

PUBLIC ACCOUNTS COMMITTEE

INQUIRY INTO GOVERNMENT PAYMENTS TO MS TIRZAH BELL

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Public Accounts Committee

Inquiry into Government Payments to Ms Tirzah Bell

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INQUIRY INTO GOVERNMENT PAYMENTS TO MS TIRZAH BELL

Report No. 7

Presented by:

Hon J.C. Kobelke, MLA

Laid on the Table of the Legislative Assembly
on 24 June 2010

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COMMITTEE'S FUNCTIONS AND POWERS

The Public Accounts Committee inquires into and reports to the Legislative Assembly on any proposal, matter or thing it considers necessary, connected with the receipt and expenditure of public moneys, including moneys allocated under the annual Appropriation bills and Loan Fund. Standing Order 286 of the Legislative Assembly states that:

The Committee may —

- Examine the financial affairs and accounts of government agencies of the State which includes any statutory board, commission, authority, committee, or trust established or appointed pursuant to any rule, regulation, by-law, order, order in Council, proclamation, ministerial direction or any other like means.
- 2 Inquire into and report to the Assembly on any question which
 - (a) it deems necessary to investigate;
 - (b) (Deleted V. & P. p. 225, 18 June 2008);
 - (c) is referred to it by a Minister; or
 - (d) is referred to it by the Auditor General.
- 3 Consider any papers on public expenditure presented to the Assembly and such of the expenditure as it sees fit to examine.
- 4 Consider whether the objectives of public expenditure are being achieved, or may be achieved more economically.
- The Committee will investigate any matter which is referred to it by resolution of the Legislative Assembly.

INQUIRY TERMS OF REFERENCE

The Public Accounts Committee will inquire into Government payments to Ms Tirzah Bell in the 2008–2009 financial year and the employment or contractual arrangements on which any payments were based.

ABBREVIATIONS AND ACRONYMS

DPC Department of the Premier and Cabinet

FOI Freedom of Information

IRC Industrial Relations Commission

MMP Ministerial Merit Panel

PAC Public Accounts Committee

PSC Public Sector Commission

PSMA Public Sector Management Act 1994

FINDINGS

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Finding 1

No precedence was found for the Bell case where both the Minister involved and the Ministerial Merit Panel recommended the appointment of a Ministerial staffer who was unacceptable to the Premier or his delegate.

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Finding 2

No evidence was presented to the Public Accounts Committee as to why Ms Bell was not a suitable person to work in a Ministerial office.

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Finding 3

The need for incoming Ministers to quickly establish their offices placed significant workload and pressure on the recruitment process with the clear potential for problems to arise.

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Finding 4

Ms Tirzah Bell's access into the Minister's office and undertaking of certain functions may have given grounds for a claim that a contract of employment was in train, even if a formal written contract had not been entered into. The possibility existed for a successful unfair dismissal claim in the Industrial Relations Commission.

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Finding 5

Given the staffing and financial implications of defending an unfair dismissal claim in the Industrial Relations Commission at a time when the Department of the Premier and Cabinet was already heavily committed, the Department's decision to conclude the matter with an out-of-court settlement was reasonable and in the Department's and the public's interest.

RECOMMENDATION

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Recommendation 1

Ministers should not permit prospective employees to undertake functions in their offices until employment contracts have been formally entered into and should ensure that proper procedures are followed to protect the State from potential compensation claims.

MINISTERIAL RESPONSE

In accordance with Standing Order 277(1) of the Standing Orders of the Legislative Assembly, the Public Accounts Committee directs that the Premier report to the Assembly as to the action, if any, proposed to be taken by the Government with respect to the recommendation of the Committee.

CHAPTER 1 INTRODUCTION

1.1 Background

(a) Election of New Government

The 2008 Western Australian State General Election was held on 6 September. The election did not deliver a conclusive result, with neither major party securing enough seats to command a majority. On election night the leader of the National Party, Mr Brendon Grylls, MLA, stated that the National Party would engage in consultation with both parties before declaring which would receive support to form Government. This period of consultation extended for one week with the National Party confirming on Sunday 14 September 2008 that it would support a minority Liberal Party Government. On 23 September 2008 the Premier of the new Government, Hon Colin Barnett, MLA, and his Ministry were sworn into office.

(b) Staffing of Ministerial Offices

Given the period of uncertainty after the election there was pressure on the newly appointed Ministers to move expeditiously to employ their complement of Ministerial staff.

The employment of Ministerial officers is governed by section 68 of the *Public Sector Management Act 1994* (PSMA). Section 68 directs that the 'Minister may appoint any person as a ministerial officer', but that this appointment 'shall be governed by a contract of employment between the ministerial officer and the Minister'. Section 68 further directs that this contract of employment is to be in writing, 'signed by or on behalf of the parties to that contract' and 'specify the day on which the term of employment expires'.

In the context of the PSMA, references to the 'Minister' mean the 'Minister of the Crown to whom the administration of this Act is for the time being committed by the Governor'. The Minister currently responsible for the administration of the PSMA is the Premier, and unless otherwise stated in this report, references to the Premier mean the Minister responsible for the PSMA.

The standard procedure for a section 68—or 'term-of-government'—contract of employment in Western Australia is for a portfolio Minster to forward a list of suitably qualified and experienced officers to the Ministerial Merit Panel (MMP) for ratification subject to approval by the Premier's Office. The MMP 'assesses the merits of any intended secondments and appointments to Ministerial Offices, together with an assessment of the designation and salary to be offered. This results in a consistent approach to the appointment of staff across all Ministerial Offices'.²

- 1 -

Public Sector Management Act 1994 (Western Australia), s. 3.

Department of the Premier and Cabinet, *Annual Report* 2008/2009, p. 24.

Under section 15 of the PSMA, the Premier, as the responsible Minister may, in writing, 'delegate to a person any of the powers or duties of the Minister under this Act'. The Premier's Director General would be regarded as having a delegation to handle Ministerial office matters including appointments and terminations of employment contracts. The Premier's Chief of Staff would be regarded as having 'an implied, if not an explicit delegation from the Premier to handle things on his behalf', including management of employment contracts.

Questions in Parliament Regarding Payment to Ministerial Employee (c) Ms Tirzah Bell

In late 2009 and early 2010 a series of parliamentary questions in both Houses of the Western Australian Parliament⁶ and reportage in the local press⁷ indicated that a Ms Tirzah Bell, a longterm staffer for former Liberal Party Leaders of the Opposition, had received a Government payment of \$15 000 after two weeks' service, in the post-2008 election period, in the Office of the Minster for Water and Mental Health, Hon Dr Graham Jacobs, MLA.

In response to an initial Question on Notice regarding Ms Bell's employment and payment, the Premier confirmed the following:

The Department of the Premier and Cabinet has not employed Ms Tirzah Bell as a ministerial officer since 23 September 2008. However the Department accepts that she did perform some services during the period 30 September to 13 October 2008 prior to gaining the support of the Office of the Premier and the appointment being considered by the Ministerial Merit Panel. When the engagement was not approved, Ms Bell, through her agent, sought compensation for the services undertaken and the expectation of an ongoing appointment. The matter was settled between the parties by the payment of \$15,000 and a Deed of Settlement and Release was entered into.8

In the Legislative Assembly on 11 March 2010 the Leader of the Opposition, Hon Eric Ripper, MLA, requested the following information with respect to Ms Bell's employment and payment:

Who determined that Ms Bell's services were no longer required and on what basis was (1)her employment terminated?

Exceptions to this delegation include the power to delegate the power of delegation (delegatus non potest delegare) and the power of the Minister, under s. 11 (1) of the PSMA, to direct the holding of a 'special inquiry into a matter relating to the Public Sector'.

Mr Mal Wauchope, Public Sector Commissioner, Transcript of Evidence, 31 May 2010, p. 4.

⁵

Answer to Question on Notice 2089 asked in the Legislative Assembly by Hon Mark McGowan, MLA, and answered by Hon Colin Barnett, MLA, Parliamentary Debates (Hansard), 23 February 2010, p. 180; Hon Norman Moore, MLC, Legislative Council, Parliamentary Debates (Hansard), 3 March 2010, p. 375; Hon Colin Barnett, MLA, Legislative Assembly, Parliamentary Debates (Hansard), 11 March 2010, p. 636.

^{&#}x27;Payout for Job Pass Over', The West Australian, 3 March 2010, p. 6.

Hon Colin Barnett, MLA, Premier, Legislative Assembly, Parliamentary Debates (Hansard), 23 February 2010, p. 180.

- (2) Was the Premier consulted about this decision?
- (3) Was the Treasurer consulted about this decision and did he approve the payment?
- (4) What formula was used in negotiations with Ms Bell to arrive at the figure of a \$15 000 payout, which is about \$13 000 more than she was entitled to?⁹

With respect to the payment, the Premier confirmed that 'it was independently assessed as to what would be a proper payment. I did not play any role in that', and, further, that he subsequently agreed that the sum of \$15 000 was an 'appropriate payout'. The Premier could not confirm whether the Department of the Premier and Cabinet or the Public Sector Commission had handled the matter of the payment and undertook to provide the Leader of the Opposition with 'written detail of what happened' with regards to Ms Bell's payment.

The 'written detail' regarding the payment to Ms Bell had not been provided to the Leader of the Opposition by the Premier as at 3 June 2010.¹²

(d) Remit of the Public Accounts Committee

Pursuant to the Standing Orders of the Legislative Assembly of Western Australia, the Public Accounts Committee is tasked with the oversight of the expenditure of public moneys in the State, with responsibility for ensuring that the objectives of public expenditure are being achieved, or may be achieved more economically. Allied to this role, is a responsibility to ensure transparency in Government activity involving public funds.

1.2 Initiation and Conduct of the Inquiry

(a) Request to Conduct Inquiry

On 18 March 2010 the Public Accounts Committee received a request from Hon Mark McGowan, MLA, to conduct an Inquiry 'into the circumstances surrounding the payment of \$15,000 of taxpayers' money to former Term of Government employee Ms Tirzah Bell'. ¹³

The Committee considered the request, but decided to delay taking action given the Premier's undertaking in the Legislative Assembly on 11 March 2010 to provide the Leader of the Opposition with 'written detail of what happened' with regards to the payment to Ms Bell.

10 tu., p.

Hon Eric Ripper, Leader of the Opposition, Legislative Assembly, *Parliamentary Debates* (Hansard), 11 March 2010, p. 636.

Hon Colin Barnett, MLA, Premier, Legislative Assembly, *Parliamentary Debates* (Hansard), 11 March 2010, pp. 636–637.

¹¹ *Ibid.*, p. 636.

Hon Eric Ripper, MLA, Leader of the Opposition, Letter, 3 June 2010.

Hon Mark McGowan, MLA, Member for Rockingham, Letter, 12 March 2010.

On 5 May 2010, having confirmed that the Leader of the Opposition had still not received information relating to the payment from the Premier, the Committee resolved to conduct a short Inquiry with the following Term of Reference:

The Public Accounts Committee will inquire into Government payments to Ms Tirzah Bell in the 2008–2009 financial year and the employment or contractual arrangements on which any payments were based.

(b) Nature and Scope of Inquiry

The Committee unanimously determined that although its Inquiry would be examining a specific payment to an individual, the focus of the Inquiry would not be on the individual but on the processes involved in Ministerial appointments, and the circumstances relating to financial settlements when these processes fail. Accordingly, it was resolved that all evidence would be taken in closed session; that Ms Bell would be invited, but not required, to provide evidence to the Inquiry; and that for procedural fairness Ms Bell would be kept informed of the course of the Inquiry and would be given an opportunity to provide comment on key evidence.

Ms Bell declined the Committee's request to provide evidence, and similarly declined to comment on the evidence taken by the Committee which was provided to her.

As the Deed of Settlement which governed the payment made to Ms Bell contained a confidentiality clause, the Committee was conscious that this may have weighed on Ms Bell's decision not to provide evidence which would become public.

1.3 Evidence Taken

(a) Submission from the Premier

To progress its Inquiry the Committee requested the Premier to submit to the Committee the information he had undertaken to provide to the Leader of the Opposition on 11 March 2010.

On 18 May 2010 the Premier provided the following written advice to the Committee:

- Ms Bell undertook certain functions in the Office of the Minister for Water in the period 30 September 2008 to 13 October 2008. This was prior to the Office of the Premier supporting the proposed employment and the matter being considered by the Ministerial Merit Panel (MMP).
- The MMP considered Ms Bell's appointment on 6 October 2008 and approved the staffing structure (other staff from the Ministerial office were also considered) "subject to approval of the Premier's Office". The appointment was to be for an initial three month contract.
- When the appointment was not approved (by the former Chief of Staff of the Premier's Office),
 Ms Bell sought compensation through the payment for the services undertaken and the expectation of ongoing employment for at least three months.

- Discussions were held between officers of the Department of the Premier and Cabinet and Mr Mark Olsen, Ms Bell's agent, during which it was alleged that she had been unfairly dismissed and that a claim would be lodged in the WA Industrial Relations Commission should a settlement not be reached.
- The settlement parameters were confirmed between the then Director General of the Department of the Premier and Cabinet, Mr Mal Wauchope, and the Chief of Staff.
- The Department estimated that settlement of the matter could be between \$11,000 for work done as a contractor on a contract for service and up to \$16,000 based on contract of service as a ministerial officer at PSGA Level 8.
- Settlement was reached and \$15,000 was paid to Ms Bell.
- On settlement, the Department and Ms Bell signed a Deed of Settlement and Release drafted by the State Solicitor's Office.¹⁴

The Premier's submission to the Committee did not provide an explanation as to why Ms Bell was not offered a contract of employment in the office of Minister Jacobs. Given this, the Committee resolved to seek further information by way of a hearing with Mr Mal Wauchope, the Public Sector Commissioner, who at the time of the payment to Ms Bell in 2008, was the Director General of DPC and also the officer who, in the exercise of delegated authority, signed off on Ms Bell's Deed of Settlement and payment.

(b) Freedom of Information Application Submission

On 25 May 2010 Mr McGowan presented the Committee with a copy of a Freedom of Information (FOI) *Notice of Decision* and the accompanying released documents relating to the Government payment to Ms Bell.

The Committee noted that very little information was available through the limited number of documents provided as a result of the FOI application. The Committee further noted that there was no documentation relating to the decision of the Premier's Office not to approve the recommendation of the MMP regarding Ms Bell's proposed employment, nor was there any documentation conveying this decision to Minister Jacobs.

(c) Hearing with Public Sector Commissioner

(i) Ms Bell's Non-Appointment

Mr Wauchope attended a closed hearing on 31 May 2010 and confirmed to the Committee that Ms Bell commenced work in the Minister for Water and Mental Health's Office on 23 September 2008, and that Minister Jacobs requested approval on 2 October 2008 for Ms Bell to be appointed to his Ministerial Office as a Level 8 officer, initially on a three-month contract. ¹⁵ Mr Wauchope

Mr Mal Wauchope, Public Sector Commissioner, Transcript of Evidence, 31 May 2010, pp. 9 and 2.

Hon Colin Barnett, MLA, Premier, Letter, 18 May 2010.

Tion Com Burnett, MEA, Trenner, Ection, 10 May 2010.

further confirmed that the MMP, comprising himself; Michelle Reynolds, then Assistant Direct General, Public Sector Management; Robert Kennedy, then Acting Director of State Administration; and support staff, convened on 6 October 2008 and approved the recommendation subject to approval by the Premier's office. ¹⁶

The Committee took the opportunity to question Mr Wauchope regarding the MMP process and was advised that the MMP was a body which, though not a requirement of the PSMA, was established by the Lawrence Government in 1991 to assess recommendations for appointment of Ministerial officers to ensure that 'people actually do have the qualifications to fit into a given position'. ¹⁷ Mr Wauchope advised that he could not recall any occasion when the MMP had 'knocked back' any recommendations for employment; on the contrary:

My experience with the ministerial merit panel was that by far the majority of cases were accepted as proposed. There were times when we had queries about what was being proposed by way of the level and we would sometimes go back to the minister's office or back through the Premier's office to query that.¹⁸

Similarly, Mr Wauchope advised that he had no recollection of an MMP endorsement not being approved by the Premier's Office: 'the normal pattern would be that people would, as I say, get confirmed in that process'. ¹⁹

With respect to Ms Bell's recommendation for employment not being approved, the Committee inquired as to how the Premier's Office conveyed to Mr Wauchope its decision, and was informed, 'That was conveyed to me either, I think, by phone or maybe in person by the chief of staff...probably a week or so after the merit panel meeting'. Upon further questioning, Mr Wauchope concurred that in receiving advice from the Premier's Chief of Staff he would not make a distinction between what the Premier wanted and what the Premier's Office wanted—that he considered that the Chief of Staff, in the exercise of a delegation to deal with Ministerial office matters, would 'make judgements on behalf of the Premier'. ²¹

When asked if he was 'aware as to the reasons why [Ms Bell's] contract was not to be offered', Mr Wauchope replied, 'No; I do not think so, no'; and upon being further questioned whether the reasons for Ms Bell's non-appointment were disclosed during the 'discussion about payments', he responded: 'I cannot recall whether or not that was the case, but certainly I do not have any notes to that effect'. ²²

¹⁶ *Ibid.*, p. 2.

¹⁷ *Ibid.*, pp. 2 and 4.

¹⁸ *Ibid.*, p. 2.

¹⁹ *Ibid.*, p. 5.

²⁰ *Ibid.*, p. 4.

²¹ *Ibid.*, p. 7.

²² *Ibid.*, pp. 6 and 11.

Finding 1

No precedence was found for the Bell case where both the Minister involved and the Ministerial Merit Panel recommended the appointment of a Ministerial staffer who was unacceptable to the Premier or his delegate.

Finding 2

No evidence was presented to the Public Accounts Committee as to why Ms Bell was not a suitable person to work in a Ministerial office.

(ii) Ms Bell's Payment

Given Ms Bell did not have a written contract of employment as prescribed by section 68 of the PSMA, and that her prospective contract of employment as a Ministerial officer was 'subject to approval by the Premier's office'²³ which had not been forthcoming, Mr Wauchope confirmed that DPC was accordingly of the view that Ms Bell did not have an employment contract which had been breached.²⁴

Notwithstanding this assessment, Mr Wauchope advised the Committee that Ms Bell's industrial representative posited the opposite view and stated that Ms Bell would claim:

that she had been given the expectation of a term-of-government contract that was then reduced to a three-month contract and then she was terminated. So he was arguing that she had a three-month contract that had been terminated unfairly by the employer.²⁵

Mr Olsen, who was Ms Bell's industrial representative, informed DPC that an unfair dismissal claim would be lodged on Ms Bell's behalf with the Industrial Relations Commission (IRC).²⁶

On the basis that Ms Bell had been 'turning up to work and being given work' in the Minister's Office with an expectation of continuing employment, DPC came to the view that 'it could be argued that she had an employment contract on foot, even if it was not in writing'. Mr Wauchope further observed that, 'it is not beyond the realms of possibility that ministers and

Minutes of Ministerial Merit Panel, 6 October 2008, as provided to the Committee in Hon Mark McGowan's submission dated 25 May 2010.

Mr Mal Wauchope, Public Sector Commissioner, *Transcript of Evidence*, 31 May 2010, p. 7.

²⁵ Ibid.

²⁶ Ibid.

²⁷ *Ibid.*, p. 9.

prospective employees can have conversations that are interpreted as being an employment commitment'. ²⁸ Of such ambiguous verbal agreements Mr Wauchope commented:

It should not happen and it should not have happened, but if it was going to happen, it was going to happen in a circumstance where you have a great deal of change occurring, which is what was happening at that time.²⁹

Having come to this position with respect to Ms Bell's employment status, DPC further considered the implications of defending an unfair dismissal case in the IRC. At any time preparing for and conducting a legal defence would result in a significant commitment of the Department's staffing and financial resources—particularly as DPC would have needed to access the State Solicitors Office's 'expertise or time'. An additional factor for DPC was that defending the claim at the end of 2008 would have diverted DPC Human Resources staff at a period when the Department was dealing with an 'enormous throughput of people' in the 'post-election environment'—a situation compounded by the election having been called 'early'. To provide context, Mr Wauchope disclosed that in the three-month period after the change of Government in September 2008, DPC processed 377 separations and commencements—a number which normally 'would take six years for an average department to get through'. In addition, DPC was also heavily involved with establishing the Public Sector Commission and in providing briefings for new Ministers and Ministerial officers.

Finding 3

The need for incoming Ministers to quickly establish their offices placed significant workload and pressure on the recruitment process with the clear potential for problems to arise.

DPC accordingly concluded that as its staff were already 'quite frankly, under the hammer trying to sort out the post-election separations and commencements', 34 and taking into consideration that

there was no guarantee that we would win the case in any event...we could have ended up paying the amount of money plus have those resources used in the meantime...³⁵

Ibid., p. 12.

²⁹ *Ibid*.

³⁰ *Ibid.*, p. 8.

³¹ *Ibid.*, pp. 5 and 11.

³² *Ibid.*, p. 5.

³³ *Ibid.*, p. 11.

³⁴ *Ibid.*, p. 8.

³⁵ *Ibid.*, p. 8.

it was considered:

in the department's interests and, I guess, in the public interest to deal with the matter quickly and get it off the plate so we could move on to the other things that we were trying to do post-election.³⁶

Fortifying DPC in taking this decision, was the fact that the Department had recently been advised by the IRC to settle a claim by a former Ministerial office employee.³⁷

Mr Wauchope confirmed that two DPC representatives, Mr Greg Moore, then Assistant Director General, State Administration and Corporate Services; and Ms Lisa Ward, Principal Policy Officer, entered into negotiations with Ms Bell's industrial representative and the agreed position was that an out-of-court settlement of \$15 000 would be paid. The State Solicitors Office prepared a Deed of Settlement and Release to 'bring the matter to a conclusion and that is it; all costs are contained in that one sum so that there can be no further claims'. The Deed of Settlement and Release also bound the parties to secrecy which prevents the disclosure of details of the settlement. Mr Wauchope 'advised the chief of staff [of the Premier's Office] what was being proposed, and I think there was agreement from the Premier's office that that was a reasonable thing to do'. Having established this, Mr Wauchope exercised his delegated authority and signed the Deed. The payment was transferred to Ms Bell in November 2008.

At the conclusion of Mr Wauchope's evidence the Committee resolved that it was satisfied with the evidence tendered to the Inquiry and would not call additional witnesses.

Finding 4

Ms Tirzah Bell's access into the Minister's office and undertaking of certain functions may have given grounds for a claim that a contract of employment was in train, even if a formal written contract had not been entered into. The possibility existed for a successful unfair dismissal claim in the Industrial Relations Commission.

³⁶ *Ibid.*, p. 7.

³⁷ *Ibid*.

³⁸ *Ibid.*, p. 9.

³⁹ *Ibid.*, p. 10.

⁴⁰ *Ibid.*, p. 8.

Finding 5

Given the staffing and financial implications of defending an unfair dismissal claim in the Industrial Relations Commission at a time when the Department of the Premier and Cabinet was already heavily committed, the Department's decision to conclude the matter with an out-of-court settlement was reasonable and in the Department's and the public's interest.

1.4 Lessons Learnt

Overall, the Committee was reassured that the breakdown in processes which led to Ms Bell receiving an out-of-court settlement of \$15 000 for two weeks' work was basically an anomalous failure of the system in the aftermath of a change of Government, and that, largely, the employment of Ministerial staffers in Western Australia works well. While the Committee did not receive any explanation as to why Ms Bell's prospective contract was not approved by the Premier's Office, the Committee also accepts that DPC's decision to settle the unfair dismissal claim out of court was reasonable. First, because the Department did not necessarily have a strong case to defend the claim and second, in the context of the inordinately busy post-election environment in which it was operating, defending the claim would have put additional pressure on the Department.

The Committee holds to the view, however, that the potential for similar payouts in the future should be avoided, not merely to guard public expenditure but also for the sake of equity and transparency in Government dealings. Accordingly, the Committee has made a recommendation to tighten the process of employing Ministerial staff in the hope that this will safeguard the State from exposure to similar financial claims in the future.

Recommendation 1

Ministers should not permit prospective employees to undertake functions in their offices until employment contracts have been formally entered into and should ensure that proper procedures are followed to protect the State from potential compensation claims.

APPENDIX ONE

SUBMISSIONS RECEIVED

Date	Name	Position	Organisation
18 May 2010	Hon Colin Barnett, MLA	Premier	
25 May 2010	Hon Mark McGowan, MLA	Member for Rockingham	

APPENDIX TWO

HEARINGS

Date	Name	Position	Organisation
31 May 2010	Mr Mal Wauchope	Public Sector Commissioner	Public Sector Commission