



**PARLIAMENTARY INSPECTOR
OF THE CORRUPTION AND CRIME COMMISSION
OF WESTERN AUSTRALIA**

7 April 2008

Hon Nicholas Griffiths MLC
President
Legislative Council
Parliament House
PERTH WA 6000

Hon Fred Riebeling MLA
Speaker
Legislative Assembly
Parliament House
PERTH WA 6000

Dear Mr President
Dear Mr Speaker

In accordance with sections 199(2) and 206(1) of the *Corruption and Crime Commission Act 2003*, I am transmitting to the Clerk of the House a copy of my report on my review, on the complaint of Mr John D'Orazio MLA, of the Corruption and Crime Commission's report, tabled on 21 December 2007 (in which it included its opinion on the misconduct of Mr D'Orazio) for the purpose of it being laid before each House of Parliament forthwith.

Yours faithfully

**Malcolm McCusker AO QC
PARLIAMENTARY INSPECTOR**

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OF THE CORRUPTION AND CRIME COMMISSION
OF WESTERN AUSTRALIA**

**REPORT ON THE CORRUPTION AND
CRIME COMMISSION'S OPINION OF
"INAPPROPRIATE CONDUCT"
BY MR JOHN D'ORAZIO**



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Background

1. On 17 July 2007 I presented to the Joint Standing Committee on the Corruption and Crime Commission a report (the "D'Orazio Report") made pursuant to section 199 of the *Corruption and Crime Commission Act*, on my investigation and review of the acts and proceedings of the Corruption and Crime Commission ("CCC") concerning Mr John D'Orazio. That report (which the Committee then tabled in both Houses) resulted from an inquiry which I had conducted, after the CCC had forwarded "*advance copies*" of a report which it had prepared, but had not yet tabled, to (among others) the office of the Leader of the Opposition. The report stated that in the CCC's opinion Mr D'Orazio had been guilty of "*inappropriate conduct*". A member of the media gained access to an advance copy, and on the following morning *The West Australian* carried a headlined news story about the CCC's finding of "*inappropriate conduct*" by Mr D'Orazio.
2. That, clearly, was a "*matter adverse*" to Mr D'Orazio; and it was one on which he had been given no opportunity to make representations, contrary to and in breach of section 86 of the Act, as I stated in the D'Orazio Report. The CCC's report, not tabled but publicised as stated, was withdrawn.

No Jurisdiction to find "inappropriate" conduct, under section 84

3. As I also stated in the D'Orazio Report, the Commission had no jurisdiction to make a finding, or express an opinion, on "*inappropriate*" conduct. Section 4 of the Act contains a definition of what constitutes either "*misconduct*" or "*serious misconduct*". "*Inappropriate conduct*" is not defined, nor referred to, in the Act. The "*functions*" of the CCC are clearly set out in

sections 16 to 20 of the Act. That both provides and limits the jurisdiction of the CCC. They include a "*misconduct function*". The CCC has no "function" - and therefore no jurisdiction - to make assessments or express opinions of "inappropriate" conduct.

4. I therefore recommended (at paragraph 18 of the Summary of Findings and Recommendations in the D'Orazio Report) that the Commission should refrain from expressing its opinion about the conduct of any witness or other person, unless such conduct constituted "misconduct" (as defined) when it ultimately completed and tabled its report. (See also paragraph 45 of the D'Orazio Report.)

The CCC's misplaced reliance on section 86

5. The CCC disagreed. On 1 August 2007, it asserted that it was "*firmly of the view*" that "*an expression of an opinion or comment about conduct which falls short of misconduct as defined in section 4 of the Act may be made (by it) where appropriate in the circumstances*". The argument advanced in support of that was as follows:
 - (a) Section 84 of the Act provides that the CCC may include in a report statements as to any of its "*assessments, opinions and recommendations and the reasons for them*".
 - (b) The words "*assessments*" and "*opinions*" refer back to section 22 of the Act which provides that the CCC may make "*assessments*" and form "*opinions*" as to "misconduct".
 - (c) Section 86 of the Act provides that "*before reporting any matters adverse to a person or body in a report under section 84 the Commission must give the person or body a reasonable opportunity to make representations to the Commission ...*".
 - (d) Because section 86 does not refer to "*assessments, opinions and recommendations*" (ie as to *misconduct*) but to "*reporting any matters adverse to a person or body*", therefore section 86 contemplates (so the CCC argues) that the CCC may include in a report "*assessments or opinions*" that a person is guilty of "*inappropriate conduct*", because

that is a "matter adverse" to a person, even though not an "*assessment or opinion of misconduct*".

6. There are several obvious flaws in that argument. First, section 86 is not the source of the Commission's power to make or table a report and what may be included in it. The source of its power to do so is section 84. Section 84(3) specifically provides what may be included in a report:

"(3) *The Commission may include in a report under this section –*
 (a) *statements as to any of the Commission's assessments, opinions and recommendations; and*
 (b) *statements as to any of the Commission's reasons for the assessments, opinions and recommendations.*"

7. It does not say that the CCC may include in a report its opinion of "inappropriate" conduct. As noted above, and as the CCC accepts, the term "*assessments, opinions and recommendations*" refers back to section 22 which provides, relevantly, as follows:

"22. Assessments and opinions as to occurrence of misconduct

(1) *Regardless of whether or not there has been an allegation of misconduct, the Commission may make assessments and form opinions as to whether misconduct –*
 (a) *has or may have occurred;*
 (b) *is or may be occurring;*
 (c) *is or may be about to occur; or*
 (d) *is likely to occur.*"

8. Thus, section 84 empowers the CCC to make a report, and to include in the report an "*assessment or opinion of misconduct*". It does not empower the CCC to include in a report the CCC's "*assessment or opinion*" of "*inappropriate*" conduct. Section 86 (on which the CCC based its argument) is not a source of power. It conditions the CCC's power (found in section 84) to include in a report a statement of its opinion that misconduct has occurred or may occur, with its reasons for that opinion.
9. An opinion of "misconduct" (by a "public officer") would be a "*matter adverse*" to the public officer the subject of that opinion. So, too, would be a statement of evidence, and factual findings, supporting the reasons for a misconduct opinion, which are to be included in a report where an opinion of "misconduct" is expressed.

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10. For that reason, section 86 requires the CCC to give a reasonable opportunity to make representations concerning a proposed report containing "*matters adverse*", to anyone to whom the "*matters adverse*" may relate.
 11. Although the CCC is only empowered to make an "*assessment or opinion*" of misconduct, the requirement under Section 86 is not limited to giving a public officer, against whom it is proposed to report an assessment or opinion of "misconduct", notice of that proposed "*assessment or opinion*" and of the relevant evidence supporting the reasons for that finding. That evidence, and the reasons for the finding of misconduct based on it, may well be "*matters adverse*" to other persons, whether public officers or not, and also to "*bodies*"
 12. That, clearly, is why section 86 uses the term "*matters adverse to a person or body*", rather than the more limited term, "*assessments or opinions*" of "*misconduct by a public officer*". The CCC can only make "*assessments or opinions*" of "misconduct" of public officers, but its reasons (and supporting evidence) for the opinion, stated in the report, may contain "*matters adverse*" to a number of persons, who may be
 - public officers proposed to be the subject of a "misconduct" opinion; or
 - public officers not proposed to be the subject of such an opinion; or
 - persons (or bodies) who are not public officers, or acting as public officers.
 13. That does not mean that the CCC has an implied power to include in a report its "*assessment or opinion*" that certain "conduct" of a person or body is "inappropriate". To do so is not within the power of the Commission. It can state, for the purpose of explaining its reasons for an opinion that certain conduct by a public officer is "misconduct", the evidence and reasons on which the opinion is based. That evidence may include, if relevant, evidence of the conduct of others; but it has no jurisdiction to express an "opinion" about that conduct.
 14. To imply that power, from section 86 which does not, like section 84, purport to confer any power, would be contrary to accepted principles of statutory

interpretation. Where there is an express power, it is not open to imply such an additional, unexpressed, power. (This is sometimes referred to as the principle "*expressum facit cessare tacitum*"). The legislature has expressly provided, in section 84, that the CCC may include in a report its opinion or assessment as to "misconduct", and the reasons for it. It did not provide in section 84, or elsewhere, any power to include in a report an assessment or opinion of "inappropriate conduct". Had that been intended, it would be expected that it would be expressly stated. There is no room for any implication of a power to include other opinions in a report, beyond those which section 84(3) states may be included.

15. The CCC's argument has other difficulties. Section 16 of the Act ("General Functions") provides that "*the Commission has the functions conferred or imposed by or under this Act or any other written law*". One of those functions is the "*misconduct function*" - see section 18. There is (as noted earlier) no "*inappropriate conduct*" function. The term "misconduct" is defined by section 4. The definition is specific and clear. It provides:

"4. "Misconduct", meaning of

Misconduct occurs if –

- (a) *a public officer corruptly acts or corruptly fails to act in the performance of the functions of the public officer's office or employment;*
- (b) *a public officer corruptly takes advantage of the public officer's office or employment as a public officer to obtain a benefit for himself or herself or for another person or to cause a detriment to any person;*
- (c) *a public officer whilst acting or purporting to act in his or her official capacity, commits an offence punishable by 2 or more years' imprisonment; or*
- (d) *a public officer engages in conduct that –*
 - (i) *adversely affects, or could adversely affect, directly or indirectly, the honest or impartial performance of the functions of a public authority or public officer whether or not the public officer was acting in their public officer capacity at the time of engaging in the conduct;*
 - (ii) *constitutes or involves the performance of his or her functions in a manner that is not honest or impartial;*
 - (iii) *constitutes or involves a breach of the trust placed in the public officer by reason of his or her office or employment as a public officer; or*
 - (iv) *involves the misuse of information or material that the public officer has acquired in connection with his or her functions as a public officer, whether the misuse is for the benefit of the public officer or the benefit or detriment of another person, and constitutes or could constitute –*
 - (v) *an offence against the Statutory Corporations (Liability of Directors) Act 1996 or any other written law; or*
 - (vi) *a disciplinary offence providing reasonable grounds for the termination of a person's office or employment as a public service officer under the Public*

Sector Management Act 1994 (whether or not the public officer to whom the allegation relates is a public service officer or is a person whose office or employment could be terminated on the grounds of such conduct)."

16. There is no "*inappropriate conduct*" function; nor is there any definition of it. If the CCC's contention were correct, it would be open to it, immune from any challenge, to table a report expressing an opinion that the conduct of any person is "inappropriate". Since there is no statutory definition of what is "inappropriate", and no objective criteria by which an opinion of "*inappropriate conduct*" might be tested, that would mean that it would be open to the Commissioner (or Acting Commissioner at the relevant time) to express his or her own subjective opinion of what conduct is "inappropriate".
17. Furthermore, the expression of such an opinion by "*the Commission*" in a report tabled in the Parliament can have serious, indeed devastating, effects on the individual concerned. For that reason, as well as the fact that there is no right of appeal against an opinion or assessment of the CCC, it would be expected that, had the Parliament intended the CCC to have the power to make assessments or opinions about "inappropriate" conduct, and to include those assessments or opinions in a report, it would have specifically provided for that, and at the same time stipulated objective criteria (as in the case of the section 4 definition of "misconduct") by which it could be determined whether conduct is to be adjudged "inappropriate", and the "inappropriate" opinion tested. (cf The remarks of Gleeson CJ in Greiner v ICAC (1992) 28 NSWLR 125 at 130)
18. The CCC's argument would also leave "at large" the question of what persons could be made the subject an "*inappropriate conduct*" opinion. The CCC's "*misconduct function*" is essentially confined to conduct by public officers, as public officers. But since there is no definition (either by reference to "*conduct by public officers*" or at all) of "inappropriate" conduct, it would give the CCC licence to label the conduct of any person, public officer or not, as "inappropriate". That is contrary to the clear purpose of the legislation, which only confers jurisdiction on the CCC to deal with the

conduct of public officers (and then only if related to their position as public officers).

"Prevention and education" function

19. An alternative argument later advanced by the CCC in the Report which it ultimately tabled, to support its contention that it may make findings of *"inappropriate conduct,"* is based on the *"prevention and education"* function provided by section 17 of the Act. The Commission refers to the fact that section 17(2) says that this "function" may be performed by:

- "(c) providing information relevant to its prevention and education function to the general community; and*
- (ca) ensuring that in performing all of its functions it has regard to its prevention and education function; and*
- (cb) generally increasing the capacity of public authorities to prevent misconduct by providing advice and training to those authorities, if asked, to other entities; "*

20. However, none of those provisions, either expressly or impliedly, empowers the Commission to make an *"assessment or opinion"* of *"inappropriate conduct,"* and to include that opinion in a report tabled in Parliament pursuant to section 84. The only provision in section 17 (the *"prevention and education"* function) dealing with *"reporting"* is section 17(2)(d) which states that the Commission may perform that function (inter alia) by *"reporting on ways to prevent misconduct"*. That does not empower the Commission to make an assessment or opinion of *"inappropriate conduct"* of some person or body, and include that in a report under section 84. It is really *"grasping at straws"* to suggest that it does.

21. Linked to that argument is another contention by the CCC that, if it concludes that certain conduct does not amount to *"misconduct,"* it may be necessary to explain *"that although the conduct is undesirable, inappropriate, unwise, imprudent, dangerous or any other number of things, it does not fall within the definition of misconduct in section 4 of the Act. The giving of reasons may well involve explaining why that is so. Furthermore, the Commission's obligation to prevent future misconduct may necessitate expressing a critical view about that conduct because, if unchecked, or if repeated in other circumstances, it may be likely to constitute or lead to misconduct"*.

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22. That argument misses the point. The source of power to table a report, section 84, does not empower the Commission to state reasons why particular conduct is not "misconduct", and in so doing to express a view that it is nevertheless "*undesirable inappropriate unwise imprudent dangerous or any other number of things*".
23. In a review conducted by Gail Archer SC, contained in a report of February 2008, this question was canvassed (in paragraphs 590 and following). The reviewer did not express any opinion on whether or not the Commission has, under the existing legislation, the power to express an opinion of what is "inappropriate conduct". The question which she addressed was whether the Act should be amended, to include an express power to assess "inappropriate" conduct. At paragraph 603 she says "*In discussions with the reviewer the PICCC agreed that section 86 requires the CCC to notify a person if it proposes to refer to any conduct which could be seen to be inappropriate or undesirable conduct even if it could not be misconduct. Therefore the CCC has, at the very least, the power to report such conduct*". Certainly (as I have said earlier) is necessary, in a report, to state the evidence supporting the reasons for a finding of "misconduct" by a public officer. That evidence may be evidence of conduct which (some might think) was "inappropriate" or "unwise" etc. But it still does not empower the Commission to express an opinion in a report tabled in the Parliament that conduct described in the evidence supporting its reasons was "inappropriate". The formation of any opinion or assessment about that conduct must be left to the reader. It is not within the Commission's power to do so.
24. In the exercise of its "*misconduct function*", the Commission is obliged, if it includes an opinion of "misconduct", as defined by Section 4(d) of the Act, in a report, not only to state that in its opinion the conduct constitutes a disciplinary offence "providing reasonable grounds for the termination of a persons office"; it must also state the "objective criteria" whereby that conclusion may be tested. See the decision of the Court of Appeal in NSW in *Greiner v ICAC* 1992 28 NSWLR 125. It can hardly have been intended by the

legislature that the Commission should have the power to express an opinion of "inappropriate conduct" on the basis of its own subjective view as to what or is not "inappropriate". But this is where the CCC's argument leads. See the passage at page 58 of the Commission's tabled report of 21 December 2007 in which it is stated (emphasis added):

"Members of Parliament and Ministers of the Crown have a leadership role within the Western Australian public sector and their conduct has significant importance. While there is no single objective standard by which conduct can be measured and whilst propriety may not be susceptible of close definition, conduct which is "inappropriate" or "improper" must at least amount to conduct that is "discreditable or dishonourable".

What this is saying, in effect, is that the CCC (or the Commissioner) may form a view, without reference to any objective criteria, of what is "inappropriate" and then (even though there is no express power to do so in the Act) table a report in the Parliament, expressing that subjective opinion!

The CCC's tabled Report

25. The CCC devoted more than half of its 71 page report entitled a report "*On an investigation into inappropriate associations between Western Australian Police Offices and Pasquale Minniti*" which it ultimately tabled on 22 December 2007 ("the Report") to a discussion of the conduct of Mr D'Orazio and its opinion that it was "inappropriate", although it was not misconduct. At page 4 of the Report it stated (emphasis added):

"After assessing all the material obtained during the course of the investigation including telecommunications interception the Commission is of the opinion that Mr D'Orazio's actions do not amount to misconduct as defined by section 4 of the Corruption and Crime Commission Act in respect to these matters.

There is no evidence to support a conclusion that Mr D'Orazio has acted corruptly or that he has engaged in conduct that could constitute an offence or a disciplinary offence providing reasonable grounds for termination under the Public Sector Management Act. However the Commission considers that Mr D'Orazio's conduct as a Minister and later as a Member of the Legislative Assembly in respect of Mr Minniti's offers to assist him in respect of his traffic infringements, as defined in this report, was inappropriate."

Conduct as "a public officer"

26. The definition of "misconduct" in section 4 is directed at the actions of "public officers", acting in their capacity as public officers. It requires the conduct to be related to the position or duties of a public officer. For example, section 4 paragraph (c) provides that it is misconduct if "*a public*

officer whilst acting or purporting to act in his or her official capacity, commits an offence punishable by 2 or more years' imprisonment". A public officer who commits such an offence, but does not do so "*whilst acting or purporting to act in his or her official capacity*" is not guilty of "misconduct as defined. (The only qualification on the requirement that the conduct be engaged in by the public officer, acting in the capacity of a public officer, is paragraph (d)(i), which provides that a public officer engages in "misconduct" if that conduct "*adversely affects, or could adversely affect, directly or indirectly, the honest or impartial performance of the functions of a public authority or public officer whether or not the public officer was acting in their public officer capacity at the time of engaging in the conduct*"; but for that to be "misconduct" it must constitute either an offence against the *Statutory Corporations (Liability of Directors) Act 1996* or any other written law; or "*a disciplinary offence providing reasonable grounds for the termination of a person's office or employment as a public service officer under the Public Sector Management Act 1994*". In any event, that provision is of no relevance to Mr D'Orazio's case. His conduct was not "misconduct").

27. The CCC's "*inappropriate conduct*" finding in the Report was previously notified, as a proposed finding, to Mr D'Orazio's lawyers and representations invited. Amongst a number of representations made in response, his lawyers pointed out that Mr D'Orazio's dealings with Mr Minniti were entirely in his private capacity, and it was erroneous for the CCC's Report to say that his conduct was "as a Minister" and "as a Member of the Legislative Assembly". The conduct of a public officer, in a purely private capacity, however it may be regarded by some, does not come within the "*misconduct function*" of the CCC, and is not susceptible to the CCC's "*opinion or assessment*"; so even if there were an "*inappropriate conduct function*" - which there is not - it would surely have to be related to conduct "as a public officer".
28. This important point appears to have been either missed or misunderstood by the CCC when it made its Report. Although Mr D'Orazio was at all relevant times a Member of Parliament, that does not mean that in his

dealings with Mr Minniti he was acting as a "Member". Following a complaint from Mr D'Orazio, I wrote to the CCC, by letter dated 25 January 2008. A copy of that letter is annexed as part of this report. I suggested, at page 3:

"On no view of the evidence before the Commission could it be said (nor was it found) that Mr D'Orazio was acting as a "public officer" (even though he is a public officer) when he spoke to Mr Minniti, and failed to "actively discourage" (the question - begging term in the report) Mr Minniti from using a "contact" he claimed to have in the DPI.

It was therefore not open to the Commission to express a view as to the "appropriateness" of Mr D'Orazio's conduct. To do so exceeded its jurisdiction".

29. In response to that, I received a letter from the CCC dated 12 February 2008. Annexed is a copy of it. That letter addresses the present issue (of whether Mr D'Orazio was acting in his capacity of public officer) at pages 6 to 9. Essentially, the proposition appears to be that it is sufficient if conduct is somehow "referable" to the position of a public officer, even though in a private capacity. I deal with this below.

30. I replied to that letter by letter dated 14 February 2008, in which I said:

At page 7 of your letter you observe (again, quite correctly) that Mr D'Orazio considered that his traffic infringement problems were impacting on his public office and "for at least that reason they had to be sorted out".

Whilst that is unquestionable, I am unable to see how that could possibly lead to the conclusion that his actions were therefore "in relation to or with regard to a public office", as you say at the end of page 7. If that proposition were correct, then it would follow that any conduct of a Member of Parliament, engaged in by that Member for the purpose of avoiding loss of Ministerial office, or the loss of the prospect of gaining Ministerial office, or simply to avoid losing his or her Parliamentary seat, or enhancing the prospect of retaining it, could be categorised as being "in relation to or with regard to a public office" and therefore constitute conduct which it would be open to the Commission to report as "inappropriate", even though the conduct was not engaged in by the member in his or her capacity as a member of Parliament, but in his or her private capacity. Is that the Commission's view?

31. In reply to that letter I received a further lengthy letter from the Commission dated 15 February 2008 (copy annexed). Despite the length of that response, the Commission's contentions as to its power to express an opinion of "inappropriate conduct" in a report may fairly be summarised as follows:

31.1 (See para 2.1, at page 4) Mr D'Orazio's conduct, in failing to "actively discourage" Mr Minniti from using an alleged contact within the

Department of Transport (not to do anything unlawful but to assist in finding a notice which Mr D'Orazio had sent to the Department) was motivated, at least in part, by his wish not to lose his office as a Minister and was therefore conduct "referable to the member or minister's public office"! So, the proposition is that the conduct of a Member of Parliament comes with the jurisdiction of the CCC, even though not conduct in his or her capacity as a Member of Parliament, if it is "referable" to his or her position. If correct, that would open up for the CCC's investigation and "opinion" an extremely broad range of "conduct". And, again, where is the statutory jurisdiction of the CCC to adjudicate on conduct which is "not misconduct" (as the CCC found); nor conduct engaged in, in his or her capacity as a Minister or Member of Parliament; but conduct which is somehow "referable" to his or her position, because it might affect his or her chances of, for example, getting or retaining a ministerial position.

31.2 That by "not actively discouraging" Mr Minniti, Mr D'Orazio made himself susceptible to being "groomed" by Mr Minniti. If that were correct, it would mean that any Member of Parliament who accepts any offer of assistance from a constituent (or any one else) might be guilty of "*inappropriate conduct*"! In fact, according to the CCC's reasoning, even a failure by an MP to "*unequivocally refuse*" assistance of any sort could be viewed as "*inappropriate conduct*", because the person offering that assistance might be "grooming" the Member (even if the Member was not aware of that - and there was no evidence, or finding, that Mr D'Orazio thought that).

31.3 The "*prevention and education of function*". This is raised at pages 7 and 9 of the letter. I have dealt with this argument at paragraphs 19 et seq.

Mr D'Orazio's "conduct"

32. In my letter to the CCC of 25 January 2008 (at pages 3 - 5) I pointed out that Mr Minniti's words, in the intercepted telephone discussion between him and Mr D'Orazio, might fairly be construed as follows:

- Minniti claimed he had some "contact" in the DPI who could speed up efforts to locate a missing form (which Mr D'Orazio had already requested from the DPI);
- that nothing unlawful or improper was being proposed nor anything that might constitute "misconduct";
- that there was no evidence (or assessment) that Mr D'Orazio believed Mr Minniti did have any contact in the DPI (in fact, the evidence was to the contrary) and
- that therefore (quite apart from any lack of power to do so) it was not reasonably open to the CCC to opine that Mr D'Orazio's conduct, in not "*actively discouraging*" Mr Minniti from approaching his alleged contact in DPI, was "inappropriate".

33. At page 52 of the Report, the reason for that opinion is said to be:

"In the Commission's opinion, Mr D'Orazio's conduct, as described herein, was consistent in that he did not actively discourage and unequivocally reject Mr Minniti's offers of assistance." (to use his alleged contacts within DPI to help find a faxed letter from Mr D'Orazio to DPI which Mr D'Orazio had asked DPI to search for). (Emphasis added)

This is repeated at page 58

"Mr Minniti, in the Silvestri Conversation, gave the impression to Senior Constable Silvestri that he had Mr D'Orazio's imprimatur to assist Mr D'Orazio. Mr Minniti had suggested to Mr D'Orazio that his contact in DPI had assigned a member of staff to "look for you".⁷⁷ Mr D'Orazio cannot, of course, be responsible for the manner in which Mr Minniti chose to communicate with Senior Constable Silvestri. However Mr D'Orazio's preparedness to attend private meetings with Mr Minniti, return phone calls regarding the missing facsimile and to entertain offers of assistance (or at least not to actively and unequivocally reject them), provided Mr Minniti with a factual basis upon which he could represent to third parties that he had a "close" relationship with Mr D'Orazio and that Mr D'Orazio was accepting his help.

There is, however, no evidence that Mr D'Orazio even knew that Mr Minniti was "communicating" with Constable Silvestri, or that he knew or believed

that he was providing Mr Minniti with "a factual basis" upon which he could represent to third parties that he had a "close relationship" with him.

34. At pages 53-4 of the Report, the last part of a telephone discussion between Minniti and Mr D'Orazio of 11 May 2006 is reproduced. It is of sufficient significance to warrant reproducing it :

MINNITI: *Listen, okay, John listen, I'm sorry. I'm just trying to help because I reckon*

D'ORAZIO: *I know you are, but don't, don't say anything to anyone because I don't need any more at this stage*

MINNITI: *No, no, no,. Fair enough. Listen eh I'll run things past you before I do anything. Okay?*

D'ORAZIO: *Yep. Don't do anything*

MINNITI: *No worries. Listen. All's I've done at this stage is I've spoken to a friend of mine, yeah, ah, from licensing, what d'you call it, DPI or whatever*

D'ORAZIO: *Yep*

MINNITI: *And, uhm, he's gonna push today, oh, like he's gonna assign one girl, yeah, eh, y'know, to, eh, to go back and look for you. You with me?*

D'ORAZIO: *Yep*

MINNITI: *uhm, y'know, you just ring me let me know and I'll do it. You know what I mean?*

D'ORAZIO: *Yep. Thank you very much Pasquale*

35. The comments by Mr D'Orazio, in response to Minniti's "offers of assistance" might, at least to some objective readers, seem fairly "discouraging":

" ... don't say anything to anyone because I don't need any more at this stage"

and again

"Yep, don't do anything".

The CCC comments, however (page 54) that

"The manner in which Mr D'Orazio left the matter ... is not an unequivocal refusal of assistance".

Mr D'Orazio has said, in his representations to the CCC, that in saying "Yep", in reference to Minniti's further statements, he was simply trying, as politely as possible, to end the conversation. What he said, in the circumstances, and having regard to his earlier very clear "Yep, Don't do anything", is at least fairly open to that interpretation.

36. It is, however, important to bear in mind, as I have said earlier, that there is no evidence, or finding, that Minniti was offering to do anything unlawful,

or amounting to "misconduct". Mr D'Orazio was perfectly entitled to a copy of the faxed letter he had sent to the DPI. That is not in dispute. At the time he was speaking to Mr Minniti, he had already, on 8 May 2006, "*set the wheels in motion*" for the DPI to trace the letter as a matter of some urgency. The affidavit of Mr Brandis of DPI (Annexure KJB4) would appear to confirm this.

37. The CCC, in expressing its opinion of "inappropriate" conduct, has at page 58 of the Report, said that such conduct "*must at least amount to conduct that is discreditable or dishonourable*. A finding of "inappropriate conduct" is therefore a very serious and damaging one. The CCC's proposition is, then, that

- Mr D'Orazio was offered assistance by Minniti to find a faxed letter he had sent to DPI, and to which he was entitled, through a friend or "contact" in DPI.
- Mr D'Orazio said "*Don't do anything*" but still (according to the CCC's view of the evidence) did not "*unequivocally reject*" the offer.
- Because of that, Mr D'Orazio is guilty of conduct which was "*discreditable or dishonest*"!

38. After carefully reviewing the CCC's Report, and considering the CCC's subsequent representations to me, I have concluded that the CCC lacked the power or jurisdiction to express that opinion, and also that there was no reasonable basis for it. It was a conclusion not reasonably open, on the evidence.

Summary of Conclusions

39. The Commission has no statutory power or jurisdiction to include, in a report made and tabled pursuant to section 84, its assessment or opinion of "inappropriate conduct". Its opinion in the Report, that Mr D'Orazio was guilty of "inappropriate conduct" was therefore beyond its jurisdiction.

40. The CCC has (rightly) accepted that Mr D'Orazio's conduct was not "misconduct". (It was clearly not open to the CCC to decide that it was.) Apart from anything else, it was not, therefore, conduct which could

constitute "*reasonable grounds for dismissal*" from his office, and there is no suggestion by the CCC that it was.

41. Because the CCC's opinion, that Mr D'Orazio's conduct was "inappropriate", is based on the subjective view of the author of the Report (and possibly other Commission officers, unidentified) there are no objective criteria against which that subjective opinion may be tested.
42. However, based on the evidence before the CCC (even given the construction put on it by the CCC) no reasonable decision maker could decide that Mr D'Orazio's conduct was "inappropriate", within the meaning of that term ascribed to it by the CCC in its Report.



Malcolm McCusker AO QC
Parliamentary Inspector

7 April 2008



**PARLIAMENTARY INSPECTOR
OF THE CORRUPTION AND CRIME COMMISSION
OF WESTERN AUSTRALIA**

Annexures



PARLIAMENTARY INSPECTOR
OF THE CORRUPTION AND CRIME COMMISSION
OF WESTERN AUSTRALIA

8 April 2008

By email: Comm.LWRS@ccc.wa.gov.au

The Hon Len Roberts-Smith RFD QC
Commissioner
Corruption and Crime Commission of
Western Australia
PO Box 7667
CLOISTERS SQUARE WA 6850

Dear Commissioner

Subsequent to the tabling of the Commission's report of 21 December 2008, presented by Mr C P Shanahan SC, Acting Commissioner, I have received a complaint from Messrs Hammond Worthington, on behalf of Mr D'Orazio.

It will come as no surprise to you that Mr D'Orazio contends, that the Commission should not have made a finding, adverse to him, that his conduct in his dealings with Mr Minniti was "inappropriate".

I appreciate that the Commission has on more than one occasion stated that it does not make "findings" but expresses opinions, or makes assessments. However, at page 4 of the report it stated that the Commission "considers" that Mr D'Orazio's conduct was "inappropriate". Whether the Commission view is expressed as what it "considers" Mr D'Orazio's conduct to be, or whether it is expressed in the form of an "opinion" or "assessment", there are 2 matters, in particular, of concern:

1. Inappropriate conduct of a public officer

The question of whether the Commission has the "function" to express an opinion on what is "inappropriate conduct" has already been extensively canvassed, and remains a live issue. As you know, I remain of the view that in the absence of an express provision, the Commission does not have the implied "power" or "function" to express an opinion as to what is "inappropriate conduct". The

Commission's view is that it does, contending that this is impliedly authorised by the prevention and education function (section 17) or by section 22 ("assessments and opinions as to the occurrence of misconduct"). The Commission's contentions appear at pages 10 to 14 of the report.

Whilst it is true that the "prevention and education function" cannot be divorced from the "misconduct function", I fail to see how that "function" could be said to authorise a finding of "inappropriate conduct". As to section 22, I accept that the Commission may make an assessment as to whether "misconduct" is or may be about to occur, or is likely to occur, and by section 22(3) it may then advise an independent agency or appropriate authority of its assessment or opinion. This is referred to at page 12 of the report, in which it is further stated that by virtue of section 84 of the Act the Commission may include such an assessment in a report when no misconduct is actually occurring, but may be about to, or is likely to occur.

However, "misconduct" is defined by section 4. That definition is restrictive. Any public officer who engages in conduct which might be considered reprehensible, or even criminal, is not thereby guilty of "misconduct", as defined by section 4. That definition requires the conduct in question to be conduct directly related to the position or duties of a public officer. For example, if a person who is a public officer commits a criminal offence is punishable by 2 or more year's imprisonment, that is not "misconduct", unless the offence is committed by the public officer "whilst acting or purporting to act in his or her official capacity". All of the sub-paragraphs of the "misconduct" definition make it quite clear that a public officer's conduct, generally, does not come within the purview of the Commission. A public officer who "misconducts" himself, in the wider sense of that term, is only subject to the scrutiny and possible censure of the Commission if the "misconduct" is in his or her performance as a public officer.

This point (albeit not in these terms) was made on Mr D'Orazio's behalf as one of the "Ultimate Representations", and is referred to at page 60 of the CCC's report. However, in dismissing that proposition the CCC has, I think, missed the point. It said "*the public expects, and their officers demand, that Ministers of State and Members of Parliament will engage the public sector of this State appropriately*". Very true. However, the Commission's jurisdiction does not make it a moral censor of the entirety of the conduct of persons who happen to be public officers. Its jurisdiction is limited to conduct by a public officer, as a public officer.

Hence, even if there were evidence (and there is not) that Mr D'Orazio believed that Mr Minniti was proposing to persuade a public officer in the DPI to engage in

"misconduct", and did not discourage him from doing so, since Mr D'Orazio was not acting in his capacity as a public officer, but purely as a private individual, that could not possibly be "misconduct" by Mr D'Orazio.

It follows that even if the Commission does have jurisdiction to deal with "inappropriate conduct" it could only be in relation to the conduct of a public officer, *qua* public officer. The conduct of a public officer, in his private capacity, however "inappropriate" it may be thought, is not within the censorial jurisdiction of the Commission. Thus, the widely reported behaviour of Mr Troy Buswell, a public officer, may be considered by some to be "inappropriate" or even "misconduct", in the generic sense; but it is not open to the CCC to say so, as he was acting in his private capacity.

On no view of the evidence before the Commission could it be said that Mr D'Orazio was acting as a "public officer" (even though he is a public officer) when he spoke to Mr Minniti, and failed to "actively discourage" (the question - begging term in the report) Mr Minniti from using a "contact" he claimed to have in the DPI.

It was therefore not open to the Commission to express a view as to the "appropriateness" of Mr D'Orazio's conduct. To do so exceeded its jurisdiction.

2. **No evidence of "inappropriate conduct"**

A further salient point is that even if Mr D'Orazio were acting in the capacity of a public officer when he spoke to Mr Minniti (which there is not) there is no evidence capable of establishing a basis for a finding that his conduct was "inappropriate".

The CCC relies on section 22 to support its contention that it may find "inappropriate conduct". But no assessment has been made, nor could an assessment be made by the Commission, that Mr D'Orazio's conduct was such that "misconduct may be about to occur or is likely to occur". For such an assessment to be made, the following evidence would be necessary:

- (a) First, that Mr D'Orazio believed that Mr Minniti had a "contact" within the DPI. But there is no such evidence. Mr D'Orazio's clear evidence was that he did not believe that Mr Minniti had any such contact. (see T8, 9, 10, 13, 14, 15, 16, 21, 23 (esp.) 24). His evidence was that he knew Mr Minniti habitually made false claims, and he simply did not believe him. The CCC has not stated, in its report, a view that Mr D'Orazio did believe that Mr Minniti had such a contact. It made the entirely irrelevant comment that Mr D'Orazio could not have known whether Mr Minniti had a contact or not.

The question is whether Mr Minniti believed that he had such a contact. It was never put to him, at the public hearing, that he held such a belief, nor was any reason suggested to him why he would have that belief.

- (b) A further question (even if Mr D'Orazio did believe that Minniti had a contact within the DPI) is whether there is evidence that he believed that Mr Minniti was proposing to have that contact do something which would amount to "misconduct", and that he did not "actively discourage" him from doing so. A passage at the top of page 62 of the report encapsulates the Commission's approach to this issue;

"The apparent preparedness of a ... Member of the Legislative Assembly to entertain offers of help from a panel beater who professed to have contacts in the DPI and WAPOL offers of aid couched in terms having "something good up my sleeve" and "trying to (do) it through the back door to you know make things quicker" is behaviour that may foster "misconduct".

The report makes no attempt to explain how this could be. It would have to interpret the two phrases used by Mr Minniti as amounting to a proposal to have someone in the DPI do something which amounted to misconduct. At the most, Mr Minniti's words might be interpreted as saying that he had a friend or contact in the DPI who could speed up efforts to locate the missing form which Mr D'Orazio had requested from the DPI. Nothing unlawful, or improper was being proposed. The report fails to explain how (if it were to be the case) for a DPI officer to expedite a search for a missing document could constitute "misconduct" by that DPI officer. The report simply takes that as a "given".

Other "issues" about the Commissions' assessment of "inappropriate conduct" have been raised with me by Mr D'Orazio's lawyers. At this stage, given the weight which I consider attaches to the 2 matters above, it is unnecessary to canvass them.

Summary

The following are my tentative conclusions, on which the CCC's comments are sought:

1. The conduct of Mr D'Orazio censured in the report as "inappropriate" was conduct of a public officer, but not conduct as a public officer. It was therefore

outside the statutory function or power of the CCC to consider or deal with that conduct.

2. Since it is self-evident that Mr D'Orazio was not acting in his capacity of public officer, but as a private citizen, he should not have been subjected to a public examination. There was no justification for doing so. (If any memo or other document, explaining the considerations which led to the decision to hold that examination in public, I wish to be provided with a copy).
3. Although point 1, above, is conclusive - i.e. The CCC acted outside its jurisdiction in examining and censoring Mr D'Orazio's conduct as "inappropriate", there is, in any event, no evidence (or assessment) that Mr D'Orazio believed that Mr Minniti had a contact in the DPI, and was proposing to have that contact to do something which would amount to "misconduct".
4. If point 3 above is correct, then the CCC's reliance on S.22 of the Act, to justify expressing an opinion or assessment of "inappropriate conduct" is misplaced.

Yours faithfully



Malcolm McCusker QC
PARLIAMENTARY INSPECTOR



CORRUPTION AND CRIME COMMISSION OF WESTERN AUSTRALIA

Your Ref: -
Our Ref: 02051/2005

Mr Malcolm McCusker AO QC
Parliamentary Inspector of the Corruption and Crime Commission
Office of the Parliamentary Inspector
Locked Bag 123
PERTH BUSINESS CENTRE WA 6839

Dear Parliamentary Inspector

REPORT ON AN INVESTIGATION INTO INAPPROPRIATE ASSOCIATIONS BETWEEN WESTERN AUSTRALIAN POLICE OFFICERS AND PASQUALE MINNITI

I refer to your letter dated 25 January 2008 which canvassed issues arising from the Commission's Report on an "*Investigation into Inappropriate Associations between Western Australia Police Officers and Pasquale Minniti*" (**the Report**) and also stated your "*tentative conclusions*" and sought the Commission's response. I also refer to your telephone attendances on my Chambers of Thursday morning, 7 February 2008 and subsequently this morning.

1. COMMISSION'S RESPONSE

Your request for the Commission's response comes at a time when you have sought the Commission's response on a significant number of matters.

When you telephoned on 7 February 2008 you sought some indication as to when the Commission would be in a position to respond to your letter.

At that time I advised that the Commissioner had asked me to respond to you in respect of two matters, the second of which concerned your letter of 25 January 2008 regarding Mr D'Orazio. However the first matter ("**First Matter**") that the Commissioner had asked me to deal with related to another matter the subject of your letter dated 22 January 2008. The First Matter concerned a current process under section 86 of the *Corruption and Crime Commission Act 2003* ("**CCC Act**") in which the Commission had produced a draft report (after lengthy delays beyond its control) and I indicated that this matter would be dealt with first. I stated that it was unlikely that the Commission would be in a position to deal with the D'Orazio matter prior to Friday, 15 February 2008.

You asked if the response concerning Mr D'Orazio could be done by Wednesday, 13 February 2008. I indicated that it would be no later than Friday, 15 February 2008 but would be provided as soon as possible.

I confirm that the Commission provided a comprehensive response, including lengthy amended proposed reports to your office on Friday, 8 February 2008 regarding the First Matter.

In your telephone attendance this morning you again sought the Commission's response regarding Mr D'Orazio before Friday, 15 February 2008. I indicated that the Commission wanted to make a full response so that its position was made clear and that response would be made by Friday, 15 February 2008. You raised the question whether the issue of the Commission's power to proffer an opinion regarding a public officer's conduct being conduct not in the exercise of that public officer's office had been considered by the Commission in the section 86 process in respect of Mr D'Orazio. I indicated to you that the Commission had considered all the matters raised by Mr D'Orazio's legal representatives. You indicated that the matter had been raised by Mr D'Orazio's legal representatives in November 2007 but perhaps not as "*succinctly*" as put by you. I stated that I did not then have the section 86 representations made by Mr D'Orazio "*in front of me*".

You will appreciate that my role within the Commission is not that of a substantive Commissioner and I discharge my duties in the context of my own professional practice. The only way to respond to your inquiries prior to Friday was to reorganise my own professional obligations. I have done so which has enabled the Commission to make this earlier response.

In the future it may be useful if a "reasonable" deadline for the Commission's response can be agreed at the time of any request by your office. Such a deadline would provide certainty to interested parties and avoid any unnecessary inconvenience or unrealistic expectations.

2. SECTION 86 PROCESS

Before dealing with the matters you raise in your letter of 25 January 2008 I note that the section 86 process in respect of this investigation was out of the ordinary in that it encompassed your "*Investigation and Review of the Acts and Proceedings of the Corruption and Crime Commission Concerning Mr John D'Orazio*" dated 17 July 2007 and tabled in both Houses of the Parliament on 18 July 2007 ("**PI Report**").

In order to appreciate the Commission's work in respect of representations made on behalf of Mr D'Orazio one must understand the extensive nature of the opportunity offered to Mr D'Orazio to make representations to the Commission.

This process is set out in the Commission's Report and included (refer page 31 of the Report"):

"Mr D'Orazio has now made substantial written representations to the Commission through his legal representatives:

(1) *Representations following the Commission's decision not to table its proposed report on 8 June 2007:-*

(a) *Mr D'Orazio's solicitors facsimile to the Commission dated 8 June 2007 seeking an opportunity to make representations regarding the draft proposed report;*

- (b) *The Commission's letter to Mr D'Orazio's solicitors dated 11 June 2007, providing Mr D'Orazio with portions of its draft proposed report containing "matters adverse" to Mr D'Orazio and inviting representations under section 86 of the CCC Act; and*
- (c) *Letter from counsel for Mr D'Orazio dated 26 June 2007 received by this Commission on 28 June 2007 being 12 pages of representations, ("**Initial Representations**");*
- (2) *An unsolicited letter dated 26 September 2007 sent in anticipation of this Commission preparing a draft of its further draft report ("**Unsolicited Representations**");* and
- (3) *Following the provision by this Commission to Mr D'Orazio of relevant portions of its further draft report ("further draft report") enclosed in its letter of 12 October 2007 inviting representations under section 86 of the CCC Act ("**the Invitation**"), this process has included:-*
 - (a) *A facsimile from Mr D'Orazio's counsel of 16 October 2007 seeking an extension of time to the week commencing 5 November 2007 within which to respond to the Invitation;*
 - (b) *A further facsimile from Mr D'Orazio's counsel on 16 October 2007 which made a series of requests for information;*
 - (c) *A letter from this Commission to Mr D'Orazio's counsel dated 18 October 2007 extending time within which representations would be received to Mr D'Orazio's counsel's request to 5 November 2007 the date requested by Mr D'Orazio's counsel ("**the Extension**");*
 - (d) *A letter from Mr D'Orazio's solicitors dated 25 October 2007 seeking a further extension of the time within which representations would be received until 19 November 2007;*
 - (e) *A letter from the Commission to Mr D'Orazio's solicitors dated 26 October 2007 extending the time within which representations would be received to 13 November 2007 and seeking further submissions if more time was required ("**Further Extension**");*
 - (f) *A facsimile from Mr D'Orazio's solicitors dated 8 November 2007 which made a series of requests for information by 9 November 2007;*
 - (g) *The Commission's facsimile to Mr D'Orazio's solicitors dated 9 November 2007 confirming receipt of their facsimile dated 8 November 2007;*
 - (h) *The Commission's letter dated 12 November 2007 providing its substantive response to Mr D'Orazio's solicitors facsimile of 8 November 2007;*
 - (i) *Three facsimiles from Mr D'Orazio's counsel to the Commission received by the Commission on 13 November 2007, of which the first was dated 14 November 2007 and the latter two were dated 13 November 2007;*

- (j) *The Commission's letter to Mr D'Orazio's counsel dated 14 November 2007 recording that the deadline for representations by Mr D'Orazio had passed;*
- (k) *A facsimile from Mr D'Orazio's counsel to the Commission received on 14 November 2007 dated 14 November 2007;*
- (l) *Following a speech by Mr D'Orazio in the Legislative Assembly regarding correspondence with this Commission in respect of the further draft report, the Commission wrote to Mr D'Orazio's counsel by letter dated 15 November 2007 setting out the history and effect of the section 86 process;*
- (m) *By letter dated 15 November 2007 this Commission informed the Parliamentary Inspector that it was prepared to extend the deadline for section 86 representations by Mr D'Orazio until 19 November 2007 ("**Ultimate Extension**"),*
- (o) *By letter dated 16 November 2007 Mr D'Orazio wrote to the Commission regarding the Ultimate Extension and the Commission's letter dated 15 November 2007;*
- (p) *On 19 November 2007 the Commission wrote to Mr D'Orazio indicating that it would treat his letter of 16 November as a representation made pursuant to section 86 of the CCC Act, and*
- (q) *On 19 November 2007 at 18:10 the Commission received a 21 page facsimile setting out representations made by Mr D'Orazio's counsel pursuant to section 86 of the CCC Act, ("**Ultimate Representations**").*

This report refers to the communications at paragraphs (1), (2) and (3) collectively as the D'Orazio submissions. The D'Orazio Representations have been carefully considered by the Commission in the preparation of this report. In particular, the Commission has examined those matters personally raised by Mr D'Orazio in his letter referred to at paragraph (3)(o) above."

To avoid confusion I use the same terms, as those used in the Report, to refer to the various aspects of the section 86 process in this correspondence.

I note that the manner in which these representations were presented made them difficult to follow, in that: (1) there was no attempt to consolidate the representations; (2) they were prolix; (3) they were repetitive; (4) they employed a system of enumeration that was unhelpful in that the headings were not numbered and individual points were not given a unique number, and (5) many of the Ultimate Representations appeared to be a response to superseded drafts of the Commission's proposed report.

There were many aspects of the Ultimate Representations that appeared to be confused or mere afterthoughts, for example it is not until paragraph (45) on page 9 that Mr Moen suggests,

"Mr D'Orazio also refers to the submissions/representations as made in the letter from his solicitors dated 26 September 2007 and requests that you once again address each of the specific paragraphs as set out at 1 – 27. These to this date have not been addressed".

3. INAPPROPRIATE CONDUCT OF A PUBLIC OFFICER QUA PUBLIC OFFICER

You raise the issue whether the Commission has the power under the CCC Act to proffer an opinion regarding the conduct of a public officer other than when that public officer is "acting or purporting to act in his or her official capacity". You put the proposition, at page 2 of your letter, that:

"A public officer who 'misconducts' himself, in the wider sense of the term, is only subject to the scrutiny and possible censure of the Commission if the 'misconduct' is in his or her performance as a public officer, or purports to be" ("Proposition 1")

3.1 SECTION 86 REPRESENTATIONS

In your telephone attendance of today's date you advised that Mr D'Orazio's representatives had made representations concerning this issue and that it was an issue that the Commission failed to engage in the Report.

In your letter you state, at page 2, referring to Proposition 1:

"This point (albeit not in these terms) was made on behalf of Mr D'Orazio's behalf as one of the Ultimate Representations, and is referred to at page 60 of the CCC's report".

At page 12, paragraphs (11) – (15) of the Ultimate Representations the following representations were put,

- "(11) The conduct of Mr D'Orazio was outside the scope and purpose of the enquiry as there was no public officer or departmental contact involved and Mr D'Orazio was acting in his private capacity' in his contact with Minniti;*
- (12) Mr D'Orazio in speaking to Minniti about speeding fines or fines enforcement was a private matter and not in his role or capacity as a Member of Parliament or as a Minister";*
- (13) The purpose of the Act is two fold namely to 'combat and reduce the incidence of organised crime" and "to improve continuously the integrity of, and reduce the incidence of misconduct in, the public sector" pursuant to s.7A of the Act. This presupposes that all matters the subject of enquiry must focus on persons who are acting not in a private capacity but in their roles as public officials;*
- (14) If the alleged conduct is a private matter then how does the subject conduct then become the subject of adverse comment in a report to the Parliament on either "misconduct" or "prevention and education" in relation to the public service.*
- (15) Under the prevention and education function, the conduct assessed is reliant on two phrases used by Minniti, and one can see that he is*

the type of person who 'big notes' himself and that he always speaks in this type of manner. It must be the analysis of the actions which need to be assessed before the Commission could conclude that it is likely to lead to misconduct in any event".

The Commission took the view in response to these representations that they "missed the point" in that they ignored the emphasis in paragraph 7A(b) of the CCC Act that one of the Commission's primary purposes is to "improve continuously the integrity of, and reduce the incidence of misconduct in, the public sector" ("**integrity purpose**"). The integrity purpose at paragraph 7A(b) of the CCC Act is not made subject to the misconduct purpose in that paragraph to "reduce the incidence of misconduct in, the public sector" ("**misconduct purpose**").

These "integrity" and "misconduct" purposes whilst they appear in the same paragraph are cumulative and several. It is the integrity purpose at paragraph 7A(b) that requires this Commission to consider whether [when performing its functions, albeit its "general" (section 16), "prevention and education" (section 17), "misconduct" (section 18), "Royal Commission" (section 19); "A-CC" (section 20); "Organised crime" (section 21) or "Reviewable police action" (section 21) functions] action is necessary to "improve continuously the integrity of the public sector".

3.2 THE REPORT – THE INTEGRITY PURPOSE

The passages in the Report from the last paragraph on page 58 seek to establish the standard of conduct that the Commission considers would be expected of a Minister of the Crown or a Member of Parliament. In doing so the Commission sought to express a standard which, *inter alia*, was consistent with its purpose to "improve continuously the integrity of the public sector".

The relevant standard is set out at page 60 of the Report.

The Commission's role is not to moralise. It is not seeking to be a "moral censor" (refer to paragraph 2, penultimate paragraph of your letter of 25 January 2008) it only seeks to achieve the purposes required of it by the Parliament of Western Australia and to discharge its functions according to law.

The Commission seeks to avoid lengthy expositions on statutory construction in its reports. However, reliance on the definition of "misconduct" takes no account of the Commission's integrity purpose, and that purpose is separate from its misconduct purpose

3.3 D'ORAZIO'S CONDUCT – PUBLIC OFFICER, PRIVATE CITIZEN?

This was not a case as contended by Mr Moen on behalf of Mr D'Orazio in which "there was no public officer or departmental contact involved" – here it appears that Mr Moen was referring to a lack of contact with the DPI – but it was a fact that Mr D'Orazio encouraged by Mr Minniti telephoned Sergeant Hailes, (refer to page 48 of the Report).

Equally, the conversations by and with Mr D'Orazio relied upon by the Commission in its Report clearly identify that Mr D'Orazio's problems with traffic infringements were

impacting on his public office as a Minister then as a Member of Parliament (refer page 23 of the Report).

Mr D'Orazio, himself, acknowledged the link between these problems and his public office himself in his telephone call at 12:55 pm on 10 May 2006, (set out in the Report at pages 46 – 47) when Mr D'Orazio states:

“ ...
MINNITI: *Listen, I just want you to ring up Senior Sergeant Hailes and if you could explain to him what's goin' on then, then after, because he said to me, he said to me, he goes, he goes, if no police officer has stopped you and told you*
D'ORAZIO: *No, no, mate. But I know that already but that's not my problem, uhm, because they can't charge me for that. But the problem*
MINNITI: *Yeah.*
D'ORAZIO: *I got is*
MINNITI: *Yeah*
D'ORAZIO: *in politics it's the fact I was driving without a license*
MINNITI: *Yeah.*
D'ORAZIO: *Cost me my job, so*
MINNITI: *Okay, okay. Well, speak to him, he might*
D'ORAZIO: *Yeah*
MINNITI: *He might know he might know of something else of helping you. You understand*
D'ORAZIO: *Mm*
MINNITI: *Speak to him please, and*
D'ORAZIO: *Have to sort it out*
MINNITI: *And be, besides that I'm going to try and get you that form*
D'ORAZIO: *Okay*
MINNITI: *Yeah. Now*
D'ORAZIO: *The form is the most important*
MINNITI: *Now, now, eh?*
D'ORAZIO: *That form is absolutely vital*
MINNITI: *Okay, Well I'm doing my very best for you. Okay?*
D'ORAZIO: *Thanks*

As Mr D'Orazio stated himself, he had “*to sort it out*”. With respect, any view Mr D'Orazio's conduct was merely a private matter given that, as a result of these problems, he lost his job as Minister for Police on the Monday, 8 May 2006, lost his job as a Minister on Tuesday, 9 May 2006, and was under significant political pressure on 10 - 11 May 2006, appears somewhat artificial and unsupported by the evidence gathered by the Commission in its inquiry.

It is for these reasons that the Commission does not accept the premise upon which your second tentative conclusion (page 5 of your letter) is based (underlining added), i.e. “*Since it is self evident that Mr D'Orazio was not acting in his capacity of public officer, but as a private citizen*”. What is self evident is that Mr D'Orazio considered that his traffic infringement problems were impacting on his public office and for, at least, that reason they had to be sorted out. Mr D'Orazio's actions were not in the context of performing a public function but they were in relation to, or with regard to, a public office.

3.4 PROPOSITION 1

The discussion at page 2 of your letter, in dealing with the definition of 'misconduct' in section 4 of CCC Act, suggests that the conduct in question is required to be directly related to the position or duties of public officer.

As discussed above:

- Section 3.2: reliance on the definition of "misconduct" takes no account of the Commission's integrity purpose, and that purpose is separate from its misconduct purpose, and
- Section 3.3: the proposition that Mr D'Orazio was acting "privately" in respect to his dealings with Mr Minniti and Sergeant Hailes is not supported by Mr D'Orazio's own account of the significance of his traffic infringement problems. Indeed Mr D'Orazio's own account indicates he was well aware of the link between these traffic infringement problems and his various public offices.

In any event the Commission does not accept the analysis of its "misconduct function" set out at page 2 of your letter where you state:

"However, 'misconduct' is defined by section 4. That definition is restrictive. Any public officer who engages in conduct which might be considered reprehensible, or even criminal, is not thereby guilty of misconduct', as defined by section 4. That definition requires the conduct in question to be conduct related to the position or duties of a public officer. For example, if a person who is a public officer commits a criminal offence punishable by 2 or more year's imprisonment, that is not 'misconduct' unless the offence is committed by the public officer 'whilst acting or purporting to act in his or her official capacity'. All of the sub-paragraphs of the 'misconduct' definition make it quite clear that the public officer's conduct, generally, does not come within the purview of the Commission. A public officer who 'misconducts' himself, in the wider sense of that term, is only subject to the scrutiny and possible censure of the Commission if the 'misconduct' is in his or her performance as a public officer or purports to be".

The Commission notes that the CCC Act deals with two types of "misconduct":

- (1) "serious misconduct", and
- (2) "misconduct" simpliciter.

The definition of "serious misconduct" appears at section 3 as "means misconduct of a kind described in section 4(a), (b) or (c)" of the CCC Act. In contrast "misconduct" simpliciter is defined at section 4(d).

The various definitions of misconduct simpliciter in sections 4(d) (ii), (iii) and (iv) of the CCC Act refer to conduct on the part of a public officer connected to 'his or her functions', 'by reason of his or her employment' and 'in connection with his or her functions' respectively. However, the definition of misconduct in s. 4(d)(i) of the CCC Act is different:

“(d) a public officer engages in conduct that –

- (i) adversely affects, or could adversely affect, directly or indirectly, the honest or impartial performance of the functions of a ... public officer whether or not the public officer was acting in their public officer capacity at the time of engaging in the conduct.

This is a particularly broad definition of “misconduct” and it applies ‘whether or not the public officer was acting in their public officer capacity at the time of engaging in the conduct’. The definition catches conduct within and outside the public officer’s official capacity.

The express terms of the CCC Act preclude, and the Commission does not accept, the analysis of the term ‘*misconduct*’ as set out in the second full paragraph on page 2 of your letter because the definition of “*misconduct*” is not conditioned, as asserted at page 2 of your letter, by the requirement that the impeached conduct be conduct by a public officer, “*whilst acting or purporting to act in his or her official capacity*”.

In any event, in the Report, the Commission’s opinion was that there had been no misconduct on the part of Mr D’Orazio. This was because the Commission did not conclude that either of the conditioning elements of “*misconduct*” *simpliciter* were made out, see:

- section 4(d)(v) - conduct constituting an offence against the Statutory Corporations (Liability of Directors Act 1996; and/or
- 4(d)(vi) - conduct constituting a disciplinary offence of the type described.

The Report stated the Commission’s opinion that evidence of Mr D’Orazio’s conduct did not support a conclusion that he had engaged in conduct in breach of section 4(d)(vi) [of course section 4(d)(v) was inapplicable], at page 61:

‘After “assessing” all the material obtained during the course of the investigation, including telecommunications interceptions, the Commission is of the opinion that Mr D’Orazio’s actions do not amount to “misconduct” as defined by section 4 of the Corruption and Crime Commission Act 2003 (the CCC Act) in respect to these matters.

There is no evidence to support a conclusion that Mr D’Orazio has acted corruptly or that he has engaged in conduct that could constitute an offence or a disciplinary offence providing reasonable grounds for termination under the Public Sector Management Act 1994 (PSMA). However the Commission considers that Mr D’Orazio’s conduct as a Minister and later as a Member of the Legislative Assembly in respect of Mr Minniti’s offers to assist him in respect of his traffic infringements, as identified in this report, was inappropriate.’ [at page 4, and see pages 61 & 62 of the Report]

4. POWER TO PROFFER OPINION LESS THAN MISCONDUCT

As you acknowledge at the top of page 2 of your letter, the Commission maintains it has jurisdiction arising out of its prevention and education function to report upon conduct that may be considered to be inappropriate but falling short of 'misconduct' as defined in the CCC Act ("**Proposition 2**").

For the reasons set out above at section 3, the Commission is not able to agree with the proposition in your letter that, "*It follows that even if the Commission does have jurisdiction to deal with, "inappropriate conduct", it could only be in relation to the conduct of a public officer, qua public officer.*"

At page 14 of the Report, the Commission summarised its position on Proposition 2 as follows:

"The Commission considers that adverse comment falling short of 'misconduct' may properly be made, where justified, whether in respect of a public officer or some other person, if relevant or related to an allegation of 'misconduct' by a public officer. Where those circumstances exist, reasons for the adverse opinion will ordinarily be given, supported by a summary of the relevant facts as well as the reason(s) for expressing the opinion, [my emphasis]".

This opinion was based, in part, on section 7A(b) of the CCC Act, where the Commission noted in the Report, at page 13,

"Such opinions can then be reported to Parliament under the CCC Act. These reports enable the Commission to publicly identify circumstances that foster "misconduct" in the Western Australian public sector. It is by such reporting that the Commission performs one aspect of its statutory obligation, "to improve continuously the integrity of, and to reduce the incidence of misconduct in, the public sector" as required by paragraph 7A(b) of the CCC Act."

The Commission's position on its role is on the public record and is comprehensively set out in Section 1.3, at pages 9 to 14, of the Report.

In order to provide this response in a timely manner the Commission's view is not repeated here. However, it is a statutory construction supported by: -

- the terms of the Commission's purposes at paragraph 7A(b) of the CCC Act;
- the Commission's "*prevention and education function*" at section 17 of the CCC Act;
- the Commission's power at section 84,

"The Commission may at any time prepare a report on any matter that has been the subject of an investigation or other action in respect of misconduct, irrespective of whether ...";

- The power to report provides one mechanism whereby the Commission can meet its obligations at section 17(2)(c) "*providing information relevant to its prevention and education function to the general community*" and at 17(2)(d) "*reporting on ways to prevent misconduct*", and
- the reference at section 86 to the material to be provided to any person or body affected by a report which includes "*any matters adverse to a person or body*" a section which includes no reference to "misconduct" and makes no use of the language of "*opinion*" or "*assessment*".

The Commission acknowledges, with respect, that you hold a different view on this point.

It was understood, as a consequence of the PI Report at paragraphs [36] *et seq*, and in particular at [45]:

"Hence, although I have recommended to the Commission that it reconsider (in the light of Mr D'Orazio's representations) the inclusion in its report of 'matters adverse' to Mr D'Orazio, and the expression of an opinion which is not one of 'misconduct', I cannot direct the Commission as to what it may include in its Report, nor can I 'annul' its decision on what, ultimately it may include".

The Commission has carefully considered the views expressed in the PI Report. The Commission has not arrived at its view of the CCC Act in this regard lightly and regards the issue as one of significance. However, having formed its view of its powers in this regard the Commission must act thereon or fail in its own statutory obligations.

5. POWER OF PARLIAMENTARY INSPECTOR

Your comments also raise the question of the role of the position of Parliamentary Inspector.

With respect, the Commission accepts your statement of the limitations of the Office of Parliamentary Inspector set out at paragraph [45] of the PI Report.

The only manner in which the questions of statutory construction discussed above can be resolved is by the courts. Any clarification of the Commission's powers under the CCC Act in this regard would be in the public interest.

As to the questions raised in your letter concerning the evidentiary basis for the opinions about Mr D'Orazio's conduct expressed in the Report, the Commission has recently responded to a similar enquiry regarding opinions and recommendations made about Mr Paul Frewer in another report. The Commission refers you to the discussion of the powers set out at pages 1 to 3 of the "*Commission Response to Draft Report By Parliamentary Inspector Regarding Paul Frewer*" dated 31 January 2008.

It is the Commission's position that there is a distinction between the proper exercise of an 'audit' function and the purported function of the Parliamentary Inspector as a

review body; the former being acceptable under the terms of the CCC Act but not the latter. Even a court of review is generally reluctant to substitute its own decision for that of a lower court or tribunal where there has been an exercise of a discretion by the lower court or tribunal.

The Commission is of the view that the CCC Act does not provide for any function on the part of the Parliamentary Inspector that could be considered to be in the nature of an appellate review of the opinions expressed or the recommendations made by the Commission in the exercise of its powers under the CCC Act.

In response to matters raised under heading 2, at pages 3 to 4 of your letter, the Commission canvassed in some detail the evidence pertaining to Mr D'Orazio's conduct at pages 39 to 51 and set out its opinions at pages 51 to 62. As such, the evidence and opinions are matters of public record.

With respect, it would appear that the matters you have raised on behalf of Mr D'Orazio could be raised by way of an application for judicial review by Mr D'Orazio rather than being dealt with in correspondence between our respective offices.

6. MR D'ORAZIO'S PUBLIC EXAMINATION

Your second tentative conclusion indicates that Mr D'Orazio should not have been subjected to a public examination. As you are aware, section 139 of the CCC Act provides for the Commission's examinations ordinarily to be held in private. The legislation establishes private examinations to be the primary or 'default' position. As such, there is no legislative requirement for the Commission to publish any reasons for deciding to hold an examination in private rather than in public.

Under section 137 of the CCC Act, the Commission may, *inter alia*, conduct examinations for the purposes of an investigation under the CCC Act. The decision to maintain confidentiality regarding an investigation may be based on a variety of reasons, including operational reasons.

However, the Commission has a discretion (reading sections 139 and 140(2) together) to open the examination to the public 'if, having weighed the benefits of public exposure and public awareness against the potential for prejudice or privacy infringements, it considers that it is in the public interest to do so.'

The decision to open an examination to the public is not subject to a consideration of whether a person concerned is acting in a capacity of a public officer or as a private citizen. Here I note the matters set out at section 3 above.

The relevant test is whether it is in the public interest to open the examination to the public. It is acknowledged that reasonable minds may disagree on the exercise of any discretion. However difficult a decision it may be, it is a decision that the Commission is entitled to make so long as it has weighed the factors set out in s. 140(2) of the CCC Act. As you will appreciate, given the likely impact of the publicity associated with public examinations on those who are called to appear before the Commission, these decisions are not taken lightly. In fact, in the Report, the Commission set out in detail the reasons for calling Mr D'Orazio to be examined in public (see page 3 and pages 23 – 25 of the Report).

7. EVIDENCE OF MISCONDUCT AND MISPLACED RELIANCE ON SECTION 22 OF THE CCC ACT

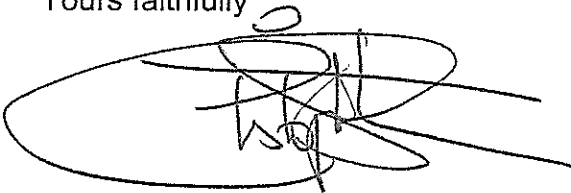
I refer to your third and fourth tentative conclusions which are predicated on an acceptance of the correctness of the propositions contained in those points. For the reasons given above, the Commission maintains its view that it is not only appropriate to report upon conduct that may fall short of defined "*misconduct*" but it does so, *inter alia*, in fulfilment of its purpose under section 7A(b) of the CCC Act '*to improve continuously the integrity of, and to reduce the incidence of misconduct in, the public sector.*' In this instance the Commission relies on the evidence set out in the Report.

8. ACTION

In the absence of an application for judicial review there can be no resolution to the issues set out above.

I note your report to both Houses of Parliament in respect of matters pertaining to Mr Frewer on Friday 8 February 2008. In the event that you choose to prepare and table a report to the Parliament in respect of this matter the Commission would be obliged if your letter of 25 January 2008 and this response were included in any such report to the Parliament.

Yours faithfully

A handwritten signature in black ink, appearing to be 'C P Shanahan', is written over a large, hand-drawn oval. The signature is somewhat stylized and overlaps the oval.

C P Shanahan SC
ACTING COMMISSIONER

12 February 2008



CORRUPTION AND CRIME COMMISSION OF WESTERN AUSTRALIA

Your Ref: MJMcC:054/06
Our Ref: 01878/2006

Mr Malcolm McCusker AO QC
Parliamentary Inspector of the Corruption and Crime Commission
Office of the Parliamentary Inspector
Level 3, 45 St Georges Terrace
PERTH WA 6000

Dear Parliamentary Inspector

REPORT ON AN INVESTIGATION INTO INAPPROPRIATE ASSOCIATIONS BETWEEN WESTERN AUSTRALIAN POLICE OFFICERS AND PASQUALE MINNITI

Thank you very much for your letter dated 14 February 2008 provided to me by email of the same date.

You have asked two questions in the third and ultimate paragraphs at page 2 of your letter. Both questions go to the power of the Commission to proffer an opinion that Mr D'Orazio's conduct, as revealed by its investigation, was "inappropriate". Before answering your questions specifically it is important to recount and identify the context in which Mr D'Orazio's conduct became the subject of the Commission's inquiry.

1. PURPOSE OF THE COMMISSION'S INVESTIGATION

I note your correspondence is headed "*John D'Orazio and the Smith's Beach Report*". I have chosen to respond by referring to the title of the Commission's report because it is the scope and purpose of the Commission's investigation that provides a general answer to both of your questions.

The circumstances of this investigation were set out in Chapter One, at page 7 of the Commission's Report:

In September 2005, the Commission received information that a number of serving Western Australia police officers (WAPOL) had formed a network of inappropriate relationships with members of the public, and had provided confidential police information and inappropriate assistance to those individuals.

On 21 September 2005 after an initial “assessment” of these allegations, the Commissioner decided to investigate the information received pursuant to section 33(1)(b) of the *Corruption & Crime Commission Act 2003* (CCC Act). The purpose of the investigation was to “assess” the “allegations” and form an “opinion” as to whether “misconduct” “had occurred, is or may be occurring, or may be about to, or is likely to occur”. It included, but was not limited to, whether any police officer or any other person had corruptly obtained, or attempted to corruptly obtain, the withdrawal of lawfully issued traffic infringement notices without authority, and whether any police officer had unlawfully disclosed confidential police information.

With respect, contrary to paragraph 5 on page 2 of your letter, where you state that,

As I pointed out in my letter of 25 January 2008, there is no finding of actual or potential misconduct on the part of Mr D’Orazio, nor on the part of any other ‘public officer’ in the Report,

the Commission ultimately made several findings of “misconduct” against a number of public officers, these are set out at page 19 of the Commission’s Report. They are expressed in the following terms:

In the Commission’s opinion two police officers engaged in misconduct:

1. **Senior Constable Arduino Silvestri:** it is the Commission’s opinion that this police officer has, by assisting Mr Minniti at least in the following ways in his capacity as a public officer, engaged in “serious misconduct”, as defined in the CCC Act. This assistance included: -

- his role in the withdrawal of traffic infringements;
- his role in the production of statutory declarations;
- providing confidential information, and
- misusing restricted access computers.

2. **Sergeant Bill Harrison:** it is the Commission’s opinion that this police officer has, by assisting Mr Minniti at least in the following ways in his capacity as a public officer, engaged in “serious misconduct”, as defined in the CCC Act. This assistance included:

- his role in the production of statutory declarations
- providing confidential information, and
- misusing restricted access computers.

The Commission made the point in its report that Mr Minniti’s success in establishing inappropriate relationships with Police was a deliberate process. The Commission described that process in the following terms:

(At page 1)

The investigation revealed that Mr Pasquale Minniti, the proprietor of an established panel beating business and used car yard located in Bayswater, had, over a number of years, deliberately cultivated relationships with police officers in order to receive illicit assistance and unauthorised services.

(and at page 2, emphasis added)

The development of inappropriate relationships with police officers by Mr Minniti was a lengthy, deliberate and calculated process, which generated a ‘network of police friends’, (a ‘network’), which Mr Minniti actively cultivated. His nickname of ‘Inspector Minniti’ was given to him by a police officer. A nickname he adopted and promoted, often referring to himself as ‘Inspector Minniti’ when acting as a conduit between his friends, associates and police officers. Over time, even people outside the WAPOL came to identify Mr Minniti as ‘Inspector Minniti’, and some police officers actively supported and perpetuated this charade.

Friends and associates of Mr Minniti viewed him as a person who could assist them with police related issues, a proposition that was confirmed in the course of the Commission’s public examinations. Mr Minniti’s conduct in this regard and the ‘misconduct’ by police officers that supported it, is in the Commission’s view, the core issue identified during this investigation. This report examines how Mr Minniti generated the perception that he could assist with police related issues and the conduct by public officers that allowed Mr Minniti to foster it.

In the Commission’s opinion Mr Minniti built inappropriate relationships with police officers deliberately for his own benefit, and, at times, acted as a predator, exploiting vulnerable police officers once they were indebted to him. He groomed new contacts in the WAPOL by encouraging them to engage in seemingly minor and innocuous yet inappropriate activity. Such activity was often the first step towards seriously compromising these officers.

The importance of these observations is that they identify that Mr Minniti’s grooming of “public officers” by encouraging them to turn to him for assistance initially in “seemingly minor and innocuous but inappropriate activity” was “often the first step towards seriously compromising these officers”. This was “the core issue identified during this investigation”.

It is in this context that the Commission considered Mr D’Orazio’s conduct. It is through this prism that the Commission proffered its opinion regarding Mr D’Orazio’s conduct, as revealed by its investigation. It is only through this prism that the Commission’s opinion concerning Mr D’Orazio’s conduct can be understood. It is for this reason that the focus of this correspondence and my earlier letter of 12 February 2008 is on the Commission’s investigation and not on Mr D’Orazio’s conduct viewed in isolation.

I now turn to your specific questions.

2. COMMISSION’S VIEW: NECESSARY NEXUS BETWEEN PUBLIC OFFICER’S OFFICE AND CONDUCT TO SUPPORT OPINION OF INAPPROPRIATE CONDUCT

I refer to your question regarding the Commission’s view in the second and third paragraphs of page 2 of your letter (emphasis added):

At page 7 of your letter you observe (again, quite correctly) that Mr D’Orazio considered that his traffic infringement problems were impacting on his public office and ‘for that reason had to be sorted out’.

Whilst that is unquestionable, I am unable to see how this could lead to the conclusion that his actions were therefore ‘in relation to or with regard to public office’, as you say at the end of page 7. If that proposition were correct then it would follow that any conduct of a Member of Parliament, engaged in by that Member for the purpose of avoiding loss of Ministerial Office, or the loss of the prospect of gaining Ministerial office, or simply to avoid losing his or her Parliamentary seat, or enhancing the prospect of retaining it, could be categorised as being ‘in relation to or with regard to public office’ and therefore constitute conduct which it would be open to the Commission to report as ‘inappropriate’, even though the conduct was not engaged in by the member (sic) in his or her capacity as a member (sic) of Parliament, but in his or her private capacity. Is that the Commission’s view--?

2.1 CONDUCT IN RELATION TO, OR WITH REGARD TO, PUBLIC OFFICE

The Commission’s view is that any conduct by a Minister or Member of Parliament engaged in for the purpose:

- of avoiding loss of Ministerial office;
- of avoiding the loss of the prospect of gaining Ministerial office;
- simply to avoid losing his or her Parliamentary seat, or
- enhancing the prospect of retaining it,

can be described, because of the motivating purpose, as “conduct in relation to, or with regard to, public office”.

This does not mean, however, that all conduct being “conduct in relation to, or with regard to, public office” can be (1) investigated by this Commission, (2) be the subject of a Commission opinion, or (3) be the subject of its reporting.

For example, the Commission is not concerned with asocial conduct at a party that, whilst it may be inappropriate, does not enliven this Commission’s jurisdiction: your letter of 25 January 2008 describes such conduct. Nor is the Commission concerned with inappropriate conduct that occurs in a purely private environment and without reference to, or relationship with, a public office.

The exchanges between Mr Minniti and Mr D’Orazio demonstrated Mr D’Orazio’s awareness that his discussions with Mr Minniti were in the nature of conduct in relation to, or with regard to, his public office. In my most recent letter of 12 February 2008 at page 7 the Commission highlighted the following portion of the telephone call at 12:55 pm on Wednesday, 10 May 2006 – refer to page 47 of the Report:

MINNITI: *Yeah*

D’ORAZIO: *in politics it’s the fact I was driving without a licence*

MINNITI: *Yeah.*

D'ORAZIO: *Cost me my job, so*
 MINNITI: *Okay, okay. Well, speak to him, he might*
 D'ORAZIO: *Yeah*
 MINNITI: *He might know he might know of something else of helping you. You understand*
 D'ORAZIO: *Mm*
 MINNITI: *Speak to him please, and*
 D'ORAZIO: *Have to sort it out*
 MINNITI: *And be, besides that I'm going to try and get you that form*
 D'ORAZIO: *Okay*
 MINNITI: *Yeah. Now*
 D'ORAZIO: *The form is the most important*
 MINNITI: *Now, now, eh?*
 D'ORAZIO: *That form is absolutely vital*
 MINNITI: *Okay, Well I'm doing my very best for you. Okay?*
 D'ORAZIO: *Thanks*

I note your observation in the second paragraph at page 2 of your letter that you appear to accept the Commission's conclusion that Mr D'Orazio's contact with Mr Minniti was motivated by Mr D'Orazio's concerns regarding his public office, and it was those concerns that meant that the traffic infringement problems had to be "sorted out":

"At page 7 of your letter you observe (again, quite correctly) that Mr D'Orazio considered that his traffic infringement problems were impacting on his public office and 'for that reason had to be sorted out'. Whilst that is unquestionable..."

I refer to the penultimate sentence at paragraph 3 on page 2 of your letter where you state:

"... it would be open to the Commission to report as 'inappropriate', even though the conduct was not engaged in by the member (sic) in his or her capacity as a member (sic) of Parliament, but in his or her private capacity."

With respect, the Commission does not hold the view that conduct that was not engaged in by the Member in his or her capacity as a Member of Parliament is necessarily, therefore, "private". Conduct motivated by a purpose referable to the Member or Minister's public office is not necessarily "private" nor beyond the Commission's jurisdiction. Conduct that is referable to the Member or Minister's public office and which is likely to, or may lead, to "misconduct" is susceptible to the Commission's jurisdiction and the Commission has a statutory duty to act in relation to such conduct.

To avoid any misunderstanding I now set out the Commission's view in this regard.

2.2 CONDUCT THAT IS LIKELY TO, OR MAY LEAD TO MISCONDUCT

Of course even where the Commission identifies conduct of a public officer being conduct of the type described at 2.1 it is not susceptible to a Commission opinion as "inappropriate unless, at least:

- (1) The conduct that comes to the Commission's attention in the course of a lawful investigation;
- (2) The conduct is referrable to the public officer's public office in the manner described at 2.1 above, and
- (3) The conduct is "inappropriate" because it is likely to, or may, lead to "misconduct".

In this instance Mr D'Orazio was participating in conduct of the kind described above as the "grooming" of "public officers" by Mr Minniti. The Commission bases this observation on the nature of the exchanges between Mr Minniti and Mr D'Orazio set out in its Report. Exchanges in which Mr Minniti was offering assistance to Mr D'Orazio of a kind, and in a manner, that may - had Mr Minniti been able to make good his offers - put Mr D'Orazio in a position where he felt under an obligation to Mr Minniti of the type described above in respect of other public officers.

The Commission found that not only could such conduct lead to "misconduct" in the case of several public officers it had led to "misconduct". This "grooming" was described throughout the Commission's Report as a "core issue" because Mr Minniti (emphasis added):

... groomed new contacts in the WAPOL by encouraging them to engage in seemingly minor and innocuous yet inappropriate activity. Such activity was often the first step towards seriously compromising these officers.

Keeping in mind that Mr D'Orazio was: (1) Minister for Police on Monday 8 May 2006, (2) Minister for Disability Services; Citizenship and Multicultural Interests; Seniors and Volunteers for on 9 May 2006, and (3) a senior member of the Government on 10-11 May 2006, Mr D'Orazio's exchanges with Mr Minniti had a potential further adverse effect, that of lending credence to Mr Minniti's claims to third parties that he was able to assist with police related issues. As the Report noted (at page 2):

This report examines how Mr Minniti generated the perception that he could assist with police related issues and the conduct by public officers that allowed Mr Minniti to foster it.

Clearly Mr Minniti spoke to Senior Constable Silvestri about Mr D'Orazio and Senior Constable Silvestri was aware that Mr Minniti was seeking his assistance to "fix" Mr D'Orazio's problems on 8 May 2006, the day on which the Premier removed Mr D'Orazio as Minister for Police. The Commission bases this observation on the exchange between Mr Minniti and Senior Constable Silvestri referred to at page 23 of the Report:

First, at the time of the public hearing the Commission was examining an allegation that Senior Constable Silvestri was involved in improperly withdrawing traffic infringement notices. The best evidence available to the Commission at that point in time was a lawfully intercepted telephone conversation at 7:26 pm on 8 May 2006 between Mr Minniti and Senior Constable Silvestri, during which they talked about Mr D'Orazio's concerns regarding alleged traffic infringements. This conversation confirmed an earlier indication of Mr D'Orazio's concerns regarding alleged traffic infringements in the context of its inquiry regarding Mr Minniti. It drew Mr D'Orazio into the Commission's inquiry. It was during this conversation that both men, and Senior Constable Silvestri in particular, let their guard down. In previous conversations both

had been very guarded. – but not this time. During this call, when Mr Minniti said, “We need to fix things up for John D’Orazio”, Senior Constable Silvestri made the following revealing replies: “He’s unfixable”, “I wouldn’t be touching him with a barge pole” and “Mate, I like my job for the moment” (“Silvestri Conversation”).

This was the point made by the Commission at page 58 of the Report:

Mr Minniti, in the Silvestri Conversation, gave the impression to Senior Constable Silvestri that he had Mr D’Orazio’s imprimatur to assist Mr D’Orazio. Mr Minniti had suggested to Mr D’Orazio that his contact in DPI had assigned a member of staff to “look for you”. Mr D’Orazio cannot, of course, be responsible for the manner in which Mr Minniti chose to communicate with Senior Constable Silvestri. However Mr D’Orazio’s preparedness to attend private meetings with Mr Minniti, return phone calls regarding the missing facsimile and to entertain offers of assistance (or at least not to actively and unequivocally reject them), provided Mr Minniti with a factual basis upon which he could represent to third parties that he had a “close” relationship with Mr D’Orazio and that Mr D’Orazio was accepting his help.

Mr D’Orazio’s conduct was conduct that was likely to, or may, lead to “misconduct” by either:

- (1) Mr D’Orazio because he was being “groomed” by Mr Minniti, or
- (2) Other public officers because Mr D’Orazio’s conduct buttressed the impression that Mr Minniti could assist others with “police related issues”.

2.3 COMMISSION’S STATUTORY DUTY TO PROFFER AN OPINION THAT CONDUCT IS INAPPROPRIATE BECAUSE IT IS LIKELY TO, OR MAY LEAD TO MISCONDUCT

Once one accepts that Mr D’Orazio’s conduct was referable to his public office and was likely to, or may, lead to “misconduct” then the Commission has a statutory duty to proffer an opinion and report it to Parliament.

This statutory duty arises because the Commission’s purposes at section 7A(b) is to (refer page 9 of the Report):

to improve continuously the integrity of, and to reduce then incidence of misconduct in, the public sector.

In my letter of 12 February 2008 I pointed out that this provision has two purposes:

- (1) to improve continuously the integrity of the public sector (“integrity purpose”), and
- (2) to reduce then incidence of misconduct in the public sector (“misconduct purpose”).

In the Commission’s view that proffering a view in respect of Mr D’Orazio’s conduct because it was both (1) referable to his public office and (2) was conduct that was likely to, or may, lead to “misconduct”, engaged both of these purposes.

As the Report points out from page 9 the CCC Act seeks to effect these statutory purposes through the creation of the Commission at section 7B, and the performance of the Commission's functions:

The CCC Act, at section 7B, sets out how its purposes are to be achieved:

- (1) ... primarily by establishing a permanent commission to be called the Corruption and Crime Commission ... [and] ...
- (3)The Commission is to help public authorities to deal effectively and appropriately with misconduct by increasing their capacity to do so while retaining power to itself investigate cases of misconduct, particularly serious misconduct

The Commission's functions are set out at section 16 of the Act; they are:

the functions conferred or imposed by or under this Act or any other written law.

One of the functions conferred on the Commission is its "prevention and education function" at section 17 of the CCC Act. With respect the full title of this function is considered to be important by the Commission. I note paragraph 4 on page 2 of your letter that describes this function as merely the "education function". The reference to "prevention" is important and in Mr D'Orazio's case is prime.

Section 17 states (refer page 10 of the Report, emphasis added)

17. Prevention and education function

- (1) The Commission has a function (the "**prevention and education function**") of helping to prevent misconduct.
- (2) Without limiting the ways the Commission may perform the prevention and education function, the Commission performs that function by -
 - (a) analysing the intelligence it gathers in support of its investigations into organised crime and misconduct; and
 - (ab) analysing the results of its investigations and the information it gathers in performing its functions; and
 - (ac) analysing systems used within public authorities to prevent misconduct; and
 - (ad) using information it gathers from any source in support of its prevention and education function; and
 - (b) providing information to, consulting with, and making recommendations to public authorities; and
 - (c) providing information relevant to its prevention and education function to the general community; and
 - (ca) ensuring that in performing all of its functions it has regard to its prevention and education function; and
 - (cb) generally increasing the capacity of public authorities to prevent misconduct by providing advice and training to those authorities, if asked, to other entities; and

(d) reporting on ways to prevent misconduct.

It is to meet its statutory obligation to, amongst other matters, “report on ways to prevent misconduct” and to meet the purposes of “improve continuously the integrity of the public sector” and “to reduce then incidence of misconduct in the public sector” that the Commission was required to proffer an opinion regarding Mr D’Orazio’s conduct.

Your letter raises the question how the Report does so at the fifth paragraph on page 2 of your letter where you state (emphasis added):

It is as you say, quite clear (by section 17(2)(ca) (sic) that in performing any of its functions the Commission must have regard to it ‘prevention and education function (sic) but that function is directed to ‘helping to prevent misconduct’. As I pointed out in my letter of 25 January, there is no finding of actual or potential misconduct on the part of Mr D’Orazio, nor on the part of any other ‘public officer’ in the Report.

The Commission has already noted the nature of its findings of “misconduct” at section 1 above. In response to your second question at paragraph 6 on page 2 of your letter, the Commission now sets out how the opinion regarding Mr D’Orazio helps to prevent “misconduct”.

2.4 HOW THE COMMISSION’S OPINION REGARDING MR D’ORAZIO MET THE COMMISSION’S STATUTORY OBLIGATIONS AND HELPS TO PREVENT MISCONDUCT

Had Mr Minniti been able to deliver the assistance to Mr D’Orazio that he promised then Mr D’Orazio would have opened himself up to the possibility that he would have been under an obligation to Mr Minniti. Exactly the grooming process employed by Mr Minniti in respect of police officers. The importance of the Commission’s opinion in helping to prevent “misconduct” is to enliven senior members of the Government and other members of Parliament, whether they Ministers or otherwise, that offers of assistance whilst they may appear innocuous may compromise them and ultimately lead to “misconduct”.

Had the Commission remained silent in respect of Mr D’Orazio’s conduct as revealed by this investigation it gives rise to the inference that the Commission either considers that there is nothing wrong with such conduct, or worse, condones it. Were the Commission to facilitate the availability of such an inference it would be a breach of the Commission’s purpose and functions.

3. IMPASSE

The Commission acknowledges that you hold a different view of the Commission’s powers as conferred by the CCC Act. The Commission makes acknowledgment with respect but considers that absent a binding determination by an appropriate court there can be no definitive resolution of the question.

The consequences to this Commission of the different views surrounding its opinion in respect of Mr D'Orazio's conduct have been significant in three respects: -

1. The volume of resources required to address Mr D'Orazio's concerns in the section 86 process, and your concerns in the post tabling phase;
2. The apparent lack of any mechanism to deal with the current impasse, and
3. What does the Commission do in the circumstance that another matter raises similar questions?

The Commission has several proposals to put to you as a means to resolve the impasse and move forward in a manner that supports the reciprocal statutory relationship between this Commission and your office.

4. COMMISSION'S PROPOSALS

I have spoken to the Commissioner and he has decided the Commission will not proffer any adverse opinions regarding conduct, being conduct less than "misconduct" as defined by the CCC Act, pending the outcome of the current legislative review.

The moratorium is simply a practical method of dealing with the current impasse that is unsupportable with the Commission's current resources and is not intended to derogate from the views expressed above. It is, however, an attempt by the Commission to note the significance of your views in the context of the statutory relationship described above.

I hope that you can appreciate the Commission's concern to engage and resolve the issues you have raised in this matter. Again, the Commission requests that were you to table a further report in this matter you include your letters of 25 January and 14 February 2008 and the Commission's responses.

Yours faithfully



C P Shanahan SC
ACTING COMMISSIONER

15 February 2008