of reporting about what in fact took place it's necessary for the Commission to at least come to some sort of a view about what occurred. So, where there is a conflict between my client, Mr MATHESON, and Mr TUTT it's necessary to make some very brief submissions.

Firstly, it's accepted, of course, that these proceedings are not a trial and that the rule in Browne v Dunn does not apply to any great extent or even at all. But it's significant that significant aspects of Mr TUTT's evidence were not put to Mr MATHESON when he gave evidence. Can I in particular identify that passage of Mr TUTT's evidence about how it came about that the amount of the grant was increased from 4 million to 4.2 million. Mr TUTT's evidence was completely at odds with that of Mr MATHESON and it wasn't put to him. So, the Commission has been deprived of hearing what Mr MATHESON might have said about that had that proposition been put to him.

I had intended to make submissions about the, with respect, inherent implausibility of Mr TUTT's account. I would have described his account in similarly unflattering terms as those used by Counsel Assisting, but I am content with his description and don't propose to indulge in any repetitive submissions.

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. Now, he must have known that. He must have known that that evidence did not reflect well upon him, yet he gave it. He gave it in an honest and forthright manner, and even when offered privilege did not take it. Those matters tend very strongly in his favour, in my submission. So, where there is a divergence of the evidence between Mr MATHESON and Mr TUTT it's submitted that Mr MATHESON's account is strongly to be preferred and that's particularly so having regard to the fact that his account is strongly corroborated not only by Mr FREER but more compellingly by the evidence of Di FARMER.

There was clear evidence submitted of the manner of Mr TUTT's interaction with senior departmental staff, and it's not going too far to describe his conduct as having a bullying aspect or standover aspect, and that comes from not just Mr MATHESON; there was evidence about that from Ms FARMER and even Mr KINNANE, who has many, many years of experience at a high level in the public sector. Mr KINNANE was aware of it but, as he said, he felt powerless to do anything about it.

So, when one considers whether what my client did amounts to official misconduct, it is not possible to divorce his dealings from the toxic nature of the working relationship that at that stage existed between the minister's office, on the one hand, and the department on the other. One can well understand the attitude being taken that actively opposing the minister, whether that's done with the minister directly or indirectly through Mr TUTT, but actively opposing the minister would be regarded as

being very much a nuclear option, and so the department might well take the view that ministers, governments, ministerial advisers come and go, and it was easier to bend to the will of the minister as expressed through Mr TUTT than take a course of action that would have the effect of destroying what was left of the working relationship.

It's significant that although Counsel Assisting is critical of the way in which the process was undertaken and the way in which my client, Mr MATHESON, played his role, no suggestion has been made of some alternative approach. Is it suggested that what in fact should have occurred in response to Mr TUTT's direction was a ministerial submission that said "not recommended" in circumstances where it's pretty clear what would have happened had that been done? Is it suggested that there should be some system in place whereby a minister who was exercising his or her prerogative to make a grant, contrary to the advice of the department, should be forced to document it? Because of course we heard the evidence from Mr MATHESON that he doubted very much whether any minister would ever embark upon a process that so transparently indicated that he or she had rejected departmental advice and made a grant for his or her own purposes.

When one considers Mr MATHESON's conduct, bearing in mind, as I said, the fact that Mr KINNANE felt powerless to do anything about what he saw as a problem, and then of course there is the position of my client, who was substantively merely an executive director, he was the acting director-general -- sorry, the acting Deputy Director-General, acting as the Director-General. So, he was scarcely in a position that offered very much by way of security. It may just be the case that he was perceived by others as being someone who was more vulnerable than Mr KINNANE to the sorts of machinations that occurred that we now know about.

The procedures for documenting these sorts of ministerial decisions are well and truly entrenched. There were no alternative procedures available to him. So, if the minister wanted something to be done the only way for it to be done was via the process that was adopted. Now, it's accepted that that's inappropriate, but Mr MATHESON, it's submitted, had no other option apart from what I described as the nuclear one.

Now, it's been suggested that the submissions that he wrote were potentially misleading. I note that it's not suggested that he behaved dishonestly. My submission is that it cannot seriously be suggested that Mr MATHESON intended to mislead the minister, because of course he understood that what was being represented to him by Mr TUTT was what the minister wanted.

Now, if Mr TUTT was not representing the ministerial will, then he must have been very confident that what he was saying would be complied with, because if he was not representing what the minister wanted, then -- and he was not confident that what he was saying would be done -- he ran the risk of it getting back to the minister that he had asked for something that was unapproved. So, from someone in Mr MATHESON's position one can well and truly understand that he thought that he was being told to do what was necessary to enable the process to take place. There is no suggestion that he benefited in any way from what occurred. It would seem that, if Mr TUTT's evidence is correct, this idea has come from somewhere; it's inconceivable

that all of the things that took place, that is, the proposal of the grant, the increase in the grant, the unorthodox funding arrangements, the diversion of the $200,000 to the academy, that all of that happened without Mr TUTT's connivance. So, when one bears in mind the really terribly unfortunate nature of the working relationship, the practicalities of day-to-day existence in that context, it is, with respect, difficult to see how what Mr MATHESON did was the sort of conduct for which he could be dismissed.

THE PRESIDING OFFICER: Thank you, Mr HUNTER. Mr FARR?

MR FARR: Given the evidence and the submissions that have been made so far as they are relevant to Ms FARMER and Mr KINNANE, we have no need to make submissions, and decline to do so.

THE PRESIDING OFFICER: Nothing, Mr DEVLIN?

MR DEVLIN: No.

THE PRESIDING OFFICER: Mr PEARCE?

MR PEARCE: I have nothing further, Mr Chairman.

THE PRESIDING OFFICER: That concludes the evidence side, then, of this hearing. As Mr PEARCE said, we have invited any public submissions with respect to the systemic issues that are involved. If any of your clients desire to make submissions -- and I say that perhaps -- well, Mr KINNANE has already made some comment in the witness box about being prepared to put in a submission. But if Mr MATHESON wanted to give the benefit to the Commission of his views now arising out of results of what has occurred in all this sorry circumstance, we would be very interested to hear those.

Any submission that's put in can be asked to be kept confidential. It's our normal process that we put submissions on our website, but if any person requests that their submission be kept confidential that is of course accepted and followed.

I thank Counsel Assisting for the assistance and also the other CMC staff for their assistance during this, and thank all of the legal representatives who appeared for the cooperation and assistance. We now close the hearing.

THE HEARING ADJOURNED AT 11.23 AM
