



WESTERN AUSTRALIA

REPORT OF THE
ROYAL COMMISSION INTO COMMERCIAL ACTIVITIES
OF GOVERNMENT AND OTHER MATTERS

1992

PART I
VOLUME 5

CHAPTER 19

TERMS OF REFERENCE 1.1 TO 1.4

ROTHWELLS

**The Kwinana petrochemical project to the settlement
on 17 October 1988**

CHAPTER 20

TERMS OF REFERENCE 1.1 TO 1.4

ROTHWELLS

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CENTRAL CITY PROPERTIES

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22.1 The term of reference

22.1.1 The Commissioners are required by their Commission, as affected by the *Royal Commission into Commercial Activities of Government Act 1992*, to inquire and report whether there has been —

- (a) corruption;
- (b) illegal conduct; or
- (c) improper conduct,

by any person or corporation in the affairs, investment decisions and business dealings of the Government of Western Australia or its agents, instrumentalities and corporations in respect of central city property transactions entered into from 1984 onwards by the Western Australian Development Corporation, the Government Employees Superannuation Board (formerly the Superannuation Board) and the State Government Insurance Commission (formerly the State Government Insurance Office) and further to report whether —

- (d) any matter should be referred to an appropriate authority with a view to the institution of criminal proceedings; or
- (e) whether changes in the law of the State, or in administrative or decision making procedures, are necessary or desirable in the public interest.

22.2 Introduction

22.2.1 Hearings in this matter proceeded together with hearings in relation to the terms of reference listed as 1.1, 1.2. and 1.3.

22.2.2 The following abbreviations and definitions will be used throughout this chapter:

"Bell Group" — The Bell Group Limited

"Baztan" — Baztan Pty Ltd, a company associated with Bond Corporation

"Bond Corporation" — Bond Corporation Pty Ltd

"CBD" — Central Business District

"Central Park" — the David Jones site

"Consolidated Press" — Consolidated Press Holdings Limited

"the David Jones site" — the site of the former David Jones Department Store and Pastoral House situated between St Georges Terrace and Hay Street, Perth, being the land comprised in Certificates of Title Volume 1549 Folios 511, 512 and 513, Volume 1577 Folio 356 and Volume 1048 Folio 280.

"Esjay" — Esjay Shelf Co (No 209) Pty Ltd

"GESB" — Government Employees Superannuation Board

"Midtown" — Midtown Properties Pty Ltd

"Newspaper House" — the property situated at 125 St George's Terrace, Perth, being the land comprised in Certificates of Title Volume 60 Folio 58A, Volume 1083 Folio 464 and Volume 1392 Folio 402

"Perpetual Trustees" — Perpetual Trustees WA Limited

"the Perth Technical College site" — the property comprising the former Perth Technical College situated between St George's Terrace and Mounts Bay Road, Perth, being the land comprised in Certificate of Title Volume 1714 Folio 510

"R & I Bank" — Rural & Industries Bank of Western Australia

"Rothwells" — Rothwells Limited

"Royal Insurance Building" — the property situated at 133 St George's Terrace, Perth, being the land comprised in Certificate of Title Volume 971 Folio 20

"SGIC" — State Government Insurance Commission

"Sharland" — Sharland Pty Ltd

"Skeat" — Skeat Pty Ltd

"Tipperary Developments" — Tipperary Developments Pty Ltd

"WADC" — Western Australian Development Corporation

"West Australian Trustees Building" — the property situated at 135 St George's Terrace Perth, being the land comprised in Certificate of Title Volume 60 Folio 57A

"the Westralia Square site" — the site situated between St George's Terrace and Mounts Bay Road, Perth comprising the Perth Technical College site, Newspaper House, Royal Insurance Building and West Australian Trustees Building

"Westralia Square Area 1" — that portion of the Westralia Square site upon which a building has been erected for SGIC and GESB as owners

"Westralia Square Area 2" — the balance of the Westralia Square site after excluding Westralia Square Area 1.

22.3 Statutory and administrative background

22.3.1 WADC was established as a statutory corporation by the *Western Australian Development Corporation Act 1983*. Its functions were set out in section 9

of the Act and included the promotion of the development of economic activity in Western Australia by providing or assisting with the provision of financial resources to business undertakings and engaging or participating in the development of economic activity either alone or with any business undertaking. Section 11 required the corporation to perform its functions and exercise its powers in accordance with prudent commercial principles.

22.3.2 SGIC was established as a statutory corporation by the *State Government Insurance Commission Act 1986* which came into force on 1 July 1987. The Act provided for a Board of Commissioners consisting of six persons appointed by the Governor on the nomination of the responsible Minister plus a managing director who was to be a commissioner *ex officio*.

22.3.3 SGIC's functions included the carrying on of third party motor vehicle insurance business, certain insurance business under the *Workers' Compensation and Assistance Act 1981* and the management and administration of the Government's self insurance arrangements: section 6. Section 7 of the Act authorised SGIC to have power to do all things necessary or convenient to be done for or in connection with the performance of its functions, and in particular, conferred on it a number of specific powers, including the following:

"(a) with the approval of the Treasurer, to borrow moneys in accordance with this Act and give or arrange security for such borrowings;

(b) to lend moneys and provide credit;"

"(e) to improve, develop or alter property;"

The Treasurer referred to was the Treasurer of the State.

22.3.4 The temporary investment of moneys was dealt with in section 19 which provided that moneys standing to the credit of SGIC might, until required for the purpose of carrying out its functions under the Act, be temporarily invested or dealt with in such manner as the Board of Commissioners should think fit.

22.3.5 The provisions of the *Financial Administration and Audit Act 1985* regulating the financial administration, audit and reporting of statutory authorities were made applicable to SGIC: section 20.

22.3.6 As originally enacted, section 10 of the *State Government Insurance Commission Act 1986* enabled the Minister to give directions to the Commission with respect to its functions, powers and duties. This provision was amended by section 16 of the *Acts Amendment (Accountability) Act 1989* with effect from 1 July 1989 to require any such direction to be in writing and its text to be included in the Commission's Annual Report to be tabled in the Parliament. The administration of the Act was committed to the Treasurer of the State as the responsible Minister.

22.3.7 The Superannuation Board was established under the *Superannuation and Family Benefits Act 1938* as the trustee of the Superannuation Fund, a fund set up as part of a scheme to provide superannuation benefits for persons permanently employed in the public service and by public authorities: sections 9 and 24. It was a body corporate consisting of three members each of whom was appointed by the Governor: sections 9 and 19.

22.3.8 The Board was required to report annually to Parliament: section 23. Its accounts were required to be audited by the Auditor General: section 28. As from 1 July 1986, the *Financial Administration and Audit Act 1985* was made applicable to the Board and its operations and sections 23 and 28 were repealed.

22.3.9 The Superannuation Board's powers of investment were set out in section 25 of the Act which, at all material times, provided as follows:

"25(1) The Fund may and shall, as far as practicable, but subject to sub-section (2) of this section, be invested in investments of the following kinds, that is to say —

- (a) any investments which are from time to time authorised by any Act of the State for the investment of trust funds; and

- (aa) loans secured by mortgages of estates in fee simple; and
 - (b) any debentures or other securities issued or given by any corporate body constituted or established by any law of the Commonwealth of Australia or of any State in the said Commonwealth which authorises the issue of such debentures or the giving of such other securities, and provides that the said debentures or other securities are guaranteed by the Government of the Commonwealth or of the State, as the case may be, under the laws whereof the said debentures are issued or the said other securities are given as aforesaid; and
 - (c) the acquisition or taking on lease of any land and the construction of buildings and effecting of other improvements thereon; and
 - (d) the acquisition from the Government Employees Housing Authority established under the Government Employees Housing Act, 1964 of land upon which are erected houses as defined in that Act, upon such terms and conditions as the Board and that authority, as they are hereby authorised to do, in writing agree upon.
- (2) The Board shall not invest the Fund or any portion thereof in any investment of any kind whatever without the consent of the Treasurer being first obtained.
- (3) Any such land that is required, from time to time, by the Board pursuant to paragraph (d) of sub-section (1) of this section, may be leased or sold or otherwise disposed of by the Board to the Authority referred to in that paragraph, upon such terms and conditions as the Board and the Authority, as they are hereby authorised to do, in writing agree upon.
- (4) The Board may sell, alienate, mortgage, charge and lease any land acquired or leased by it pursuant to paragraph (c) of sub-section (1) of this section."

22.3.10 The superannuation scheme provided for in the *Superannuation and Family Benefits Act 1938* was essentially a pension scheme established for the benefit of members of the public service and employees of various statutory authorities. Members were required to make periodic contributions to the Fund which were invested to provide income as part of the members' pensions. The Government itself contributed part of the pensions paid.

22.3.11 Over the period 1983 to 1987, a detailed review of the existing superannuation arrangements applicable to both the Public Service and statutory authorities was undertaken and as a result, a new scheme came into force on 1 July 1987 with the enactment of the *Government Employees Superannuation Act 1987* and amendments to the *Superannuation and Family Benefits Act 1938* which became operative at the same time. The Superannuation Board was replaced by the Government Employees Superannuation Board ("GESB") as trustee of the Superannuation Fund established under the *Superannuation and Family Benefits Act 1938*. The Superannuation Fund was made to form part of a new fund established and called "the Government Employees Superannuation Fund" which was required to be maintained and managed by GESB. The Superannuation Board was merged into GESB with the legislation effecting a transfer of all assets and liabilities and the novation of contracts: *Superannuation and Family Benefits Act 1938*: sections 4, 7 and 21.

22.3.12 Under the new legislation, GESB was established as a body corporate consisting of seven members of whom four were appointed by the Governor and three were elected as representatives of the members of the Fund: *Government Employees Superannuation Act 1987*, section 5.

22.3.13 The investment powers of the new Board were considerably wider than those of its predecessor. The list of authorised investments contained in earlier legislation was abandoned and replaced by a simple provision which enabled the Board, with the approval of the Treasurer, to invest moneys standing to the credit of the Fund in such manner as the Board might think fit. In managing the Fund, the Board was required to maximise returns having regard to the need to exercise care and prudence to maintain the integrity of the Fund and to provide for the payment of benefits: *Superannuation and Family Benefits Act 1938*, section 13. The Board was also given power, with the approval of the Treasurer, to borrow money and generally to obtain financial accommodation: section 14.

22.3.14 No provision was made for any kind of ministerial direction, either under the *Superannuation and Family Benefits Act 1938* or the *Government Employees Superannuation Act 1987* as originally enacted. However, the latter Act was amended by the *Acts Amendment (Accountability) Act 1989* with effect from 1 July 1989 to enable the Minister to whom the administration of the *Government Employees Superannuation Act 1987* was committed to give directions in writing to GESB with respect to its functions and powers and requiring GESB to give effect to any such direction so made.

22.4 Membership of the Superannuation Board and principal officers

22.4.1 Over the period from 1 January 1985 to 30 June 1987 when the *Government Employees Superannuation Act 1987* came into force, the membership of the Superannuation Board was as follows:

Mr L K J Brush (Chairman)	24 July 1984 to 13 March 1987
Mr A J Lloyd (Chairman)	19 March 1987 to 30 June 1987
Mr B J Markey	29 October 1981 to 30 June 1987
Mrs W E Scott	21 May 1985 to 12 July 1986

Section 9 of the *Superannuation and Family Benefits Act 1938* required a Board of three members. According to the Annual Report of the Board for the year ended 30 June 1987, on the expiry of Mrs Scott's appointment no appointment was made to fill the vacancy and the Board proceeded with only two members in office until it was merged with GESB on 1 July 1987.

22.4.2 On and from 1 July 1987 to 30 June 1989, the membership of GESB was follows:

Mr A J Lloyd (Chairman)	1 July 1987 to 31 December 1987
Mr W F Rolston (Chairman from 1 January 1988)	1 July 1987 onwards
Mr B J Markey	1 July 1987 to 31 December 1987
Mr M C Kingsmill	1 July 1987 onwards
Mr M H Helm	14 October 1987 onwards

Mr K J Edwards	1 January 1988 to October 1988
Mr O B Mansfield	10 June 1988 onwards
Mr J A McGinty	10 June 1988 onwards
Mr O S Middleton	10 June 1988 onwards
Mr W C Heron	4 October 1988 onwards

22.4.3 During his period of office, Mr Brush served as full time chairman of the Superannuation Board until 24 November 1986 when he was seconded to WADC to act as the manager of Fundscorp, the latter was in the course of being established at that time. Until his secondment, Mr Brush worked closely with Mr Brian Neville, the Investment Manager of the Board in making and monitoring its investments. After his secondment, Mr Brush continued to occupy the position of part time Chairman of the Board until his resignation on 13 March 1987.

22.4.4 Fundscorp was set up as a division of WADC with the object of managing, *inter alia*, the investment portfolio of the Superannuation Board. It was also looking to manage part, if not all, of the investment portfolio of SGIC and in some instances, to act as adviser to SGIC in relation to various investment matters.

22.4.5 Mr B H Neville was the Investment Manager of the Superannuation Board in 1985 and 1986 until he also was seconded to Fundscorp on 24 November 1986 along with Mr Brush.

22.5 The SB Investment Trust

22.5.1 The origin of the SB Investment Trust has been discussed in chapter 5 of this report in connection with the involvement of the Superannuation Board in the Halls Head development. Suffice it to say for the purposes of this chapter that it was a unit trust established by a trust deed dated 15 March 1982 between M & S Management Ltd as manager and West Australian Trustees Limited as trustee under the name of *The Richards Property Investment Trust*. The trust deed was approved pursuant to section 166 of the *Companies (Western Australia) Code*, a provision which deals with the approval of trust deeds for the purposes of the *prescribed interest* provisions of the Code. It was amended on a number of occasions and each amendment was similarly approved. The trust was originally set up as a *shelf trust* which meant that it was available for purchase by persons requiring such an entity

urgently and who were not prepared to suffer the long delay which would normally occur in having such a deed prepared and approved by the then Corporate Affairs Department.

22.5.2 The Richards Property Investment Trust was acquired by the Superannuation Board in June 1983. Its name was changed to the SB Investment Trust, Perpetual Trustees became both manager and sole trustee and the Superannuation Board became the sole unit holder.

22.6 Mr Joseph Wong — expert opinion

22.6.1 Counsel assisting the Commission called Mr Joseph Wong as an expert witness to express an opinion on certain of the investments made by the Superannuation Board, GESB and SGIC and which are the subject of this chapter. Mr Wong is a consulting actuary and a principal in Western Australia of William M Mercer Campbell Cook & Knight Pty Ltd, consulting actuaries. He is a Fellow of the Institute of Actuaries of London and also a Fellow of the Institute of Actuaries of Australia. He prepared separate reports concerning the investments of SGIC on the one hand and the investments of the Superannuation Board and GESB on the other. He was accepted by the Commission as an expert witness in relation to the subject matter of his two reports.

22.6.2 In his report relating to SGIC, Mr Wong outlined a preferred investment strategy which he said would have been appropriate for that body as well as other Government insurance offices and private insurance companies. The strategy was as follows:

- (a) to minimise investment risk by the appropriate diversification of assets, limiting the investment in any one company to 10% of the portfolio and ensuring that there is adequate security for loans, for example, by restricting loans secured on properties to 75% of the property value with a first ranked mortgage;
- (b) to seek the advantages of higher returns typically secured on shares and property for part of its assets; and

- (c) to maintain a reasonable level of liquidity, in order to meet the day to day claims costs and allow for a flexible investment strategy.

He also said:

"Any investment strategy should aim to match the liabilities with the assets. Therefore, the short-tailed liabilities require short-tailed assets. Liquidity is essential so that the day to day demand for claim payments can be promptly met and the asset values need to be stable. Assets should be readily realisable without potential loss from fluctuating market values. Fixed interest and cash are therefore appropriate."

22.6.3 In his report relating to the Superannuation Board and GESB, Mr Wong pointed out that the liability of the Superannuation Fund and the Government Employees Superannuation Fund was to pay to its members their due entitlement on resignation, retirement, death or disablement. The liabilities of those Funds depended on future rates of inflation. An appropriate investment strategy would therefore aim to produce investment returns in excess of inflationary increases. His preferred investment strategy for those Funds was as follows:

- (a) to obtain a rate of return in excess of salary inflation to ensure that accumulated contributions increase in value in line with costs (which are effectively indexed);
- (b) to seek the advantages of higher returns typically secured on share and property assets;
- (c) to minimise investment risk by appropriate diversification of assets, limiting the investment in any one company to 10% of the portfolio and ensuring that there is adequate security on loans, for example, by restricting loans secured on properties to 75% of the property value with a first-ranked mortgage; and
- (d) to maintain reasonable liquidity in the investments to allow for a flexible investment strategy.

He said that such a strategy would not have been unique to the Funds referred to but would have been suitable for a large majority of superannuation funds throughout Australia.

22.6.4 In the course of his evidence, Mr Wong discussed certain issues concerning the management of investments. He pointed out that one could look at investments *per se* but that a better way of managing them was to look at why they were being made, to have regard to the nature of the liabilities of the organisation and to endeavour to match its investment assets with those liabilities. In the case of a superannuation fund, the liabilities to which the assets would be matched would be the pension and lump sum payments to members of the fund. In a fund such as that of GESB, these would tend to be long term in nature and of the order of 10 to 15 years. On the other hand, the liabilities of a company engaged in general insurance would be of much shorter term. Even liabilities described as "long tail" in that context would be merely of the order of four years.

22.6.5 Mr Wong said that a portfolio would be divided into various sectors such as shares, property, fixed interest investments and cash (including short term deposits). The term of the liabilities should influence the weighting of each sector. Where liabilities are of a short term nature, it would be unwise to invest a large proportion of the portfolio in assets of a long term character such as shares and property. There may be a need to realise such investments in the short term and this may have to be done at a time when markets such as the stock market or property market are experiencing an adverse cycle. On the other hand, long term assets, such as shares and property would, in general, realise better returns over the long term. If the liabilities of the organisation are of the longer term, it would be more appropriate to give greater weighting to assets such as shares and property. Mr Wong regarded property as a longer term investment than shares because the latter tended to be a more liquid form of investment and more readily realisable.

22.6.6 The volatility of the market was also a factor in considering the asset allocation of a particular investment portfolio. Shares tended to be more volatile than property. While the latter can be very volatile, the number of sales are relatively low and changes in value are not so evident.

22.6.7 Mr Wong was asked to outline an investment strategy where there was a real risk that a substantial part of the investment portfolio might be required to meet liabilities in the short term. He said in that case one would seek to minimise the level of investment in property, perhaps investing in property trusts, as such investments would be more readily realisable. Longer term investments could include shares as they are relatively liquid and could be realised if necessary. However, the major part of the portfolio in these circumstances should be in cash and fixed interest securities, but without too much in illiquid fixed interest securities.

22.6.8 Another general issue to arise from Mr Wong's evidence was the need to ensure that the assets within a particular sector of an investment portfolio were sufficiently diversified, in other words that there should be an adequate spread within the sector so that the portfolio would not be affected unduly by an adverse market in a particular investment item.

22.6.9 The Commission accepts Mr Wong's evidence on the above matters.

22.6.10 Mr Wong's reports and his evidence to the Commission were concerned with an objective evaluation of various investment decisions simply by measuring them against the criteria referred to. It is clear from his evidence and from the terms of correspondence between him and the Commission which is in evidence that he did not concern himself with special considerations which SGIC, the Superannuation Board and GESB might have taken into account in making a particular investment decision or the way in which a particular decision might have been arrived at. As the Commission sees it, facts and circumstances which might be relevant to a particular investment decision and which would provide a satisfactory explanation for what would otherwise be regarded as imprudent or extraordinary are matters for the Commission itself.

22.7 The David Jones site — negotiations

22.7.1 Shortly after his appointment as chairman of the Superannuation Board, Mr L K J Brush was approached on a number occasions by Mr Warren Tucker, who was then senior partner of the property consultants, Richard Ellis, with a view to encouraging the Board to consider a real estate development as part of its investment portfolio. It appears that Mr Tucker had the David Jones site specifically in mind. Improvements on that site consisted of the former *David Jones* Department Store, the

adjoining *Pastoral House* and a smaller three-level building with a frontage to Hay Street. The site was owned by Midtown in its capacity as sole trustee of the Midtown Property Trust, a unit trust in which the units were held by or on behalf of Bond Corporation and Mr L R Connell. In his evidence, Mr Brush expressed the view that Mr Tucker was acting on his own initiative at the time and not on behalf of either the Bond or Connell interests.

22.7.2 In his discussions with Mr Brush on the matter, Mr Tucker pointed out that the property was lying dormant and that it needed someone like the Superannuation Board with the necessary financial resources to develop it. There is no doubt the site was then ripe for development.

22.7.3 Mr Brush was interested in pursuing a proposal which might in some way involve the Superannuation Board as a participant in the development of the site. In the first instance, he approached Mr Brian Burke, who was Treasurer and Minister responsible for the Superannuation Board, to inform him of what he had in mind. He then telephoned Mr Connell and arranged a meeting with him and with Mr Peter Beckwith, the managing director of Bond Corporation, at which the future development of the site was discussed. The precise date of this first meeting is not known although it is clear from the evidence of Mr Brian Neville, the Investment Manager of the Superannuation Board, that it took place in the early part of 1985.

22.7.4 In his evidence, Mr Brush said that neither he nor the Superannuation Board had had any prior business dealings with either Mr Connell or Bond Corporation.

22.7.5 A number of meetings ensued in which proposals for the establishment of a joint venture between the Superannuation Board and Midtown for the future development of the site were considered. The scheme arrived at was that the SB Investment Trust, in which the Superannuation Board was the sole unit holder, would purchase a half interest in the site from the Midtown Property Trust and that the parties would associate in a joint venture for its future development. Each party would have equal representation on the Management Committee. Bond Corporation would be Project Manager at an agreed fee. The cost of the development would be borne equally by the parties but the Superannuation Board would be required to lend to Midtown an amount equal to its share of the development costs incurred from time to time. In his evidence, Mr Brush said that at that stage the parties had in mind an office development

with the possible incorporation of a hotel costing somewhere in the vicinity of \$100 million.

22.7.6 The matter was brought to the Board at a meeting on 12 March 1985 when preliminary approval was given for the purchase of a half share in the David Jones site.

22.7.7 Initially, the parties were unable to agree on a value for the site. It was therefore decided that each would engage a licensed valuer to prepare a valuation. Bond Corporation and Mr Connell instructed Jones Lang Wootton, who valued the property at \$22.7 million. The Superannuation Board instructed Richard Ellis, who valued it at \$22 million. The difference was split and a price of \$11.175 million for a half share was agreed.

22.7.8 The Superannuation Board had Collison & Hunt acting for it as its solicitors in the transaction and in particular Mr Michael Hunt, a partner of that firm who had acted as the Board's solicitor over a number of years.

22.8 The David Jones site — acquisition

22.8.1 Heads of agreement were executed on 19 April 1985 between Midtown and the Superannuation Board providing for the acquisition by the SB Investment Trust of a half interest in the David Jones site and the establishment of a joint venture between that trust and the Midtown Property Trust in connection with its future development. The document also related to a development submission which the parties were proposing would be undertaken by the two trusts referred to in order to secure title to the Perth Technical College site on the other side of St George's Terrace. That matter will be discussed later in this chapter.

22.8.2 Under section 25 of the *Superannuation and Family Benefits Act 1938*, the Board was prohibited from investing any part of the Superannuation Fund without the approval of the Treasurer of the State. By 19 April 1985 this had not been obtained. Under clause 9 of the heads of agreement, the Superannuation Board agreed to procure Perpetual Trustees, as trustee of the SB Investment Trust, to purchase a half interest in the David Jones site but such agreement was expressed to be conditional on the Treasurer's approval. The heads of agreement themselves were not made conditional

on the such approval, but as the purchase of an interest in the site was a fundamental element of the scheme, one could reasonably imply that the granting of approval was a condition of the plan proceeding.

22.8.3 Mr Brush wrote a lengthy submission to the Treasurer on 19 April 1985 seeking his approval to the purchase. The submission referred to the SB Investment Trust No. 2 as the vehicle which would be used by the Superannuation Board to make the purchase. No such trust was in existence at the time although it was then contemplated that it would be set up. In fact, this did not happen and the SB Investment Trust referred to earlier in this chapter was used.

22.8.4 Mr Burke, as Treasurer, referred Mr Brush's submission to Mr John Horgan as Chairman of WADC for advice. While Mr Horgan appeared to have a number of initial reservations about the proposal, these were apparently satisfied and his recommendation to the proposal secured. Mr Burke gave his approval as Treasurer on 26 April 1985.

22.8.5 A contract for the sale of a half interest in the David Jones site to Perpetual Trustees as trustee of the SB Investment Trust for a purchase price of \$11.175 million was entered into between Midtown as vendor, Perpetual Trustees as purchaser and the Superannuation Board on 10 May 1985. The purchase was completed immediately. Also, on the same day, Perpetual Trustees, Midtown, Bond Corporation, Mr Connell, and the Superannuation Board executed a joint venture agreement providing for the future development of the site. These documents were prepared by Mr Hunt. Material terms of the joint venture agreement were as follows:

- (a) A joint venture was constituted between Perpetual Trustees and Midtown ("the Participants") for the purpose of holding and developing the David Jones site and any other land forming part of the joint venture.
- (b) The project the subject of the joint venture was to include the rezoning of the land, demolition, the construction of all buildings and the management, leasing and sale of the land as improved. The joint venture agreement itself did not describe any particular project to be undertaken but this was left to the decision of the Board of Management

appointed under the agreement. No warranties were given as to the estimated completion date but it was stated to be 31st December 1987.

- (c) The individual interests of the Participants were 50% each.
- (d) Each Participant was required to bear a share of the project costs in proportion to its individual interest.
- (e) There was to be a Board of Management of four consisting of two persons appointed by each Participant. In the case of Perpetual Trustees, its nominees were to be members, officers or employees of the Superannuation Board. Voting was in accordance with the individual interests of the Participants so that, for all practical purposes, no decision of the Board of Management could be made without the concurrence of the Perpetual Trustees' nominees. In addition to approval of a particular project, the approval of the Board of Management was required to programmes of development on a six-monthly basis, the determination of periodic budgets and the determination of spending parameters within which the Joint Venture Manager was authorised to act.
- (f) Bond Corporation was appointed Joint Venture Manager during the development period at a fee being the lesser of 1.5% of the total cost of the building construction and \$1.5 million with no more than \$500,000 on account of the fee being paid in any one calendar year. After the development period, the Joint Venture Manager was to be paid such reasonable fee as the Board of Management should determine. The Joint Venture Manager was to be responsible for the day to day management of the project
- (g) The Superannuation Board was to provide both Perpetual Trustees and Midtown with finance from time to time. The terms of the relevant clause, so far as material, appear below.
- (h) Interest was at the bank bill rate plus 0.75%. Interest was to be capitalised every six months.

- (i) The loan was to be repaid at the expiration of 10 years after completion of the development or on the disposal by Midtown of its interest in the development.
- (j) As security for the financial accommodation to be provided to Midtown, there was to be a first registered mortgage over the site and improvements in which Midtown was the borrower and the Participants (Perpetual Trustees and Midtown) were the mortgagors.
- (k) The agreement provided a formula under which the income of the development was to be distributed between the Superannuation Board (in reduction of interest accruing, including capitalised interest) and the participants in the joint venture.
- (l) The obligations of Midtown under the joint venture agreement were guaranteed by Bond Corporation and Mr Connell.
- (m) The agreement contained a right of first refusal under which a participant desiring to sell its interest in the joint venture was required to offer the interest concerned first to the other participants.
- (n) Subject to one limited exception, the heads of agreement of 19 April 1985 were declared to be of no force or effect.

22.8.6 While the joint venture agreement provided for the execution of a mortgage over the site in favour of the Superannuation Board as mortgagee to secure Midtown's debt to the Board from time to time, such mortgage was not in fact executed by Midtown until 1 June 1987 at a time when advances by the Superannuation Board to Midtown on account of development works on the site had accumulated to approximately \$2.3 million. The evidence does not explain the delay in execution.

22.9 The Connell — Brush letter of 10 May 1985

22.9.1 Clause 5.2(2) of the joint venture agreement contained a sensible safeguard for the protection of the Superannuation Board in connection with the project. In terms, the clause read as follows:

"The Superannuation Board will provide to Midtown finance from time to time in an amount equal to the share of the Project Costs which Midtown is required from time to time to contribute pursuant to Clause 4.2 PROVIDED THAT at no time may the Principal Sum exceed fifty per centum (50%) of the value of the Subject Land as improved. If the value is disputed it shall be determined by a valuer appointed by the Superannuation Board at its cost. No further advances will be made until the Principal Sum (together with the proposed advance) is less than fifty per centum (50%) of the value of the Subject Land as improved."

The "Principal Sum" was defined in the clause quoted above to mean the total of all advances made by the Superannuation Board to Midtown together with capitalised interest.

22.9.2 On the same day, 10 May, as the joint venture agreement was signed, Mr Connell wrote to Mr Brush in the following terms:

"Further to discussions today in respect of clause 5.2(2), whilst our side of the joint venture does not feel uncomfortable with that clause in the sense that we, like you, believe it is highly improbable that the principal sum as defined would ever be greater than 50% of the value of the subject land, I believe that it is important and I understand you are prepared to agree to the following, in the spirit of the original agreement.

That is, if the formula in 5.2(2) were ever to cause the principal sum ever to exceed 50% of the value then the parties will vary this clause so that Bond Corporation and myself will not be called upon to contribute to project costs or to reduce the principal sum.

To further clarify the matter would you confirm that it is your understanding that the valuation of the property will be done on the basis of original cost plus cost of development to date plus capitalised interest to date.

Would you please sign the attached copy of this letter to confirm your agreement. The only two copies of this letter will be held by you personally and me personally."

A copy of the letter was signed by Mr Brush to signify his agreement. The letter bears the date 10 May 1985. No copy of it has been found amongst the files of GESB submitted to the Commission. A search has been made for the letter or a copy of it by officers of GESB but without success.

22.9.3 Both Mr Connell and Mr Brush said in evidence that the true arrangement between the parties was that the Superannuation Board was to bear the entire cost of the project and that the joint venture agreement, as drawn by the Superannuation Board's solicitors, did not properly reflect the arrangement in this respect.

22.9.4 A clear inference to be drawn from the last paragraph of the letter is that it was intended as a secret arrangement between Mr Connell and Mr Brush. If that were not so, one would expect it to have been placed with the other contract documents of the same date among the records of GESB or on the file relating to the David Jones site development. That was not the case. Neither Mr Neville nor Mr Hunt knew anything about it. Mr Brush professed surprise at the last paragraph of the letter but denied that there was anything secret about the arrangement. His explanation was unconvincing and we reject it. It is worth noting that in chapter 6 of this part of the report dealing with the Superannuation Board's investment in the Fremantle Anchorage site, Mr Brush also claimed the executed agreement entered into by the Board did not properly reflect the agreement of the parties. As a consequence of that view, he claimed he was justified in making payment of \$1 million some time before it was due for payment pursuant to the executed agreement: paragraphs 6.13.16 and 6.13.17 of this part of our report. We also rejected that evidence of Mr Brush.

22.9.5 The fact that the letter could not be found amongst the records of GESB coupled with the terms of the last paragraph and the absence of any knowledge of the matter on the part of either the Superannuation Board's then Investment Manager or its solicitor in charge of documenting the transaction leads us to the conclusion that this extraordinary arrangement was intended to be clandestine.

22.9.6 The purpose of the letter was to nullify the safeguard provided by clause 5.2 of the agreement and, in effect, to ensure that Bond Corporation and Mr Connell did not have to make any further contributions to the development irrespective of the fact that, over time, the total advances probably would far exceed the

value of Midtown's interest in the site and improvements and thus exceed the value of the mortgage security held by the Superannuation Board. To achieve this result, Mr Brush was prepared to vary the transaction so that, under certain circumstances, neither Bond Corporation nor Mr Connell would be called upon to contribute to the project costs under the joint venture or to reduce the principal under the mortgage relating to it. In our view, in agreeing to this letter, Mr Brush acted improperly.

22.10 The David Jones site — the investment

22.10.1 The purchase of a half share in the David Jones site at a total outlay (including acquisition costs) of \$11.688 million represented approximately 3% of the Superannuation Fund's portfolio as at 30 June 1985. In itself this was not a significant investment although in Mr Wong's view (which the Commission accepts), the Superannuation Fund was already overweight in property. However, contemporaneously with the purchase of an interest in the site, the Superannuation Board entered into a joint venture agreement for its future development. While no firm proposals had been agreed upon at that stage, it is clear that the parties had in contemplation a major office development at a cost in the vicinity of \$100 million and possibly more.

22.10.2 Moreover, an agreement had been reached whereby the Superannuation Board was to finance the entire project, the only equity contributed by Midtown being its half share of the site. The financing arrangement was to remain in place for 10 years after the building was complete, interest was to be at a margin of a mere 0.75% over the rate from time to time applicable to 90 day bank bills and was to be capitalised and added to the principal during the period of the loan, with some allowance being made for rents received after the development had been completed.

22.10.3 The financing arrangement was an imprudent investment on the part of the Superannuation Board. The major objections to it were that the security held was inadequate, the margin over the bank bill rate was too low, the term of the facility was too long and the development in contemplation was too large having regard to the size of the Superannuation Board's portfolio. The decision to have the Superannuation Board provide the financing arrangement was taken by Mr Brush as Chairman and the member of the Board directly concerned in the negotiations, and he must bear the prime

responsibility for that decision, one which would cost the Superannuation Board and its successor, GESB, dearly in years to come.

22.10.4 The security to be offered was insufficient having regard to the fact that the Board was to advance to Midtown amounts from time to time equal to its entire share of development costs of the project and that interest on those amounts was to be capitalised from time to time and added to the advances made. The security arrangements made no allowance for the possibility that there might be a downturn, or even a levelling off of property values. While the joint venture agreement made some provision for the crediting of rents or part of the rents received from the development over the 10 year period of the loan, it nevertheless appears from Mr Wong's report that yields on Central Business District ("CBD") properties have traditionally been well below yields on bank securities — in the order of one-half to one-third, so that there could have been little prospect of all interest due being met from rental income.

22.10.5 In his report, Mr Wong provided an example as follows:

"If we assume that:

- (a) on completion of the development, Midtown owed 50% of the then value of the property;
- (b) the rate of interest on Midtown's loan was 16% per annum (the bank bill rate in May 1985 was 15.55%);
- (c) the yield on the property was 6% per annum net; and
- (d) property and rental values increased by 7% per annum over the next 10 years (the inflation rate over the year to May 1985 was 7%) —

then the debt would have increased to 155% of the property value by the end of the 10 year period and, in dollar terms, would have been increased by a factor of three. In this example, the growth rate in property values and rentals would have had to have been approximately 10.5% per annum for the 10 years, in order that the debt would have simply remained at the valuation."

22.10.6 No other security was held for the payment of the mortgage debt from time to time due to the Superannuation Board. The joint venture agreement contained a guarantee by Bond Corporation and Mr Connell but that guarantee was for the benefit of Perpetual Trustees in relation to the performance of Midtown under the terms of that agreement and not for the benefit of the Superannuation Board. The joint venture agreement also contained cross charges given by Midtown and Perpetual Trustees but those charges were given by each to the other in respect of performance under the agreement and were of no benefit whatever to the Superannuation Board.

22.10.7 A prudent lender would not lend more than an amount equal to 75% of the value of the property taken as security for the loan to make allowance for fluctuations in the market. Mr Wong pointed out that in the case of a lender, if the value of the security rises the return to the lender does not increase. On the other hand, if the value of the property falls, the lender is at risk.

22.10.8 The interest rate was inadequate in the circumstances. As Mr Wong put it in his report:

"For a loan which is fully secured by mortgage on property and within reasonable limits of the value of the property, a rate of Bank Bill plus 0.75% per annum would, in our view, be on the low side, but not unreasonable. However, given the potential lack of security, a higher margin would be more appropriate. For example, at the time (May 1985), the Bank Overdraft Rates (for amounts over \$100,000) exceeded the 90-day Bank Bill rate by 1.45% per annum."

He thought the loan "high risk" and the interest rate less than would be expected to compensate for that fact.

22.10.9 The problems with the security and the interest rate were exacerbated by the fact that the finance was to be provided for a term expiring 10 years after the completion of the development, which was far longer than should reasonably have been contemplated. As far as the security was concerned, the risks inherent in a development project such as a market downturn, delays in construction and the inability to let the premises because of an oversupply, were enhanced by the long period involved. The

effect of such a long period on the arrangement to capitalise interest on the debt had serious adverse implications for the Superannuation Board.

22.10.10 Under the joint venture agreement of 10 May 1985, a development project for the David Jones site was required to be approved in general terms by the Board of Management before it could be proceeded with. It is clear from the terms of that document that no such approval could be forthcoming in any particular case against the opposition of the representatives of Perpetual Trustees on that board. As we have said previously, under the terms of the joint venture agreement, those representatives were required to be members, officers or employees of the Superannuation Board. In a sense, that provision operated as a safeguard against proceeding with a development which was unduly expensive. Nevertheless, the parties were dealing with a prime site in the CBD and had contemplated from the beginning that a major office development would be built. It would have been unthinkable for a government instrumentality not to have honoured arrangements made according to their true spirit.

22.10.11 In his evidence, Mr Brush said that, while Chairman of the Superannuation Board, he had spent time in marketing various developments within the Board's portfolio, including the David Jones site development. He referred in particular to a series of meetings with Japanese investors which failed to proceed owing to his resignation as Chairman of the Board following certain charges laid against him in an unrelated matter, charges in respect of which he was eventually acquitted. It may be that Mr Brush, if given sufficient time, might have been able to find a further joint venture partner to take over all or part of the Board's interest in the project but it is highly unlikely that any third party would have been interested in sharing the disadvantageous financing arrangement which had been reached with Midtown. We treat Mr Brush's evidence on the refinancing of the project with a high degree of scepticism. The fact is that he resigned from office in March 1987 and nothing even approaching serious negotiations had eventuated in the period of nearly two years which had elapsed from the signing of the joint venture agreement.

22.10.12 The acquisition of a site and the involvement in its subsequent development had risks associated with them which were not present in investment in other forms of commercial property. The state of the property market at the time of the completion of the development would, of necessity, be unknown, thus placing in doubt the prospects of rental or sale. In the development stage, the property would not be able

to earn income. There was potential for delay during development due to industrial stoppages, shortages of materials and other like eventualities. A property in the course of development is not readily marketable.

22.10.13 In his report in relation to the Superannuation Board, Mr Wong commented on the prospective development of the David Jones site with a view to assessing its potential effect on the Superannuation Fund as follows:

"To assess the potential effect of the development proposal on the GESB Fund, we have calculated:

the potential exposure to this property which could have been expected on completion of the development; and

the percentage of the annual cashflow which would have been needed to pay for the development costs each year -

for various estimates of development costs ranging from \$100 million to \$500 million in total.

These projections required several assumptions to be made regarding the GESB Fund's expected future cashflow, as well as the incidence of the development costs. Our assumptions, which are detailed below, are intended to reflect what would have been reasonable assumptions at the time of this transaction, if these projections had in fact been performed then.

The assumptions made for the purpose of these projections were as follows:

- (i) A five-year development period.
- (ii) Development costs would be incurred evenly throughout this period.
- (iii) The cashflow would consist of investment income, assuming a 15% per year return on all investments excluding non-income earning investments such as development properties. The actual investment return over the five years, 1984 to

1989, was 12.5% per annum and this included unrealised returns.

- (iv) Contribution income was assumed to be sufficient to meet the benefit payments and expenses each year. In practice, the contribution income was not sufficient, and the difference was made up from the investment income.
- (v) The total development costs ranging from \$100 million to \$500 million, are in 30 June 1985 dollar values. Implicit in this assumption is that the annual costs would increase in line with inflation. An inflation rate of 7% per annum was assumed, based on the rate applicable as at May 1985. The actual development costs which would be incurred over the five years (adjusted for inflation) are shown separately.

Table 1 shows the results of these calculations:

Estimated Development Cost - 1985 Dollars	Inflated Development Costs	Development Property on Completion Expressed As Percentage of Total Investments		Annual Development Costs Expressed as Percentage of Net Cashflow	
		(a) %	(b) %	(a) %	(b) %
\$ Million	\$ Million				
100	115	9	18	16	32
200	230	18	36	34	68
300	345	26	52	54	108
400	460	35	70	77	154
500	575	45	90	102	204

Table 1: David Jones Development Projections

- (a) Figures based on the GESB Fund's 50% interest in the development.

- (b) Figures based on the GESB Fund's 50% interest plus the additional exposure to the remaining 50% interest as a result of the funding arrangement with Midtown (see below).
- (c) The percentage of net cashflow is the average percentage over each of the development years, weighted by the net cashflow. The "weighted" average gives greater emphasis to the years when the cashflow is greatest.

The results of these projections show that at the time of entering into this agreement, the expected cashflow would have been insufficient to fund a development of \$300 million or more (in 1985 dollars). In this case, if the GESB Fund did not borrow in order to pay for the expected development costs, it would have been obliged to have sold other assets, in order that the proceeds could then have been used to pay the development costs.

If \$200 million represented a reasonable estimate of the development costs at 30 June 1985, then:

on completion of the project, the GESB Fund could have expected that 18% of its investments would be in this one property alone, and this would be in addition to any other property investment held by the portfolio; and

during the development period, approximately 34% of the net cashflow could be required to meet the GESB's share of the development costs each year.

When the funding arrangement with Midtown is taken into account, where Midtown's entire share of the development costs was to be provided by the GESB and secured by a mortgage over Midtown's share of the development property, then:

on completion, the exposure to this one property could become 36% of the GESB Fund's investments; and

approximately 68% of the net cashflow would be required to meet the development costs each year.

In summary, the purchase of the David Jones interest:

increased the GESB Fund's investment in property from 26% to 30% of investments as at 30 June 1985; when

the average property investment by comparable private sector funds was 24% and declining; and

the average property investment by public sector funds was 19% of investments;

could result in a property exposure to this one property alone, anywhere between 18% and 90% on completion of the development, when the funding arrangements are taken into account;

increased the GESB Fund's exposure to higher risk development properties to at least 15% of its total property exposure;

committed at the very least 32%, but more than likely over 100% of the entire net cashflow each year to meeting the annual development costs; and

reduced the liquidity levels in the GESB Fund.

Actual Development Costs

In the GESB's 1991 Annual Report, the total cost for the project was estimated to be \$345 million and this allowed for the \$70 million future commitment requirement to complete the development. After deducting the initial purchase costs of \$11.688 million, and adding back the amounts expended by the GESB as part of the funding arrangements but not already taken into account, the total expenditure by the GESB on this property post May 1985 came to \$341 million. Although this corresponds closely to the third row — that is \$300 million in 1985 dollars and \$345 million in inflated dollars, the actual value of the \$341 million in 1985 dollars was closer to \$246 million. This is

because the development was spread over eight years, with the majority of the costs being incurred during the last four years.

So in terms of Table 1, in hindsight the actual development fitted between the second and third rows corresponding to \$200 million and \$300 million in 1985 dollars."

In the report, the expression "GESB" was intended to include the Superannuation Board and the expression "the GESB Fund" was intended to include the Superannuation Fund.

22.10.14 From this analysis, if one were to have regard to the development which actually proceeded on the site, it would appear that some 44% or thereabouts of the Superannuation Board's entire portfolio would be exposed to this one property at the time of its completion and that to allow such a thing to happen was to put the portfolio at risk. If the property were to fall in value, the impact on the earnings of the Fund would be dramatic. Mr Wong thought that it might lead to the situation where there would be a shortfall in assets of the Fund compared with its liabilities to its members so that technically the Fund would be insolvent.

22.10.15 The other difficulty which is illustrated by Mr Wong's table is that a development of the magnitude of that which ultimately proceeded on the site would be likely to absorb up to 90% on average of the net cash flow of the Fund during the period of the development.

22.11 The David Jones site — use of the SB Investment Trust

22.11.1 The Superannuation Board itself did not have the power, either under the *Superannuation and Family Benefits Act 1938* or the *Trustees Act 1962* to acquire an interest in the site as a tenant in common or to enter into a joint venture with others for its future development. It was for this reason that the SB Investment Trust was used as the vehicle to enable the purchase to be made and the joint venture to proceed. The moneys required to enable a half interest in the David Jones site to be purchased were provided by the Superannuation Board making a subscription for units in the trust, thus enabling Perpetual Trustees as trustee to make the purchase with the funds so subscribed.

22.11.2 Under section 25 of the *Superannuation and Family Benefits Act 1938*, the Board was permitted to invest moneys forming part of the Superannuation Fund in investments authorised by any Act of the State for the investment of trust funds. Section 16 of the *Trustees Act 1962* authorised a trustee to invest trust money in his hands in the units of a unit trust scheme in respect of which there was in existence at the time of investment an approved deed under the *Companies (Western Australia) Code*. There was however, one qualification which was that before making such an investment, the trustee was required to obtain and consider proper advice in writing on the question of whether the investment was satisfactory having regard to the need to ensure diversity of investments both in respect of description of investment and in respect of investments within a particular description and also having regard to the need to ensure suitability to the trust of the investment under consideration both in terms of description of investment and in terms of investments within a particular description: *Trustees Act 1962*, subsection 16(5).

22.11.3 For its part, the SB Investment Trust had very wide powers of investment. These included the investment in land (including investment as a tenant in common with others) and the acquisition and joining in carrying on of any business or venture of any nature alone, in partnership or in joint venture with any other person or body: SB Investment Trust Deed, clause 19.

22.11.4 Under its enabling legislation there is no doubt that the Superannuation Board was a trustee and required to act as such. Its powers of investment were limited and did not extend to the carrying on of development ventures in common with other persons. Such ventures involved a measure of speculation and risk about them. There were great profits to be won from such activity if the timing was right and all went well; but conversely, the risks inherent in the activity were also substantial. Power to engage in such activity may well be seen as something which a legislature would not grant to the trustee of the public sector superannuation fund where investment policies were to be dictated by considerations of prudence and the proper management of risk.

22.11.5 The involvement of the Superannuation Board in the scheme for the acquisition of an interest in the David Jones site and its subsequent development by means of the device of the SB investment Trust was, on the face of it, authorised by the Board's enabling legislation. The powers were exercised purportedly for the benefit of the Superannuation Fund and there is no evidence that they were exercised for an

improper purpose in the sense that they were exercised for a purpose foreign to the trust or for the benefit of a third party. In that sense there was no impropriety in the use of the SB investment Trust to make the investment under consideration. However, the matter does not stop there.

22.11.6 The statutory powers confer a discretion on a trustee which "must be exercised honestly and with due regard to [its] fiduciary position as holding the money in trust for others" - *Jacobs' Law of Trusts in Australia, 5th Edition, page 436*. The fact that a particular investment is included in a list of authorised investments is not, of itself, sufficient. A trustee has an additional duty to avoid investments which, although authorised, are hazardous or speculative: *Learoyd v Whiteley* (1886) 33 Ch D 347 per Lord Watson at 355 and *Fouche v The Superannuation Fund Board* (1952) 88 CLR 609 at 637.

22.11.7 In considering the propriety of the investment in the SB Investment Trust, one must look beyond the trust itself and have regard to the underlying proposal which was for the purchase of an interest in the David Jones site and for the trustee to enter into a joint development with the Midtown Property Trust for its development. The trust did not itself have substantial assets. Its balance sheet as at 30 April 1985 was admitted in evidence showing net assets at that date of \$1.8 million, of which \$1.5 million represented capital payments made by the SB Investment Trust in relation to its Halls Head joint venture. In this case the investment was high risk. The transaction in question was not a simple purchase of land but called for a commitment under a joint venture for its future development. This was likely to require a large expenditure of money and there were all the risks inherent in a development project as well as the risks in an oversupply of rental accommodation and a general downturn in the property market.

22.11.8 Having regard to the evidence of Mr Wong and to his report on the matter to which we have referred earlier in this chapter, the subscription for units in the SB Investment Trust was a hazardous investment. In undertaking such an investment, the Board was guilty of a breach of trust.

22.11.9 The individuals who constituted the Board at the time of any such investment owed a duty to it which did not differ materially from that owed by a trustee in relation to investments. Their duty was to cause the Board not to make investments

which, even though authorised, were hazardous or speculative: *Fouche v The Superannuation Fund Board* supra at pp 640-1. In causing the Board to make an investment in units in the SB Investment Trust associated with the purchase of an interest in the David Jones site, the members of the Board were similarly guilty of a breach of trust. Mr Brush was personally involved in what occurred and must bear the greatest responsibility for the consequences. In these circumstances, we consider that he acted improperly. The other members of the Board at the time were Mr Markey and Mrs Scott. While each participated in decisions made by the Board, neither was directly concerned in the negotiations. In the circumstances, it would not be appropriate to make a finding of impropriety against either of them.

22.11.10 As we have said, before making an investment in the units of an authorised unit trust scheme, a trustee was obliged to obtain advice in writing on the question of whether the proposed investment was satisfactory having regard to the questions of diversity and suitability as required by subsection 16(5) of the *Trustees Act 1962*. The required advice could be given by an employee of the trustee provided he or she was reasonably believed by the trustee to be qualified by ability and practical experience to give it.

22.11.11 In connection with the purchase of a 50% interest in the David Jones site, the Superannuation Board obtained a letter dated 1 May 1985 from Mr Warren Tucker, a member of the firm of property consultants, Richard Ellis, the material paragraph of which read as follows:

"In my opinion, having regard to the need for diversification of the Board's investments, both by type of investment and investments within each particular type, the proposed purchase of a 50% interest in the David Jones site is a suitable investment for the Superannuation Board at this time."

While Mr Tucker clearly had expertise in the matter of real estate investments, one may doubt whether his qualifications were sufficiently broad to enable him to express an opinion on the matter of the diversity of the Superannuation Board's investment portfolio or on the matter of the suitability of a particular investment.

22.11.12 The Commission has been unable to discover the existence of any other report or advice obtained under subsection 16(5) of the *Trustee Act 1962* relating to the funding of an interest in the David Jones site or the development of the site by the subscription of units in the SB Investment Trust. If such a report were not obtained on any occasion upon which the Superannuation Board subscribed for units in the SB Investment Trust, the investment made would have been unauthorised and the Superannuation Board and its members would have committed a breach of trust. In the circumstances, this may be largely academic in view of the conclusion we have reached that the subscription of units in the trust to fund the purchase of the David Jones site was a hazardous investment and in breach of trust in any event.

22.11.13 Also, subsection 16(6) of the *Trustees Act 1962* obliged a trustee to review an investment in a unit trust scheme at regular intervals having regard to the criteria of diversity and suitability of investments of which we have already made mention. Clearly, if the investment referred to did not measure up on any occasion, consideration would have to be given to its realisation. Having regard to this requirement, it is apparent that an investment in the units of a unit trust scheme should be contemplated only where the units themselves are freely marketable. There would be little point in obtaining advice under subsection 16(6) if nothing could be done in consequence of it. This would seem to be an additional reason why the Superannuation Board should not have made an investment in the SB Investment Trust.

22.12 The David Jones site — advances by GESB to the Midtown Property Trust

22.12.1 As we have seen, in addition to funding its own share of the development on the David Jones site, the Superannuation Board had also agreed to finance the share of the Midtown Property Trust.

22.12.2 As security for such advances, it was agreed between the parties that Midtown and Perpetual Trustees would join in granting a first mortgage over the entire site. In effect, the share in the development of which the Superannuation Board was the ultimate beneficiary was being used as part of the security for Midtown's debt to the Board, along with the share of which Midtown was itself the registered proprietor. Under clause 29 of the mortgage which was granted, the parties acknowledged that Perpetual Trustees would be personally liable under it to the extent of the assets of the

SB Investment Trust but that its personal liability would extend no further. Clause 30 of the mortgage contained an acknowledgment that Midtown had primary liability for the moneys secured and that it indemnified Perpetual Trustees for liability arising under the mortgage. The result was that Perpetual Trustees had joined in the mortgage as a surety with its liability being limited to the assets of the SB Investment Trust.

22.12.3 As the Superannuation Board had agreed to finance the Midtown Property Trust to 100% of its share of the value of the development from time to time, the Superannuation Board had a risk as great as if it had acquired for itself the interest of the Midtown Property Trust in the site and in the development.

22.12.4 The advances to the Midtown Property Trust were a hazardous investment and constituted a breach of trust on the part of the Superannuation Board and those persons who were its members at the relevant times: *Learoyd v Whiteley* and *Fouche v The Superannuation Fund Board* supra. As Mr Brush was directly involved in the negotiations, we also find that he acted improperly in the matter.

22.12.5 We have considered the provisions of section 22 of the *Trustees Act 1962* but do not regard them as having any application in the present case. The section in question offers protection to a trustee in relation to the lending of money on the security of property in certain circumstances. The investment under consideration was a hazardous one and the section had no application to it. The section is only applicable to property "upon which a trustee may properly lend". The property used here as security was hazardous and not a proper security for a trustee in the circumstances.

22.13 The Perth Technical College site — negotiations

22.13.1 The Perth Technical College site was an area of Crown land of some 1.1488 hectares having frontages to both St George's Terrace and Mounts Bay Road, Perth. It contained a number of buildings, including a substantial one of red brick construction fronting St. George's Terrace.

22.13.2 In 1983, Mr Brian Burke, the then Premier, established a task force to report on the future development of the site. In May 1984, it was handed over to WADC as part of a commission to advise the Government on the management of certain of the State's major assets. WADC was given a mandate by the Premier to oversee its

development. A brochure was prepared and distributed in December 1984 informing prospective purchasers that the site was on the market, either for outright purchase or on a ground lease of up to 99 years. A committee was formed by WADC with outside experts to present the property in the best manner.

22.13.3 In February 1985, Bond Corporation, on behalf of a syndicate consisting of itself, L.R. Connell & Partners and the Superannuation Board, put in a preliminary submission for the development of the site. Their proposal was to redevelop it by erecting a hotel on the southern section and a major office tower with some 40,000 m² of net lettable space on the St George's Terrace frontage. A feature of the proposal was to offer the Government part of the David Jones site by way of exchange for use as a public park. However, as there were already limitations on the development of the David Jones site under the existing town planning scheme in force, WADC thought that part of the proposal to be of limited value.

22.13.4 The matter was brought to a meeting of the Superannuation Board on 12 March 1985. At that stage, the Board simply noted an interest in the proposal to acquire the site and no formal decision seems to have been made.

22.13.5 A committee comprising officers of WADC and outside consultants evaluated the various proposals for the development of the site which had been received in response to the December 1984 brochure. As a result, a short list of some five developments was compiled one of which was the joint proposal of Bond Corporation, Connell and Superannuation Board. The committee drew attention to the fact that of the five, only two were Western Australian based. The developers placed on the short list were each then asked to prepare a full proposal leading to final selection. A letter dated 4 April 1985, setting out WADC's requirements in relation to the project and the final stage of the tender process was sent to Bond Corporation on behalf of the consortium.

22.13.6 The proposal finally put forward by the consortium consisted of two buildings fronting Mounts Bay Road and a major office tower abutting St George's Terrace. The development was to be staged over a 10 to 15 year period. It is clear from Mr Brush's evidence that one of the objectives of the original plan to acquire the site was for the consortium to be in a position to control development in the hub of the city so that it could plan and control the sites concerned to suit itself. This evidence was

corroborated by evidence given on the subject by Mr Neville, the Investment Manager of the Superannuation Board.

22.13.7 Reference has been made earlier to the heads of agreement dated 19 April 1985 made between Midtown and the Superannuation Board in respect of the David Jones site. This agreement also regulated the relationship of the parties concerning the submission of proposals to WADC for the future development of the Perth Technical College site. It was however, limited in its operation to the submission and clearly, was not intended to act as a joint venture agreement for subsequent development activities. Although the heads of agreement were superseded by the joint venture agreement dated 10 May 1985 in relation to the David Jones site, they nevertheless continued in operation for the Perth Technical College site submission.

22.13.8 In February 1985, the Perth Technical College site was valued by Mr John D Fleming, Licensed Valuer, at the request of WADC at \$19 million, ignoring current improvements and subject to its highest and best use.

22.13.9 At about that time, WADC approached the Government for freehold title. Mr Horgan, the Chairman of WADC, was asked about this matter when giving evidence. He said this was the first property sale that WADC had handled and the organisation was almost entirely staffed by private sector people who, he said, did not like to present a property for sale commercially without having title because of the problems that could have followed if title could not be delivered. WADC therefore sought title from the Government. The matter was brought to Cabinet on 10 June 1985 and authority was given for the sale of the site to WADC. Cabinet also authorised WADC to make the site available to a suitable applicant either for sale or for lease. A Crown Grant of the land was eventually made to WADC for a consideration of \$20.5 million with a new title issuing on 10 December 1985.

22.13.10 On 20 September 1985, an offer for the Perth Technical College site was made by the Superannuation Board on behalf of the consortium. The offer contained various proposals including a cash alternative of \$33.1 million payable on 1 January 1986. The amount eventually offered, as appears from later documents in the possession of the Superannuation Board and WADC and also as appears from the contract documents themselves was \$33.5 million. The discrepancy in the documents has been put to both Mr Brush and Mr Neville but neither was able to shed any light on

the matter beyond that disclosed in the documents produced to them. The tender submitted by the Superannuation Board, Bond Corporation and Mr Connell was acknowledged by WADC by letter dated 1 October 1985.

22.13.11 WADC engaged Mr Justin Seward, a property consultant, Campbell Cook & King, Consulting Actuaries and Forbes & Fitzhardinge, Architects to advise it in relation to the tenders received. Four proposals were considered. Each of the offers was materially different in terms from the others so they were not easy to compare. They were therefore submitted to Campbell Cook & King to enable their net present value to be calculated so that a realistic comparison in financial terms could be made. While the offer of the Superannuation Board consortium was for \$33.5 million in cash, it was nevertheless contemplated that a nominee of WADC would lease back the property for a period of two years or so at a rental of \$2 million per annum. The net present value of the offer was calculated by Campbell Cook & King in a report to WADC dated 8 October 1985 to be \$29.9 million, which proved to be some \$8.1 million more than its nearest competitor.

22.13.12 In a report on the matter to WADC dated 9 October 1985, Mr Justin Seward expressed the view that recent sales evidence in the CBD had confirmed that a substantial increase in property values had occurred in 1985 and that a current valuation of the order of \$29 million to \$30 million could be expected in respect of the Perth Technical College site.

22.13.13 There is a note on the files of the Superannuation Board dated 8 October 1985 prepared by Mr Neville which in part reads as follows:

"FILE NOTE - PERTH TECH SITE

8.10.85

Peter Beckwith rang re revised deal to WADC
Purchase price to be \$33.5 payable 20.12.85
Education Department will lease back the site for 2 years
Rental to be \$2m p a, payable annually in advance
Redevelopment clause to be inserted — can be exercised
20.12.86 subject to 6 months notice to quit."

It is clear from such documents as appear to exist that all tenders for the site had been submitted to WADC prior to the reports of Campbell Cook & King and Mr Justin Seward which were dated 8 and 9 October 1985 respectively, so that it would appear that some further negotiations between Mr Beckwith as Managing Director of Bond Corporation and WADC had ensued after all offers had been received and submitted to the various consultants assisting WADC for advice. Mr Brush and Mr Neville were each examined on the content of this note but neither was able to shed any additional light on the matter.

22.13.14 On 10 October 1985, Mr Brush sought the approval of the Treasurer to the proposed purchase. In his submission, he pointed out that the Superannuation Board had agreed to take a half interest in the property and Bond Corporation and Mr Connell, the remaining half. The share of Bond Corporation and Mr Connell of the purchase price of the property was to be funded by the Superannuation Board. The loan was to be secured by a first mortgage over the property for a term of two years with interest at the rate of 0.75% per annum above the current bank bill rate with interest being capitalised over the two year period. Reference was made to an intention on the part of the Participants to introduce a fourth party as an equity participant in the property prior to any construction commencing subject to that party demonstrating the ability to fund construction costs. Again, the SB Investment Trust was to be used as the vehicle to facilitate the purchase. Mr Burke, as Treasurer, gave his approval to the transaction on 12 October 1985.

22.13.15 The proposal of the Bond Corporation, Connell, Superannuation Board consortium was accepted by WADC. A media release was issued by that organisation on 11 October 1985 in which the proposal was described as a massive, integrated development including a 40 storey office tower and a hotel complex. The development was to be known as *Westralia Square*. It was expected to cost \$320 million on completion. The existing Technical College building was to be retained as part of the facade to St George's Terrace. Part of the media release read as follows:

"A wide range of assessment criteria was used in the selection of the successful tenderer including the practicability, appearance and suitability of the design, the manner in which the whole site was utilised, parking provisions, and the financial capacity and project experience of the tenderers. Advice was sought from

independent actuaries, architects and real estate professionals to assist in the selection.

Consulting actuaries Campbell, Cook and King valued the Superannuation Board/Bond/Connell tender as providing the highest return to the Government in net present value terms at 1st January 1986."

The formal acceptance of the Superannuation Board, Bond, Connell tender was not forthcoming until 2 December 1985 when Mr J B Horgan, the Chairman of WADC wrote to Mr B Buckley of Bond Corporation to that effect and confirmed the conditions on which the sale of the site would proceed.

22.13.16 Mr Burke gave evidence to the Commission that at about the time of acceptance of the tender, Mr Beckwith and Mr Connell came to see him and sought to be released from their tender because, as he put it, they had realised that the next tender was several million dollars below the tender that they had put in. Mr Burke said that he declined to accede to their request and referred them to Mr Horgan, the Chairman of WADC who was in charge of the matter. On the other hand, Mr Connell recalled a discussion with Mr Burke at about the time of the closing of tenders and a subsequent discussion with Mr Horgan. He maintained that the discussion with Mr Burke was "in an endeavour to get us to increase our price". The true position may be that both topics were discussed on the occasion in question. Mr Horgan recalled a discussion with Mr Beckwith and Mr Connell at about that time but said that it related to an accounting matter concerning the allocation of the price in the books of the parties to the sale and that he had no recollection of any discussion about lowering the price.

22.14 Loan to Mr Brush

22.14.1 Certain records of L R Connell & Partners purport to document a loan of \$30,000 from that firm to Mr Brush on 29 October 1985 repayable at the expiration of twelve months with interest at 15% per annum payable quarterly. In discussing the circumstances of this transaction it is convenient to describe it as a "loan". At the time, he was Chairman of the Superannuation Board and was personally involved on behalf of the Board in negotiations with Bond Corporation and Mr Connell to acquire the Perth Technical College site and to agree upon the terms of a joint venture for its future development. L R Connell & Partners was a partnership between Mr and Mrs Connell.

22.14.2 Mr P K Lucas, an executive of L R Connell & Partners at the time, gave evidence about this matter. He said that Mr Brush called at the office to see Mr Connell on 29 October 1985. Mr Connell then brought him into Mr Lucas' office and introduced him. Mr Connell indicated that Mr Brush was seeking a loan and left Mr Lucas to arrange it. Mr Lucas said that he offered Mr Brush what he described as "our friendly rate" which was 15% per annum at the time. The rate being offered to members of the public was then 20% per annum.

22.14.3 Mr Lucas was asked about the so called friendly rate and had this to say:

Q: But why would he qualify for that rate as opposed to somebody who just came off the street, for example?

A: Well, I had the impression, I think, that it was going to be a short-term requirement and was happy to assist.

Q: Was that the practice then, that if people wanted money on the short-term basis that they would be loaned money at a friendly or lower rate than people who wanted longer term?

A: No, I don't think you would say that. It wasn't a great thing. It was a concession on my part — it was a concessional gesture to Mr Brush.

Q: Why did you offer Mr Brush that concession?

A: Well, I believe that it was a worthwhile thing to do. He was a person of influence. I can't recall whether we were having any relationship other than the one that you meant then but I thought it was a reasonable thing to do. I mean, he wasn't unique in that situation. I mean, 15 per cent was a rate that others were advanced.

On the other hand, Mr Brush said in evidence that he could not recall any discussion about a "friendly rate" or indeed, whether or not the rate of interest to be charged was even discussed.

22.14.4 The cheque requisition for the loan was tendered in evidence. It was completed in Mr Lucas' handwriting and bears various notations, including the following:

DETAIL OF PAYMENT:

12 months advance 15.0% pa
payable quarterly in
arrears

On the other hand, Mr Brush said his recollection of the matter was that the loan and interest were to be repaid from the proceeds of a motor vehicle insurance claim he had outstanding and he expected it would be twelve months or so before his claim would be settled. He said he recalled nothing being said about paying interest on a quarterly basis. Neither Mr Brush nor Mr Lucas was able to recall the purpose for which the loan was required.

22.14.5 There is no doubt that Mr Brush obtained the loan at a concessional rate of interest. No effort seems to have been made by L R Connell & Partners to recover the loan or interest on it although the arrangement appears to have been that interest would be payable quarterly. Mr Brush said his expectation that his personal injury claim would be settled within twelve months did not materialise. The matter dragged on for almost three years.

22.14.6 The making of this loan was not properly documented although that was not unusual for L R Connell & Partners. There was no loan agreement or memorandum setting out the terms of the transaction. The best evidence of it was the notation written by Mr Lucas on the cheque requisition. Nothing under Mr Brush's signature appears to have been obtained. A document was tendered in evidence containing a summary of the transaction but this appears to have been created at a later stage and as part of the programme of computerisation of the firm's accounts which took place in 1987.

22.14.7 Certain records of L R Connell & Partners purport to document that a further loan of \$12,000 was made to Melampus Pty Ltd, the trustee of the Brush family trust, on or about 3 February 1986. Mr Brush was a director and shareholder of that company. He was unable to say for what purpose the loan was borrowed. In discussing the circumstances attending this transaction, we will also refer to it in this section as a "loan".

22.14.8 A copy of the requisition that was completed when the cheque for the Melampus loan was drawn has been put in evidence. It is in Mr Lucas' handwriting and part of the notation is as follows:

DETAIL OF PAYMENT:

being gross profit on
sale of Vital Tech shares
in name of Oceania Holdings

20,000 shares	1.48	9600
5000 options	.45	2200
		11,800

Mr Lucas said that the payment in question related to the sale of a parcel of shares and options in a company known as Vital Technology Australia Limited which he himself had earlier arranged to be acquired for Mr Brush at the request of Mr Connell and placed in the name of Oceania Holdings Limited as a nominee and which had been resold at a profit of \$11,800.

22.14.9 A possible explanation of the arithmetic is that 20,000 shares were subscribed at par of one dollar each in a new float and that these carried an entitlement to options on the basis of one for four. There is still a minor discrepancy in the figure relating to the options in that the amount should have been \$50 more than the amount stated but this may be explained merely as an arithmetical error.

22.14.10 This matter was put in evidence to Mr Brush on two occasions. On the first he said he had checked his records and ascertained that neither he nor Melampus had held shares at any time in Vital Technology Australia Limited. On the second, the evidence of Mr Lucas on the matter was specifically referred to. Mr Brush was adamant that the transaction in question was a loan and not a sale of shares and that Mr Lucas' version of it was not correct. He was nevertheless unable to say what it was for. No claim was ever made by L R Connell & Partners for the repayment of this loan or for the payment of interest on it and Mr Brush did not at any time offer to repay the loan or interest. Theoretically, the loan and accrued interest remain outstanding to this day.

22.14.11 Mr W G Ball, a book-keeper in the employ of L R Connell & Partners, prepared a hand-written ledger of loans made and included in it sheets relating to the two loans referred to above. Although he expressed some uncertainty about the matter, it is reasonably clear from his evidence that the ledger sheets were prepared at about the time of the loans in question. The ledger sheet for the loan of \$30,000 recorded the making of it and referred to an interest rate and the fact that the loan was to be for a term of 12 months but contained no further entry. The sheet for the Melampus loan referred to an advance of \$12,000, and the deduction of a fee of \$200 charged leaving a net amount of \$11,800. It also recorded that Mr Brush had rung on 8 February 1986 and that Mr Lucas had agreed to roll the loan until 12 February 1988. During his examination, Mr Lucas was asked about the fee but was unable to explain how it was arrived at. He indicated that there was no scale or set rule but that a fee would be fixed according to what the transaction would bear.

22.14.12 Mr Brush eventually received the proceeds of his personal injury claim in or about September 1988. On his version of events, he said that he telephoned Mr Lucas later that month indicating that he was in a position to repay his loan and requesting details of the amount payable. His evidence on the point is as follows:

"I rang Mr Lucas and asked him — I told him that I had the MVIT settlement and I was ready to settle; could he please let me have a pay out figure on that 30,000 loan. He told me that there was no need to worry about that; that he and Mr Connell were of the opinion that I had been put through a fair bit; that they didn't need it. It was better off with me: 'That's our contribution to your woes at the moment.' I said: 'No. That's not to be the case. I've got the MVIT pay out' and he said: 'Well if you insist, put it in writing to us and we'll let you know.' That's in fact what I did. I wrote back with this letter. I do have a copy."

He wrote to Mr Connell on 14 September 1988 repeating his request. Mr Lucas replied on behalf of L R Connell & Partners by letter dated 22 September 1988 in which he quoted a pay out figure of \$30,000 plus \$13,068.49 for interest. The amount in question seems to have been quoted at the rate of 15% per annum and without any extra being charged for the fact that no interest had been paid over a period of almost three years. Mr Brush then wrote a letter to L R Connell & Partners dated 23 September 1988, a Friday, in which he enclosed a cheque for \$43,068.49. His recollection is that he

brought the letter in personally to L R Connell & Partners and handed it to Mr Lucas. Mr Brush's account of the meeting appears from the following evidence.

Q: Do you recall any conversation you had with Mr Lucas about the matter?

A: He tried to talk me out of repaying the loan.

Q: What was your response to that?

A: I just said: 'No.' I wasn't prepared to do it, although I was not in a position at that stage to pay back the 12,000. He was of the same opinion about that. He said: 'Well, there is no hurry. We don't want it back. Pay it back if you like but we're not in a hurry.'

22.14.13 On the other hand, Mr Lucas denied that he had said anything of the sort to Mr Brush. He recalled a conversation when Mr Brush sought a pay out figure in respect of his loan of \$30,000. From consulting his appointment diary, he believed that the conversation in question took place in his office on 22 September 1988. He said in that conversation Mr Brush said that when the amount of the loan and interest were paid to L R Connell & Partners, he would be seeking a new advance of \$30,000. A passage of Mr Lucas' evidence was as follows:

Q: And can you now please tell the Commission what was said at the meeting, as best you can recall?

A: Well, the elements that I recall were that Mr Brush was going to repay the 30,000 principal, together with the interest, and that was subject to receiving a new advance. He wanted to clean up the past advance and it would be subject to a new advance flowing from that repayment. It was my recollection that the new advance was, in fact, to be an amount approximately equal to the original principal, that is 30,000.

The matter was revisited shortly afterwards in Mr Lucas' evidence, when he was asked to recount the conversation which had occurred on 22 September. He said:

"The only matters of which I'm certain were that Mr Brush sought to repay the principal plus interest and he wanted to do that at the earliest opportunity and that however as a sequel to that — the

corollary of that he would require a new advance. Now, it has always been my recollection of that meeting and the circumstances to flow that that new advance was in fact a new extension of the principal. In fact I now understand it was a larger amount than that but as far as I was aware it was going to be a re-advance of the — sorry — when I say `aware' my recollection was that we were only advancing a new principal."

Mr Lucas became aware of the larger amount involved after having looked at the documents about the matter tendered in evidence. He was asked whether he had asked Mr Brush on that occasion why he wanted to make the repayment and take the new advance but said that he could not recall doing so. He was also asked whether Mr Brush had said anything on the subject but said that he had not. He was asked whether he was able to offer any explanation why the transaction had occurred but said that he could not. He was asked whether anything was said about Mr Brush receiving payment of the new advance in cash but he said that, so far as he could recall, nothing was said on that subject.

22.14.14 Mr Lucas then said that he spoke to Mr Ball and indicated to him that he should expect to receive repayment by Mr Brush of his loan and authorising him to made a new advance "against that deposit". He said that although L R Connell & Partners was not, as he described it, "an aggressive lender" at the time, he was prepared to authorise the new advance as there was no new net exposure for the group. This was a surprising statement in that both Rothwells and L R Connell & Partners were in serious financial difficulties at that time and one would expect that every outstanding loan that could be recovered would be recovered.

22.14.15 A cheque for the above amount of \$43,068.49, drawn by Mr and Mrs Brush on 27 September 1988 was banked into the account of L R Connell & Partners on the same day. On 3 October 1988, a cheque bearing the serial number 383143 for \$43,000 was drawn by L R Connell & Partners made payable to "cash". The instrument was signed by Mr W Burgess, an officer of L R Connell & Partners and countersigned by Mr Ball. It was endorsed on its face "PLEASE PAY CASH" and the endorsement was authenticated by the same signatories. The cheque was cashed on the same day and from the annotation on the back of the instrument, it would appear that it was cashed for \$100 notes. Mr Burgess has since died and Mr Ball, when asked about the matter, said he had no recollection of it. Specifically, he maintained that he had seen

Mr Brush in person for the first time at the Royal Commission. Mr Ball said there was no set practice about the cashing of cheques. Sometimes they were cashed by the staff and the proceeds handed to the customer; sometimes they were handed to the customer for him to cash. Sometimes the proceeds were collected by a staff member alone and sometimes two were in attendance. Mr Ball said he could not recall what happened on this occasion.

22.14.16 The requisition for the cheque in question bore the following annotation:

DETAILS OF PAYMENT:

Exchange cheque
(Refer deposit — 27/9/88)

It also contained a reference in hand-writing to an account no. 8099 in the firm's chart of accounts which was a suspense account.

22.14.17 Mr M A Mitchinson was an accountant in the employ of L R Connell & Partners and was engaged in the setting up and maintenance of a computer to keep the accounts of the firm. He gave evidence that a number of suspense accounts were maintained and that the one numbered 8099 in the chart of accounts was used specifically for those cases where moneys coming in were exchanged for moneys going out, either on the same day or within a matter of days. The moneys coming in might be in the form of cash or cheque. Where what was happening was essentially an *exchange*, the moneys concerned were debited and credited to that suspense account rather than to the customer's own account with the firm. As a matter of practice what had become understood as *exchange cheques* were always posted to that part of the ledger.

22.14.18 A document headed: "L R Connell & Partners, Detailed Account Transaction Listing" was produced. Mr Mitchinson explained that the document represented a listing of all transactions which had been posted to particular accounts with the firm, such as over a particular date range or account range. In this case, the document contained the following two entries under the heading "8099-0000 suspense a/c":

DATE	JNL ID	DEBIT	CREDIT	NAME	DOC-NO	REFERENCE
27/9/88	CM000671		43,068.49		001347	EXCHANGECHQLBRUSH
3/10/88	CM000686	43,000.00		CASH	383143	EXCHANGE CHQ

He said that as a matter of office practice, the entries to this account would have been posted directly from the firm's duplicate copy of the bank deposit slip and from the cheque requisition. The requisition and the original deposit slip are both in evidence. The Commission has been unable to obtain possession of the duplicate copy of the deposit slip which was in the possession of the firm at the time. It was the practice to post receipts directly from this copy where annotations were made in respect of the various entries to facilitate posting and to explain the nature of the transaction. From the evidence of Mr Mitchinson, it is clear that there was a high probability that the words "EXCHANGE CHQ L BRUSH" set out above would have been entered to the suspense account referred to.

22.14.19 The fact that there was an exchange cheque and that the money was not remaining with L R Connell & Partners was corroborated by Mr J L Selwood, another accountant employed by the firm at the time.

22.14.20 The matter of the conversation with Mr Lucas about the exchange of cheques was put to Mr Brush who denied that such a conversation took place. Mr Brush said the only discussion that took place with Mr Lucas was whether there was a need for Mr Brush to pay the loan. He then qualified that by referring to a need to pay the loan "just at that time". He denied there was any discussion about a new loan. Mr Brush also denied he received the cash cheque for \$43,000 referred to or that amount in cash.

22.14.21 Mr Brush also gave evidence of a further incident concerning the loan to Melampus. He said that sometime after the repayment of the \$30,000 loan in September 1988, he bumped into Mr Lucas in the coffee shop in *Allendale Square* on St George's Terrace. He said:

"I just bumped into him in the coffee shop down there and he asked me how I was going and I told him: 'Not real flash. Unfortunately I'm still not in a position to repay the money'. He laughed as if I was creating a joke about it. He said: 'Brushie, we don't want that money back, I told you before'."

Mr Lucas said that it was possible that he could have met Mr Brush in the coffee shop although he had no recollection of having done so. He denied saying anything to Mr Brush about not wanting money back.

22.14.22 Having considered the documents and the evidence of those involved as well as that of Mr Ball, Mr Mitchinson and Mr Selwood, the Commission finds that, notwithstanding his denial of the matter, Mr Brush received \$43,000 in cash from L R Connell & Partners on 3 October 1988. Regardless of the testimony of those involved, the contemporaneous records of L R Connell & Partners strongly indicate that Mr Brush did in fact arrange for and receive payment of the \$43,000 in cash.

22.14.23 The difficult question is, why would he have done such a thing? One possible explanation is that the \$30,000 loan was never really intended as a loan at all but rather an outright payment and that it was dressed up as a loan to conceal the true position in the event that the matter should be the subject of official investigation. The most unbusinesslike manner in which the matter was handled lends support to this view. No effort seems to have been made to recover the loan even though it was long overdue. No interest was ever paid or requested. Whatever may have been the position before 1988, by that time both Rothwells and L R Connell & Partners were desperately in need of money. If the loan were genuine, one would expect that Mr Lucas would seek its recovery rather than, as Mr Brush would have us believe, defer payment to some indefinite future date. It is only in a case where the loan was not a genuine transaction that such a course of action in the circumstances makes sense.

22.14.24 The likely explanation of the events of September 1988 is that Mr Brush decided to go through the motions of paying off the loan to head off any suggestion that what had been received at the outset was an outright payment rather than a loan from a person with whom he was then doing business in an official capacity. He therefore contacted Mr Lucas about the matter. The latter protested and reasserted the original understanding that the money did not have to be repaid — reasserted at a time, we emphasise, when L R Connell & Partners were desperately in need of money. Mr Brush decided to take the \$43,000 to be exchanged in cash in the belief that the money could not be traced to him.

22.14.25 The fact that Mr Brush dealt with large amounts in cash is, of course, nothing new. This matter has already been commented upon in the chapter of this report dealing with the Fremantle Anchorage development.

22.14.26 Reference should also be made to the so called loan to Melampus Pty Ltd dealt with earlier in this report. Mr Lucas, supported by documentary evidence, told the Commission that this transaction was not a loan at all but rather a payment representing the profit on the sale of shares. On that point his evidence was in direct conflict with that of Mr Brush. As it is supported by the documentary evidence and as we have formed an unfavourable view of Mr Brush as a witness of truth, we propose to accept Mr Lucas' version of the matter. Also, we are mindful of the fact that Mr Brush was unable to explain the reason for the Melampus loan in the first place. We are also mindful of the fact that this loan remains outstanding and that not the slightest effort seems to have been made by Mr Brush to repay it and not the slightest effort seems to have been made by L R Connell & Partners to collect it or the interest accrued on it. In the light of all the evidence the Commission accepts Mr Lucas' evidence that the so called Melampus loan was not a loan at all. An analysis of this transaction is of some assistance in coming to a view about the \$30,000 loan transaction and the events of September 1988.

22.14.27 The circumstances surrounding the \$30,000 transaction reek with suspicion. Mr Connell's instruction to Mr Lucas to look after Mr Brush, the grant of a "friendly rate" of interest, the fact that the term of the "loan", twelve months, was ignored and no interest was paid or sought and finally the discouragement offered to Mr Brush when nearly three years later he embarked on the charade of purporting to want to repay it with interest all lead to the conclusion that it was intended to be an outright gift. But, however the transaction be characterised, whether as a gift or a loan, it was improper for Mr Connell and Mr Brush to embark on the arrangement at a time when GESB and Midtown were involved together in negotiating the terms of a major property transaction, namely, the acquisition of the Perth Technical College site. Neither Mr Connell or Mr Brush seem to have recognised the importance of avoiding any appearance of a conflict of interest. Indeed, it could be suggested that Mr Brush made the same mistake a few months later when he accepted loans from Mr R P Martin, a matter which is discussed in chapter 6 of this report: see section 6.11 of that chapter.

22.15 The Perth Technical College site - acquisition

22.15.1 The acquisition of the Perth Technical College site proceeded on 20 December 1985. A contract for sale and purchase was entered into between WADC as vendor and Perpetual Trustees (as trustee of the SB Investment Trust) and Midtown (as trustee of the Midtown Property Trust) as purchasers with each taking a moiety of the site as tenant in common. On the same day, the property was transferred to the purchasers and leased to the Minister for Works as the nominee of WADC for a term expiring on 31 December 1987 at a rental of \$4 million payable in two instalments of \$2 million each on 20 December 1985 and 20 December 1986 respectively. The price of \$33.5 million was paid to WADC.

22.15.2 Again, arrangements were made whereby the Superannuation Board subscribed sufficient moneys for units in the SB Investment Trust to enable Perpetual Trustees in its capacity as sole trustee of that trust to contribute its half share of the purchase price. An amount sufficient to cover the remaining half of the purchase price was lent by the Superannuation Board to Midtown and secured by way of a first mortgage over the Perth Technical College site granted by Perpetual Trustees and Midtown as mortgagors to the Superannuation Board as mortgagee.

22.15.3 The mortgage was the only security taken for the advance to Midtown. It was expressed in terms of security for the debt of Midtown to the Superannuation Board from time to time on any account whatsoever. By the document, both Perpetual Trustees and Midtown mortgaged their respective interests in the site to secure a debt which was owed by Midtown and Midtown alone to the Superannuation Board. In effect the interest in the site which was held for the Superannuation Board as unit holder was being used as part of the security for the due payment of Midtown's debt. No guarantees from either Bond Corporation or Mr Connell were provided.

22.15.4 During his evidence, Mr Neville said that while a valuation of the Perth Technical College site had not been obtained before December 1985, the Superannuation Board had nevertheless obtained an opinion of value from Mr Maurice Owen, who, he said, was then the Managing Partner of the property consultants, Jones Lang Wootton. Mr Owen's opinion was that the site was then worth in the vicinity of \$29 million to \$30 million. The property consultants, Richard Ellis, were instructed in December 1985 to prepare a valuation of the site. They wrote to Perpetual Trustees on

20 December 1985 expressing an opinion that the property was worth \$33.5 million and indicating that a detailed valuation report would follow shortly. A formal valuation report was furnished on 3 January 1986.

22.15.5 The transaction did not receive the formal approval of the Superannuation Board until a meeting held on 21 January 1986.

22.15.6 A joint venture agreement between Midtown Property Trust and the SB Investment Trust for the development of the site was contemplated at the time. The Board's solicitor, Mr Hunt, prepared a draft agreement for consideration. This document went through a number of drafts over the next two years or so but was never finally executed. No plans were in hand to proceed with the development. As we have said earlier, one of the prime objectives in making the purchase was to control development in the area for the benefit of the project which was proceeding on the David Jones site.

22.15.7 At the time of the purchase, agreement had been reached between the Superannuation Board and the Bond and Connell interests that the Superannuation Board would fund Midtown's share of the property and future costs incurred up to 31 December 1987 but there was no agreement in place under which the Superannuation Board would be required to finance all or part of Midtown's share of any future development. The property was occupied by the Education Department until 31 December 1987 so that costs and expenses incurred in relation to the site up to that date were minimal.

22.16 The Perth Technical College site — the investment

22.16.1 In his evidence to the Commission, Mr Wong was of the view that, if asked, he would have recommended strongly against the investment made by the Superannuation Board in the Perth Technical College site. In his report on the Superannuation Board referred to earlier in this chapter, Mr Wong compared the exposure of the Superannuation Board at the time to property as a class of investment with the exposure of selected private sector and public sector superannuation funds as at 30 June 1985. The private sector funds selected for comparison were all professionally managed, their combined assets accounting for close to 50% of all private superannuation assets invested with professional managers.

22.16.2 At the time of comparison, the top of the range of exposure to property of the investment portfolios of the private superannuation funds selected was 24% or thereabouts and the corresponding figure for public funds was about 32%. With the acquisition of an interest in the Perth Technical College site, the exposure of the Superannuation Fund to property was of the order of 37% of its investment portfolio which, in Mr Wong's opinion, was far far too high in a fund such as the Superannuation Fund, particularly as there was, in relative terms, no diversification in the property holdings to speak of because so much of the portfolio was tied up in the two projects referred to in this chapter.

22.16.3 Again, as Mr Wong pointed out in his report, this investment and the investment in the David Jones site were substantial and ones which were not easily liquidated. He also drew attention to shortcomings in the security position. In his report, he had this to say:

"The loan to Midtown was secured by a mortgage over the Perth Technical College site. In view of the fact that:

- (a) the loan was for 100% of Midtown's interest in the property mortgaged;
- (b) no additional guarantees were obtained; and
- (c) interest payments were deferred —

there was a reasonable prospect that the amount owing would, at some stage, exceed the value of the property mortgaged.

Unless the property's value increased in line with the capitalisation rate on the loan, an immediate shortfall would result."

He also drew attention to the fact that the Superannuation Board had a pre-existing exposure to Midtown, that there was a high probability of exposure to a downturn or even a levelling off of the property market and that the interest rate agreed to was less than would be expected, given interest rates prevailing at the time and the level of security.

22.16.4 The Commission accepts the evidence of Mr Wong on the above matters.

22.17 The Perth Technical College site — use of the SB Investment Trust

22.17.1 The views expressed earlier in this chapter relating to the use of the SB Investment Trust in the purchase of an interest in the David Jones site are relevant here. The difference however is that there was no commitment on the part of the Superannuation Board to proceed with development. The terms of a joint venture agreement were negotiated over time but this agreement was never executed. In our view, there was nothing in itself improper about the purchase of an interest in the site. This was something that the Superannuation Board could have done directly in exercise of its powers under its own legislation.

22.17.2 The Superannuation Board not only financed its half share of the purchase but also financed the Midtown Property Trust to the extent of 100% to enable it to fund its share as well. This transaction was hazardous in that the loan was for 100% of Midtown's interest in the property. In assessing any margin of safety, one should disregard the half interest of Perpetual Trustees in the property as this was held on trust for the Superannuation Board. Interest was to accumulate with the risk, as Mr Wong pointed out, of a shortfall in the value of the property as against the loan and accumulating interest.

22.17.3 In our view, the advance to the Midtown Property Trust to enable it to purchase its share of the Perth Technical College site was a hazardous investment and constituted a breach of trust on the part of the Superannuation Board and those persons who were its members at the relevant time for the reasons which we have already given in relation to a similar transaction involving the David Jones site. For the reasons already advanced in that matter, we do not consider that section 22 of the *Trustees Act 1962* has any application: see paragraph 22.12.5 of this chapter.

22.18 The loan of \$30 million by SGIC to Mr Connell

22.18.1 Shortly after the stock market crash in October of 1987, Rothwells Limited ("Rothwells") experienced financial difficulties and sought and obtained a number of support measures from the Government and from private sources. The events

surrounding the Rothwells support are discussed in detail in chapter 13 of this report and we do not propose to repeat them here. One such measure was the sale by Mr Connell of his units in the Midtown Property Trust to SGIC for \$30 million.

22.18.2 In October 1987, Mr Connell held 30 units in the Midtown Property Trust out of 60 units on issue. He also held one of the two issued shares in the capital of Midtown. At the time, Midtown was the sole trustee of the Midtown Property Trust. Midtown, on account of the trust, continued to hold a half interest in both Central Park and the Perth Technical College site, with the remaining half interest in each case being held by Perpetual Trustees as sole trustee of the SB Investment Trust. Under the *Government Employees Superannuation Act 1987* and amendments to the *Superannuation and Family Benefits Act 1938* which came into force on 1 July 1987, GESB became the unit holder of the SB Investment Trust in lieu of the Superannuation Board.

22.18.3 By 1987, the David Jones site had become known as Central Park.

22.18.4 As at 23 October 1987, the balance sheet of the Midtown Property Trust was as follows:

UNITHOLDERS' EQUITY	\$86,840
Represented by:	<hr/>
Assets:	
Land and improvements	\$30,174,074
Plant and equipment	4,592
Sundry debtors and loans	139,246
	<hr/>
TOTAL ASSETS	\$30,317,912
	<hr/>
Liabilities:	
Unsecured creditors	\$335,616
Term advances secured	24,081,967
Advances from unit holders	5,813,489
	<hr/>
TOTAL LIABILITIES	\$30,231,072

NET ASSETS

\$86,840

The only assets of significance were the interests of the trust in Central Park and the Perth Technical College site.

22.18.5 On 22 October 1987, L R Connell & Partners wrote a letter to SGIC containing an offer to sell to it the 30 units in the Midtown Property Trust registered in Mr Connell's name. The last paragraph of the letter read as follows:

"A full description and valuation of the two properties is enclosed which was prepared recently by Richard Ellis and which gives valuations for LRC's interest in the two properties as follows:

CENTRAL PARK DEVELOPMENT - \$16,250,000

This valuation is for the project only and does not include any value for the carried nature of the interest, nor the recently approved improvement in the number of parking bays.

PERTH TECHNICAL COLLEGE - \$36,250,000

These valuations indicate a total value for LRC's interest in the units of Midtown of \$52,500,000."

The valuations referred to accompanied the letter. These were expressed to have been prepared on instructions from L R Connell & Partners.

22.19 The Richard Ellis valuations

22.19.1 The valuation of the Perth Technical College site was prepared in or about July or August 1987 following an inspection which, according to the document, took place on 30 June 1987. The purpose of the valuation was described as follows:

"To determine the current open market value of a 25% interest in the subject property, subject to the proposed development scheme

as outlined under the heading 'Proposed Improvements' in this report [being] approved by all relevant authorities at the date of valuation."

The proposed development scheme referred to was to comprise a total of 87,000 m² in net lettable area of office accommodation, 4,000 m² in net lettable area of retail accommodation and 1,400 car bays. The report pointed out that the then current zoning permitted the site to be developed for office purposes with a maximum plot ratio of five to one, providing a lettable area of five times the site area of the land. In certain circumstances an increase of 20% on the maximum plot ratio would be permitted. Under the applicable zoning, car parking on the site would be allowed at the rate of 200 vehicles per hectare. The scheme under consideration appeared to be outside the parameters of the planning scheme then in force in the area. No planning approvals for it had been given.

22.19.2 The report proceeded to consider the value of the land using two methods of valuation. The first was to consider comparable sales and market activity current at the time. On that basis the valuer arrived at a figure of \$103.365 million as the value of the site. The second was to consider the above proposal as a hypothetical development on the site on the assumption that it had been approved by all relevant authorities and to determine its value having regard to the cost of the development and the income that the property was likely to earn on completion. Using that method, the valuer arrived at a figure of \$145 million. He then concluded that that amount was the value of the site and that a 25% interest would be \$36.25 million. Apart from the fact that the second produced a greater figure, the valuer's reasons for adopting it and totally ignoring the former method are not clear from the valuation report. It must be stressed, however, that both in the summary and in the concluding statement of value in the report, the valuer made it clear that his valuation was on the assumption that the development proposals as described above were approved by all relevant authorities. In fact, as we have said, they had not been approved so that the valuation in question was, in reality, nothing more than a feasibility study for a particular project. It should have been laid aside immediately as being of little or no value in making an assessment of the worth of the site.

22.19.3 The valuation of Central Park was prepared at about the same time, again following an inspection which, according to the document, took place on 30 June 1987. The purpose was similarly described:

"To determine the current open market value of a 25% interest in the subject property, based upon the current development proposal."

The proposed development scheme referred to was to comprise some 59,000 m² in net lettable area of office accommodation, 6,700 m² in net lettable area of retail accommodation and a total of 663 car parking bays.

22.19.4 Again, the report considered the value of the site, first, on the basis of comparable sales and market activity and secondly, having regard to the cost of the development described in the valuation and the income that the property, as so developed, would be likely to earn. In this case however, the figures arrived at by each method were similar, being \$62 million on the basis of comparable sales and market activity and \$65 million on the basis of a hypothetical development. The greater figure was taken as the value of the site and \$16.25 million was put forward as the value of a 25% interest. Again, the valuation was made on the assumption that the development proposals referred to had been approved by all relevant authorities, although, in this case, the difference in result between the two methods of valuation was marginal.

22.19.5 Each report contained a statement to the effect that it was for the use only of the party to whom it was addressed and that no responsibility was accepted to any third party for the whole or any part of its contents. SGIC intended to rely on the reports and therefore arranged for a letter to be obtained from Richard Ellis to the effect that that firm was prepared to waive the clause to which we have just referred and that it would accept liability to SGIC for the two reports. The letter from Richard Ellis which was dated 23 October 1987 read as follows:

"We refer to our valuation reports of the Central Park Development and the Perth Technical College Redevelopment Site dated the 30th June 1987 (copies enclosed), and advise that we are prepared to waive the final clause in the valuations and extend liability to the State Government Insurance Commission.

We confirm our valuations of the 30th June 1987, as being 25% interests in the redevelopment sites of \$16,250,000 for Central Park Development Site and \$36,250,000 for Perth Technical College Redevelopment Site.

Both valuations are conditional upon and assume the approval of the Development Schemes as outlined in the valuation reports by all relevant Authorities as at the date of the valuations.

Our valuations have been based upon normal valuation criteria and do not include any special funding arrangements which may be available to a purchaser by virtue of the Joint Venture agreements which relate to the land the subject of these valuations.

Should you have any further queries, please do not hesitate to contact the undersigned."

The letter was signed on behalf of the firm by Mr G Ryan and Mr G Solomon, both of whom were licensed valuers.

22.19.6 Apart from arranging that Richard Ellis would accept liability to SGIC for the two reports, it would appear that the reports, on being received by SGIC, were accepted at their face value and there were no steps taken to obtain independent verification of value of the sites. Nor does it appear that SGIC was in any way deterred from proceeding with the proposal before it by the fact that the reports in question were only feasibility studies and not true valuations at all.

22.19.7 This Commission obtained a report on the Richard Ellis valuations from William M Mercer Campbell Cook & Knight which was put into evidence and which was highly critical of the calculations made in the hypothetical development section of the report, of the consistency of the calculations with the assumptions set out in the report, of the logic underlying the mathematical assumptions, of the mathematical accuracy of the calculations upon which the conclusions in the report were based and a number of other matters. This report was concerned with matters of calculation only and not with matters of valuation.

22.19.8 The Commission also obtained a report from Mr G I Gauntlett of Baillieu Knight Frank, property consultants of Perth on the valuations above referred

to and also a report on a further valuation given by Richard Ellis as of the same date, 30 June 1987, on instructions from the Superannuation Board. Mr Gauntlett was asked whether the valuations given were proper ones. His conclusion was as follows:

"The answers must be in the affirmative so far as the Central Park site valuations are concerned. However, we have considerable difficulty with the question relative to the "\$145 million" valuation for all the reasons set out herein."

Mr Gauntlett's report was also put into evidence.

22.19.9 The Commission decided to receive the reports of Wiliam M Mercer Campbell Cook & Knight and Baillieu Knight Frank as view points on the matter. When receiving them, the Commission had this to say:

"With respect to those exhibits, the Commission has no hesitation in finding that they are relevant and therefore admissible. They are relevant because of their relation to the subject matter of the transactions. However, bearing in mind the limitations that are imposed upon the Commission by reason of time, the Commission proposes that they be admitted as exhibits but that the Commission expressly puts to one side any issue as to the correctness of those valuations upon which the instrumentalities acted."

22.20 The 23 October 1987 Midtown/SGIC transaction

22.20.1 A deed providing for the sale of Mr Connell's share in Midtown and his units in the Midtown Property Trust to SGIC for a total price of \$30 million was prepared and executed on 23 October 1987. The circumstances surrounding this deed and the manner in which the \$30 million was disbursed have been discussed in chapter 13 of this report.

22.20.2 The deed contained a call option granted by SGIC to Mr Connell to enable him to repurchase the share and units from SGIC at any time in the period between 6 and 12 months after the transaction at a price of \$30 million plus interest at 16% per annum. It also contained a put option granted by Bond Corporation to SGIC under which Bond Corporation could be required to purchase the share and units for \$40

million at the expiration of 12 months from the transaction. SGIC further agreed to use its best endeavours to procure a release of Mr Connell from a guarantee contained in the joint venture agreement dated 10 May 1985 relating to Central Park. The sale of the units in the Midtown Property Trust was completed on 23 October 1987 as a matter of great urgency. SGIC stipulated for an acceptance fee of \$200,000 in respect of the transaction and this was paid.

22.20.3 Although the transaction was documented as a sale, it had many of the features of a mortgage and a number of the persons who were concerned with the negotiation of the transaction and, in particular, Mr Connell, Mr Edwards, Mr Lloyd and Mr Wiese, all said in evidence that they thought that it was merely a financing transaction. We accept that to have been the position. This view is supported by a letter dated 6 November 1987 from Mr F P Michell, the managing director of SGIC, to the Auditor General in which he said:

"My Commission acquired title to the above sites against security of an advance of \$30M to Mr. Connell."

and by a memorandum from Mr B H Neville of Fundscorp to Mr S Gregory of that same organisation dated 18 December 1987 in which Mr Neville said:

"SGIC's involvement to date is purely a financing arrangement."

22.20.4 In the deed, Mr Connell warranted that Midtown had no liabilities, either in its own right or as trustee of the Midtown Property Trust, other than amounts due to trade creditors and consultants not exceeding in the aggregate \$5,000 and amounts due to the Superannuation Board not exceeding \$24,081,967. In fact, the warranty was deficient in respect of trade creditors to the extent of \$335,616 and in respect of amounts due to Bond Corporation and Mr Connell totalling \$5,813,489 as disclosed in the balance sheet set out above.

22.20.5 In evidence, a number of witnesses referred to the fact that Mr Connell's call option had been assigned to Bond Corporation. An unexecuted copy of a deed to this effect was tendered in evidence, although neither an executed copy nor a photostat of it was ever produced to the Commission. There is contemporary documentary evidence that such an assignment existed. Formal notice of it was given on behalf of

Mr Connell to SGIC in October 1987. The unexecuted copy of the assignment which was put into evidence before the Commission was an assignment couched simply in absolute terms and made no provision for re-assignment. Although the underlying arrangement relating to the assignment was never made clear, it is reasonable to suppose that Bond Corporation insisted on it in order to ensure that if there was a likelihood that the put option might be exercised, it could ensure that the call option was exercised instead. To do so would result in a saving of several millions of dollars to Bond Corporation.

22.20.6 At or about the same time as Mr Connell assigned his interest in the Midtown Property Trust to SGIC, Bond Corporation assigned its interest in the trust to an associate company, Baztan Pty Ltd ("Baztan").

22.20.7 The deed of 23 October 1987 provided for the appointment of a nominee of SGIC to the Board of Midtown in place of Mr Connell. Mr F P Michell, the Managing Director of SGIC, was so appointed.

22.21 The GESB mortgage debt

22.21.1 At the time of the transaction on 23 October 1987, the solicitors for the parties were aware of the existence of the mortgages over Central Park and the Perth Technical College site to secure indebtedness from time to time to GESB. This debt had arisen in part from advances made from time to time by the Superannuation Board to Midtown under the arrangement made in May 1985 whereby the Board agreed to fund Midtown's share of the cost of the development on Central Park and in part from an advance made by the Superannuation Board to Midtown to finance its share of the cost of acquiring the Perth Technical College site in December 1985. These debts had been acquired by GESB from the Superannuation Board as part of the revision of the State's superannuation arrangements which took place in July 1987. These matters have been discussed earlier in this chapter.

22.21.2 As at 23 October 1987, the mortgage debt owing by Midtown to GESB was \$24,081,967. At the time the parties appeared to have been aware and appeared to have intended that the GESB debt needed to be brought into account in some way. It appears however that they were unclear on how best to proceed with the matter. One way to deal with it would have been to reduce the price by, \$12,040,983.50, being half

of the mortgage debt. The purpose of the transaction was however to provide \$30 million to Mr Connell in connection with the assistance to Rothwells which was then being arranged and clearly, any reduction in the price would have been inconsistent with this objective.

22.21.3 At the time of the completion of the sale of the units in the Midtown Property Trust, Oakhill Pty Limited, a company in which Mr Connell had a substantial shareholding, sold an interest in a Falcon jet aircraft to North Kalgurli Mines Limited, a Bond company, for \$10 million and that transaction was completed at the same time. Part of the proceeds from these two transactions totalling \$12,040,983.50, was paid into the trust account of Parker & Parker, solicitors of Perth, and placed by them on a short term deposit over the coming weekend. Parker & Parker were acting for Bond Corporation and Mr Connell in these transactions.

22.21.4 On the following Tuesday, 27 October 1987, the amount of \$12,040,983.50 was withdrawn from Parker & Parker's trust account, and, at the direction of Mr Connell's attorney, as Mr Connell appeared to be absent at the time, paid by bank cheque to Midtown. The cheque was then endorsed over to Bond Corporation, the underlying transaction being an interest bearing deposit with that company. These funds remained on deposit with Bond corporation until 16 November 1987 when a rounded amount of \$12,040,984 was repaid to Midtown.

22.22 The 16 November 1987 deed of variation

22.22.1 A deed of variation was entered into on 16 November 1987 between Mr Connell, SGIC, Midtown and Bond Corporation in order to tidy up a number of anomalies which had arisen out of the Midtown/SGIC transaction of 23 October 1987. First, Midtown acknowledged its indebtedness to Mr Connell in respect of the amount of \$12,040,984 which Midtown had on that day received from Bond Corporation and agreed to repay it to Mr Connell forthwith. Mr Connell agreed to deposit that amount with Rothwells as a deposit repayable on or before 31 May 1988 and then to assign the deposit so made to SGIC. These arrangements were in fact carried out.

22.22.2 Secondly, the deed made a number of changes in the terms and conditions applicable to the put and call options which had been granted on 23 October 1987. In general, these changes were within the spirit of the original arrangement and

were beneficial to SGIC. One of the changes made was to alter the price payable by Mr Connell on the exercise of his call option to include stamp duty which SGIC was liable to pay on the original transaction.

22.23 The involvement of the Auditor General

22.23.1 The Auditor General came to hear of the transaction of 23 October 1987 from a report which appeared in *The West Australian* of 26 October 1987. The following day he wrote to SGIC seeking details of the interests purchased and a copy of the relevant valuation. The valuations obtained by Mr Connell from Richard Ellis were furnished to him. On 3 November 1987, the Auditor General wrote again pointing out that the valuations supplied by Mr Connell differed very significantly from others which he, the Auditor General, had for Central Park and the Perth Technical College site as of 30 June 1987. It appears that he had obtained other valuations in his capacity as auditor of GESB and that the total value of the two sites as disclosed in those valuations was \$115 million and not \$210 million as appeared from the Richard Ellis valuations obtained from Mr Connell. The Auditor General also said that he had obtained independent valuations of the sites from the Valuer General and that these were as follows:

Central Park	\$56,000,000
Perth Technical College site	58,000,000
	<hr/>
Total	\$114,000,000
	<hr/>

He pointed out that the total of these valuations did not differ markedly from those obtained by GESB from private sources.

22.23.2 Mr Michell replied by letter dated 6 November 1987 in which he expressed the view that SGIC was satisfied with the security that it had obtained "against the transaction". He also advised that a further valuation had been requested from the property consultants, Chesterton International.

22.23.3 Chesterton International inspected the properties on 12 November 1987 and furnished written opinions on 25 and 29 November 1987 respectively in which they

valued a 25% interest in the Perth Technical College site at \$25 million and a 25% interest in Central Park at \$14 million. By that stage, planning approval had been obtained in respect of the Central Park development. There was however, no change in the planning status of the Perth Technical College site.

22.23.4 Again, the valuation of the Perth Technical College site prepared by Chesterton International was still nothing more than a feasibility study. The value given was expressed to have been based on the proposed development as outlined in the report receiving the necessary planning and building approvals and proceeding to construction. The development proposal under consideration in the report was even larger than that proposed in the Connell valuation. It contemplated an office tower with a gross building area of 130,000 m² together with retail accommodation of 5850 m² and provision for the parking of 1650 motor vehicles. Such a development proposal was far outside the ambit of the planning scheme which was in force in respect of the site at the time. The valuer pointed out that an optimistic development of the site at the time would yield a gross building area of a little under 69,000 m² although the proposal under consideration contemplated a gross building area of approximately 135,000 m².

22.23.5 Following the initial correspondence with the Auditor General, SGIC wrote to Richard Ellis by letter dated 13 November 1987 in the following terms:

"I am in receipt of a letter from Mr. N.E. Smith, the Acting State Auditor General, wherein he expresses concern as to the basis upon which you determined your valuation for which you have extended a liability to this Commission.

You have confirmed your valuation at \$210M for both sites which were conditional upon and assume the approval of the development scheme as outlined in your Valuation Report.

The Auditor General has sought independent valuations from the Valuer General who has provided a valuation for the full interests in the respective sites at the 30th June, 1987 as:

· Central Park Development site	=	\$ 56M
· Perth Technical College site	=	\$ 58M
		<hr/>
		\$114M

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I would appreciate if you would outline your reasons for the significant variation between your valuation and that of the Valuer General. I regret that I do not have a copy of the Valuer General's valuation and therefore will rely upon your advice as to any perceived variations.

As you will no doubt appreciate this matter is the subject of Government review. Your urgent and confidential advice will be appreciated.

For your information I understand that through the Superannuation Board, valuations totalling \$115M for a full interest in the properties as at the 30th June, 1987 had been undertaken and that one of the valuers was your Mr. G. Solomon."

22.23.6 Richard Ellis replied by letter dated 17 December 1987 as follows:

"Thank you for your letter received on the 20th November 1987, in which you queried the discrepancy between our reported valuation of \$210 million for the above properties versus the valuation you have received from the Valuer General's Office at \$114 million.

Not having the benefit of the Valuer General's report I am obviously unable to give a definitive answer, however, as you pointed out in your letter the instructions upon which our opinions of value were prepared were on the assumption that a certain level of development was approved on each of the sites. At the date of valuation neither of the sites had a planning approval in place and the assumptions for the Perth Technical College site in particular were well in excess of those which would normally receive approval from the relevant Planning Bodies.

These valuations were prepared for L.R. Connell & Associates and were not intended for use, based on our understanding, for either lending purposes or to assist a purchaser in arriving at a purchase price. [our emphasis]

At the time we extended liability to the State Government Insurance Commission we were not aware of the circumstances for which the reports were required, however, we did mention the basis upon which the figures had been arrived at in our covering letter. The valuation figure provided to the State Superannuation Board which you referred to assumed normal planning criteria without any assumed planning approval.

We would be happy to discuss this matter further with you, however, on the surface the above would appear to be the major reason for the differential in values."

While reference was made in this letter to the fact that the valuations prepared for "L R Connell and Associates" were not intended for use either for lending purposes or to assist a purchaser to arrive at a purchase price, it appears that these limitations did not appear in the valuations themselves, nor was any reference made to them in the letter from Richard Ellis dated 23 October 1987. Such references should have been made by Richard Ellis. In our view, it was quite inadequate for Richard Ellis to justify the omission, at least from their letter of 23 October, on the basis that they were not aware of the circumstances in which it was sought. The fact that they were being asked to extend liability to SGIC should have put them on notice that it might be a potential purchaser or lender. They ought to have enquired before writing as they did.

22.24 The Bell Group purchases

22.24.1 The Bell Group Limited ("the Bell Group") was a listed public company with its base of operations in Perth. Mr Robert Holmes a Court was its Executive Chairman.

22.24.2 In evidence Mr Burke said that in November 1987, following the stock market crash late in the previous month, he became aware that a major line of credit had been withdrawn from Mr Holmes a Court's companies and he believed that they might have been affected by the sharp downturn in the market which had occurred. Mr Burke said that he raised the matter with Mr David Parker in the course of conversation on 10 November 1987 and it was agreed that Mr Parker would telephone Mr Holmes a Court to see whether there were any assets for sale and to ascertain how his companies had fared. We are unable to make any finding as to how this matter arose.

22.24.3 Mr Parker said that he telephoned Mr Holmes a Court that evening and a long conversation ensued. He said that in the course of that conversation, Mr Holmes a Court stressed that the Bell Group and other companies under his management were in a very sound position. There had however been some adverse press speculation which he did not consider to be accurate. The banks were nevertheless, very nervous about his position and as a result he was looking to quit assets, not because he needed to but merely in order to assuage the Banks. Mr Parker said that in the course of the conversation, Mr Holmes a Court referred to the fact that his companies had put together a development site which he regarded as the best in Perth consisting of the Forrest Centre, the Parmelia Hotel and various properties on the southern side of St George's Terrace between Mill and William Streets. He indicated that these properties would be available for sale. Some of them adjoined the Perth Technical College site and were therefore of particular interest to the Government. Mr Parker said that he expressed interest and indicated that the Government would be in touch with Mr Holmes a Court about the matter shortly. Mr Holmes a Court also made reference to his BHP shares. The subsequent purchase by SGIC of those shares is dealt with in chapter 15.

22.24.4 Mr Parker reported back to Mr Burke who, according to Mr Parker, arranged for Mr Kevin Edwards to get in touch with Mr Holmes a Court to pursue the matter. At the time, Mr Edwards was on the Board of SGIC. Mr Burke said he thought that, in all probability, either SGIC or GESB would be interested.

22.24.5 Mr Edwards said that he was telephoned by Mr Holmes a Court the following morning and asked to get in touch with the Properties Officer of the Bell Group, Mr M G Garner. Mr W Rees, the Chairman of SGIC and Mr B H Neville were contacted and Mr Edwards said that a meeting was arranged with Mr Garner at the offices of the Bell Group that day when negotiations for the sale of various CBD properties owned by the Bell Group or its subsidiaries commenced.

22.24.6 The properties on offer were:

the Forrest Centre situated at 219 to 221 St George's Terrace
the Parmelia Hilton International Hotel situated in Mill Street
MMI House situated at 181 St George's Terrace
Commercial Union House situated at 185 St George's Terrace
a strata titled office building situated at 189 St George's Terrace

Newspaper House situated at 125 St George's Terrace

Royal Insurance Building situated at 133 St George's Terrace.

22.24.7 In negotiations with Mr Garner, Mr Edwards said in evidence that he managed to get him down to \$216 million for the properties but that Mr Garner would not budge beyond that point. Mr Edwards' evidence continued as follows:

A: So in the end I rang up Holmes a Court.

Q: That same night?

A: Yes. I think about 2 o'clock in the morning.

Q: Yes, and what did you say to Mr Holmes a Court?

A: Well, I said: "You know we would be able to help but, you know, you can have 206, take it or leave it".

Q: Did he respond?

A: He took it.

Q: You said that you said to him in that conversation: "We would be happy to help". What did you mean by that?

A: Well, the Government was obviously helping him, weren't they. I mean you don't unload \$206 million worth of properties in 24 hours without someone being prepared to get out of their way. Well — that was something that was obvious to you."

22.24.8 A valuation of each of the properties was obtained from the property consultants, Jones Lang Wootton. In the first instance, this was by letter dated 13 November 1987 addressed to Mr Rees as Chairman of SGIC and some days later by comprehensive valuation reports. The individual properties were valued as set out in the table below.

22.24.9 Contracts for the purchase of the properties were entered into on 13 November 1987 between various subsidiaries of the Bell Group as vendors and SGIC as purchaser. Each sale was for cash payable on completion of the purchase which, in each case, took place on 27 November 1987. The total consideration for these

purchases was \$206 million and this was apportioned between the various properties as set out in the table below.

22.24.10 The consideration was paid with extraordinary haste. The contracts were prepared and executed and no less than \$100 million on account of the price was paid within three days of Mr Burke having first raised the matter in his conversation with Mr Parker. There would have been no real opportunity for any proper enquiry or investigation to be undertaken in respect of the properties before the purchaser had parted with almost half the total consideration. The purchases were completed on 27 November 1987 when \$106 million, the balance of the price, was paid and transfers of the properties in favour of SGIC executed. The payment of a 10% deposit on the properties on 13 November 1987 would have been reasonable and in accordance with normal conveyancing practice. The payment of almost half the price, and \$100 million at that, before either completing the purchase or taking proper security for that amount was nothing short of extraordinary.

22.24.11 After the purchases had been completed, they were entered in the books of SGIC as set out in the table below. The SGIC book value of the properties differed from the consideration stated in the contracts of sale and purchase and Titles Office transfers in a number of respects. The net result was that the value of the Forrest Centre was entered in the books of SGIC at a higher price than that paid for it and the value of the other properties acquired from the Bell Group were entered at values which were lower than the prices paid. The book value of the Forrest Centre did however approximate the figure advised for it by Jones Lang Wootton in November 1987. The consequences of what occurred was that SGIC was able to book a larger profit in its accounts in the year ended 30 June 1988 than would have been the case if the purchase prices for the various properties had been treated as the values to be brought to account in SGIC's books.

22.24.12 The table referred to is as follows:

	Valuation by J L W 13.11.87	Contracted Purchase Price	SGIC Book Value
	\$M	\$M	\$M
Forrest Centre	111.0	102.0	110.0
Parmelia Hilton 181,185 & 189	40.0	33.0	30.0
St George's Terrace	15.0	17.0	16.0
WA Newspaper House and Royal Insurance Building	50.0	54.0	50.0
	216.0	206.0	206

22.24.13 The Commission finds nothing in the purchases by SGIC of the properties from the Bell Group in November 1987 to warrant an adverse finding against any person.

22.25 The December 1987 SGIC/Bond Corporation exchange transaction

22.25.1 The purchases from the Bell Group altered the position dramatically so far as SGIC was concerned. If it were to acquire the interest of the Midtown Property Trust in the Perth Technical College site, it would, together with GESB, own a much enlarged site between St George's Terrace and Mounts Bay Road with a considerable frontage to St George's Terrace. This site had considerable potential for development.

22.25.2 By December 1987, SGIC had outlaid a very substantial sum on properties in the CBD. It was essential that something be done with them as soon as possible. A decision must be made promptly on whether particular properties were to be held or on-sold. It was therefore decided to open negotiations with Bond Corporation and with Mr Connell with a view to SGIC acquiring the Bond

interests in the Perth Technical College site. A relevant passage of the evidence of Mr Edwards on the matter was as follows:

Q: When was the transaction conceived?

A: I think at some stage after we acquired the Bell Group properties.

Q: You are now speaking of the SGIC?

A: Yes.

Q: How did that acquisition lead to this swap in December of 1987?

A: Well, what it left — you see, what you had was a very large development area of CBD property stretching from Mill Street through to the West Australian and the Super Board at that time had 50 per cent of the site known as Perth Tech, the other 50 per cent being held by this Midtown Property Trust between Bond and Connell. By the acquisition of Midtown Properties or Connell's share of the Midtown Property Trust the SGIC held 25 per cent of the Perth Tech site and the David Jones site.

Q: You are now referring to the financing transaction?

A: Yes, but that was converted into a purchase subsequently and that left, effectively, the State in control of all but 25 per cent of one bit of this very large development tract. Secondly, the Super Board was in a not good position in my view.

Q: In relation to what?

A: In relation to its arrangements with respect to Perth Tech.

Q: Why was that?

A: Because to some extent the joint venture arrangement was not — was a bit loaded against it; was not the best.

Q: Was that a legacy of the 1985 agreements?

A: 85 or earlier, I'm not sure when they were done.

Q: This is the joint venture with Bond?

A: Yes.

22.25.3 Discussions ensued with Mr Connell on 17 December 1987 and with representatives of Bond Corporation on or about that date.

22.25.4 Agreement in principle between SGIC, Mr Connell, Bond Corporation and its associate, Baztan in relation to their respective interests in the Perth Technical College site and Central Park appears to have been reached on 18 December 1987 when a letter confirming arrangements made at that time was sent by Mr Rees on behalf of SGIC to Mr Beckwith on behalf of Bond Corporation and Baztan. Mr Beckwith signed an endorsement to the letter in acknowledgment that a common understanding had been reached on the matters contained in it. The arrangement made contemplated that SGIC would acquire the beneficial interest of Baztan in the Perth Technical College site for a price of \$27 million less a proportionate part of the mortgage debt outstanding by the Midtown Property Trust to GESB and that Baztan or its nominee would acquire the beneficial interest of SGIC in Central Park for \$13 million. These arrangements were made "subject to contract" and the letter acknowledged that the precise legal technique for giving effect to them would need further examination. By the letter, it was also agreed that Bond Corporation would relinquish its management rights in respect of the Perth Technical site on payment by SGIC to Bond Corporation of a further \$5 million.

22.25.5 The letter also referred to the cancellation of the put and call options in the following manner:

"The `Deed Cancelling Options' will be executed by Bond today, and assuming execution by L R Connell, will also be executed by the Commission today and settlement effected prior to the close of business today."

22.25.6 On the same day, SGIC entered into a deed with Bond Corporation and Mr Connell under which the put and call options contained in the deed dated 23 October 1987 were surrendered for a consideration of \$9.5 million payable to Mr Connell or as

he should direct. This amount was paid immediately by a bank cheque dated 17 December 1987 drawn in favour of L R Connell. The cheque was paid the following day into the current account of Rothwells at the Perth Office of the National Australia Bank. The proceeds were credited in Rothwells' books to an account styled "L R Connell Private No. 2 Account".

22.25.7 The effect of this deed was to convert what was, in effect, a loan from SGIC to Mr Connell on the security of a 50% interest in the Midtown Property Trust into an outright purchase. At that stage, SGIC did not own a direct interest in the properties; this was owned by Midtown as trustee of the Midtown Property Trust. All SGIC had was an interest as unit holder in the Midtown Property Trust, one of two shares on issue in the capital of Midtown and a seat on its Board.

22.25.8 Clearly, the letter of 18 December 1987 referred to above had done no more than put in place an *in principle* arrangement between the parties regarding the exchange of the properties. There would be no binding commitment on either side until the arrangement was formally documented and yet SGIC seemed prepared to proceed to implement its agreement with Mr Connell without ensuring that arrangements with Bond Corporation were in place. It is impossible to see why SGIC placed itself into what could have been a very invidious position in that it had outlaid a substantial sum of money to Mr Connell without, at the same time, completing contractual arrangements with Bond Corporation to ensure that the ultimate objective could be achieved.

22.25.9 Mr Edwards said that SGIC's purpose at the time was to secure the entire Perth Technical College site in Government hands. He said he did not believe that the surrender of the options was in any way connected with Rothwells' liquidity problems. He said Mr Connell might have said that the money would be paid into Rothwells but he believed that was merely part of Mr Connell's on-going commitment in relation to that company. Mr Lloyd was asked about the same thing. The questions and his responses were as follows:

Q: Do you recall any discussion about the placing of that money with Rothwells?

A: I'm not really sure that I do. I think it was — the money was collected at settlement by a Rothwells' officer. I recall that.

Q: Was that at a time when Rothwells had liquidity problems?

A: Rothwells always had liquidity problems.

22.25.10 From SGIC's perspective, the arrangement with Mr Connell whereby the options were cancelled for a consideration of \$9.5 million and the arrangement with Bond Corporation whereby there was an exchange of properties were both part of the one transaction. The two elements should have been dealt with together. At the very least, each should have been made conditional on the other. From SGIC's point of view, to deal with the matter in any other way was to take an unwarranted risk.

22.25.11 We find the explanation for what occurred was that Rothwells was, as Mr Lloyd said, "always having liquidity problems" and that by 18 December 1987, there was an urgent need to find more cash for the company. The transaction with Mr Connell could not wait until the arrangements with Bond Corporation were sorted out and was implemented as a matter of urgency on 18 December 1987 even though there was risk to SGIC in what had occurred.

22.25.12 At this stage both Central Park and the Perth Technical College site were held by the trustee of the SB Investment Trust as to a 50% share and by the trustee of the Midtown Property Trust as to the remaining 50% share. GESB was the sole unit holder in the SB Investment Trust and Baztan and SGIC were each the holders of half the units on issue in the Midtown Property Trust.

22.25.13 The transaction with Bond Corporation, involving an exchange of properties, occurred on 24 December 1987. A deed bearing that date was executed between Midtown, Baztan and SGIC. This provided for the transfer of the interest of the Midtown Property Trust in the Perth Technical College site to SGIC so that the trustee of the SB Investment Trust and SGIC would thereafter become the proprietors of the site in equal shares. In exchange, the deed provided for SGIC to surrender its units in the Midtown Property Trust so that thereafter Baztan would become the sole beneficiary thereunder. This meant that the trustee of the SB Investment Trust and the trustee of the Midtown Property Trust would become the proprietors of Central Park in equal shares. SGIC agreed to take over the liability of Midtown to GESB under the registered mortgage which existed over the Perth Technical College site in respect of

which there was \$25,237,399.70 outstanding, including interest due as at 31 December 1987.

22.25.14 For the purposes of these transactions, the value placed on the Perth Technical College site was \$108 million, \$8 million higher than the figure arrived at by Chesterton International a month or so earlier to which we have referred in paragraph 22.23.2 of this chapter. On the other hand the value placed upon Central Park was only \$52 million, some \$4 million less than Chesterton's figure taken from a valuation made at the same time as that furnished in relation to the Perth Technical College site. Mr Edwards was asked about the negotiations which took place in relation to these transactions. He said that the figures were based on valuations of the properties in the possession of SGIC but that in the end the matter was merely a commercial negotiation.

22.25.15 Under the deed referred to there was a net amount payable by SGIC

to Midtown and this was calculated as follows:

Agreed value of the half interest of the Midtown Property Trust in the Perth Technical College site	\$54,000,000.00
Agreed value of the other real property assets of the Midtown Property Trust (including its half interest in Central Park)	26,000,000.00
	<hr/>
	\$80,000,000.00
	<hr/>
Baztan's interest in the Midtown Property Trust	\$40,000,000.00
Less value of other assets retained in the Midtown Property Trust	26,000,000.00
	<hr/>
	\$14,000,000.00
Less half amount owing to GESB as at 31st December 1987	12,618,699.85
	<hr/>
Net amount payable by SGIC to the Midtown Property Trust	\$1,381,300.15
	<hr/>

22.25.16 The various transactions were carried out, property transferred, units surrendered and liability assumed on 24 December 1987. In addition, the share in the capital of Midtown held by SGIC was transferred to Baztan. Mr Michell resigned as a director of Midtown. GESB furnished letters to Bond Corporation and Mr Connell agreeing to release them from the guarantees they had given in the joint venture agreement of 10 May 1985 in relation to Central Park. GESB also entered into a deed with SGIC, Midtown and Perpetual Trustees under which SGIC assumed the liability of Midtown under the registered mortgage existing over the Perth Technical College site as if named as the debtor therein in place of Midtown and GESB discharged Midtown

from any further liability under the mortgage. Curiously, no mention was made in any of the documents of the unregistered mortgage over Central Park.

22.25.17 An amount of \$5 million was paid by SGIC to Bond Corporation to relinquish all its rights to promote, co-ordinate, manage or otherwise seek involvement in the Perth Technical College site development project. Half of this amount was subsequently reimbursed to SGIC by GESB. It is difficult to see on what basis this payment was made. No joint venture agreement in respect of the Perth Technical College site was ever executed and the Commission has not been able in its inquiry to discover that Bond Corporation had any claim or entitlement whatever to management, development or other rights in relation to the property.

22.25.18 The deposit of \$12,040,984 into Rothwells which was assigned to SGIC by the deed of variation dated 16 November 1987 referred to above, was further assigned by SGIC to GESB on 24 December 1987. Although the assignment was expressed to be in absolute terms, it would appear that it was nothing more than by way of collateral security for the payment of the debt due by SGIC to GESB under the mortgage still subsisting over the Perth Technical College site. This view of the matter was borne out by a letter from Robinson Cox, the solicitors acting for SGIC in the transaction, to Mr B H Neville in which they said:

"It is also proposed that the assignment of the deposit should still take place, and that upon maturity of the deposit, GESB should apply the proceeds in reduction of the amount due under the mortgage. If the proceeds on maturity of the deposit are less than the face value of the deposit, then the result will simply be that under the terms of the mortgage, the amount owing under the mortgage will be reduced by the actual proceeds of the deposit rather than the face value of the deposit."

22.26 Repayment of the GESB mortgage debt

22.26.1 The mortgage debt assumed by SGIC in December 1987 was reduced by the payment of \$20 million on 29 January 1988 and was paid off altogether on 31 March 1988. The circumstances attending the payment of \$20 million by SGIC to GESB on 29 January 1988 are dealt with in chapter 16 of this report.

22.26.2 On 12 April 1988, after SGIC had paid off the mortgage to GESB, the Rothwells deposit assigned by SGIC to GESB on 24 December 1988 was re-assigned to SGIC. The deposit was redeemed by SGIC from Rothwells on 22 June 1988.

22.27 Investment considerations of the purchases by SGIC of the Perth Technical College site, the Bell Group properties and the BHP shares

22.27.1 Taking into account fees and other expenses, the total purchase price paid by SGIC for a 50% interest in the Perth Technical College site was \$60 million. This amount was made up as follows:

	\$Million
Initial payment for 50% of Midtown Property Trust	30.00
Less Rothwells deposit assigned by L R Connell to SGIC	(12.04)
Payment to L R Connell to relinquish call option	9.50
Payment to Midtown for "swap"	1.38
Payment to Bond Corporation to relinquish management rights	2.50
Stamp duty costs	2.81
Legal and valuation and other sundry expenses less recoupments	0.22
GESB debt taken over by SGIC and subsequently paid out in two instalments	25.59

	\$59.96

This outlay compares with a valuation of \$100 million for the property (\$50 million for a half share) made by Chesterton International in November 1987 on instructions from SGIC and the valuation made by Richard Ellis in June 1987 of \$145 million (\$72.5 million for a half share) although that valuation was based on a hypothetical development in respect of which approvals had not been given. Taken on its own, the investment represented approximately 7% of SGIC's portfolio as at 30 June 1987.

22.27.2 However, at about the time the Perth Technical College site was acquired, SGIC had proceeded to acquire the Bell Group properties at a total cost of approximately \$216 million (including acquisition costs) and 39,150,906 shares in Broken Hill Proprietary Company Limited at a total cost of \$288,135,705 (again including acquisition costs). These properties and shares, together with the Perth Technical College site, represented a total outlay of \$564 million over the space of two months in respect of an organisation whose total investment portfolio as at 30 June 1987 came to only \$871.4 million. In order to fund these purchases, a discount facility of some \$400 million from a consortium of banks led by the R & I Bank had to be arranged in early December 1987.

22.27.3 In his report on SGIC tendered in evidence to the Commission, Mr Wong considered the effect of the acquisition of the Perth Technical College site, the Bell Group properties and the BHP shares on SGIC's investment portfolio. He pointed out that SGIC's property exposure had increased from the level of 8% as at 30 June 1987 to approximately 37% at the end of December 1987. He also pointed out that approximately 29% of the SGIC's investments was now exposed to one particular sector — the Perth CBD property sector.

22.27.4 The BHP share purchase exacerbated the situation. Mr Wong pointed out with that purchase SGIC's share exposure increased from the level of 5% as at 30 June 1987 to approximately 35% of the portfolio at the end of December 1987. 30% of the total portfolio was now exposed to the one company, namely BHP.

22.27.5 Mr Wong concluded his opinion of the matter by making the following observations:

"The investments were not sufficiently diversified to ensure that risk was adequately minimised. A downturn in either the Perth CBD or BHP would have left approximately 59% of the SGIC's investments exposed to a loss.

30% of the SGIC's investments were exposed to just one company — BHP, when a more reasonable upper limit of exposure to any one company would have been 10% of the investments.

If the intention was to increase the share exposure for the investment portfolio, this would usually have been achieved by selecting a range of companies to invest in, after seeking specialist advice, rather than placing 30% of investments in the shares of just one company."

22.27.6 Mr Wong reinforced these opinions by certain observations given in the course of his evidence before the Commission. He said that there was too much concentration on just one area of the property sector, namely the Perth CBD. The total investment in property, being 37% was very high and to have it concentrated in a particular area was most undesirable. It would have been much better spread over a wider area of Western Australia or even over other capital cities because, as he pointed out, the property cycle tends to move in different places at different times.

22.27.7 He also commented specifically on the question of the BHP shares. He said that at 30 June 1987, SGIC's "shareholders' funds" were only \$60 million and that they rose very rapidly to \$184 million over the ensuing 12 months. Averaging the growth, he said that it would be reasonable to assume that the funds as at 31 December 1987 would be \$120 million. He then pointed out that SGIC had expended some two and a half times "shareholders' funds" on the acquisition of shares in one company and stressed the risk to the portfolio inherent in such action where there can be significant differences in share value for various reasons. He said that his concern with the investment strategy that had been adopted by SGIC was that it was common for the market price of a particular share to move 40% in a year and that if this had happened to BHP it would have wiped out the "shareholders' funds" of SGIC. He expressed the view that from that point of view, the investment in BHP was not a wise decision.

22.27.8 The Commission accepts the views of Mr Wong expressed in his report and in evidence before the Commission on these matters. We do so, notwithstanding that, fortuitously, the BHP shares became a profitable investment.

22.28 The purchase of the West Australian Trustees building

22.28.1 For some time, management of West Australian Trustees Limited had planned to sell its building situated at 135 St George's Terrace and relocate its operations in new premises elsewhere. The building was strategically located between the Royal Insurance Building and the Perth Technical College building, each of which

had a frontage to St. George's Terrace. SGIC became aware that the West Australian Trustees Building might be on the market and opened negotiations for its purchase.

22.28.2 These negotiations were ultimately successful and led to the conclusion of a contract for the sale of the building to SGIC at a price of \$14 million with the completion of the sale to take place on 30 June 1988.

22.29 The sale of Westralia Square

22.29.1 On the acquisition of various properties from the Bell Group, SGIC decided that it did not wish to hold or develop them but rather determined to make them available for sale with a view to obtaining the maximum return quickly. SGIC received a number of approaches from developers with one such approach, according to Mr Edwards, being within 24 hours of concluding the purchase. Although no agents were appointed and no formal tender process was entered into, SGIC let it be known that the properties were on the market and that offers would be considered. Approaches were made by a number of groups and in some cases SGIC sought out particular developers with a view to obtaining attractive offers for purchase of the properties involved. The Perth Technical College site was, with the concurrence of GESB, included amongst the properties which were available for sale.

22.29.2 Mr Lloyd, in collaboration with Mr Warren Tucker, a property consultant, prepared a detailed analysis of four of the proposals received. Among these was a proposal from Tipperary Developments Pty Ltd ("Tipperary Developments"), a company controlled by Mr Warren Anderson and Consolidated Press Holdings Limited ("Consolidated Press"), a company controlled by Mr Kerry Packer, to acquire the Perth Technical College site, Newspaper House, the Royal Insurance Building and West Australian Trustees Building for a total price of \$270 million, payable in three instalments and subject to various other conditions. The site, comprising the four properties referred to, was to become known as *Westralia Square*.

22.29.3 Mr Lloyd's analysis was considered at a meeting on 7 March 1988 at which were present the Premier, Mr Dowding, and Mr Parker, Mr Berinson, Mr Edwards, Mr Rees and Mr Lloyd. The proposal of Tipperary Developments and Consolidated Press was considered the most advantageous in financial terms and it was decided to proceed to negotiate a contract with that group. The Premier later instructed

Mr Edwards, who was in charge of the negotiations, that he was to stipulate for a deposit by Tipperary Developments and Consolidated Press of \$50 million into Rothwells. The reason for requiring such a deposit to be made and the circumstances surrounding it are discussed in chapter 16 of this report.

22.29.4 Negotiations for the sale of the Westralia Square site were concluded in Sydney. The contract was executed on 18 March 1988. SGIC and Perpetual Trustees as trustee of the SB Investment Trust were the vendors and Tipperary Developments and Consolidated Press were the purchasers. GESB was made a party. Material provisions of the contract were as follows:

- (a) The purchase price of \$270 million was payable in three instalments of \$90 million each on 30 June 1988, 1989 and 1990 respectively.
- (b) The outstanding balance of the purchase price was to be secured by first mortgage over Westralia Square in favour of SGIC and Perpetual Trustees.
- (c) The price was allocated between SGIC and Perpetual Trustees as to 72.2% and 27.8% respectively. These percentages reflected the respective interests of SGIC and GESB in the site on the basis of land area.
- (d) The purchasers had the right to elect to postpone the due date of the 2nd and 3rd instalments up to 30 June 1995.
- (e) If payment of any instalment were postponed, the postponed amount was to bear interest at the Australian Merchant Bankers bill rate for 90 day bills plus 1% capitalised on 90 day rests. Interest was payable when the instalment itself became payable.
- (f) If payment of the 2nd or 3rd instalment were deferred, acceptable security for payment had to be provided.

- (g) Settlement was to take place on 30 June 1988. Vacant possession of various parcels was to be given at various dates up to 30 September 1989.
- (h) The contract contained a rent guarantee given on the part of SGIC and GESB which was substantially to the effect that, subject to the purchasers constructing a building with first class office accommodation of not less than 32,000 square metres net lettable area on the site and paying within one year of the completion of the building, one full year's net rental income on 32,000 square metres of the building at \$400 per square metre in 30 June 1991 dollars escalated at 10% per annum thereafter, SGIC and GESB agreed that for 5 years after the completion of the building *they would guarantee to the purchasers the receipt of a net rental (excluding outgoings) in respect of 32,000 square metres of net lettable area in the first office building to be erected on the land at the rate of \$400 per square metre in 30 June 1991 dollars escalated at the rate of 10% per annum thereafter.* The rental guarantee did not include any undertaking by SGIC or GESB in respect of car park sites or retail office or shopping space. The guarantee was conditional on the building being complete by 30 June 1995. [our emphasis]

22.29.5 It appears that SGIC took no steps in early 1988 to ensure that Westralia Square was let out to a formal public tender or even widely advertised for sale. It may be that if such steps had been taken, a worthwhile cash offer, free of the complications that attended the Tipperary Developments/Consolidated Press offer, might have been forthcoming.

22.30 Agreement to underwrite property trust

22.30.1 At the time of executing the contract for the sale of Westralia Square, Consolidated Press had plans to float a public listed property trust containing properties from the CBD of various capital cities in Australia. It was contemplated that such a trust would have a large proportion of its property held in the Perth CBD and that a development to be carried out on the Westralia Square site would be its first project. It was contemplated that the trust would seek funds of \$1,000 million over a period of time and that Consolidated Press would be the fund manager.

22.30.2 The property trust proposal was discussed at the time of the negotiations in connection with the contract for the sale of Westralia Square and, in particular, at a meeting of representatives of the parties which was held in Sydney shortly before the contract was executed. As part of the deal involving Westralia Square, it was agreed in principle that SGIC and GESB would participate in the property trust proposal by negotiating in good faith with its manager to underwrite a raising of \$50 million by 1 October 1988 and a further \$50 million by March 1989. Assurances by SGIC and GESB on this matter were contained in a letter dated 18 March 1988 signed on their behalf and addressed to the Chairman of Consolidated Press. The letter also indicated that SGIC and GESB would give consideration to underwriting a further \$50,000,000 by March 1990. The aggregate investment of the instrumentalities was however, not intended to exceed 10% of the total number of units in the trust on issue.

22.30.3 We shall return to this matter later in this chapter.

22.31 The completion of the Westralia Square sale

22.31.1 The contract for the sale of Westralia Square was due to be completed on 30 June 1988. At the request of Tipperary Developments and Consolidated Press, it was terminated in mid-June and replaced by another dated 16 June 1988 in which the purchasers were Sharland Pty Ltd ("Sharland") and Skeat Pty Ltd ("Skeat"), companies associated with Mr Anderson and Mr Packer. The replacement contract was in substantially the same terms as that of 18 March 1988 except that Consolidated Press agreed to guarantee the performance of the purchasers thereunder.

22.31.2 The sale was completed on 30 June 1988 when \$90 million on account of the purchase price was paid, a transfer was executed in favour of Sharland and Skeat and a mortgage granted in favour of SGIC and Perpetual Trustees to secure the outstanding balance of the price, namely \$180 million and any other debt such as interest which might become due from time to time.

22.32 The sale to Yalardy Pty Ltd of various properties acquired from the Bell Group

22.32.1 The Parmelia Hilton International Hotel, MMI House, Commercial Union House and the strata titled office building were sold to Yalardy Pty Ltd under a

contract of sale and purchase dated 24 June 1988 for a total consideration of \$75 million. The properties were purchased for \$50 million. The gross profit was therefore \$25 million from which there would need to be deducted holding costs and expenses.

22.32.2 The sale to Yalardy Pty Ltd was completed on 22 December 1988. Of the properties acquired by SGIC from the Bell Group, the Forrest Centre was the only one retained.

22.33 Difficulties with the Central Park joint venture

22.33.1 Mr A J Lloyd succeeded Mr Brush as chairman of the Superannuation Board in March of 1987. Shortly after assuming office, he became aware that there were shortcomings in the joint venture arrangements that Mr Brush had negotiated with Midtown two years earlier. He sought an opinion on the Superannuation Board's position from the R & I Bank in or about May of 1987.

22.33.2 The Bank furnished a detailed report on the matter in June 1987. A number of criticisms of the joint venture of May 1985 were made. Included among them were the fact that the Superannuation Board was funding the development at a significant concession on normal market rates of interest and the fact that the contract documents lacked a number of controls for the protection of the Superannuation Board as the party which had undertaken to fund the entire project. Apart from the various considerations which the Bank had raised, Mr Lloyd was himself concerned at the size of the development and its capacity to create an imbalance in the Superannuation Board's portfolio.

22.33.3 Mr Lloyd took up the matter with Mr Beckwith at a private meeting but was unable to obtain any sympathy from him for the notion that the existing arrangements should be re-negotiated. Mr Beckwith took the view that the joint venture and financing arrangements were part of a total deal entered into at the time and that the arrangement should stand. Mr Lloyd approached Mr Connell with a similar objective in mind but was unable to make any progress with him either.

22.33.4 In the years that followed the establishment of the 1985 joint venture, the Superannuation Board had become increasingly aware that the Central Park site project

was far too large for it to handle on its own and that something had to be done to relieve the situation.

22.33.5 Mr Neville wrote a memorandum to the Board of GESB on 23 March 1988 in which he said that under the terms of the joint venture agreement, any development in respect of Central Park required the approval of all parties and that at that date GESB had agreed to proceed with preliminary works only. He anticipated that Bond Corporation would shortly be seeking approval to proceed. He recommended that the Board defer any further approvals "until the financing commitment is rationalised". He concluded his memorandum by saying:

"However, before a decision is made with regard to future works on the site we recommend that the Board seeks Queens Counsel opinion of its obligations and possible liabilities in the event that a decision is made not to proceed with the development beyond preliminary works."

This memorandum demonstrates that matters with Bond Corporation had reached a point where the Central Park project could not proceed under the present arrangements and that something had to be done to bring the relationship to an end.

22.33.6 Mr M C Kingsmill gave evidence on this matter and had this to say:

"The Board which I joined on 1 July, was left with a heritage of — one could only describe it as a dreadful mess, and the Board had to clear the title to the David Jones site, or the Central Park, now, site before it could do anything. At that stage, of course, negotiations, I understand took place with Mr Bond. In hindsight he may not have been able to carry out his obligations to develop the site because he may have had financial trouble, but the real crux of the matter was that the Board were painted into a corner with this. Other people had interests in the site and the Board found it necessary to clear the title to the site by all means. The Board at no time wished to be so heavily in property development, although on one occasion some advisers we had, risk assessment managers, suggested we were under-exposed to property."

22.34 Negotiations for the purchase by Esjay of the interest of the Midtown Property Trust in Central Park

22.34.1 It will be remembered that, following the exchange concerning the Perth Technical College site and Central Park (formerly the David Jones site), which took place in December 1987, the Midtown Property Trust (of which Baztan, a Bond associate, was the sole unit holder) became the holder of a 50% interest in Central Park. The SB Investment Trust (of which GESB was the sole unit holder) continued to hold the remaining 50% interest.

22.34.2 Negotiations with Bond Corporation then ensued with the object of GESB taking over the whole Central Park development for the time being, at least, until other joint venture partners could be obtained. It was left to Mr Edwards to conduct the negotiations on behalf of the Board. At this time, Bond Corporation appeared to be in need of money and was clearly in a mood to negotiate the sale of the Midtown interest in the development. In the first instance, the negotiations proceeded on the basis that GESB would buy out the interest of Baztan in the Midtown Property Trust or possibly even acquire an interest in Baztan itself; but a proposal along these lines was dropped in May 1988 in favour of one to acquire directly Midtown's 50% interest in the Central Park development itself. This would confirm 100% ownership in GESB.

22.34.3 At the time of these negotiations, GESB did not have in mind holding any interest in Central Park which it might acquire from the Bond group on a permanent basis. That would appear to be the position from the text of letters and other communications from the solicitors for the Board, Blake Dawson Waldron, to Mr Edwards where reference is made to a later purchaser of the land and the possibility of a further sale to such purchaser.

22.34.4 Mr Beckwith of Bond Corporation approached Mr Anderson with a view to interesting him in the purchase of the Bond groups' interest in the Central Park development in the early part of 1988, possibly in or about April of that year, as they "were not getting on too well with the GESB". In response, Mr Anderson pointed out that he held Westralia Square already and that he was not in a position to take on Central Park as well. Mr Beckwith indicated that with Central Park, Mr Anderson would be able to control the destiny of both developments and one would not then be competing against the other.

22.34.5 A meeting occurred between Mr Edwards and Mr Anderson on 27 April 1988 in which the purchase by Mr Anderson or a company associated with him of a half interest in Central Park was discussed. Mr Edwards wrote to Mr Anderson the following day confirming what he described as the understandings reached in their discussion. The copy of the letter which was produced in evidence is dated 28 May 1988. This is clearly a misprint and from looking at the text of the letter itself and the minutes of GESB of 3 May 1988 referred to below, it is reasonable to assume that the letter should have borne the date "28 April 1988". The text of the letter is as follows:

"I write with the authority of the Government Employees Superannuation Board to confirm understandings reached in our discussion on 27 April 1988.

The Government Employees Superannuation Board is prepared to give you or your designates, an exclusive option to purchase 50% of the David Jones site for \$50 million exercisable on or before 5 pm Western Standard Time, Wednesday, 11 May 1988.

The Government Employees Superannuation Board is also prepared, subject to completion of its purchase of the other 50% interest from Bond Corporation, to give you an exclusive option to purchase 100% of the David Jones site for \$100 million exercisable on or before 5 pm Western Standard Time, Wednesday, 11 May 1988.

You will appreciate our concern that time is of the essence in this matter and we undertake not to continue with negotiations with other interested parties during the abovementioned option period.

We would be prepared to consider an extension of this arrangement on the payment of an appropriate fee if by Wednesday, 11 May you are in a position to advise agreement with the parameters of sale set out above subject to completion of the necessary formalities."

The letter bore a footnote in Mr Edwards' handwriting as follows:

"N.B. As advised this offer relates to land only — outlays on the actual development to date would be additional."

It seems from this letter that Mr Edwards, at least, had in mind at the time the possibility of selling GESB's own half interest in the site and acquiring the interest held by the Bond group as a means of resolving what was then perceived as an unsatisfactory arrangement. GESB was also prepared to go further and give an option over the half interest that it was hoping to acquire from Bond so that it would be out of the development entirely. Nothing seems to have come of the offer.

22.34.6 The minutes of GESB for 3 May 1988 noted that the Board had:

"authorised Mr K Edwards to finalise negotiations for the Board to purchase Bond Corporation's share of the David Jones site and, in conjunction with the Chairman, to execute the necessary documentation."

The minutes of that date also contained a paragraph recording that the Board had noted: "... the letter of offer sent to Mr W Anderson of Tipperary Developments by Mr K Edwards on behalf of the Board".

22.34.7 In or about May 1988, Mr Edwards discussed the situation of the Central Park development with the Premier, Mr Dowding. At that time, the Government had concluded a number of dealings with Bond Corporation and some of these, at least, had become sensitive politically. Mr Edwards said in evidence Mr Dowding had on that occasion told him the Government did not want GESB to enter into a commercial transaction with the Bond group at that time and that the Board should seek out a third party to purchase the "Bond" interest.

22.34.8 Mr Dowding's version of the incident was somewhat milder. He admitted that he may have expressed the view that GESB should do what it considered to be commercially desirable but that if it were to enter into a further transaction with the Bond group, the Board could expect to come under close political scrutiny. He put it that he was delivering a warning and not a direction as Mr Edwards in his evidence seemed to suggest. Whatever may be the correct interpretation of what occurred on the occasion in question, GESB did not proceed with negotiations with the Bond group to buy the interest in the development for itself.

22.34.9 Although nothing came of the offer contained in Mr Edwards' letter to Mr Anderson, negotiations with Mr Anderson for the sale and purchase of an interest in the Central Park development continued. The minutes of a meeting of the Board of GESB held on 10 May 1988 noted: "... Mr Edwards reported that negotiations for the sale of the Board's share are continuing with Tipperary Developments and Bond Corporation". and those of 23 May 1988 noted a report from the Chairman in respect of the negotiations with Tipperary Developments and Bond Corporation.

22.34.10 Negotiations with Mr Anderson continued through May and June of 1988. After making the purchase, Mr Anderson was to be given 12 months within which to find the finance to proceed with further development. If he could, well and good; but if not, then they would have to look to alternative arrangements. Mr Anderson said that he did not have the funds to make the purchase but Mr Edwards indicated that the money could be made available with a loan from the R & I Bank.

22.34.11 In early to mid June 1988, Mr Edwards prepared a draft of a proposed letter to Mr Grill. Although it dealt primarily with the funding of Rothwells, the purchase of an interest in Central Park by Mr Anderson was also discussed. The letter in question was in Mr Edwards' handwriting, although it was never completed, engrossed and sent. The significance of the draft is discussed in chapter 18 of this report. It is nevertheless convenient to cite from the text:

"In my view, we are close to having locked in agreement on the value of Pickle but the psychology of Hong Kong and the Sailor is such that this can only be finalised in the context of another deal. Logically such a deal is one which creates the liquidity bridge till 4th July payment from them falls due.

Hong Kong has put forward two propositions - Emu and DJ's.

[The reference to Emu is irrelevant and has not been included.]

The discharge of financing obligations and purchase of the Sailor's interest in DJ's is commercially critical to the Board.

I believe it may be possible to get the Sydney developer to immediately acquire the Sailor's interest if this can be made available at say \$50-55m.

It is in my view feasible to arrange a deposit of say \$15m on such a contract of sale forthwith. In a pinch I would support provision of necessary cash through 3rd party back to back arrangements in short term. Such payment would enable the Sailor to bridge liquidity. The need for such a deal is well known in the market and has been actively pursued by the Board. At a price of \$42½m on the land it would also enable the Board to gain a valuation profit of \$12½m before 30 June which will help it show a positive return on investment for the year.

The new financing arrangements agreed between the Board and the Sydney push are commercial and remove an enormous long term problem.

In short, I recommend the following course of action -

Reach contractual agreement on value of Pickle with Hong Kong in the context of facilitating and consenting to sale of the Sailor's interest in DJ's and written commitment by us to purchase Emu development next year.

If this cannot be achieved then the Bank should close on 30th June (preferably in context of non payment of Media fee)."

A number of pseudonyms and abbreviations were used in the letter. "The Bank" referred to Rothwells, "Hong Kong" to Mr Beckwith, "the Sailor" to Mr Bond, "Pickle" to the Kwinana petrochemical project, "DJ's" to the David Jones site, "the Sydney Developer" and "the Sydney push" to Mr Anderson and "the Board" to GESB.

22.34.12 This document is significant in a number of respects. First, it indicates that in the perception of Mr Edwards, at least, the Bond group was a willing seller in respect of its interest in Central Park; it would be persuaded more readily to become involved in the Kwinana petrochemical transaction if it could be bought out of Central Park on satisfactory terms. Secondly, it indicates that GESB was very keen to bring the existing relationship with the Bond group to an end as a matter of urgency. The

discharge of "the existing financing obligations" in respect of Central Park was described as "commercially critical". Thirdly, it suggests that the transaction under consideration did itself have a Rothwells connection in that it was necessary to take the Bond group out of Central Park to assist it with liquidity for the purposes of the Kwinana petrochemical project. This matter has been dealt with in more detail in chapter 18 of this report.

22.34.13 Negotiations between GESB, Bond Corporation and Mr Anderson continued and agreement was reached on price. Mr Anderson then raised with Mr Edwards the question of what he called a take out. He sought an arrangement whereby, if things did not work out, he could transfer the property to GESB for an amount equal to what he paid for it and his costs, including holding costs. He made it clear that such an arrangement was an essential element of the bargain and that without it, there would be no deal. In effect, he sought a put option from GESB over the property to be acquired, although that term was not one with which he was familiar. In evidence, he was asked what he meant by a take out and his response was as follows:

"My concept of the take out was that in 12 months' time, if I hadn't arranged finance to complete the building, I did not want to be left with a half completed building and half the debt. I told him [Mr Edwards] very specifically that I would not go into the project unless the GESB took me out."

22.34.14 Mr Edwards said in evidence that he was against the notion of a take out for two reasons. First, because, he said, it would create a liability in the books of GESB without any tangible benefit and secondly, if it were politically embarrassing to make a purchase from the Bond group directly, the same political considerations would be involved in GESB being a party to a put option. He therefore refused to provide the "take out". Mr Anderson thereupon stormed out of his office and went to see the Premier. The Premier subsequently telephoned Mr Edwards, called him down to his office "... and told me that he'd agreed with Warren that it was okay, go ahead and give it to him". Mr Edwards was asked: "Did the Premier tell you why he agreed to Anderson's request for a put option?". He replied: "No. I just assumed Anderson bulldozed at him a bit".

22.34.15 Mr Anderson's version of events was that he spoke to Mr Edwards about the take out, as he called it, and said: "If you don't give me a take out, I'm not interested.

See you later". Mr Edwards is said to have replied: "Look, you've got to see Peter Dowding about that. I can't give you the authority to do that". Mr Anderson saw the Premier and explained that he would not buy the Bond interest in Central Park without a take out. The Premier said: "What does Kevin think?" referring to Mr Edwards. Mr Anderson said, "Well Kevin knows that I won't do it without it". The Premier replied: "All right", picked up the phone and summoned Mr Edwards to his office.

22.34.16 Mr Dowding had no memory of discussing any particular transaction with Mr Anderson at any time. He did not exclude the possibility that Mr Anderson might have discussed the put option with him but categorically denied that he had directed GESB to give Mr Anderson a put option. He admitted that he might have gone as far as to say to Mr Edwards to try and help Mr Anderson if he could but refuted any suggestion that what he had to say to Mr Edwards on the matter amounted to or was intended to amount to a "direction" in any sense.

22.34.17 There is a difference in emphasis in the evidence of Mr Edwards and the evidence of Mr Anderson relating to this incident. One speaks of a refusal to entertain the notion of a take out; the other of an inability to consider it. The importance of the incident however, is that it lends support to the view that the transaction was not a warehousing arrangement. This matter will be discussed further later in this chapter.

22.34.18 Although Mr Edwards was a Board member of GESB, he was nevertheless an officer in the Premier's own Department and in close touch with the Premier.

22.34.19 We find that no direction, as such, was given by the Premier but there is no reason to doubt, consistently with the evidence of Mr Anderson and Mr Edwards and their actions at the time, that the Premier acquiesced in the take out that Mr Anderson sought and, in effect, encouraged Mr Edwards to arrange it.

22.34.20 It should be made clear that, as at June 1988, no power existed for the Treasurer, as Minister responsible for GESB, to give the Board a legally binding direction with respect to its functions and powers. Provision for such a direction was not included in the applicable legislation until July 1989 with the enactment of the Acts Amendment (Accountability) Act 1989. Mr Dowding was Treasurer at the time.

22.34.21 A meeting of the Board was held on 28 June 1988. All members, except Mr Helm, were present. From the minutes, it would appear to have been a regular meeting in that a wide range of business was discussed. According to the minutes, the only item of business relating to Central Park was as follows:

"David Jones Site

Mr Edwards reported to the Board that negotiations were continuing for the re-arrangement of the Board's position with respect to the David Jones site."

22.34.22 The question of a put option does however appear to have been discussed at the meeting. Handwritten notes of the discussion were taken by Ms Elizabeth Paige, a member of the staff. In these notes the following appears:

"Tipperary want a protector. If we are unable to do that in the time-frame or if we determine that we should proceed they would want right for 60 days to elect to put their half of the land back to us *at what they had put in.*" [our emphasis]

There was no mention of any sum in addition to "what they had put in". The significance of this point will appear later. The "Tipperary" referred to was, of course, Mr Anderson's company, Tipperary Developments.

22.34.23 A meeting of the Board was held at 8.30 am on 30 June 1988. All members were present. The only business conducted at the meeting related to Central Park and the Minutes read as follows:

"David Jones Site

The Board resolved

- (a) That the Board consent to the proposed assignment by Midtown Properties Pty Ltd ("Midtown") of its interest in the David Jones site Development to ESJAY Shelf Co. (No. 209) Pty Ltd ("ESJAY") subject to variation of the Joint Venture Agreement dated 10th May 1985 in the manner outlined in a

letter dated 30th June 1988 from the Board to ESJAY, a copy of which is annexed hereto.

- (b) That the Chairman of the Board is hereby empowered and authorised to sign the aforesaid letter.

The Board expressed its thanks to Kevin Edwards, for his efforts in resolving this matter on behalf of the Board."

An outline of the letter referred to is given later in this chapter. In the minutes quoted, no reference was made to the put option.

22.34.24 In the minutes of GESB in the period 3 May 1988 to 30 June 1988, the only references to the purchase by Esjay of an interest in Central Park or negotiations with Esjay or Bond Corporation on that topic were the instances to which we have specifically referred earlier in this chapter. None of the minutes of meetings of the Board over the period in question makes any reference to Mr Anderson's take out or put option.

22.35 The acquisition by Esjay of an interest in Central Park

22.35.1 Esjay Shelf Co. (No. 209) Pty Ltd, as its name implies, was a shelf company. It was acquired by Mr Anderson and the Armstrong Jones group as the vehicle to be used for the purposes of acquiring a 50% interest in Central Park from the Midtown Property Trust. Interests associated with Mr Anderson and the Armstrong Jones group each held one share in the company.

22.35.2 A contract was entered into on 30 June 1988 between Midtown as trustee of the Midtown Property Trust and Esjay for the purchase by Esjay of a 50% interest in Central Park for \$45 million with the purchase to be completed immediately. In addition, there were a number of subsidiary agreements, the main ones being as follows:

- (a) a deed dated 30 June 1988, between Bond Corporation, Midtown, GESB and Esjay under which Esjay took the place of Midtown under the joint venture agreement of 10 May 1985 and assumed its rights and obligations under that document, Bond Corporation surrendered its

management rights on GESB procuring Esjay to pay \$1.5 million to Bond Corporation, Bond Corporation resigned as Joint Venture Manager under the agreement referred to and GESB and Esjay took over from Midtown all liability under outstanding contracts in respect of the Central Park development;

- (b) a deed dated 30 June 1988, between Esjay, GESB and Midtown under which Midtown surrendered its favourable financing rights under the joint venture agreement of May 1985 as against GESB in consideration of the payment by Esjay of \$11 million and the release by GESB of Midtown of its obligation to repay \$5,066,659.77 then owing to GESB in respect of the financing obligation;
- (c) a letter dated 30 June 1988 from GESB to Esjay expressed to record an agreement between them to amend the joint venture agreement of May 1985 by providing that Esjay would take the place of Midtown under it;
- (d) a deed dated 30 June 1988 whereby Mr Connell was released from the guarantee which he had given under the joint venture agreement; and
- (e) deeds dated 30 June 1988 providing for various options to Bond Corporation to lease office space on the highest floors in any building constructed on the site and to lease various numbers of car parks. The office space and car parks were to be provided on commercial terms.

22.35.3 The letter amending the joint venture agreement of May 1985 and referred to above contained a number of important provisions which could be summarised as follows:

- (a) The development was to be limited to the construction of a car park and plaza. There was to be no agreement in force relating to the office tower.
- (b) Esjay was to be substituted as a participant for Midtown.

- (c) Mr Connell and Bond Corporation were to cease to be guarantors and were to be replaced by Tipperary Developments.
- (d) Esjay was to assume Midtown's liability for its share of the project costs estimated at that time at \$7 million. The amount in question was in fact \$5,066,659.77.
- (e) In addition to funding its own share of the development, GESB was to provide finance to Esjay to contribute to its share of so much of the project costs as related to the construction of the car park and plaza, including the liability of Midtown assumed by Esjay in (d) above.
- (f) Beyond the car park and plaza level, each of GESB and Esjay was to accept responsibility for the financing of its share of future project costs.
- (g) Funds were to be provided to Esjay on the same terms as formerly provided to Midtown except that the interest rate was to be at bank bill rate plus 2%, an increase of 1¼%.
- (h) Esjay was to give a second mortgage over its interest in Central Park to secure the finance provided to it by GESB.
- (i) Esjay was to be appointed as Joint Venture Manager for a fee of \$5 million payable in annual instalments over a period of three years or so, commencing with an instalment of \$1.5 million on 15 July 1988.

22.35.4 GESB also took the occasion to acquire a direct interest in Central Park and the various contracts relating to the development. The 50% interest in the site and the benefit of the various contracts held as assets in the SB Investment Trust were distributed to GESB as sole unit holder. Title to a 50% interest in the site was transferred to GESB. Perpetual Trustees ceased to have any further interest in or involvement with the site.

22.35.5 The documents were executed at the offices of Bond Corporation on 30 June 1988. Completion of the purchase did not however proceed on that date because

Mr Anderson was not able to have his financing arrangements in place in time to enable that to occur. The transaction was finally settled on 8 July 1988.

22.35.6 In order to complete the purchase, arrangements were made with the R & I Bank for the establishment of a facility of \$45.5 million to Esjay. Of this amount, \$35.5 million was an advance to Esjay and the balance was to allow for the capitalisation of interest, costs, stamp duties and other expenses in connection with the transaction. The facility was by way of acceptance of commercial bills and was for a period expiring on 31 December 1989. The amount outstanding from time to time was to be secured by a first mortgage over Esjay's interest in the Central Park development supported by a personal guarantee from Mr Anderson.

22.35.7 Mr Michael Hunt acted as solicitor for GESB in the transaction and was present during the execution of the documents.

22.35.8 The cost to Esjay of the purchase from Midtown was as follows:

	\$M
Acquisition of interest in land	*45.0
Compensation to the vendor (Midtown) for relinquishing its financing rights	
(i) Payment in cash	*11.0
(ii) Assumption by Esjay of liability owing by Midtown to GESB for project costs incurred to 30 June 1988	5.1
Compensation to Bond Corporation for foregoing its project management rights	*1.5
Stamp duty on transaction	1.9

	64.5

* Required the outlay of cash by the purchaser to the vendor.

From this transaction, Midtown and Bond Corporation received a total of \$57.5 million in cash and a further \$5.1 million by reason of the assumption by GESB of Midtown's liability to GESB in respect of project costs, a liability from which Midtown was released on 30 June 1988. It should be stressed that the total benefit to Bond Corporation, through the Midtown Property Trust, for the relinquishment of the favourable financing rights under the Joint Venture Agreement of 10 May 1985 referred to earlier in this chapter, amounted to more than \$16 million.

22.36 The put option — its execution and subsequent events

22.36.1 The document known as the put option was prepared by Mr Hunt and brought along to the offices of Bond Corporation on 30 June 1988. He was instructed by Mr Edwards to bring along two copies for execution by the parties, GESB and Esjay, and not to keep a file copy for himself. Material terms of it were as follows:

- (a) GESB, by deed, granted a put option to Esjay to require GESB, upon notice, to purchase from Esjay an undivided half share of Central Park together with Esjay's individual interest in the joint venture on foot in respect of that development.
- (b) No provision was made for payment of any fees or other consideration to GESB in return for the option.
- (c) The purchase price was the aggregate of
 - \$57.5 million
 - \$5 million
 - interest on \$57.5 million from 30th June 1988 to the date fixed for settlement
 - establishment costs, financing costs, stamp duty etc.
- (d) The \$57.5 million was made up of the purchase price for the land at \$45 million, \$11 million as the cash component for relinquishing

Midtown's financing rights and the \$1.5 million payable to Bond Corporation for giving up its rights as Joint Venture Manager.

- (e) The option was conditional and exercisable only if, by practical completion of the below ground car park and surface level plaza then under construction:
 - (i) GESB had failed to obtain a reasonable financing arrangement for underwriting the cost of a proposed project consisting of a low rise podium building and a high rise office tower to be erected on the site including the disposal of the land which was acceptable to both GESB and Esjay (both acting reasonably); and
 - (ii) GESB had failed to vote under the joint venture agreement in respect of Central Park for the proposed project to go ahead.
- (f) The option was exercisable between the date of practical completion of the car park and surface level plaza and 60 days thereafter or 31 December 1989 (whichever should come first).
- (g) GESB had no call option to purchase.

22.36.2 The put option was expressed in its testimonium to be a deed and therefore consideration passing from GESB was not needed for its validity.

22.36.3 In evidence, GESB's solicitor, Mr Hunt, said that instructions for the preparation of the put option and the letter referred to above amending the terms of the May 1985 joint venture agreement were only given to him on 29 June 1988. He was out of the office at the time and they were relayed to a solicitor employed by the firm. Mr Hunt returned to the office at about 6.00 pm. He had a brief discussion on the telephone with Mr Edwards about the matter and was told that drafts of the documents were required first thing the following morning as the matter had to be settled on that day. In the telephone conversation, the question of the minutes of a meeting of GESB to approve the transaction was raised. Mr Edwards said that he did not want Mr Hunt to draft the minutes but that he would draft them himself and requested the drafts of the documents first thing the next morning so that he could attend to that matter. The

instructions were carried out and drafts of the documents delivered to Mr Edwards as requested. In the event, no mention of the put option was made in the minutes which suggests that Mr Edwards deliberately wanted it that way.

22.36.4 At the meeting at the offices of Bond Corporation on 30 June 1988, the Chairman, Mr W F Rolston, and Mr Edwards, represented GESB. As we have said, the Board's solicitor, Mr Hunt, was also present. Representing Esjay were Mr Anderson and his solicitor, Mr Bert Gianotti. Mr Hunt produced two copies of the put option. One or two small amendments were made and it was then executed by Mr Rolston and Mr Edwards on behalf of GESB. The seal of GESB had been brought along to the meeting and was applied to the document. It was not executed by Esjay on that occasion; nor was it dated. Mr Edwards regarded the matter as very confidential and instructed Mr Hunt accordingly.

22.36.5 GESB kept a seal register. Mr Rolston brought it with him to the meeting at the offices of Bond Corporation and recorded a description of each document signed as dictated to him by Mr Hunt. No reference to the use of the seal on the put option was ever recorded. The matter was raised with Mr Rolston in evidence and his response was that the sealing of the document was not recorded in the register because it was to be kept confidential until such time as Esjay indicated its intention to execute it.

22.36.6 At the meeting, Mr Hunt raised the question of whether the put option should be dated and stamped but was instructed that it should not be.

22.36.7 The confidential manner in which the put option was treated is borne out by correspondence between Mr Hunt and GESB at the conclusion of the matter when he wrote to the Chairman on 11 July 1988 reporting fully on what had occurred and giving a brief description of each of the documents which had been signed. No mention was made in this letter, however, of the put option. Mr Hunt wrote a further letter dated 11 July 1988 addressed to Mr Edwards in which he said:

"For your information I am enclosing a copy of my letter to the Chairman of the Board formally reporting on the transaction.

You will note that reference to one document signed on 30 June 1988 was deliberately omitted from my letter.

Thank you for your instructions in this matter."

In evidence, Mr Hunt said that the document to which he was referring was the put option. When asked the purpose of writing this letter, he replied that he wanted it recorded, at least from his point of view, that there was another document signed but that he knew that he could not send it to GESB. He therefore sent it to Mr Edwards.

22.36.8 The Board of GESB met on numerous occasions in the period 30 June to 30 November 1988. According to the minutes relating to that period, the Chairman reported at a meeting held on 12 July 1988 that the interest of Bond Corporation in the development had been transferred to Esjay and on a number of occasions, the question of the further development of the site was either reported or discussed. There was however, no reference on any occasion to the put option or to the arrangements that had been made with Mr Anderson in respect of it.

22.36.9 In evidence, Mr Edwards referred to an oral agreement that he had made on 30 June 1988 with Mr Anderson that the document would not be executed by Esjay and brought into existence. He said Mr Anderson had agreed on the basis that if subsequently he was unable to finance his share of the project, he would then advise GESB and bring it into existence. Relevant evidence on this matter was as follows:

Q: Just to clarify the position, the Board had executed the put option and had handed the document to Mr Anderson?

A: And agreed that it wouldn't be brought into existence.

Q: But Mr Anderson had the power to execute it and—?

A: But he did have an agreement not to.

Q: But if he needed to he could have?

A: But give us notice that he was doing so because then we would have a liability.

Shortly afterwards, he gave the following evidence:

Q: Well if he found a need on 1st July and gave you notice?

A: Well, if he had done that we would have — prior to finalisation of our accounts we would have had to record a liability. There was no doubt about that.

Q: But what sort of notice did he have to give you; that he intended to execute it?

A: Yes; write and advise us that he had brought the document into existence.

Q: So it was to notify you of his execution?

A: Yes.

Mr Edwards' version of the arrangement was corroborated by Mr Rolston.

22.36.10 The put option was taken by Mr Anderson and Mr Gianotti from the meeting and placed by Mr Gianotti in the safe at his office where it remained until in or about November 1988 when Mr Gianotti believed that it was executed; although in evidence he said that he had no recollection of the actual signing of the document on behalf of Esjay. The document remains undated except for the year which was typed in when it was prepared. It bears a notation that it was stamped on 30 November 1988. It would be reasonable to infer that it was executed by Esjay on or shortly before that date.

22.36.11 The Annual Report of GESB for the financial year ended 30 June 1988 is undated although there is attached a report of the Auditor General which bears date 1 November 1988. Reference is made in notes 14, 15 and 16 to the accounts to a number of contingent liabilities in accordance with normal practice. There is, however, no reference to the put option in the financial statements accompanying the report, either in the accounts or in the notes which followed them.

22.36.12 This matter was put to Mr Edwards in the course of his examination. The view he took was that as the put option had not been executed by all parties, there was no need to mention it in the annual accounts or in the notes thereto. The relevant passages of the transcript read:

Q: I now ask you to look at another document which is the GESB Annual Report for the year ended June 1988. I think the Board's year ended on 30 June 1988. The point about this document, I think, Mr Edwards is that it makes no reference to the existence of the put option?

A: That's right.

Q: That's for the reasons you have already given?

A: That's right. We didn't put it in as a liability because as far as Rolston and I were concerned — and we discussed it — it wasn't in existence. It hadn't been brought into existence. There was no liability and this document was completed and issued, I think — we had only 60 days — so it was around about August. So it wasn't an issue.

and later his evidence was as follows:

Q: Was there anything clandestine about the way the seal was applied to the put option?

A: No. I don't see it as clandestine. We were certainly trying to avoid — I have made no bones about bringing into existence a contingent liability for our accounts. We turned our mind to it.

Q: You have said repeatedly in your evidence that the put option didn't exist?

A: Yes.

Q: In fact the position is, is it not, that there was a contingent liability because the GESB had done all that it needed to do to bring the document into effect?

A: We — that's one view of it I suppose. That wasn't the view we turned our mind to. It wasn't the view we formed. Whether we are wrong or right is I guess open to — you know — determination but it was — I mean — it was certainly not the view we took of it and we turned our minds to it.

22.36.13 Mr Rolston gave similar evidence. He said that the signing of the put option by him and by Mr Edwards was not brought to the attention of GESB

subsequently. His reason was that the put option had been overtaken by a series of transactions which took place in the period December 1988 to February 1989 and which are referred to later in this report. He was pressed on the matter. His evidence was as follows:

Q: But, Mr Rolston, surely if you had signed a document of this kind, would you not bring it to the attention of the Board at the next meeting?

A: Well, yes. I think, looking back in hindsight, it was something we should have done, yes.

Q: Indeed, you would admit, would you not, that it could have been brought to the Board on several occasions in the course of its regular meetings before the buy-out arrangements were finally put in place in December 1988?

A: Yes.

Q: And that in fact this did not happen?

A: Yes.

22.37 The put option - Commission conclusions

22.37.1 The first question is whether the execution of the put option was itself improper. In considering that matter, we have put to one side for the moment the further question of whether Mr Rolston and Mr Edwards had proper authority from the Board to affix the seal.

22.37.2 The available evidence does not support the conclusion that there was in existence an arrangement that Mr Anderson would *warehouse*, for the benefit of GESB, the interest in Central Park to be acquired from the Bond group. The evidence supports the proposition that the arrangement with Mr Anderson at the beginning was for an outright sale of the interest to him or a company associated with him. It appears that, on the available evidence, it was not until the meetings with Mr Edwards and with the Premier to which we have referred that the notion of a take out or put option over the property was first considered and that notion was raised by Mr Anderson and not Mr Edwards.

22.37.3 The terms of the put option itself were not consistent with a mere *warehousing* arrangement. If such was all that was intended, the option to put the property to GESB would have been without qualification. As it was, the right to exercise the option was subject to complex conditions relating to the financing of the future high-rise development; conditions which may well not have been satisfied. Mr Edwards said that he made the terms of the put option very stringent so that it would have been difficult for Mr Anderson to have exercised it.

22.37.4 It is true that GESB was anxious for the transaction to proceed because it wanted the Bond group out of the development. At a relatively late stage in the negotiations it had to accept the put option and moreover, had to accept the prospect of paying a fee of \$5 million to Esjay in the event that finance could not be found and the development could not proceed. Those matters really indicate that Mr Anderson was in a much stronger negotiating position than GESB. They are not however, sufficiently indicative of a *warehousing* arrangement for any inference to be drawn to that effect.

22.37.5 On the evidence, we are not prepared to conclude that the put option was a sham or otherwise not a genuine transaction; nor are we prepared to find that, given the disastrous circumstances in which decisions of the former Superannuation Board had placed GESB, the transactions entered into in June 1988 in relation to Central Park were not intended in the best interests of GESB. On the evidence, we do not consider that it was improper for GESB to enter into the put option provided those concerned had proper authority from the Board to do so, or alternatively, provided their actions were ratified by the Board as soon as possible.

22.37.6 The put option transaction exposed GESB to the risk of having to acquire the entire site and thereafter, having to bear directly 100% of the cost and risk of the development without recourse to any other party. It may be that GESB could have on-sold an interest to some other suitable investor. It nevertheless took the considerable risk that it might not be able to do so, leaving itself to carry the burden alone. The disastrous financing arrangements of May 1985 relating to Central Park had placed GESB in an unenviable position. In one way or another GESB would have to shoulder the entire cost and risk of the development with its only recourse to Midtown, for what that might be worth. As at June 1988, no contract for the office tower on the development had been let although the moment of truth was rapidly approaching. To buy out the Bond group interest at that time and before proceeding with the construction

of a high-rise office tower does not seem to us to have been an unreasonable thing to do in the very difficult circumstances in which GESB was placed, circumstances for which the then members of the Board were not responsible. One may argue that the Bond group exacted too high a price. That may well be so but it would not be right for us in the circumstances to pass judgment on what must have been very difficult commercial negotiations when looked at from the stand point of GESB.

22.37.7 The next question is whether Mr Rolston and Mr Edwards, in executing the put option, were authorised to do so by the Board.

22.37.8 We have already referred to a minute of a meeting of GESB held on 3 May 1988 at which Mr Edwards was authorised to finalise negotiations for the Board to purchase the interest of Bond Corporation in Central Park. Plainly, this had nothing to do with the transaction relating to Mr Anderson and Esjay.

22.37.9 There is evidence that a put option of some sort was discussed at a meeting of the Board on 28 June 1988, although from the notes of Ms Paige quoted previously, it does not appear that any mention of an additional \$5 million payment was made. Indeed, the notes refer to the right to "put" the property to GESB "at what they had put in". The document being discussed on that occasion was materially different from the document which was finally executed by Mr Rolston and Mr Edwards. Also, it does not appear from either the minutes or the notes relating to that meeting that any authority was given to either Mr Rolston or Mr Edwards to enter into the put option on behalf of GESB.

22.37.10 A special meeting of GESB was held at 8.30 am on 30 June 1988 at which all members of the Board were present and at which the only item of business recorded in the minutes as having been discussed was the purchase by Esjay of an interest in Central Park. At that meeting, specific authority was given to Mr Edwards to sign a letter varying the terms of the 10 May 1985 joint venture agreement to substitute Esjay for Midtown but the minutes are silent on the question of the put option which was executed by Mr Rolston and by Mr Edwards later that same day.

22.37.11 A number of meetings of the Board were held between 3 May 1988 and 30 June 1988 but none of the minutes of the meetings referred to appears to record the

fact of any authority having been given to anyone to conclude arrangements or execute documents relating to the purchase by Esjay on 30 June 1988 or the put option.

22.37.12 Under paragraph 11 of schedule 3 of the *Government Employees Superannuation Act 1987*, the common seal of GESB was not to be used except as authorised by the Board. The Board dealt with this matter on 7 July 1987 when it passed a resolution to the effect that the seal was not to be used other than upon a resolution of the Board and under signature of at least two members. A further resolution was passed on 27 July 1987 on this topic which was as follows:

"Use of Common Seal

The Board noted that there were some circumstances where a departure from strict compliance with the procedures adopted for [the use of] of the Common Seal, in accordance with Minute No. 5, appeared to be warranted. It was therefore resolved to authorise the use of its seal under the following circumstances:

- (a) Where any delay in signing documents under seal could result in financial loss to the Fund (for example, share transactions);
- (b) Tenancy leases (both new and assignments);
- (c) Transfer of land re Government Employees Housing Authority loan repayments;
- (d) Discharge of mortgages for Parkland Villa units; and
- (e) To give effect to a specific decision of the Board.

The affixing of the seal would still require the signature of two members and ratification of the action to affix the seal to be sought at the next meeting of the Board."

22.37.13 In this case, authority for the use of the seal was not given in advance, nor was the use of the seal ratified subsequently. Its use did not fall within any of the categories specified in the resolution of 27 July 1987. Authority could have been given

for the use of the seal at the meeting of the Board held at 8.30 am on 30 June 1988. Specific authority was given for the signing of the letter concerning modifications to the existing joint venture and there would appear to have been no reason why a similar authority could not have been sought on that occasion to authorise the use of the seal on the put option. It follows that the use of the seal of GESB for this purpose on 30 June 1988 by Mr Rolston and Mr Edwards was an unauthorised use and that it was therefore improper. Mr Edwards must however take prime responsibility for what occurred. The transaction was negotiated by him and he attended to the procedural arrangements. He should have seen that what occurred was properly authorised by the Board.

22.37.14 The next question is whether Mr Rolston and Mr Edwards concealed the existence of the put option from the Board of GESB.

22.37.15 It is clear that at the meeting of the Board on 28 June 1988, the members were aware that a put option might be required to cover Mr Anderson's company for its outlays. There is no evidence, however, that they were aware of or approved an arrangement whereby an additional \$5 million might be required.

22.37.16 The omission of reference to the put option in GESB's seal register or in the minutes of meetings of GESB, either before or after its execution on 30 June 1988, and in particular, the minutes of the meeting held at 8.30 am on 30 June 1988, the fact that Mr Hunt was instructed not to keep a file copy, the fact that GESB's copy was retained by Mr Edwards and not sent to the Board for safe custody after execution and the terms of Mr Hunt's letter of 11 July 1988 to Mr Edwards all lead to the conclusion that the put option, at least on the terms eventually agreed upon, was not only shrouded in secrecy, but also intended to be kept by those involved from the other Board members and staff of GESB. This is also borne out by the evidence of Mr Rolston, the material extract of which has been quoted earlier in this chapter.

22.37.17 We find that GESB executed the put option as a deed on 30 June 1988. At that time, it agreed with Mr Anderson, acting for Esjay, that Esjay would not execute the document without prior notice in writing to GESB. The deed, in terms, did not require its execution by Esjay before GESB was bound by it. It could be suggested, however, that what occurred was that GESB executed and delivered the deed as an escrow. There has been some debate as to whether a deed can be delivered as an escrow

to a party intended to benefit under it — see *Norton on Deeds*, 2nd ed, pp 18-19 and *In re Carile* [1920] VLR 427 at pp 431-432 and compare *Halsburys Laws of England*, 4th ed, vol 12, para 1333. But even accepting that the document was delivered to Esjay as an escrow, it could not be withdrawn, recalled or repudiated - see *Alan Estates Ltd v W G Stores Ltd* [1982] Ch 515, at pp 523 and 527. Putting it at its lowest, a contingent liability had been created with potentially enormous significance for GESB and one requiring a least outline approval of the Board beforehand and formal ratification at the earliest opportunity. In the circumstances of the put option, neither of these things appeared to have occurred.

22.37.18 It is clear that the execution of the put option should have been communicated at the earliest possible opportunity to the Board of GESB and ratification sought of what had been done. We find that this did not occur and that Mr Rolston and Mr Edwards concealed the fact that they had caused the common seal of GESB to be affixed to the put option from the other members of the Board of GESB.

22.37.19 Mr Edwards denied that there was anything clandestine about the arrangement but the weight of the evidence is clearly to the contrary.

22.37.20 The next question is whether reference to liability which might arise under the put option should have been included by way of note to the published Annual Accounts of GESB for the year ended 30 June 1988 and whether Mr Rolston and Mr Edwards deliberately omitted reference to it.

22.37.21 It is clear from the evidence that both Mr Rolston and Mr Edwards took the view that a contingent liability of GESB under the put option would not arise for the purposes of disclosure in the Annual Accounts of GESB until the document was signed by both Esjay and GESB and GESB notified of that fact. Although the omission was deliberate, we have no reason to think that the view held by Mr Rolston and Mr Edwards was not honestly held. However, in our view, they should have known that a contingent liability would have arisen on the execution of the document by GESB. The attention of the auditor should have been drawn to the liability by way of a note in the accounts.

22.37.22 Section 58 of the *Financial Administration and Audit Act 1985* authorised the Treasurer to prepare instructions, known as *Treasurer's Instructions* in

relation to the practices and procedures to be observed in the establishment and keeping of accounts of those departments and statutory authorities subject to that Act. GESB was so subject. Paragraph (6) of Instruction No 1102 as in force as at 30 June 1988 provided as follows:

"(6) There shall be shown by way of note:

- (i) capital commitments being the aggregate amount, or estimated aggregate amount, and particulars of capital expenditure contracted for, so far as the amount has not been provided for; and
- (ii) contingent liabilities with a statement of the general nature of the liability and, so far as it is practicable, the maximum amount or estimated maximum amount for which the reporting entity could become liable."

22.38 Westralia Square - further difficulties

22.38.1 In the months following the sale of Westralia Square to Sharland and Skeat in June 1988, negotiations proceeded between Mr Anderson and the Armstrong Jones group in connection with the proposed property trust referred to earlier in this chapter. Representatives of the Armstrong Jones group looked at the Westralia Square contract and sought clarification of the provisions contained in it relating to the rent guarantee. There was some uncertainty in their minds about what the document meant and, in addition, efforts were being made by Mr Anderson, largely at the prompting of Armstrong Jones, to improve the position from his point of view. Certain views on the matter were reached by Mr Anderson's solicitors which were put to the solicitors acting for SGIC and GESB and, not unnaturally, differences of opinion arose.

22.38.2 In order to resolve the matter, the solicitors for the parties prepared a draft letter the object of which was to clarify and amend the Westralia Square contract in a number of respects. By Friday, 14 October 1988, Mr Anderson and his advisers were happy with the content of the draft letter which had been prepared to that stage but the representatives of Armstrong Jones were anxious to try for a bit more.

22.38.3 Over the following weekend, Mr Anderson flew to Derby to see the Premier, Mr Dowding, in relation to his deposit with Rothwells. It was decided that Mr Newby of Armstrong Jones would accompany him with a view to discussing the question of the rent guarantee. The rent guarantee was raised but dismissed peremptorily by the Premier. According to Mr Anderson, the Premier simply said he was not interested. This meeting took place on the night of Sunday 16 October 1988. Following the meeting, Mr Anderson telephoned Mr Gianotti who was then in his office in Perth and the signing of the letter to vary the June contract proceeded either that evening or in the early hours of the following morning. The letter itself was not a matter of great urgency. There were however a number of other matters in hand at the time between Mr Anderson and the Government which were urgent and important. This letter was signed along with the other documents in order to clear up all outstanding matters. From the solicitors' point of view, they were anxious to resolve the differences which had arisen over the rent guarantee and to place the Armstrong Jones group in a position to purchase half of Westralia Square. From that point of view, there was some urgency about the matter.

22.38.4 Although dated 15 October 1988, the letter was in fact signed on 16 or 17 October by Mallesons Stephen Jaques as solicitors for Sharland and Skeat. It was addressed to SGIC and GESB. It constituted a variation of the June 1988 agreement in relation to Westralia Square in that its terms and conditions were acknowledged and accepted by Mr Rees and Mr Rolston on behalf of SGIC and GESB respectively. Material terms of the variation were as follows:

- (a) The existing first mortgage pursuant to the Agreement for Sale and Purchase of 16 June 1988 and also the existing guarantee on the part of Consolidated Press in favour of SGIC and Perpetual Trustees were to be discharged on the provision of a several guarantee provided by Consolidated Press (25%), Tipperary Developments (25%) and the Armstrong Jones Growth Trust (50%).
- (b) If the time for payment of the balance of the purchase price was extended, then either Consolidated Press or the Armstrong Jones Growth Trust (but not both) was to assume joint and several liability with Tipperary Developments to the extent of its own interest in the joint

venture and that of Tipperary Developments under the several guarantee for the amount of the payment or payments so extended.

- (c) If Sharland and Skeat were to sell the land and if there were any surplus after the payment of the moneys secured by permitted securities, the available funds were to be applied in reduction of the debt to SGIC and GESB. To secure this obligation, Sharland and Skeat agreed, if requested to do so, to grant a mortgage to SGIC and GESB over the land ranking after all permitted securities. Permitted securities were referred to in the letter as those given in favour of a project financier.
- (d) The rental guarantee was to operate from the date of practical completion of the first building and extend for five years thereafter.
- (e) The letter contemplated the possibility of up to three buildings being erected on the site, two fronting Mounts Bay Road and a tower office block fronting St George's Terrace. If the first building or buildings to be erected fronted Mounts Bay Road, the area covered by the rental guarantee would abate by an amount equal to half of the net lettable area of office space therein leased. On the other hand, if the first building to be erected were the office tower fronting St George's Terrace, the area covered by the rent guarantee would abate by an amount equal to 40% of the net lettable area of office space therein leased. This assumed that the rate would not be less than the rate stipulated. If the rent were to be less, an adjustment would be made in the formula to accommodate that fact.
- (f) The rate stipulated continued to be \$400 per square metre with provision for indexation over time.
- (g) SGIC and GESB were to refrain from any activity in leasing and were to direct all enquiries to Sharland and Skeat who were to be entitled to act in relation to the leasing in their discretion to achieve the best commercial rentals.

- (h) The remaining conditions of the rent guarantee, as set out in the agreement of 16 June 1988, were to continue to apply, including the condition as to the payment by Sharland and Skeat of one year's rent before the rent guarantee was to become operative.

22.38.5 The 15 October 1988 letter brought about a serious weakening in the security held by SGIC and GESB. The existing first mortgage over the site and guarantee of Consolidated Press for all moneys outstanding and, in particular, for the unpaid price of \$180 million, were to be replaced by unsecured guarantees given by Tipperary Developments for 25% of the debt and no more, by Consolidated Press for 25% of the debt and no more and by Armstrong Jones Growth Trust for 50% of the debt and no more. The failure of any one of them would leave SGIC and GESB exposed to a serious risk that part of the outstanding debt would not be recovered. The letter did, however, go on to provide that if the payment of either instalment of \$90 million should be extended under the original contract either Consolidated Press or the Armstrong Jones Growth Trust (but not both) would assume joint and several liability with Tipperary Developments under its several guarantee.

22.38.6 The involvement of the Armstrong Jones Growth Trust in the arrangement recorded in the letter was expressed to be dependent on the finalisation of negotiations for a joint venture for development of Westralia Square. The status of the agreement contained in the letter in the event that such joint venture was not concluded is not clear. The letter concluded with the following paragraph:

"Please acknowledge and confirm by executing and returning a copy of this letter, that the above sets out the terms of the agreement reached between the parties and that the contract of sale will require amendments to put these agreements into effect."

22.38.7 An unsecured guarantee is itself not to be compared with a first mortgage security provided an adequate margin is available. Guarantees have always been a fertile ground for legal dispute and for litigation. Even if a guarantee is upheld, one cannot be assured that in due course, when the liability has to be met, the guarantor has the financial ability to meet it. In the intervening period the guarantor's fortunes may have suffered seriously and adversely. The continued prosperity of a guarantor cannot

be assured. To rely on a guarantee and nothing more was unwise and as a course of action, should not have been entertained.

22.38.8 Also, the obligations contemplated were bare guarantees and without the numerous covenants which would generally have been included in such documents for the protection of the creditors. The guarantors would have been entitled to refuse to accept such conditions in formal deeds of guarantee which might be proffered subsequently.

22.39 The Westralia Square December 1988 transaction

22.39.1 Mr Tucker was appointed a property consultant to SGIC in June 1988. The appointment involved the giving of general advice on property transactions and investments.

22.39.2 In August 1988, Mr Tucker met with Mr Rees and Mr Rolston at SGIC to discuss Central Park. Prior to that meeting, Mr Rolston had approached Mr Rees to see whether SGIC would be prepared to acquire an interest in the development. In evidence before the Commission, Mr Tucker said that Mr Rolston had expressed concern to him at Mr Anderson's position in relation to both Westralia Square and Central Park and his capacity to manipulate one development for the benefit of the other. He said that the reason for Mr Rolston's approach to SGIC was to "get Anderson out" of Central Park. Mr Tucker prepared a detailed analysis of the position and submitted a report to SGIC at the end of August. However, the matter did not proceed.

22.39.3 Following the work done on Central Park for SGIC, Mr Tucker was approached by Mr Rolston as Chairman of GESB to act as a property consultant to the Board and to join the Project Management Committee for the Central Park development on which there were representatives of both GESB and Esjay. Mr Rolston and Mr Tucker became GESB's representatives on that committee.

22.39.4 On 22 November 1988, Mr Tucker prepared a report in relation to the project in which he warned that there were no less than 16 new office developments proposed for the CBD of Perth and that if all were to proceed, a situation of over supply would undoubtedly occur during the 1990s. He urged the Board to consider the matter

and pointed out that the timing of other developments would have a significant bearing on the viability of the Central Park development. He said:

"If the projects outlined above are completed in accordance with the schedule, then there is little doubt 'Central Park' will be competing in a highly competitive market. It should be borne in mind however, that the development is a major landmark building and is capable of attracting major lessee interest over those of its competitors, including QV1 [another major city development proceeding or planned]. I am uncertain however, about its competitiveness against a major tower on Westralia Square and therefore to maintain its market edge, it is relatively important for 'Central Park' to be completed prior to Westralia Square."

He was also critical of Esjay's performance as Project Manager, expressing concern that day to day project matters were not being attended to properly.

22.39.5 After the letter of 15 October 1988, the parties continued to run into the same difficulties as had been experienced earlier as to the meaning of the rent guarantee. Correspondence was exchanged between solicitors but it became clear that the October letter had not overcome the differences between the parties.

22.39.6 Mr Tucker was not involved in preparing or negotiating the letter of 15 October 1988 but did become involved subsequently on behalf of both SGIC and GESB. He regarded the revised arrangements in relation to the rent guarantee as thoroughly unsatisfactory and unfair to his clients. He spent a considerable amount of time discussing the problem with SGIC's solicitor in the matter, Mr Hagar, and also with Mr Rees. As a result of those discussions, there emerged the idea that there should be a complete re-negotiation. The undertakings given by SGIC and GESB relating to the public property trust would be extinguished; SGIC and GESB would purchase a building on the Westralia Square development fronting Mounts Bay Road with a floor area of approximately 32,000 m²; the rental guarantee would be cancelled and Esjay would sell its interest in Central Park to either SGIC or GESB. Proposals along these lines were conveyed in a letter dated 23 November 1988 from Mr Tucker to both SGIC and GESB.

22.39.7 Following these discussions, Mr Rees authorised Mr Tucker to raise the matter at one of his regular meetings with Mr Gianotti, Mr Anderson's solicitor, which

he did. Shortly afterwards, Mr Anderson telephoned Mr Tucker and expressed interest in pursuing negotiations, although no figures were discussed on that occasion. That question was left to Mr Rees to take up with Mr Anderson.

22.39.8 The proposals were subsequently discussed by Mr Rees with Mr Anderson and general agreement reached along the lines suggested by Mr Tucker in his letter of 23 November 1988, although the question of price was yet to be determined.

22.39.9 Following his meeting with Mr Anderson, Mr Rees discussed the matter with Mr Tucker and requested him to prepare a memorandum setting out Mr Anderson's terms. Mr Anderson's asking price to sell part of the Westralia Square site and to erect a 32,700 m² office building on it was \$255 million on the basis that the purchasers fund the development on a draw-down basis. Mr Tucker prepared and distributed a memorandum dated 30 November 1988 on the matter to both SGIC and GESB.

22.39.10 Further negotiations ensued which ultimately resulted in agreement between the parties that SGIC and GESB would purchase from Sharland and Skeat a portion of the Westralia Square site being approximately a quarter of the total area with a frontage to Mounts Bay Road at a price of \$55 million and that Tipperary Developments would erect a building of 18 levels on the land purchased of equivalent quality to the R & I Bank Tower on St. George's Terrace for a fixed price of \$184 million. SGIC and GESB were to own the site and building to be acquired as tenants in common with SGIC having a 70% interest and GESB having a 30% interest. The building and the part of the Westralia Square site upon which it stands is referred to in this chapter as "Westralia Square Area 1".

22.39.11 Before completing the sale of Westralia Square Area 1, it was necessary for a Plan of Subdivision in respect of the land in question to be prepared and lodged at the Titles Office. This would take some months and the parties therefore arranged that an amount of \$55 million secured by second mortgage over the Westralia Square site would be advanced by SGIC and GESB to Sharland and Skeat on the basis that it would be interest free until 31 December 1989. This amount was to be advanced by an instalment of \$23.9 million on 30 December 1988 and a further instalment of \$31.1 million on 31 January 1989. The mortgage was to rank second over the whole Westralia Square site subject to the existing first mortgage in favour of SGIC and GESB

to secure the outstanding amount of \$180 million under the June 1988 contract between the parties. The effect of this arrangement was to put Sharland and Skeat, in money terms, in the same position as if completion of the sale of the property had taken place in or about December 1988 and thus, no interest was to be paid on the total advance of \$55 million over the estimated period of twelve months during which the loan would be outstanding. On registration of the Plan of Subdivision at the Titles Office, completion of the sale of Westralia Square Area 1 would take place and the outstanding loan would be set off against the purchase price of the same amount which would be payable.

22.39.12 It was also agreed that the contract of sale and purchase of June 1988 between SGIC and GESB as vendors and Sharland and Skeat as purchasers would be amended in certain respects. The provision for the postponement of the two outstanding instalments of \$90 million each remained largely unchanged and it was still possible for Sharland and Skeat by notice to postpone the instalments concerned for periods up to 30 June 1995.

22.39.13 On completion of the sale and purchase of Westralia Square Area 1, the existing mortgages over Westralia Square were to be discharged and replaced by a second mortgage over Westralia Square Area 2 to secure moneys due to SGIC and GESB on any account whatsoever and a letter of credit from a trading bank for \$55 million. The second mortgage was to rank after securities in favour of a financier to secure finance in respect of the project. If Westralia Square Area 2 were sold, SGIC and GESB were obliged to give a discharge of the second mortgage on receipt of excess funds received by Sharland and Skeat from the purchaser over and above the moneys required to discharge any security over the area taken in respect of project finance.

22.39.14 The existing rent guarantee arrangements were abandoned. Consolidated Press and Tipperary Developments gave a joint and several guarantee for the payment of the outstanding amount of \$180 million under the June 1988 contract and for the payment of the further advance of \$55 million referred to above. Consolidated Press was released from earlier guarantees given.

22.39.15 SGIC and GESB were each released from all obligation on their part in relation to the underwriting of the proposed property trust to be promoted by Consolidated Press and referred to earlier in this chapter.

22.39.16 Heads of agreement dealing with these matters were executed by the parties on 30 December 1988. These were followed by various documents to give effect to the above arrangements, including a Project Development Agreement dated 22 March 1989 between SGIC, GESB, Tipperary Developments and Mr Anderson in relation to the construction by Tipperary Developments for SGIC and GESB of the building above to which we have referred.

22.39.17 A Plan of Subdivision was, in due course, lodged at the Titles Office and the sale of Westralia Square Area 1 to SGIC and GESB completed on or about 29 December 1989.

22.39.18 Each of the instalments of \$90 million was, before its due date, postponed to 30 June 1995.

22.40 The Central Park December 1988 transaction

22.40.1 It was also a term of the heads of agreement to which we have referred in paragraph 22.39.16 in this chapter that Esjay would sell its 50% interest in Central Park to GESB at a price which would reimburse Esjay in respect of its outlays in the matter (but without any profit element) and that it would relinquish its joint venture and project management rights in respect of the development.

22.40.2 The price paid was \$83.2 million made up as follows:

	\$M
Acquisition of interest in land (amount originally paid by Esjay)	45.0
Repayment of Esjay's acquisition costs in June 1988	
Compensation to Midtown for relinquishment of its financing rights	11.0
Compensation to Bond Corporation for foregoing project management rights	1.5
Holding and incidental costs	

- stamp duty paid by Esjay	1.9
- legal fees, interest, bank fees and other costs	7.1
Assumption of liability for Esjay's joint venture loans from GESB	13.9
Stamp duty on agreement	2.8
	<hr/>
	83.2
	<hr/>

22.40.3 A contract providing for the sale of the interest to GESB was entered into on 6 January 1989. Under this agreement, GESB assumed all the obligations of Esjay in respect of the joint venture agreement dated 10 June 1985 and that agreement was discharged by mutual consent, GESB released Esjay from its obligation to repay the advances which had been made to it under the obligation on the part of GESB to continue to fund the development, GESB assumed all liability in respect of joint venture contracts entered into and the payment of joint venture creditors and Esjay surrendered its rights as joint venture manager. The contract was completed on or about 15 February 1989 and GESB thereafter became the sole owner of the Central Park development.

22.41 The December 1988 transaction — investment considerations

22.41.1 The repurchase of a 70% interest in Westralia Square Area 1 had the following effect upon the investment portfolio of SGIC. SGIC's share of the purchase price amounted to \$38.5 million for a 70% interest. That investment represented 3.6% of SGIC's investment funds as at 30 June 1988 adding to the 26% already invested in property as at that date. Combined with the existing deferred interest loan of \$100.921 million to Sharland and Skeat, 13% of the portfolio was in non-income earning investments.

22.41.2 SGIC's property exposure would be further increased as the property was developed. On completion, the property would represent 12% of SGIC's portfolio on the assumption that no further assets were bought or sold during the development period. This would take SGIC's total exposure to property to 38% of its portfolio in total.

22.41.3 A difficulty lay with the fact that SGIC was still heavily committed on its borrowing from a consortium of banks which took place in late 1987. The amount outstanding was \$250 million on 30 June 1988 and \$140 million on 30 June 1989. On the assumption that the indebtedness reduced uniformly over the year, the amount owed as at December 1988 was \$200 million. We accept the point made by Mr Wong in his report on SGIC that, assuming that the loan was intended to be repaid over the next two years and at least 15.2% interest was being charged (given that that represented the 90-day bank bill rate at December 1988), then approximately \$117 million would be required to meet the interest plus capital repayments each year from cashflow. This would absorb 100% of the expected cashflow leaving the development costs to be met from either further borrowings or asset sales.

22.41.4 In making that point, Mr Wong took claims and expenses as exceeding SGIC's net premiums by 25% each year with premium levels remaining constant over the years. He said that this reduced the cashflow otherwise obtained from the investment income. Investment earnings were assumed to be 15% per annum of investments excluding non-income earning investments. He assumed SGIO's net premiums to exceed claims and expenses by 35%, but with an annual growth of only 5% in the net premiums.

22.41.5 We accept Mr Wong's evidence on the point outlined in the paragraph 22.41.3 of this chapter.

22.41.6 The repurchase of a 30% interest in Westralia Square Area 1 and the purchase of a 50% interest in Central Park had the following effect upon the investment portfolio of GESB. The reinvestment by GESB of \$16.5 million for a 30% interest in Westralia Square represented 3% of GESB's investment funds and the investment by GESB of \$83.2 million for the remaining 50% interest in Central Park represented a further 15% of GESB's investment funds. Taking into account these two investments, 49% of GESB's investment portfolio was invested in property as at 30 June 1989. In addition to the high overall exposure of the GESB fund to property, higher risk development projects accounted for 61.5% of the total property exposure and 30% of the fund's investments as at 30 June 1989. An additional, 7% of the fund's investments was indirectly exposed to property through the mortgage provided by Sharland and Skeat. Between the two development projects, Central Park and Westralia Square Area

1, as well as the loan to Sharland and Skeat, at least 37% of GESB's total investments as at 30 June 1989 was in non-income earning assets.

22.41.7 Over the next two or three years, the exposure of GESB to Westralia Square Area 1 and Central Park would continue to grow as the developments proceeded. In that period such exposure has been estimated to grow to 61% of GESB's investment portfolio. To this must be added the exposure to other properties which, at 30 June 1989, was 19%, so that within two or three years, some 80% of the investment portfolio could be invested in property unless steps were taken in the meantime to realise certain assets.

22.41.8 In his report on GESB, Mr Wong said that on the assumptions to which we refer below, the combined development costs of Central Park and Westralia Square Area 1 would equal approximately 151% of the expected net cash flow of GESB in each year of the development periods. For this purpose, the percentage of net cash flow was taken as the average percentage over each of the development years weighted by the net cashflow. To meet the development costs, GESB would have to deplete its existing cash reserves, sell other assets or borrow. He said that as more and more of the income earning investments are directed to these two development projects, the GESB Fund's cashflow would reduce even further, compounding the problem. We accept Mr Wong's evidence on these matters.

22.41.9 In arriving at the figure of 151%, the following assumptions were made:

- (a) that as at 31 December 1988, the estimated development cost of Central Park still to be incurred was \$210 million;
- (b) that the estimated development periods of Westralia Square Area 1 and Central Park were two years and three years respectively;
- (c) that the cashflow would consist of investment income, assuming a 15% per year return on all investments excluding non-income earning investments such as development properties (The actual investment return over the five years

1984 to 1989, was 12.5% per annum including unrealised returns);

- (d) that the development costs would be incurred evenly throughout the development period;
- (e) that there would be inflation at a rate of 7% per annum; and
- (f) that contribution income would be assumed to be sufficient to meet the benefit payments and expenses each year (In practice, the contributions income was not sufficient and the difference was made up from the investment income).

22.41.10 According to the Annual Report of GESB for the year ended 30 June 1991, \$275.2 million had been spent on the Central Park development, GESB's interest in which was then valued at \$186.5 million. By the same date, \$72.4 million had been spent by GESB on the Westralia Square Area 1 development, its interest in which was then valued at \$44.3 million.

22.41.11 Both GESB and SGIC had increased their investment funds in property within the CBD at a time when they had been forewarned of a possible oversupply of rental space by 1992.

22.41.12 SGIC and GESB were persuaded to enter into this transaction by a number of considerations. Material among them were the difficulties which appeared to continue over the rent guarantee, and the desire of SGIC and GESB to be relieved of any obligation to contribute up to \$150 million to a public property trust with no real say in its investment decisions.

22.41.13 Relief from the rent guarantee should not have been a significant consideration. On a worst case scenario, the liability of SGIC and GESB on that account would only be of the order of \$22 million of which SGIC's share was 72.2% or approximately \$16 million and GESB's, 27.8% or approximately \$6 million.

22.41.14 The prospect of being relieved of the obligation under the proposed property trust may have been more significant, although the obligation itself was

probably not legally binding. At least Mr Edwards did not regard it so. Nevertheless, the instrumentalities would have been concerned to honour the spirit of the undertakings they had given and it is understandable that they would not want to court controversy about the matter.

22.41.15 Apart from those matters, GESB was concerned about the continuing conflict of interest on the part of Mr Anderson who had become involved in both development sites. Also, Mr Rolston was aware of the put option and the possibility that GESB might have to face up to buying out Esjay and proceeding alone with the Central Park development.

22.41.16 The arrangements made in December 1988 and relating to Westralia Square resulted in some improvement to the security position so far as SGIC and GESB were concerned. They remained under an obligation to vacate their first mortgage position over the balance of the property, Westralia Square Area 2, and were required to take a second mortgage ranking behind a mortgage securing project finance for the future development of that part of the site and interest on the amount involved. No limitations appear to have been included in the documents as to the amount of project finance at any one time. In those respects, the position was no different from that which arose out of the letter of 15 October 1988. There was one improvement however, and that was that before a first mortgage position was to be given up over Westralia Square Area 2, a bank guarantee for \$55 million was to be provided as additional security.

22.41.17 Given the rate of interest payable on deferral of the instalments of \$90 million each and the security provided, there was every likelihood that at some time prior to 1995 the security provided would be insufficient, particularly in the event of a downturn in the property values. In fact, this came to pass. In SGIC's 1991 accounts the value of the property mortgaged to secure SGIC's proportion of the \$180 million (\$129.6 million) was only \$86.64 million.

22.41.18 According to Mr Wong, whose evidence we accept, the rate of interest payable on deferral of the instalments was reasonable, at the time of the transaction (18 March 1988), but was insufficient by reason of the later provisions which provided for the downgrading of the security as of 30 December 1988.

22.42 Conclusion

22.42.1 The city property transactions have cost SGIC and GESB dearly. The SGIC became involved in the first place as a consequence of its support for Rothwells arranged by the Government through Mr Burke at the time of the rescue of that company. Thereafter, it engaged in a succession of hazardous transactions involving a disproportionate share of its investment portfolio.

22.42.2 SGIC had no need to rush into the November 1987 transactions in which it acquired properties from The Bell Group at a total cost of \$216 million and shares in BHP at a cost of \$288 million. The purchase of the properties from The Bell Group, made as they were with a massive borrowing of \$400 million from a consortium of banks, savoured of speculation.

22.42.3 The transactions to which we have referred throughout this chapter left SGIC with the Forrest Centre and a 70% interest in the Westralia Square building. SGIC was also owed 70% of \$180 million which was not payable until 1995. In the meantime, interest was accumulating on this debt but was not payable until the same date.

22.42.4 SGIC, and not the Government, was charged with the responsibility of investing its portfolio. We would have expected the property dealings to have been characterised by caution and the proper management of risk. Instead they had all the hallmarks of ill considered investments.

22.42.5 The Superannuation Board became involved in the central city properties at a much earlier stage. It ought not have done through an interposed trust what it could not do directly. The investments in 1985 were also hazardous. These projects were far too large, having regard to the Superannuation Board's portfolio and the need of the Board to ensure diversity and suitability of the investments made.

22.42.6 But the real concern arose from the disastrous financing arrangement made over the David Jones site with the Bond group in the initial transaction in 1985. This left the Superannuation Board in a most disadvantageous position.

22.42.7 Subsequent transactions in the city properties involving GESB as the successor to the Superannuation Board were motivated by a need to extricate it from the consequences of the original financing arrangement. In doing so, however, it became financially committed to an extent that should not have been contemplated.

22.42.8 **Mr Brush and the Superannuation Board.** The Commission has found that Mr Brush improperly agreed to an arrangement contained in the letter dated 10 May 1985 written by Mr Connell to Mr Brush whereby the joint venture agreement relating to the David Jones site entered into on that date was to be varied under certain circumstances so Bond Corporation and Mr Connell would not be called on to contribute to the project costs under the joint venture or to reduce the principal under the mortgage relating to it. The property was to be valued in such a way as to achieve that result.

22.42.9 The arrangement under which the Superannuation Board financed development costs associated with development on the David Jones site was an imprudent investment by the Superannuation Board. The major objections to it were that the security held was inadequate, the margin over the bank bill rate was too low, the term of the facility was too long and the development in contemplation was too large having regard to the size of the Superannuation Board's portfolio.

22.42.10 The decision to have the Superannuation Board provide the financing arrangement was taken by Mr Brush as full-time Chairman and the member of the Board directly concerned in the negotiations, and he must bear the prime responsibility for that decision, one which would cost the Superannuation Board and its successor, GESB, dearly in years to come.

22.42.11 The Commission has found that in causing the Superannuation Board to invest in units in the SB Investment Trust, associated with the purchase of an interest in the David Jones site, the members of the Board were guilty of a breach of trust. It follows that all subsequent advances were also in breach of trust.

22.42.12 Mr Brush was personally involved in what occurred and must bear the greatest responsibility for the consequences. In these circumstances, we consider that he acted improperly. The other members of the Board at the time were Mr Markey and Mrs Scott. While each participated in decisions made by the Board, neither was directly

concerned in the negotiations. In the circumstances, it would not be appropriate to make a finding of impropriety against either of them.

22.42.13 The Commission has found that the advance made by the Superannuation Board to the Midtown Property Trust to enable it to acquire a half interest in the Perth Technical College site was a hazardous investment and constituted a breach of trust by the Superannuation Board and those people who were its members at the time of the advance.

22.42.14 **Loan to Mr Brush.** In section 22.14 of this chapter, reference is made to records from L R Connell & Partners which purport to document a \$30,000 loan from that firm to Mr Brush on 29 October 1985. At the time, Mr Brush was Chairman of the Superannuation Board and was personally involved on behalf of the Board in negotiations with Bond Corporation and Mr Connell to acquire the Perth Technical College site and to agree on the terms of a joint venture for its development.

22.42.15 The circumstances surrounding the \$30,000 transaction attract suspicion. Mr Connell's instruction to Mr Lucas to look after Mr Brush, the grant of a "friendly rate" of interest, the fact that the term of the "loan", 12 months, was ignored and no interest was paid or sought and finally the discouragement offered to Mr Brush when nearly three years later he embarked on the charade of purporting to want to repay it with interest all lead to the conclusion that it was intended to be an outright gift.

22.42.16 However the transaction be characterised, whether as a gift or a loan, it was improper for Mr Connell and Mr Brush to embark on the arrangement when GESB and Midtown were involved together in negotiating the terms of a major property transaction, namely, the acquisition of the Perth Technical College site.

22.42.17 Neither Mr Connell nor Mr Brush seem to have recognised the importance of avoiding any appearance of a conflict of interest. Indeed, it could be suggested that Mr Brush made the same mistake a few months later when he accepted loans from Mr R P Martin, a matter which is discussed in section 6.11 of chapter 6.

22.42.18 We have found that Mr Brush acted improperly in relation to the payment of \$30,000 from L R Connell & Partners to Mr Brush on 29 October 1985.

22.42.19 **The Richard Ellis valuations.** In sections 22.19 and 22.23 of this chapter, reference is made to the valuations of the Perth Technical College and Central Park sites which we conclude, for reasons outlined in those sections, were nothing more than feasibility studies.

22.42.20 Richard Ellis claimed the valuations were not intended for use either for lending purposes or to assist a purchaser arrive at a purchase price but it appears that these limitations did not appear in the valuations themselves.

22.42.21 SGIC sought from Richard Ellis a waiver to the condition of their valuations that no responsibility would be accepted to any person other than L R Connell & Partners.

22.42.22 In our view, it was inadequate for Richard Ellis to justify the omission, at least from their letter of reply of 23 October 1987 (see paragraph 22.19.5 of this chapter).

22.42.23 **The Bell Group purchases.** In November 1987, SGIC agreed to buy several central city properties from the Bell Group for \$206 million (see section 22.24 of this chapter). Contracts for the purchase of the properties were signed on 13 November 1987 and each sale was for cash payable on completion of the purchase which, in each case, took place on 27 November 1987.

22.42.24 The consideration was paid with extraordinary haste. The contracts were prepared and executed and no less than \$100 million on account of the price was paid within three days of Mr Burke having first raised the matter in his conversation with Mr Parker. There would have been no real opportunity for any proper inquiry or investigation of the properties before the purchaser had parted with almost half the total consideration.

22.42.25 The purchases were completed on 27 November 1987 when \$106 million, the balance of the price, was paid and transfers of the properties in favour of SGIC executed. The payment of a 10% deposit on the properties on 13 November 1987 would have been reasonable and in accordance with normal conveyancing practice. The payment of almost half the price, and \$100 million at that,

before either completing the purchase or taking proper security for that amount was nothing short of extraordinary.

22.42.26 Nevertheless, the Commission has found nothing in the purchases by SGIC of the properties from the Bell Group to warrant an adverse finding against any person.

22.42.27 **The put option.** On the evidence, we were not prepared to conclude that the put option was a sham or otherwise not a genuine transaction; nor were we prepared to find that, given the disastrous circumstances in which decisions of the former Superannuation Board had placed GESB, the transactions entered into in June 1988 in relation to Central Park were not intended in the best interests of GESB.

22.42.28 On the evidence, we did not consider that it was improper for GESB to enter into the put option provided those concerned had proper authority from the Board to do so, or alternatively, provided their actions were ratified by the Board as soon as possible. However, that was not the case.

22.42.29 The Commission has found that authority for the use of the common seal of GESB on the put option executed by GESB on 30 June 1988 was not given in advance; nor was the use of the seal ratified. Its use did not fall within any of the categories specified in the resolution of 27 July 1987. Authority could have been given for the use of the seal at the meeting of the Board held at 8.30 am on 30 June 1988. Specific authority was given for the signing of the letter concerning modifications to the existing joint venture and there would appear to have been no reason why a similar authority could not have been sought on that occasion to authorise the use of the seal on the put option.

22.42.30 It follows that the use of the seal of GESB for this purpose on 30 June 1988 by Mr Rolston and Mr Edwards was unauthorised and that it was therefore improper. Mr Edwards must however take prime responsibility for what occurred. The transaction was negotiated by him and he attended to the procedural arrangements. He should have seen that what occurred was properly authorised by the Board.

22.42.31 The execution of the put option should have been communicated at the earliest possible opportunity to the Board of GESB and ratification sought of what had been done. The Commission has found that this did not occur.

22.42.32 The Commission has found that Mr Rolston and Mr Edwards took the view that a contingent liability of GESB under the put option would not arise for the purposes of disclosure in the annual accounts of GESB until the document was signed by Esjay and GESB and GESB notified of that fact. Although the omission was deliberate, the Commission has no reason to think that the view held by Mr Rolston and Mr Edwards was not honestly held. However, they should have known that a contingent liability would have arisen on the execution of the document by GESB. The attention of the auditor should have been drawn to the liability by way of a note in the accounts.

22.42.33 **Further matters.** Finally, reverting to the terms of reference, the Commission reports:

- (a) There are no matter addressed in this chapter which should be referred to an appropriate authority with a view to the institution of criminal proceedings; and
- (b) There are several matters addressed in this chapter render changes in the law or in administrative or decision-making procedures necessary or desirable in the public interest. These include the constitution, powers and practices of statutory authorities. They will be discussed in Part II of our report.

* * *

21.1 Conclusions

21.1.1 Before the stock market crash of October 1987, Rothwells enjoyed a popular reputation as a successful merchant bank. According to its published accounts, had enjoyed a rapid increase in growth during the preceding few years. The reality was somewhat different. In March 1987 Mr Connell had been advised in confidence by Mr Jonathon Pope, a chartered accountant, that Rothwells could continue only for so long as more people wanted to put money in than to take it out. Mr Pope gave that advice after reviewing loans made by Rothwells, other than those made to L R Connell & Partners and to Oakhill Pty Ltd, a company owned substantially by Mr Connell. Mr Pope found Rothwells' records to be in a deplorable state. There was a lack of loan documentation and security which cast doubt on the likelihood of many loans being repaid. Some of the other directors of Rothwells were aware of these matters but relied on Mr Connell having sufficient interest in Rothwells to ensure its future and sufficient personal wealth to achieve that end.

21.1.2 From March 1987 until the stock market crash of October 1987, Rothwells was able to continue in business because more people did want to put money in than take it out. The depositors were encouraged, no doubt, by the fact that Rothwells paid higher rates of interest than did other deposit taking institutions. Among those attracted by the high rates were several local government authorities and the Catholic Archdiocese of Perth. Despite the support which Rothwells received from its depositors, it was bedevilled by liquidity problems. These problems, although not known generally, were apparent to certain members of the financial community, in which it was rumoured that Rothwells had made substantial loans to Mr Connell and had substantial bad debts. Those rumours were, in fact, true.

21.1.3 When the stock market crashed, there was an immediate run on Rothwells which it was unable to meet from its own resources. Despite its apparently sound financial position, Rothwells had been unable to obtain any standby facilities for use in an emergency such as it then faced. As the run became increasingly serious, Mr Connell turned to the man he thought would be prepared to assist him — Mr Burke. As a result of their association over the previous four years, during which Mr Connell had acted as an adviser to the Government in a number of matters as well as providing exceedingly generous financial support to the Labor Party and Mr Burke and encouraging others to do likewise, Mr Burke had a predisposition to assist. He referred Mr Connell to Mr Tony Lloyd, who was then an Assistant Under Treasurer, Chairman

of GESB, a Commissioner of SGIC and a friend and ally of Mr Burke and person in whom Mr Burke had reposed the greatest trust and confidence.

21.1.4 In order to obtain a full appreciation of the Rothwells saga it is necessary to understand the relationship between Mr Burke, Mr Lloyd and Mr Kevin Edwards, another senior public servant. Mr Lloyd, who had been a close friend of Mr Burke's for many years, had been catapulted by Mr Burke from an unremarkable career in university and local government administration into the upper echelons of the public service. Shortly after Mr Burke became Premier in 1983 Mr Lloyd was appointed as Director of the Policy Secretariat in the Department of Premier and Cabinet. Mr Lloyd's advancement perhaps marked the commencement of the practice which was typical of the Burke administration, of appointing persons intended to be ministerial policy/political advisers as permanent public servants under the *Public Service Act*. The consequence of this practice in a number of instances was, as we have observed elsewhere in this report, the undermining of the relationship between the permanent head of a department and the Minister responsible for that department. We have observed a dramatic illustration of this phenomenon in chapter 7, the Northern Mining term of reference. Personal contact between the departmental head and the Minister, which characterised former administrations, was replaced by communication through the medium of a person in Mr Lloyd's position or the "adviser". The opportunity for the department head to draw on his experience in advising the Minister was thus diminished. The new practice was said to have arisen from a lack of trust in the impartiality of those in the senior echelons of the public service, because the Labor Party had been out of office for so long. This explanation may be considered a convenient excuse for what was in truth a practice designed to enable a strong-willed, entrepreneurial Government to pursue what it considered to be its mandate without serious hindrance.

21.1.5 Mr Lloyd's influence was extended by his later appointment as an Assistant Under Treasurer. The appointment was made on the insistence of Mr Burke but against the wishes of the Under Treasurer. The Under Treasurer had steadfastly refused to recommend Mr Lloyd to the position of Deputy Under Treasurer, which was Mr Burke's preferred role for him, on the ground of his inexperience.

21.1.6 When Mr Lloyd left the Department of Premier and Cabinet to take up other positions in the Burke administration, he was replaced as Director of the Policy Secretariat by Mr Edwards. Mr Edwards was a very close friend of Mr Lloyd and

described himself as a "close colleague" of Mr Burke. Mr Edwards also was appointed under the Public Service Act as a permanent or career public servant after observance of the formal procedures associated with such an appointment. He was one of 14 applicants for the position. However, he was persuaded by Mr Lloyd and, indirectly, by Mr Burke, to submit his application. Mr Lloyd was a member of the selection committee. Though he disclosed his interest, he should have disqualified himself.

21.1.7 Mr Edwards took up his appointment in October 1984 and was responsible thereafter for the co-ordination of Cabinet submissions. This involved decisions about which department should comment on proposals made to Cabinet, the co-ordination of those comments and the provision of advice in respect to Government policy and budgetary considerations generally. In addition, Mr Edwards was involved in a number of important committees in the public service and became, in 1987, a Commissioner and Deputy Chairman of SGIC. With Mr Lloyd, Mr Edwards also served on the highly influential Government Functional Review Committee.

21.1.8 We cannot over emphasise the extent of the power and influence wielded by Mr Edwards in discharging his many roles. He was described in some quarters of the public services as "the *de facto* premier". Mr Edwards said he could understand that many department public servants viewed him in that light.

21.1.9 It is also necessary to understand the attitude of Mr Burke to the role of statutory instrumentalities and, in particular, SGIC and GESB. We were told plainly by Mr Edwards and others, that SGIC and GESB were no more than arms of Government which existed to fulfil the Government's policy aims and objectives. Mr Burke said he regarded SGIC as a vehicle for investment by Government. These views appeared to be the natural outcome of a "whole of Government" approach to the practice of Government which Mr Burke brought to his administration. As we shall see, it was an approach adopted at serious cost to the State, not only in terms of money but also in terms of the integrity of the system of public administration.

21.1.10 The dangers implicit in freeing the supposedly independent authorities from the constraints of some of the accountability mechanisms to which Government is ordinarily exposed and subjecting them to the influence of a *de facto* premier were released when Mr Burke committed the Government to the rescue of Rothwells. The disaster steadily increased month after month as the magnitude of Rothwells' problems

emerged. More and more public money was channelled into Rothwells in order to sustain the myth that the rescue had worked.

21.1.11 Soon after Mr Burke retired and Mr Dowding became Premier, it became impossible to take comfort any longer in the absurd euphemism that "Rothwells was basically sound but subject to liquidity problems". Mr Dowding, Mr Parker and Mr Grill, assisted by Mr Edwards, then set about enhancing the value of the PICL project so that the Government could justify paying a sufficient price to Mr Connell for his interest, to enable him to solve the problems in Rothwells which were largely of his creation. In the 12 month period from the rescue of Rothwells until its demise, the actions taken by Mr Lloyd and Mr Edwards to "manage" its problems were carried out with the full knowledge and approval of, first, Mr Burke and then Mr Dowding and, latterly, of Mr Parker and Mr Grill. Mr Burke and Mr Parker not only kept from Cabinet the enormity of the problems and the extent to which public funds had been used in futile attempts to solve them but, on some occasions, actively misled their Cabinet colleagues. The full extent of their deviousness may never be known. We call to mind Mr David Parker's statement in evidence before this Commission that "government worldwide is built on the basis of concealment". This reveals a profound misconception of the proper role of Government. It is a misconception which, unfortunately, seems to have been commonplace amongst some of his Government colleagues, in particular, the Premier, Mr Dowding.

21.1.12 The Government's involvement in Rothwells commenced with Mr Connell's approach to Mr Burke following the stock market crash. Mr Burke referred Mr Connell to Mr Lloyd, then an Assistant Under Treasurer, Chairman of GESB and member of the board of SGIC, who was then telephoned by Mr Lucas a director of Rothwells. He asked whether GESB could make \$30 million available to it. Mr Lloyd said that was impossible but he arranged for GESB to make \$5 million available for Rothwells. This it did on 22 October 1987, not by way of a deposit but by purchasing from Rothwells commercial bills which had been endorsed by Paragon Resources NL, a company which was 60% owned by Oakhill. Although Mr Lloyd said he obtained some advice from WADC to the effect that Paragon was sound, we have found that the purchase was an improper use of GESB's funds. In an extremely uncertain financial climate, it was effected urgently, without proper advice, to assist an ailing merchant bank which was not well regarded by Mr Lloyd. Mr Lloyd committed GESB to the investment only because of the encouragement which he received from Mr Burke. We have found that both Mr Burke and Mr Lloyd acted improperly in this

regard. Why a person such as Mr Lloyd, a public servant, should have been appointed to apparently independent statutory authorities may easily enough be understood by Mr Burke's professed "whole of Government" approach. The appropriateness of such appointments may, however, be seriously questioned.

21.1.13 The balance of the funds sought by Rothwells from Government sources were provided by SGIC on 23 October 1987. SGIC accepted an offer from Mr Connell to purchase for \$30 million his interest in the Midtown Property Trust. The trust, in which Mr Connell and Mr Bond held equal interests, owned property in the central business district of Perth. The transaction was structured so that Mr Connell had the option of repurchasing his interest at a price which represented the selling price and interest at 16% per annum. SGIC had the option of requiring Bond Corporation to purchase the interest for \$40 million within 12 months. In substance, therefore, the transaction was a loan of \$30 million on the security of the interest in the properties and the put option to Bond Corporation.

21.1.14 SGIC entered into the agreement as a matter of urgency and did so for the purpose of assisting Rothwells. It was encouraged by the knowledge, conveyed to it by Mr Lloyd and Mr Edwards, that Mr Burke wanted it to do so. SGIC relied on so-called valuations of the properties. These had been prepared for Mr Connell and were, in reality, feasibility studies based on proposed developments for which no approvals had been given. It was a condition of the agreement between SGIC and Mr Connell that the valuers extend their liability to SGIC. They did so, but did not inform SGIC that they had provided the valuations to Mr Connell on the basis that they were not intended either for lending purposes or to assist a purchaser in arriving at a purchase price. The transaction was effected in haste and without an exhaustive examination of securities. No proper account was taken of the fact that \$12 million of the \$30 million represented Mr Connell's share of an existing liability of the Midtown Property Trust to GESB in respect of a mortgage on the properties. Further, it was overlooked by SGIC that it would be liable to stamp duty on the transaction.

21.1.15 We have found the Midtown transaction to be improper in the sense that it was not permitted by the legislation governing SGIC, being effected for the purpose of assisting Rothwells and not in the furtherance of SGIC's objectives. It seems, however, that SGIC was advised at the time by its solicitors that it could properly enter into the agreement with Mr Connell. We have gleaned this from Mr Edwards, SGIC itself having claimed legal professional privilege for all legal advice which it has

received, a position it maintained throughout the inquiry despite the obvious impediment it posed to complete disclosure of the truth. Another possible impediment was the fact that in 1989 SGIC "reconstructed" its filing system. As a result, its filing system ceased to exist in its original form. This exercise was, of course, inimical to the concept of accountability.

21.1.16 GESB and SGIC have sought to justify the transactions not only on the basis that their respective investments were inherently worthwhile, but also because these instrumentalities had a general power to act in the interests of the State as a whole and it was said to be in the interests of the State to ensure that a financial institution such as Rothwells did not fail. This view finds no justification in the governing legislation. It must be seen for what it was, an attempt, after the event, to put their actions in the best possible light.

21.1.17 We have not accepted Mr Burke's evidence that he insisted to Mr Lloyd that the interests of SGIC be paramount in this transaction. We have found that Mr Burke acted improperly by encouraging SGIC to make investments for the assistance of Rothwells.

21.1.18 In addition to the \$30 million raised by Mr Connell on the Midtown properties, he obtained \$10 million from Bond Corporation on the sale to it of Oakhill's interest in a Falcon jet aircraft. However, only about \$8 million of the \$40 million flowed into Rothwells. The balance was paid to Bond companies. Bond Corporation did, however, provide a \$10 million facility for Rothwells on 23 October 1987. \$12 million out of the balance was held in the Trust Account of Bond Corporation's solicitors against Mr Connell's liability under the mortgage to GESB. On 16 November 1987, pursuant to a Deed of Variation made in relation to the Midtown properties, the \$12 million was deposited in Rothwells to SGIC's account. This was done to assist Rothwells when SGIC knew it had liquidity problems. We have found that SGIC's Chairman, Mr Wyvern Rees, and its Managing Director, Mr Frank Michell, acted improperly in effecting this transaction and thereby putting SGIC's funds at risk.

21.1.19 In addition to money raised from GESB, SGIC and Bond Corporation, Mr Connell borrowed \$40 million from a company within the NZI group. The total was, however, insufficient to meet the demands of Rothwells' depositors for the repayment of their funds. On 22 October 1987, while Mr Connell was in Sydney, he enlisted further assistance from Mr Beckwith who had also been asked by Mr Burke to

do what he could. Mr Beckwith approached Wardleys, the merchant bank. On the evening of 22 October and on the following day, Wardleys commenced a preliminary review of Rothwells' balance sheet. It concluded that beyond lending \$7.5 million to Mr Connell on the security of land he owned in Perth, nothing could be done. An approach to National Australia Bank on 23 October 1987 also provided fruitless. NAB, which had exacerbated Rothwells' problems by refusing to honour its cheques, was not persuaded to reverse that decision.

21.1.20 While these events were unfolding in Perth and Sydney, Mr Bond was in Rome. He was telephoned there by Mr Beckwith who probably passed on Mr Burke's request for assistance. Mr Bond travelled immediately to Perth, as did a team from Wardleys led by its managing director, Mr James Yonge, with Mr Connell's longstanding friend and colleague, Mr Brian Yuill, the managing director of Spedley Securities Ltd. They arrived on 24 October. Mr Connell and Mr Aleco Vrisakis, a leading corporate solicitor who had worked closely with Mr Connell, had travelled to Perth the previous evening.

21.1.21 These people and Mr Beckwith met at Rothwells' offices on the afternoon of Saturday 24 October 1987. It soon became apparent that Mr Burke had already foreshadowed Government support by way of a guarantee equal in amount to contributions made by private investors in the form of share capital and that a guarantee of \$150 million would be sought.

21.1.22 Later Mr Lloyd, Mr David Parker and Mr John Horgan joined the meeting. Their attendance had been requested earlier by Mr Burke and they reported to him at his home that evening. They discussed the situation with Mr Burke and decided that Mr Lloyd should look closely at Rothwells' loan book. Mr Burke said that Opposition support would be a precondition of any Government involvement in Rothwells. Mr Lloyd said that the Government should not proceed in any event because of the lack of information about Rothwells. He returned with Mr Parker and Mr Horgan to Rothwells that night and told Mr Bond of the requirement that he review the loan book. It was agreed that he should do so on the following day because the rescue would not succeed unless it was in place before Monday morning.

21.1.23 On the morning of Sunday 25 October, Mr Burke told Mr Parker he thought the Government had little option but to assist Rothwells, subject to Mr Lloyd being satisfied with the loan book, Opposition support being obtained and sufficient

private capital being provided. Also that morning, Mr Lloyd attempted to review Rothwells' loan book. He found it to be in a "shambles" and difficult to understand. He told Mr Burke so.

21.1.24 Later in the day, Mr Yonge, Mr Beckwith and Mr Connell attended a meeting of those members of the Government's Budget subcommittee who were then available. They were Mr Burke, Mr Peter Dowding, Mr Parker and Mr Berinson. Mr Edwards and Mr Lloyd were also in attendance. The rescue package was explained to Mr Burke who had Mr Beckwith and Mr Yonge confirm his understanding that, before the Government was at risk under the proposed \$150 million guarantee, all the shareholders' funds, \$150 million of new capital and Mr Connell's \$70 million would all have to be lost.

21.1.25 Mr Yonge stressed that his assessment was not based on an analysis of Rothwells' financial position, there having been insufficient time to review the bad and doubtful debts. He thought these might amount to \$30 million. That figure was not accepted by Mr Lloyd. He thought that \$120 million should be allowed. It was urged on the Government that even so, it would not be at risk pursuant to the proposed guarantee.

21.1.26 Mr Burke decided to commit the Government to the rescue despite the fact that the Opposition did not give its support and despite Mr Lloyd's dissatisfaction with Rothwells' loan portfolio. At that time, the Government had been involved in the Teachers' Credit Society which had been the subject of a run shortly after its rescue. Mr Burke was well aware of this and ought to have appreciated that the run on Rothwells might not be halted and that public funds might be put at risk. While we have accepted that Mr Burke was concerned at the prospect of Rothwells' depositors, particularly local government authorities and the Catholic Archdiocese, looking to the Government for assistance if Rothwells failed, he was not motivated solely by that concern. He wanted also to assist Mr Connell and to preserve the standing of the Australian Labor Party in the eyes of the business community from which it had secured so much financial support and from which he had derived personal benefit. It could not be said that the well-established relationship between Mr Burke and Mr Connell and other businessmen who financially supported the Labor Government of Mr Burke, counted for nothing. In these circumstances, we have found Mr Burke's conduct to be improper. However, we are satisfied that Mr Parker and Mr Berinson, who acquiesced

in the decision, did so solely in the belief that it was in the State's interests to participate in the rescue of Rothwells.

21.1.27 It was one of Mr Burke's conditions for the Government's commitment to the rescue of Rothwells that a Government representative be nominated to its board. Mr Burke asked Mr Lloyd to serve in that capacity and he agreed reluctantly. Mr Lloyd was involved from the outset in assisting with the provision of liquidity for Rothwells. This was necessary because the run continued when Rothwells opened its doors on Tuesday 27 October 1987 and more than \$300 million was withdrawn within a few days. Mr Lloyd reported this development to Mr Burke and thereafter kept him fully informed about all relevant developments in Rothwells.

21.1.28 Mr Lloyd was involved in obtaining funds for Rothwells from SGIC which on 2 November 1987 deposited \$10 million in United Credit Union Ltd which in turn, deposited the funds in Rothwells. These arrangements were made following an approach by Mr Lloyd to the managing director of United Credit who told him that, although United Credit was willing to assist, it had insufficient liquidity of its own. Mr Lloyd then asked Mr Edwards to speak to Mr Rees and inquire of him whether SGIC would place funds with United Credit.

21.1.29 At the time, SGIC was proposing that SGIO should invest in United Credit with which it had a long term business relationship. Mr Edwards asked Mr Michell to place funds with United Credit and the latter arranged for a deposit of \$10 million. We have found that Mr Edwards acted improperly because he did not tell Mr Michell that the purpose of the deposit was to assist Rothwells. Mr Edwards told Mr Michell that the object was to assist United Credit and to generate goodwill towards SGIO. That was not true. Further, the deposit was an improper use of SGIC's funds because the transaction was effected for the purpose of assisting Rothwells. We have found that Mr Edwards arranged to fund Rothwells by this indirect means to avoid the risk of public scrutiny and to maintain the fiction that the rescue had worked.

21.1.30 On 6 November 1987, a company in the NZI group which had \$5 million on deposit with Rothwells, withdrew that sum and deposited it with Barrack Securities Ltd. At about that time Barrack Securities purchased Paragon bills to the value of \$5 million from Rothwells. The chairman of Barrack Securities was Mr Denis Horgan who had been overseas during the rescue of Rothwells. He had instructed the managing director of Barrack Securities not to participate in the rescue. On his return, Mr Horgan

was contacted by Mr Parker who asked him whether the Barrack group would deal with Rothwells' money market. Mr Horgan initially declined to do so, on the advice of his managing director. Mr Horgan changed his mind after further discussions with Mr Parker who said that Barrack Securities would be put in funds by a third party. We have not been able to determine how, or by whom, the arrangements were made whereby Barrack Securities received an unsolicited deposit of \$5 million from an NZI company with which it was able to purchase the Paragon bills. We have investigated assertions made by a former employee of Barrack Securities that the Barrack group in general, and Mr Horgan in particular, received favoured treatment subsequently from the Government. This included the provision of a \$30 million facility provided to one of Mr Horgan's companies in October 1988 to fund the purchase of properties in the Fremantle area for the proposed Notre Dame University. We have found no evidence of favoured treatment and are satisfied that the \$30 million facility, provided by the R & I Bank, was not a *quid pro quo* for Barrack Securities' assistance in providing liquidity to Rothwells in the previous year.

21.1.31 In mid November 1987, SGIC purchased certain properties in the central business district of Perth and 2.5% of the shares in BHP Ltd from Bell Group companies associated with Mr Holmes a Court. His business interests had suffered as a result of the stock market crash and he wanted to liquidate assets in order to satisfy his bankers. Following a discussion between Mr Holmes a Court and Mr Parker, there were negotiations between Mr Edwards and a Bell Group representative in relation to the properties. There were also negotiations in respect of the BHP shares between Mr Holmes a Court, and his staff and advisers and solicitors retained by WADC. Initially, Mr Burke and Mr Parker contemplated the Government purchasing 20% of BHP on the basis that Mr Holmes a Court would use part of the proceeds to buy more shares so that Western Australian interests would then become the major shareholders in BHP and control it. It soon became apparent that this extravagant ambition could not be achieved.

21.1.32 On 12 November 1987 there was a meeting of Cabinet Ministers at which it was agreed that SGIC should be permitted to purchase the properties for \$206 million. SGIC had been advised previously that it should increase its property holdings and \$206 million was regarded as an appropriate price to pay. It was \$10 million less than Mr Holmes a Court wanted, but he agreed to accept \$206 million in the course of a telephone discussion with Mr Edwards later that night.

21.1.33 There was discussion at the meeting of Cabinet Ministers about the possible purchase of 10% of BHP. Mr Berinson and others spoke against the proposal because of the risk which would be incurred having regard to the substantial cost of acquisition. By this stage, it had become apparent that WADC could not acquire the shares, possibly because of its borrowing limitations. It was therefore proposed that the shares be purchased by SGIC.

21.1.34 On the following day, Friday 13 November 1987, there was a special meeting of SGIC at which the acquisition of 5% of BHP was discussed. SGIC was not opposed in principle to the acquisition of 5% of BHP but was concerned about the size and scale of the proposed investment and about the substantial borrowing which would be required. It was resolved that SGIC would require a specific direction from the Minister before proceeding. It is not clear how SGIC came to consider the acquisition of 5% of BHP when, on the previous evening, the meeting of Cabinet Ministers had resolved that SGIC should purchase 10%. The change seems to have come about because of advice received from Mr Burke that Mr Holmes a Court could not sell more than 5% of BHP without the company's consent which was unlikely to be given.

21.1.35 Following the meeting of Cabinet Ministers, Mr Berinson became increasingly concerned about SGIC's capacity to service the borrowings required to fund the proposed acquisition. He expressed his concern to Mr Burke late on the evening of Saturday 14 November. At Mr Burke's suggestion, Mr Berinson then telephoned Mr Parker and repeated his concerns to him. As a result of those discussions, the decision was taken to reduce the purchase to 2.5% of the shares in BHP with an option over a further 2.5%. The matter was considered again at a Cabinet meeting on Monday 16 November 1987. Mr Burke informed Cabinet that he had told the vendors of the shares that they could anticipate a purchase of 2.5%. A Cabinet submission was prepared on that basis. There was no mention in the Cabinet submission, nor did Mr Burke tell Cabinet, that partial settlement of the purchase was to take place that day and that \$50 million out of the proceeds was to be deposited in Rothwells.

21.1.36 At the time, Rothwells had been diagnosed by Mr David Hurley, one of its relatively new directors, as suffering from a fundamental problem. On 13 November 1987, Mr Hurley produced a memorandum which was submitted to all directors of Rothwells in which he said that approximately two-thirds of Rothwells' loans, aggregating over half a billion dollars, should be regarded as medium term equity investments in related and unrelated companies which were unable or unwilling to repay

the loans or to pay the interest due thereon. Mr Hurley said that, with no prospect of obtaining facilities Rothwells could be expected to cease functioning early in 1988 unless it was able to generate working capital from the repayment of major loans and/or the realisation of investments. In addition to the problems identified by Mr Hurley, Rothwells' treasurer came to the view, on Saturday 14 November 1987, that Rothwells would exceed its overdraft limit by \$5-10 million on the following Monday.

21.1.37 During the weekend of 14 to 15 November 1987, there were discussions between Mr Burke and Mr Holmes a Court in which it was agreed that SGIC would purchase 2.5% of BHP and one of Mr Holmes a Court's companies would deposit \$50 million in Rothwells. Mr Holmes a Court had been requested previously to deposit funds in Rothwells but had resisted. We have accepted Mr Edwards' evidence that the \$50 million deposit was made a condition of the settlement which was to take place the following day. In other words, settlement would not proceed until the funds were deposited in Rothwells.

21.1.38 Although we are not prepared to reject the view that Mr Burke wanted to pursue the acquisition of 2.5% of BHP for commercial and policy reasons, his objectives embraced the need to obtain funds for Rothwells. He acted improperly by failing to disclose to Cabinet on 16 November 1987 that the Rothwells' deposit was an element of the proposed transaction. He also acted improperly by allowing Cabinet to proceed on the basis that the share purchase was an SGIC initiative which Cabinet was being asked to approve. The proposed acquisition was not an SGIC initiative. The reality was, as he knew, that the share acquisition and the deposit were both initiatives that he was determined to pursue. The acquisition of shares for the purpose of obtaining funds for Rothwells was foreign to SGIC's objectives, as was the purpose of exercising influence over the management or control of BHP in the interests of the State as a whole.

21.1.39 Mr Burke's misrepresentation of the position to Cabinet was concealed behind a smokescreen created by an exchange of correspondence between him and Mr Rees in which Mr Rees purported to seek the approval of Government to SGIC's proposed purchase of the shares and in which Mr Burke purported to inform Mr Rees that Cabinet had approved the proposal. The correspondence was brought into existence by Mr Edwards after the event. This is not conduct to be expected of a senior public servant. Unfortunately, it is conduct which may be induced from a partisan adviser who wrongly considers the end justifies the means. Such appears to have been the case here.

21.1.40 Unbeknown to the Government at the time of the rescue, the NCSC had been investigating Rothwells and suspected Mr Connell of a number of breaches of the Companies and Securities Codes. Mr Burke was told of these matters on Monday 26 October 1987, following a telephone call made to his office by Mr Schoer, the chief executive of the NCSC. There followed, in late October and November 1987, a series of meetings between representatives of the NCSC and Mr Vrisakis. Mr Vrisakis was acting for Rothwells, and to a certain extent, for the Government. In the course of these negotiations, Mr Vrisakis produced to the NCSC a business plan for Rothwells. The plan provided that Rothwells be restructured and that it review its receivables and report to the NCSC by 28 February 1988. The NCSC was persuaded by Mr Vrisakis not to pursue its own investigation of Rothwells on the basis that the Government was satisfied about Rothwells' position and had installed Mr Lloyd as a director. The NCSC was also persuaded to accept Mr William Burgess as the chairman of Rothwells in place of Mr Connell. It did so at the express request of Mr Burke. Mr Burgess, who was in poor health, was a longstanding employee of Mr Connell who was accustomed to acting in accordance with his direction. This was not known to the NCSC. On 16 December 1987 the NCSC notified Rothwells that it would not take any action in respect of events prior to 27 November 1987 and would not continue its current investigations.

21.1.41 Although the NCSC appreciated that Mr Vrisakis was acting for Rothwells, it regarded him as an honest broker who was safeguarding the NCSC's interests as well as those of his client. Mr Vrisakis was aware of the NCSC's perception of him but did not enlighten the NCSC to the fact that his clients' primary objective was to stifle the NCSC's investigation. Neither did Mr Vrisakis inform the NCSC about Rothwells' continuing liquidity problems. He was aware of those problems when he prepared the business plan, and yet it gave the impression that the rescue of Rothwells had succeeded.

21.1.42 We have found that Mr Vrisakis acted improperly by conducting himself as he did.

21.1.43 In late November 1987 Mr Hurley investigated Rothwells' position further. He came to the conclusion that \$320 million had been loaned by Rothwells to several interrelated companies which were connected in some way to Mr Connell. Mr Hurley knew that the stock market crash had harmed many of those companies and he knew it would be difficult to extract money from Mr Connell. He regarded it as impossible to achieve the objective to which he had referred in his memorandum of

13 November 1987, namely, the onslaught on certain of the major loans in order to provide liquidity to Rothwells.

21.1.44 Mr Hurley therefore decided to resign as a director of Rothwells. He informed Mr Lloyd of his decision. Mr Lloyd arranged a meeting between Mr Burke, Mr Hurley and himself at Parliament House. We are satisfied that at the meeting, Mr Hurley told Mr Burke the reasons for his decision. Mr Burke persuaded Mr Hurley to remain as a director giving him an assurance of future employment in a Government instrumentality.

21.1.45 Between late December 1987 and early January 1988, Rothwells' loan portfolio was investigated by Mr M Hurst and Mr M Roberts, two officers seconded from the R & I Bank at the request of Mr Lloyd and Mr Burke. The officers produced a report early in January in which they pointed out that 81% of the total outstanding loans amounting to about \$720 million had been advanced to 29 corporate borrowers and that, to all intents and purposes, the loans were unsecured. The report was considered on 6 or 7 January 1988 by a policy committee of Rothwells which had been established pursuant to the business plan. The committee was to comprise Mr Lloyd as chairman, Mr Hurley and Mr Vrisakis. At its first meeting, however, Mr Connell and Mr Hilton were also present. They were very critical of the report. The consensus of the meeting was that the Hurst-Roberts report was unhelpful in that, although it identified shortfalls in security, it did not address the recoverability of the loans. However, the report did nothing to cast doubt on Mr Hurley's opinion about the difficulty of recovering funds from Connell related companies. Mr Connell ordered that all the copies of the report be collected and destroyed.

21.1.46 In addition to the work carried out by Mr Hurst and Mr Roberts, two employees of Rothwells, Mr R Hare and Mr J Selwood, carried out a review of loans made to the Pier Street companies. They reported to Mr Hilton in a memorandum dated 22 December 1987 in which they said that the Pier Street group could not service its current level of debt to Rothwells which amounted to \$264 million, 70% of which had been advanced to four companies and their subsidiaries. The authors concluded that the debt to Rothwells exceeded the assessed net realisable assets by \$137 million.

21.1.47 That report was not disclosed to Mr Lloyd. Instead, he was given a revised version. It said only that a review of the Pier Street group indicated a significant overall deficiency which could not be determined without further and more

comprehensive examination. The report was re-written on the instructions of Mr Connell and Mr Hilton who "didn't want to panic Lloyd". We have found that it was improper for Mr Hilton and Mr Connell to conceal from Mr Lloyd the existence of the first report. Their conduct was indicative of a desire to conceal from Mr Lloyd, and hence from the Government, the magnitude of Rothwells' problem. The report could hardly have inspired confidence in Rothwells' future.

21.1.48 Between the stock market crash and the end of December 1987, about \$640 million was injected into Rothwells. This was \$200 million more than was contemplated at the time of the rescue. Early in January 1988, Mr Lloyd came to the conclusion that Rothwells needed a further \$100 million in order to meet its requirements for the next two months. However, Mr Lloyd asserted that he had no indication that the problem might be more fundamental than mere liquidity. We are not satisfied that Mr Lloyd honestly believed that to have been the case. Although we have accepted as genuine Mr Lloyd's belief that \$200 million could be written off without affecting Rothwells' viability, it was impossible to ignore the fact that the vast majority of loans were not performing and had not been recovered to any significant extent some three months after the rescue. Mr Hurley's assessment of the situation, together with the Hurst-Roberts report and the revised Hare-Selwood report, all strengthened the doubt about the recovery of outstanding loans.

21.1.49 We have also found that Mr Lloyd failed to discharge his duties as a managing director, although he was largely successful in his attempts to obtain funds for Rothwells, particularly from Government sources. His task was to keep Rothwells operating until something could be done to put it on a sound footing. He made no or insufficient effort to limit or control the outflow of funds, particularly to L R Connell & Partners and to Oakhill. He pursued a policy of "keeping Connell whole" whereby Rothwells made sufficient funds available to Mr Connell to ensure that he did not default on certain of his personal obligations. Mr Lloyd left the implementation of policy to Mr Hilton and Mr Burgess, who owed their primary allegiance to Mr Connell.

21.1.50 Rothwells obtained further support from SGIC in December 1987 and January 1988. The support was obtained by the sale to SGIC of commercial bills endorsed by Rothwells. SGIC's holding of commercial bills rose to \$42 million by 31 January 1988. SGIC borrowed \$25 million from Treasury in order to make these purchases. Most of these investments were made by Mr Rees who accepted that SGIC

would not normally have dealt with a financial institution which was suffering from liquidity problems. Mr Rees acted as he did at the request of Mr Edwards and in the belief that SGIC should implement Government policy of assisting Rothwells.

21.1.51 On 29 January 1988, Mr Rolston, the Chairman of GESB agreed to utilise \$50 million standing to its credit in Treasury to purchase commercial bills from Rothwells. Mr Rolston was persuaded by Mr Edwards and Mr Parker that GESB should utilise its funds in that way. Because the funds were not available immediately from Treasury, SGIC borrowed \$20 million from Treasury to enable it to discharge part of its liability to GESB pursuant to the mortgage over the Perth Technical College site earlier than it would otherwise have done.

21.1.52 We have found that it was improper for SGIC and GESB to use their respective funds, and in SGIC's case, to borrow funds, for the support of Rothwells. The purpose was outside the scope of the legislation governing the instrumentalities and the transactions were imprudent. Both instrumentalities invested funds when they would not have done so in normal circumstances. Both acted at the instigation of Mr Edwards. We have accepted that he believed himself to be under a general duty to take appropriate steps to ensure that the rescue of Rothwells succeeded but he acted improperly in translating a general desire by Mr Burke into specific requests of the instrumentalities.

21.1.53 The investment of GESB's funds in Rothwells required the approval of Mr Burke, as Treasurer. He was holidaying on Rottneest at the time. We have found that he approved the use of GESB funds for the purpose of assisting Rothwells but that on his return he refused to sign the formal approval. He was about to retire as Premier. We have not accepted his evidence that when he was given the approval document he could not recall having given his approval informally.

21.1.54 We have found that the support derived by Rothwells from WADC involved no impropriety. Although WADC purchased commercial bills from Rothwells, it purchased only those bills which had been endorsed by major banks. It was not therefore at risk as a result of those transactions.

21.1.55 We have found that Mr Dowding was briefed about Rothwells when he became Premier on 26 February 1988 and that he was kept informed by Mr Edwards of subsequent developments of any consequence. He no doubt appreciated he had

inherited a difficult political problem from Mr Burke with only 12 months before the next State election.

21.1.56 On 29 February 1988, SGIC deposited \$10 million in Spedleys Securities Ltd which immediately lent the funds to Rothwells. We have found that these arrangements were made by Mr Edwards, Mr Rees and Mr Lloyd, who acted improperly because the transaction between SGIC and Spedleys was undertaken without any regard for SGIC's needs or requirements. Its sole purpose was to assist Rothwells, this being a purpose outside the scope of SGIC's Act. We have not accepted the evidence of Mr Edwards and Mr Lloyd that the transaction was approved by Mr Dowding in Mr Berinson's presence. We have found that Mr Dowding was told of the arrangements shortly after they were made. We have not accepted his evidence that he learned of the deposit only when he read Mr McCusker's report.

21.1.57 Although Mr Hilton and Mr Hare had continued to review Rothwells' receivables following the rescue, no report was given to the NCSC, contrary to the requirements of the business plan. Shortly after the Hurst-Roberts report had been rejected as being inconclusive, a decision was taken by Mr Lloyd, after discussions with Mr Hurley and Mr Hilton, that there should be an audit for the half-year ending 31 January 1988. The audit was conducted and was accepted by the NCSC although there is no evidence of any express agreement to waive the reporting requirements of the business plan. The audited accounts presented a wholly misleading view of Rothwells, but having regard to the charges pending against Mr Louis Carter in relation to the audit, we have not fully investigated the audit procedure and therefore have refrained from expressing any view in relation to it.

21.1.58 In March 1987 SGIC sold properties on the south side of St George's Terrace, Perth (the Westralia Square development), to Tipperary Developments Pty Ltd, a company associated with Mr Warren Anderson. SGIC had received four proposals from potential purchasers of the properties. These proposals had been analysed by Mr Lloyd who came to the view that an offer made by Tipperary Developments Pty Ltd and Consolidated Press Holdings Ltd, Mr Kerry Packer's company, was the most favourable to SGIC. We have found that the various offers were considered at three meetings, on 29 February and 7 March 1988 and probably on 15 March 1988. At the second of those meetings, Mr Dowding, who had undertaken to assist GESB to recover the \$50 million which it had spent on the purchase of commercial bills from Rothwells, proposed that the purchaser of the southside properties be required to deposit

\$50 million in Rothwells. Mr Berinson was present at the meeting. He cautioned against prejudicing the prospect of obtaining the best price by the imposition of such a condition. By the date of the third meeting, the Tipperary Developments/Consolidated Press offer had emerged as the most attractive and further discussions had taken place between Mr Edwards and Mr Anderson. At the third meeting, Mr Dowding stipulated that SGIC must obtain a deposit of \$50 million in Rothwells as a condition of the contract. It is not clear who was present at the third meeting. We have not found Mr Berinson to have been present.

21.1.59 There followed a meeting in Sydney on 16 March 1988 between Mr Edwards, Mr Rees, Mr Lloyd, Mr Anderson and representatives of Consolidated Press. After discussion, terms were agreed for the purchase of the Westralia Square properties by Tipperary Developments. Mr Edwards then sought to impose the condition of a \$50 million deposit in Rothwells. Mr Lloyd who was present on Rothwells behalf, produced a copy of the recently audited accounts. He told Mr Anderson that on the basis of those accounts, Rothwells would have the capacity to repay the \$50 million facility. He gave assurances that Rothwells would continue to receive Government support.

21.1.60 Mr Lloyd had not been authorised to give such assurances. He merely assumed that assistance would be forthcoming from the Government as required. We are not satisfied that Mr Lloyd believed Rothwells would have been able to repay the \$50 million without further Government support.

21.1.61 Mr Anderson declined to accept the condition. Mr Edwards then telephoned Mr Dowding in Perth who instructed him to discontinue negotiations with Mr Anderson and to return to Perth immediately. In fact, Mr Edwards and his colleagues were unable to return until the following day. In the meantime, Mr Anderson made arrangements with Mr Packer to borrow \$50 million and he agreed to the condition. The money was not used as a deposit but to purchase commercial bills from Rothwells.

21.1.62 We have found that Mr Dowding acted improperly in interfering in the business affairs of SGIC. He intervened by imposing the \$50 million condition without reference to SGIC and did so after it had resolved to accept the Consolidated Press/Anderson offer. Mr Dowding jeopardised the negotiations by taking the risk that

the condition would not be accepted. We have found that although Mr Dowding acted with the best of intentions, he improperly interfered in the business affairs of SGIC.

21.1.63 In late March or early April 1988, Mr Hilton came to the view that there was a potential for a very substantial deficiency in Rothwells. This was because of the difficulty in putting any value on the loan portfolio and, particularly, the Connell-related loans. Their value was related to Mr Connell's worth which had also become difficult to establish. Mr Hilton realised that it would be necessary to utilise some asset of Mr Connell's in order to solve Rothwells' problems. The only asset which then appeared to have the necessary potential was Mr Connell's interest in the Petrochemical Industries Company Ltd ("PICL") in which he had an equal interest with Mr Dallas Dempster.

21.1.64 On 23 March 1988, Mr Beckwith, on behalf of Bond Corporation, gave Mr Dowding a cheque for \$200,000 as a donation to his political image campaign. Mr Dowding said he had not solicited the donation. The cheque was not deposited in the Labor Party's account controlled by the State Secretary of the ALP. As Mr Burke had done before him, Mr Dowding had opened his own "Advertising Account" into which this cheque was deposited. No doubt the donation was intended to foster a healthy relationship between Bond Corporation and the new Premier. Apparently Mr Dowding was pleased to accept it and to exercise control of its application for political purposes.

21.1.65 In late March 1988 or possibly on 1 April, Mr Hilton told Mr Lloyd there was a problem in Rothwells because of the size of its exposure to Mr Connell and companies related to him. Mr Hilton told Mr Lloyd the Connell-related debt was of the order of \$400 million and its recoverability was uncertain. Mr Lloyd immediately alerted Mr Edwards, who was then on holiday, to the existence of a major problem in Rothwells. Shortly after Mr Edwards returned from holiday on 5 April 1988, Mr Lloyd told him about Mr Hilton's concerns. Mr Edwards immediately informed Mr Dowding who told him to "get Bond to fix it".

21.1.66 Mr Edwards immediately made arrangements to meet Mr Beckwith and, on 12 April 1988, flew to Sydney to see him. He and Mr Beckwith discussed the problem on 13 April when they returned together from Sydney in a Bond aircraft. In his account of the discussion, Mr Edwards said Mr Beckwith was shocked and agreed something had to be done, saying they had clearly been duped. Mr Edwards said they canvassed some options and might have mentioned PICL as a possible solution.

Mr Edwards thought it would be embarrassing for Mr Bond if Rothwells was to fail because of his involvement in promoting the rescue. Mr Edwards said that he and Mr Beckwith both knew about a number of transactions involving Bond companies and Rothwells which would be investigated by the NCSC in any liquidation of Rothwells.

21.1.67 On 13 April 1988 there was a meeting involving Mr Dowding, Mr Parker, Mr Lloyd and Mr Edwards at which Mr Dowding was briefed on the Rothwells' problem. It is possible that Mr Connell and Mr Vrisakis were present but the evidence does not allow us to make any findings in relation to them. At about this time Mr Lloyd tackled Mr Connell about the potential deficiency in Rothwells due to his borrowings. Mr Connell blamed Mr Lucas and Mr Hugall saying they had transferred debts to him without his knowledge.

21.1.68 Mr Hilton's advice about Rothwells' position exploded once and for all the myth that "Rothwells was basically sound but subject to liquidity problems". This was the view of Rothwells promoted by Mr Lloyd and Mr Edwards and accepted in Government circles. One of the reasons it had been possible to maintain the myth was that Rothwells had continued to advance funds to many of its existing borrowers to enable them to continue in business and keep alive the possibility of repayment. Rothwells was therefore able to avoid having to write off the loans. The pursuit of this policy contributed to Rothwells' liquidity problems and hence increased its need for funding by Government sources. Despite the enormity of the Connell-related indebtedness to Rothwells, Mr Lloyd continued to implement the policy of "keeping Connell whole". Indeed, the outflow of funds from Rothwells to L R Connell & Partners and Oakhill rose rapidly from the end of April to 31 October 1988. In that period, it increased by over \$40 million. It was appreciated by Mr Lloyd and Mr Edwards that if Mr Connell was subjected to bankruptcy proceedings, the collapse of Rothwells would be inevitable. As a result, the State had effectively become the banker of last resort to Rothwells.

21.1.69 Despite the potential for a major deficiency in Rothwells, it entered into heads of agreement with CSR Ltd on 22 April 1988 for the purchase of all the issued capital of Western Collieries Ltd ("Western Collieries"). We have found it extraordinary that, when Rothwells was facing the prospect of a major deficiency in its assets, it should embark on a major capital acquisition which had somewhat speculative prospects and that it should do so without having finance in place. Rothwells' acquisition of Western Collieries was presented to the public in such a way as to create

a wholly false impression of Rothwells, enhancing the myth that it had been restructured and placed on a financial basis which was sufficiently sound for it to embark on the new venture. There is, however, no evidence that Rothwells was prompted or encouraged by the Government to acquire Western Collieries. Nor did the Government provide any financial assistance to Rothwells to enable it to pay the purchase price.

21.1.70 On 15 April 1988, a few days after Mr Dowding had been told about the problem in Rothwells, Mr Bond went to see him. Only three weeks earlier, Mr Beckwith had made the \$200,000 donation to Mr Dowding's campaign on behalf of Bond Corporation. Mr Bond had earlier presented himself as the selfless saviour of Rothwells when he organised the rescue, though he had his own corporate interests well in mind when he did so. Bond Corporation had its own problems. Now the Government had identified serious difficulties with Rothwells. Mr Bond proposed to Mr Dowding that he and the Government should each acquire 20% of the shares in Bell Group. As was well known at that time, Bell Resources, a subsidiary of Bell Group, possessed \$1.2 billion in cash or assets readily convertible into cash. Mr Holmes a Court had for some time been seeking to quit his 46% holding in Bell Group and Mr Bond wanted to buy it. Mr Bond had been unable to find a way of doing so. He could not acquire more than 20% without making a full bid for the company and that was beyond his means.

21.1.71 We are satisfied that when Mr Bond and Mr Beckwith learned of the problem at Rothwells they appreciated immediately that the situation could be exploited to their advantage. A Bond company and the Government could each acquire 20% of the shares in Bell Group without either being required to make a full bid. This would satisfy Mr Holmes a Court's requirement to sell virtually the entirety of his holding. Further, if the Government could be persuaded to remain as a passive investor, Mr Bond would have control of the Bell Group and its cash resources at the cost of acquiring only 20% of the company. It would be a relatively small price to pay to make such funds available from those resources as might be necessary to solve Rothwells' problems.

21.1.72 We do not suggest that Mr Bond necessarily spoke in those terms to Mr Dowding at their meeting on 15 April 1988. However, we are satisfied that they discussed the possibility of the Government and Bond interests each acquiring 20% of Bell Group. Mr Dowding stressed that the Government would only pursue the matter if the acquisition resulted in funds being provided to Rothwells. It was appreciated that,

having regard to the provisions of the Takeovers Code, they could not be seen to have reached any agreement or understanding as to their respective courses of action.

21.1.73 Following the meeting, Mr Dowding instructed Mr Edwards to look into the proposal. Mr Edwards discussed it with Mr Beckwith and he also instructed Mr Vrisakis to provide an opinion to SGIC as to whether, as a Crown instrumentality, it enjoyed an immunity from the Takeovers Code. Mr Vrisakis in turn instructed Mr Wiese to provide an opinion on that subject. Mr Wiese delivered his opinion on 18 April 1988. Although SGIC has claimed legal profession privilege in relation to the opinion, we have been told by others who read it that Mr Wiese advised SGIC was not bound by the Takeovers Code.

21.1.74 On 19 April 1988, Mr Bond called again on Mr Dowding. We have found they reached an agreement or understanding that subject to Mr Holmes a Court agreeing to sell, Bond Corporation and SGIC would each purchase 19.9% of his shares in Bell Group and SGIC would remain a passive investor so as to give effective control of Bell Group to Bond Corporation which would then procure funds to assist Rothwells. We have not made any finding as to whether this constituted illegal conduct on the part of either Mr Dowding or Mr Bond. The matter was investigated by the NCSC and was settled. In the investigation SGIC maintained that it enjoyed Crown immunity. The NCSC accepted that and was aware of the argument that Bond Corporation enjoyed derived immunity. The NCSC elected not to test those issues in legal proceedings. We have found, however, that it was improper of Mr Dowding to have acted in a way which was clearly contrary to the spirit of the Takeovers Code.

21.1.75 On the morning of Sunday 24 April 1988, Mr Berinson went to Mr Dowding's home to discuss several matters with him. At the end of their discussion, Mr Dowding told Mr Berinson about the proposal that SGIC acquire shares in Bell Group at \$2.50 per share. The market price was then about \$1.75 per share. Mr Dowding also told Mr Berinson that Mr Holmes a Court would only sell the entirety of his holding and that Mr Bond was also known to have expressed an interest in acquiring 20%. Mr Dowding said that while SGIC was not interested in a position on the board of Bell Group, Bond interests would be and that they would have the same interests as SGIC in the orderly retirement of various things. Mr Berinson asked a number of questions and specifically, what guarantee there was of an orderly conduct of matters in relation to Bond. Mr Dowding told Mr Berinson that there could be no guarantee and it was something which could not be discussed because of the provisions

of the Takeovers Code relating to acting in concert. We are satisfied that Mr Dowding did not tell Mr Berinson about the agreement or understanding which he had already reached with Mr Bond. Mr Dowding asked Mr Berinson to look at the value of the Bell Group shares to determine whether SGIC should be permitted to proceed.

21.1.76 Later on the Sunday, Mr Lloyd and Mr Edwards attended on Mr Berinson at his home to discuss the matter. We were unable to make a finding about what was said. Mr Berinson claimed no recollection of the occasion and the evidence given by Mr Lloyd and Mr Edwards was vague.

21.1.77 On Anzac Day, 25 April 1988, Mr Edwards and Mr Peter Mitchell of Bond Corporation attended on Mr Berinson at his office. Mr Mitchell explained his valuation of the Bell Group assets to Mr Berinson. Mr Berinson derived no benefit from this exercise because he was not in a position to make any judgment about Mr Mitchell's views. Mr Berinson felt constrained from questioning Mr Mitchell by his concern not to contravene the Takeovers Code.

21.1.78 It was decided, possibly at Mr Berinson's request, that SGIC should obtain an independent valuation of the Bell Group shares. Salomon Brothers, the merchant bankers, was retained for that purpose. The work was carried out by Mr Trevor Rowe of Salomon Brothers who was intercepted by Mr Bond at Sydney airport on the morning of 26 April 1988. He was about to board a flight to the Philippines and instead was brought to Perth immediately in a Bond aeroplane. On arrival in Perth Mr Rowe was taken to meet Mr Bond, Mr Edwards and Mr Connell. Mr Rowe was told by Mr Edwards that SGIC proposed to purchase Bell Group shares at \$2.50 per share and convertible bonds for a price of \$140 million and wanted to have a fairness opinion which was required before a meeting with Mr Holmes a Court at about midday on Thursday 28 April 1988. Mr Rowe said a fairness opinion could be produced, using Salomon's London office.

21.1.79 Mr Rees was holidaying in England while these matters were unfolding. Mr Edwards had spoken to him on 18 April and told him, in general terms, about an opportunity of acquiring shares in Bell Group. Mr Rees returned to Perth in the early hours of Wednesday 27 April and was met by Mr Edwards at Perth airport. After a breakfast meeting at the Parmelia Hotel, at which Mr Rowe gave Mr Rees and Mr Edwards a briefing on Salomon's progress, Mr Rowe and Mr Rees accompanied Mr Edwards who was to attend a Cabinet meeting that morning.

21.1.80 Shortly before the Cabinet meeting, Mr Berinson called on Mr Dowding at his office. Mr Dowding told Mr Berinson that if SGIC was interested in proceeding with the acquisition of the Bell Group shares, the Government should not do anything to disturb that and should approach the matter on the basis of noting the acquisition rather than approving or disapproving it. Mr Dowding asked Mr Berinson to introduce the matter to Cabinet, which he did. At the Cabinet meeting, Mr Berinson put the matter on the basis that it was "something of a re-run of the BHP share purchase". He spoke in those terms because the proposal involved SGIC making a substantial purchase of shares from Mr Holmes a Court at above the market price. Those factors were common to the purchase of BHP shares. Cabinet was told, and it may have been by Mr Dowding, Mr Berinson or Mr Edwards, that the shares were worth at least as much as Mr Holmes a Court was asking for them, that a representative of Salomon Brothers who had carried out a valuation was waiting outside if anyone wanted to hear from him and that "Bond" would be acquiring a similar percentage of shares. Cabinet was also told that advice had been sought from solicitors as to whether there were any problems with the Takeovers Code. In answer to questions, principally from Mr Grill, about independence from Mr Bond, Cabinet was told that while discussions for the purpose of assisting the valuation had occurred, nothing had taken place which would render the Government liable under the Takeovers Code, even if it could not rely on Crown immunity. Mr Dowding told Cabinet about the objectives of the purchase, saying there was a need for the continued presence in Western Australia of the Bell Group of companies which were major employers and that the purchase would help Rothwells because there would be greater stability in funding arrangements and Bell Group might use Rothwells as an in-house banker.

21.1.81 Towards the end of the meeting, Mr Berinson asked Mr Edwards directly whether he was sure there was nothing in the proposal which could be in breach of any legal requirement. Mr Edwards replied there was not and SGIC had a written legal opinion to that effect. Mr Berinson admitted to the Commission that he made "the unfortunate assumption" that the opinion related to the extent to which SGIC had to remain at arm's length from Bond Corporation. He did not become aware until 3 June 1988, when he was shown the opinion by Mr Parker, that it addressed only the question of Crown immunity. Two Ministers suggested that the opinion be shown to Cabinet or that Government commissioned its own opinion. Mr Berinson opposed that course on the basis that the transaction was a matter for SGIC.

21.1.82 We have found that Cabinet was misled by the presentation. Mr Dowding misled Cabinet deliberately by failing to disclose the agreement or

understanding he had reached with Mr Bond on 19 April 1988. Mr Berinson, who did not know of that arrangement or understanding, misled Cabinet unwittingly. Although the circumstances of the transaction were sufficient to alert Mr Berinson's suspicions he did not act improperly by not insisting on the production of the legal opinion relied on by Mr Edwards. He made the "unfortunate assumption" about the opinion but that was no more than an error of judgment on his part. Cabinet was also misled into the belief that the acquisition of the shares was an SGIC initiative which it wished to pursue. The reality was that Mr Rees had learned the details of the proposal only that morning, while the other Commissioners, apart from Mr Edwards, had no knowledge of it.

21.1.83 There was a meeting of SGIC that afternoon when the proposal was put by Mr Rees that SGIC acquire a strategic holding in Bell Group on the terms proposed. Mr Rowe was present at the meeting. He gave a presentation in which he confirmed that the respective prices of the shares and the convertible bonds were fair on the basis of the preliminary work which had been carried out thus far. One of the Commissioners asked Mr Edwards whether SGIC was being directed to acquire the shares. Mr Edwards said "at the moment it is not a direction but this is what the Government want and it will become so".

21.1.84 Mr Edwards told the meeting that the Government was keen to keep Bell Group within the Western Australian corporate atmosphere. He said that another party, which was identified as Bond Corporation, would be purchasing another 19.9% of Bell Group and would be paying \$2.70 per share. He made some mention of the fact that the Takeovers Code would not apply to the transaction.

21.1.85 SGIC then resolved to appoint Salomon Brothers as consultants at a fee of \$375,000. It further resolved to purchase the shares at \$2.50 per share and the convertible bonds for a price of \$1.40 million, in each case subject to confirmatory advice from Salomon Brothers. It no doubt resolved in these terms in the belief that it had no choice. It was misled by Mr Edwards who knew that Cabinet had acted in the belief that the acquisition was an SGIC initiative. He acted improperly in this regard.

21.1.86 Salomon Brothers did provide confirmatory advice in letters dated 27 and 28 April 1988 relating to the convertible bonds and the shares respectively. However, each letter was highly qualified, making reference to the limited review and analysis which had been carried out in the short time available and relied solely on information available publicly as at 30 June 1987. It was pointed out in each letter that

there had been changes in the financial condition of the Bell Group which had occurred after 30 June 1987 and might be material. Each letter expressly excluded any consideration of SGIC's "underlying business decision".

21.1.87 The NCSC commenced an investigation into the Bell Group share acquisition by SGIC and Bond Corporation immediately following SGIC's announcement. The NCSC conducted hearings in Melbourne in which it took evidence from several people involved in the transactions, including Mr Edwards and Mr Mitchell. Mr Edwards gave some misleading answers so as to avoid implicating the Government in improper conduct.

21.1.88 By the end of May, NCSC had formed the view that there may have been collusion or unacceptable conduct between Bond Corporation and SGIC. Mr Berinson was told by NCSC representatives that consideration was being given to the possibility of a charge. Mr Dowding took advice from Mr Eric Heenan QC who attended a gathering of Ministers at Parliament House on 2 June 1988. Mr Dowding suggested to those present that SGIC should sell its Bell Group shares as quickly as possible. Mr Heenan confirmed advice which he had given previously to Mr Dowding that it was open to SGIC to do so and that a sale appeared to offer a solution to the problem. Mr Heenan travelled to Melbourne that night to act for SGIC in negotiations with the NCSC the following day.

21.1.89 On the morning of 3 June 1988 Mr Heenan met Mr Edwards in Melbourne and decided to exclude him from the negotiations having formed an adverse view of his conduct in the matter and his lack of truthfulness to the NCSC in its inquiry.

21.1.90 A meeting was held later that morning between representatives of SGIC and NCSC at which an undertaking was sought, and given, that SGIC would not sell its shares. Shortly afterwards Mr Beckwith met Mr Schoer to discuss a possible settlement. Mr Beckwith said it was "a fair catch" and he wanted to know the terms on which NCSC would accept if Bond Corporation was to avoid a vesting order. Mr Schoer said the NCSC would require Bond Corporation to make a takeover offer at \$2.70 per share, pay \$1 million to the Crown and pay the NCSC's costs. Mr Beckwith agreed.

21.1.91 It soon became apparent within Bond Corporation that it could not afford to purchase the entirety of the shares in the Bell Group at \$2.70 per share. Intensive negotiations then followed between Bond Corporation and the Government in which

Bond Corporation sought to have SGIC's holding of shares in Bell Group excluded from the ambit of the takeover offer. Ultimately, agreement was reached that SGIC's shares would be excluded, subject to a Bond company indemnifying SGIC against any shortfall which it might suffer as a result of selling its shares in a defined period at less than \$2.70. In addition, Bond Corporation was required to deposit \$100 million in Rothwells so that it might repay the funds invested by GESB and SGIC. The Tipperary Developments' facility of \$50 million, which was intended to reimburse GESB, had been diverted to meet more urgent demands. Bond Corporation was also required to deposit an additional \$50 million should a demand be made by Bell Resources for repayment of the deposit which it had made on 16 November 1987, and which had matured.

21.1.92 Bond Corporation would agree to these terms only on the basis that it was provided with security in the form of a mortgage over Mr Connell's interest in PICL. However, Bond representatives were dissatisfied with the then current state of PICL and sought to have the Government make some commitment to the project which would enhance its value. In response to this request, Mr Parker instructed Dr John McKee, the Chairman of SECWA, to write what he described as a "wish washy" letter of support for the PICL project. Although Mr Grill was involved in the negotiations to some extent, the decisions were taken for the Government by Mr Dowding and Mr Parker. The agreement between the Government and Bond Corporation could not, however, be completed until Mr Connell consented to his interest in PICL being given as a security. After initial reluctance and advice from Mr Musca, his solicitor, and Mr Hilton that he should not do so, Mr Connell relented and executed the various security documents which had already been prepared in anticipation of his co-operation. He did so because he realised that, without his consent, Rothwells was doomed.

21.1.93 The agreement between Bond and the Government was finalised in the early hours of the morning of 4 June 1988 when instructions were given to SGIC's representatives in Melbourne that they could execute the settlement agreement with the NCSC. Like the NCSC, they had been unaware of the developments in Perth.

21.1.94 During the negotiations which were conducted in Perth on 3 June 1988, Mr Lloyd had become aware of the proposal that Mr Connell's interest in PICL be given as security to Bond Corporation. This caused him concern, because he appreciated that PICL was the only one of Mr Connell's assets which had the potential to solve the Rothwells problem. He had attended a meeting with Mr Burke, Mr Connell and

Mr Hilton in May 1988 in which Mr Burke had attempted, unsuccessfully, to persuade Mr Connell to sell his interest in PICL to Rothwells at a price equal to the deficiency in Rothwells' assets.

21.1.95 PICL was, of course, a project which was quite independent of Rothwells. The possibility of a petrochemical project in Western Australia arose in 1985 when Mallina, a company associated with Mr Dempster, sought a mandate from the Government to conduct a feasibility study. On 27 January 1987, the Cabinet granted it a mandate for a period of 6 months in which to study the feasibility of a petrochemical project based upon the ethane content of the domestic gas supply from the North West Shelf project. The mandate involved no commitment by the State either to supply feedstock to the project or to take the product. Nor did the mandate imply that either the State or SECWA could supply ethane or natural gas with any particular ethane content. We have found that there is no evidence of impropriety associated with the selection of PICL to carry out the feasibility study.

21.1.96 From the outset of the petrochemical project, the cost of supply of energy to the project was of concern to both PICL and SECWA. Mr Dempster, who was in control of negotiations, expressed the view to Dr McKee that the gas price had to be internationally competitive in terms of prices prevailing in Saudi Arabia and Indonesia. Dr McKee responded that SECWA's gas was not internationally competitive in those terms. He advised Mr Dempster that a major subsidy as indicated by Mr Dempster's thinking would be impossible for SECWA and would have to be funded by the Government in some separate manner. Notwithstanding Mr Dempster's view, on 2 November 1987 heads of agreement were signed by SECWA and PICL in which the prices agreed were commercially realistic and included a provision for escalation based on a formula linked to CPI.

21.1.97 Although the heads of agreement had been signed, Mr Dempster soon demonstrated his awareness that the project was not viable and could not obtain finance with the energy prices as fixed in the heads of agreement. As Mr Edwards succinctly and accurately said, the original arrangement made no sense because the project would not get off the ground in view of its inability to obtain finance. In his evidence in connection with this aspect and other matters associated with attempting to develop the project to the point where it could commence, Mr Dempster displayed a willingness to bend and depart from the truth.

21.1.98 In January 1988 Wardleys prepared an information memorandum based on instructions from Mr Dempster. That memorandum falsely described the proposed project manager, Gofair, as a "Hong Kong based company with extensive petrochemical plant construction experience". In addition, it falsely stated that PICL had signed "a 15 year co-extensive agreement" with SECWA. Overall that memorandum conveyed the impression of a project far more advanced with its contracts than was the true position.

21.1.99 Mr Dempster was looking for 100% debt finance. It was made clear to him that equity capital in the order of 20%-\$30% of the total project cost, including interest, was required during the construction phase. Ultimately Mr Dempster accepted that position, but falsely maintained in evidence that he continued to believe that 100% debt funding could be obtained without special government support.

21.1.100 In the knowledge that 100% debt funding was not possible without special government support, during March and April Mr Dempster sought that support from SECWA. His overtures were either rejected or SECWA responded that it would consider his request but on conditions that were clearly unacceptable to Mr Dempster. During this process Mr Dempster deliberately made false statements to Standard Chartered and Mitsubishi about what had been agreed with SECWA. We are satisfied that he was attempting to "ratchet" the project forward. He sought to obtain agreement from Standard Chartered and Mitsubishi in respect of finance on the basis of his misrepresentation to them that certain support was being provided by SECWA. It is likely that he intended to use such agreements to pressure SECWA and the Government into providing the support that Standard Chartered and Mitsubishi had been told would be given. Mr Dempster made similarly misleading statements to Bankers Trust Australia Limited, the third company from which he sought assistance to obtain finance.

21.1.101 The alternative of an injection of equity capital was also being investigated by both Mr Dempster and Standard Chartered. Although the possibilities had not been exhausted, it had become clear that, as the project stood, without special Government support, the prospects of obtaining such equity were very remote indeed.

21.1.102 By April 1988, Mr Parker had decided against providing any special Government support and Mr Dempster was aware of that decision. Attempts to obtain 100% finance or further equity had been unsuccessful. The project was in a most

precarious position. It was, at the least, stalled, and its prospects of successfully "getting off the ground" were poor. In addition, Mr Dempster was being pressed by the R & I Bank to improve his position with the Bank. Mr Connell had his own financial problems. These were the circumstances in which the Government and Bond Corporation made their move to purchase PICL. Those circumstances should have placed the Government and Bond Corporation in an ideal bargaining position but, for other reasons, that advantage was surrendered.

21.1.103 The ongoing problems of Rothwells during the first half of 1988 caused consideration to be given to any assets that Mr Connell owned which might be used to the advantage of Rothwells. This became particularly important when the significant deficiency of assets within Rothwells was discovered and was found to be in connection with loans to Mr Connell or entities related to him. In this context, Mr Connell's "asset" in PICL came to be viewed as a potential source of funds that could be applied to the benefit of Rothwells. As the year progressed, the situation became urgent because there was a need to deal with the loans on the balance sheet before the balance date of 31 July 1988.

21.1.104 Initially, Mr Hilton, Mr Lloyd and Mr Edwards were all involved in developing a proposal to sell PICL to the Government and Bond Corporation for about \$400 million. The proposal envisaged the placement of the proceeds with Rothwells to enable the retirement of the Government indemnity, together with payment of Rothwells' debts to SGIC and Bond Corporation, while leaving cash within Rothwells to provide liquidity. As this proposal was emerging, the Government, SGIC and Bond Corporation became involved in the NCSC inquiry into the Bell Group share transaction which resulted in the settlement of 3 June 1988. As part of that settlement, Bond Corporation agreed to deposit \$100 million in Rothwells, and up to \$150 million if Bell withdrew its \$50 million. Bond Corporation only agreed to do so, however, on the basis that Mr Connell's interest in PICL was used as security. This caused concern to both Mr Edwards and Mr Lloyd. They realised that more than \$100 million would be required and believed the asset should have been kept available to provide those additional funds.

21.1.105 Discussions continued through June, by which time it was firmly believed that there was a deficiency in Rothwells' receivables in the order of \$300 million. This deficiency had to be rectified by Rothwells' balance date of 31 July 1988 if Rothwells was to continue in business. We have found that the Government first became aware of the existence, though not the precise size, of a large problem in

April 1988. The figure of \$300 million was the subject of a discussion between Mr Beckwith and Mr Parker in June 1988. During that discussion Mr Beckwith mentioned PICL as a potential solution.

21.1.106 Mr Edwards had already discussed PICL extensively with Mr Beckwith. We have no doubt that Mr Beckwith was aware of the proposal to sell PICL to the Government and Bond Corporation and thereby provide the necessary funds to Rothwells. There was a difficulty, however, because PICL, without any special Government support, could only have been valued at somewhere in the order of \$20 million to \$30 million. An answer was manufactured. In essence, the value of the project had to be enhanced to such a degree that a purchase price sufficient to solve the problem in Rothwells would be justified. This could only be achieved if the Government provided special support.

21.1.107 A meeting was held at the end of June or early July 1988 involving representatives of Bond Corporation and Rothwells, together with Mr Edwards, Mr Parker and Mr Grill. We have referred to this meeting as "the crucial meeting". The essential agreement reached at this meeting set the ground rules for what followed. We repeat our essential findings in the next two paragraphs.

21.1.108 We find that Mr Parker, Mr Grill and all involved in the crucial meeting of late June or early July were well aware of the following:

- (a) Rothwells required \$300 million or more in order to restore its solvency and produce an acceptable balance sheet as at 31 July 1988.
- (b) Initially the justification for the Government and Bond Corporation buying PICL rested solely in the needs of Rothwells.
- (c) PICL was worth very much less than \$300 million unless it could be enhanced by the provision of Government guarantees and support mechanisms, particularly with respect to the cost of energy supplies to the project.
- (d) Bond Corporation would not participate unless the Government provided support and guarantees and no other entity or person was in view as an alternative to Bond Corporation.

- (e) The Government could not proceed alone with the deal as planned.
- (f) A total of \$400 million was needed in order to put \$300 million into Rothwells to meet the deficiency, plus \$50 million for liquidity and \$50 million to purchase Mr Dempster's interest in PICL.

21.1.109 We also find that rather than let Rothwells collapse and face the consequences, subject to Mr Dowding's approval, Mr Parker and Mr Grill agreed in principle as follows:

- (a) The Government and Bond Corporation would purchase PICL for a total of \$400 million.
- (b) The Government would contribute \$175 million and Bond Corporation \$225 million.
- (c) The Government would provide sufficient support and guarantees necessary to enhance the value of PICL to approximately \$400 million.
- (d) \$350 million would be paid to Mr Connell who would purchase a portfolio of bad debts from Rothwells, thus providing \$350 million to Rothwells.
- (e) Rothwells would apply the proceeds to repaying Bond Corporation, SGIC and NAB, thereby securing the discharge of the Government's October 1987 indemnity.

21.1.110 Thereafter Mr Dowding was given a full briefing of the facts and tentative agreement that had been reached at the crucial meeting. He approved of that agreement and told Mr Parker and Mr Grill that he wanted to undertake personal negotiations with Bond Corporation or Mr Bond to see if he could improve the Government's position.

21.1.111 It was agreed in principle at the crucial meeting that the Government would provide special support, but the broad details were not settled until shortly after

the meeting. The precise date upon which these details were settled is unclear. That support centred on SECWA's return from the supply of gas being an agreed percentage of the revenues from the sale of the products of the project, and the Government was to bear any short term loss to SECWA caused by that arrangement. We must emphasise that before the Government provided its support to PICL the project was probably worth no more than \$20 million-\$30 Million. The only reason it could possibly be valued at \$400 million was because of the Government's support mechanisms. In effect, the Government undertook a contingent liability in order to enhance the value of PICL and agreed to pay that enhanced value to Mr Connell and Mr Dempster. We are satisfied that Mr Dowding, Mr Grill and Mr Parker all approved of those new arrangements. It was highly improper of them to do so.

21.1.112 The principal reason, if not the only one why it was contemplated in 1988 that the Government should purchase an interest in PICL was to provide sufficient funds to Rothwells to cover the deficiency in the receivables and enable a satisfactory balance sheet to be produced on 31 July 1988. Not surprisingly, the agreement included a condition that the Government and Bond Corporation investments in Rothwells were to be repaid. These events occurred less than 12 months before a State general election was due. Notwithstanding protestations to the contrary, we are satisfied that electoral considerations dominated the reasoning of Mr Dowding and the two Ministers in arriving at this decision. They preferred political or electoral advantage to the interests of SECWA and the public. The provision of Government assistance to special projects of importance to the State is not unusual. In this instance, however, while the project was in the hands of Mr Dempster and Mr Connell, it was obviously Mr Parker's view that the importance of the project to the State did not justify providing the special assistance sought despite the strenuous attempts by Mr Dempster to obtain it. Mr Parker's position changed dramatically, however, when it became necessary to provide the project with sufficient value to justify a purchase price that he believed would solve the problem within Rothwells.

21.1.113 The whole question of the PICL support arrangement was cloaked in secrecy. SECWA was not involved in negotiating the change of arrangements. Mr Dowding gave instructions that a memorandum of understanding being prepared in July be split into four documents in order that the full picture would not be disclosed if one of the documents "fell off the back of a truck". It was well known amongst the group working on behalf of the Government from July 1988 to settlement on 17 October 1988 that the Government did not wish to disclose the existence of the support

arrangements. The desire for secrecy was not borne out of concern about commercial confidentiality but a desire to protect the Government's political interests. It was correctly perceived by Mr Dowding, Mr Parker and Mr Grill, that the arrangements would attract trenchant criticism if they became public. They appreciated that these arrangements could not withstand public scrutiny and they pressed on with them.

21.1.114 While delegating responsibility to Mr Parker and Mr Grill, and notwithstanding his evidence to the contrary, we are satisfied that Mr Dowding essentially remained in control of the developments during July 1988. He set out to involve himself in the negotiations and met with Bond on 26 July in order to resolve outstanding differences that had to be settled before the memorandum of understanding could be signed. The matter was urgent. Through Dalleagles, Mr Connell was to use the \$350 million proceeds from the sale of his interest in PICL to finance the purchase of a portfolio of valueless loans. The shareholders of Rothwells were to meet on 29 July in order to approve the sale of the loans to Dalleagles, but the NCSC had insisted upon receiving satisfactory evidence that Dalleagles could finance the purchase before the meeting went ahead. Hence Cabinet met on 28 July 1988 and approved the signing of the memorandum of understanding by Mr Grill. That approval provided a sufficient basis for the NCSC to permit the shareholders' meeting to proceed.

21.1.115 Not only were the public to be kept in the dark about these arrangements, but Cabinet also was not given the full picture on 28 July 1988. Mr Dowding did not explain to his colleagues the connection between the purchase price and the size of the problem at Rothwells. He did not explain that the Government was deliberately building up the value of PICL by a support mechanism. If Cabinet had been aware that the Government was effectively paying twice by undertaking a contingent liability to increase the value and then paying the increased value, Cabinet may well have had a different view of the proposal.

21.1.116 Following the signing of the memorandum of understanding, hard headed negotiations were obviously required in order to settle all the details. It is apparent, however, that Bond Corporation was in control throughout. As arrangements stood at the signing of the memorandum of understanding, the Government bore all the risk, but Bond Corporation had unfettered control over whether the risks would come to fruition because it was to be the project manager during the construction phase. Any advances made by the Government, through WAGH, to the cost of the project, were to be interest free. Any amount still owing to WAGH at the end of the debt repayment period was to

be forgiven. Mr Heron rightly regarded this situation as extraordinary and sought to rectify it. He and the other negotiators for the Government, however, faced an impossible task because Bond Corporation continually relied on the memorandum of understanding. The Government representatives were unable to alleviate the Government position, except to the extent of extending the debt repayment period, thereby lessening the likelihood that any amount would be owing at the end of that period. Bond Corporation met every attempt to ameliorate the Government's position by asserting the binding effect of the memorandum of understanding. Despite the clause which denied legal effect to the document, the Ministers involved meekly surrendered under the threat by Bond Corporation that it would walk away from the deal. They did not pause to reflect on what the public interest required.

21.1.117 The Government team to carry out the negotiations was heralded publicly as a task force. This was an inaccurate description, but we accept that Mr Dowding sought to have people of varying expertise brought together in order to conduct negotiations on behalf of the Government. Mr Dowding also insisted upon an independent valuation of PICL being obtained; but, from previous work carried out, Mr Edwards and Mr Parker knew that the valuation would be in the region of \$400 million because the degree of Government support had been determined with that figure in mind. We are satisfied that Mr Dowding would have been told of their confidence. Mr Johnson of First Boston, who provided the valuation, was quick to highlight the commercial difficulties facing the Government. Mr Heron was aware of Mr Johnson's views from 9 August and, on 18 August 1988, Mr Johnson explained his concerns to Mr Dowding in the presence of Mr Heron. On 23 September 1988, the project, including all the risks, was the subject of a detailed presentation by Mr Johnson to a meeting that included Mr Parker, Mr Grill and Mr Berinson.

21.1.118 Mr Johnson provided a valuation under a covering letter of 29 September 1988. It was heavily qualified. Mr Johnson's evidence and the valuation graphically demonstrated the extraordinarily difficult position into which the Government had placed itself, as well as the minimal value of PICL before the Government support mechanism was put in place. Mr Dowding wanted to launch the project publicly with the support of the valuation. The letter of 29 September, however, was unsuitable because of the heavy qualifications and its reference to the various credit enhancements proposed by the Government. Mr Dowding sought a short letter suitable for publication and this was provided on 6 October 1988. Mr Dowding used this letter, containing the opinion of First Boston as to value, to give credibility to the Government's involvement.

The letter conformed to Mr Dowding's instruction that he wanted a short letter. Mr Johnson did not intend that it should be read in isolation. It did not disclose that the value had been enhanced by the Government support mechanisms and Mr Dowding did not disclose that fact. Nor was it disclosed that the project could not have obtained finance without such mechanisms. Contrary to the true position, the impression was conveyed that the project could stand alone and succeed on its own merits. This deception was now to be practised on the public.

21.1.119 Cabinet had met to consider the matter on 3 October. Negotiations were still continuing and a number of important issues had not been resolved. In particular, the essential contract with SECWA for the supply of energy was far from agreed. Other issues raised by Mr Johnson had not been settled. In these circumstances, it was quite inappropriate for Mr Dowding to proceed to Cabinet on 3 October seeking its approval to proceed and to follow that approval with a public announcement on 6 October 1988.

21.1.120 We have no doubt that Mr Dowding pushed ahead with the matter because of the continuing critical problem within Rothwells. Mr Dowding, together with Mr Parker and Mr Grill, were determined that Rothwells must not collapse. An election had now to be held within a few months. Despite the expert qualifications concerning the viability of the petrochemical project so long as Bond Corporation was involved in it, they gambled that it would work. If it did, the Government could claim a significant industrial development for the State, and quietly defuse the political time-bomb that lay smouldering beneath the shaky edifice of Rothwells. If they did nothing, the time-bomb would inevitably explode destroying their political credibility immediately prior to the imminent election.

21.1.121 While various facts and figures were presented to Cabinet on 3 October, Cabinet was misled in one significant respect and not provided with important information that was required in order to arrive at an informed decision. Cabinet was told that PICL's arrangements with SECWA were consistent with commercial terms offered to large users in similar circumstances. That was clearly incorrect. Cabinet was not told of SECWA's strenuous opposition. While it was advised that WAGH had provided a credit support mechanism to ensure that the cash flow from operations was adequate to meet loan and interest repayments over the 10 year life of the loan, neither the risk nor the requirement to forgive any amount of the loan outstanding at the end of that period was explained. No explanation was given of the relationship between the determination of the purchase price and the size of the problem at Rothwells. Cabinet

was not advised that the Government support mechanisms had enhanced the value of PICL. These were not minor details of which Cabinet had no need to be informed. Cabinet should have been fully apprised of all the implications of the arrangement. It was improper of Mr Dowding and Mr Parker to fail to provide such an account in that regard, and for Mr Grill, who had until that time been an active participant, to maintain silence while such an inadequate and inaccurate presentation was made.

21.1.122 Throughout the period July to October 1988, the problems at Rothwells had continued unabated and the Government continually provided support. On 11 July, at the request of Mr Parker, SGIC deposited \$5 million with PICL, which in turn deposited a total of \$5 million with Rothwells. On 30 August 1988, SGIC deposited \$4 million with Spedleys, which was immediately lent to Rothwells. On 27 September 1988, Mr Lloyd sought a \$5 million overdraft facility from the R&I Bank. A \$3 million facility was granted, but only because cheques had already been drawn by Rothwells for that amount. The R & I Bank correctly took the view that, if those cheques were not met on presentation, it could have resulted in the collapse of Rothwells. By September 1988, Mr Anderson was pressing for the return of the \$50 million which he had borrowed from Mr Packer.

21.1.123 The concealment of the true situation continued. It had begun with the release of a statement on 28 July by the Government that it had taken the decision in principle to participate in the first stage of the PICL project. The statement, however, in its context and totality, was misleading as to the true reason for the Government's decision to participate in the project and as to the nature of the joint exercise with Bond Corporation. In addition, it was misleading in conveying the impression that Rothwells, by its own efforts and restructuring, would be able to achieve an early retirement of the Government's indemnity. It was also misleading as to why the Government had been willing to negotiate an energy tariff which was connected to rises and falls in the product prices.

21.1.124 On 6 October 1988, Mr Dowding held a news conference to announce the Government's decision to proceed. He failed to explain that \$150 million of the Government share of \$175 million had been earmarked for payment by Rothwells to NAB in order to retire the Government's indemnity. When asked whether the decision to invest in PICL had any bearing at all on the "Rothwells guarantee", Mr Dowding falsely responded in the negative. Shortly thereafter he compounded the concealment by saying that the Government's exposure had been at no cost to the community and had

"not cost us one cent". Unfortunately, the total impression conveyed was that Rothwells, by its own efforts, had managed to put itself in a position where it could discharge the debt and indemnity. Contrary to the assertion in evidence by Mr Dowding that the link to Rothwells was clearly established in the sense that the circumstances of Rothwells gave rise to the Government's involvement in the project, we are satisfied the link in that fashion had never been acknowledged and the contrary impression had been conveyed.

21.1.125 The problems for Rothwells continued unabated. On about 10 October, Mr Lloyd sought an advance of \$4.5 million from the R&I Bank. Indirectly, Mr Parker intervened by having someone from his office indicate to the relevant officers of the bank his desire that the application be approved. It was approved, but was quickly followed by the withdrawal of facilities. On 12 October, the bank advised Rothwells that existing facilities were no longer operative and were withdrawn. It also advised that all facilities had to be cleared from the settlement of the Dalleagles transaction on 14 October 1988. Mr Lloyd advised the bank on 13 October that Rothwells would not be in a position to settle the temporary exposures from the proceeds of the sale of the loans to Dalleagles.

21.1.126 It is apparent that no one had any confidence that the PICL settlement would solve the problem in Rothwells. An accounting firm, Arthur Young, was retained by Bond Corporation to review the position in Rothwells and, although its draft report is dated 7 October, it appears likely it was not provided to Bond Corporation until 11 or 12 October 1988. It did not provide the comfort that had been hoped would result. Mr Judge described the results in a memorandum of 12 October as "not terribly attractive". His "gut feeling" that an additional \$75 to \$100 million would be needed fairly soon in order to meet ongoing liquidity problems, proved to be about the mark. Mr Parker saw that report on about 12 October, but he said he gained more comfort from it than Mr Judge. We cannot understand how he could have done so.

21.1.127 On 13 October, Mr Wiese reported to Mr Heron concerning the law governing preference payments. In the course of his letter he indicated an understanding that, even after settlement, Rothwells "... may well have severe difficulty in meeting its obligations".

21.1.128 Another indication of the anxiety felt before settlement is found in the visit to Parliament House by Mr Lloyd and Mr Edwards on 12 or 13 October 1988.

Both spoke with Mr Parker and we are satisfied Mr Edwards recommended to him the Government should not proceed with the PICL settlement. There could be no doubt that Mr Parker was put on notice of their concern that settlement would not provide as much to Rothwells as originally anticipated and further funds would be required following the settlement. Mr Dowding was apprised of the situation by Mr Parker. Unfortunately, Mr Dowding declined to meet with Mr Lloyd and Mr Edwards and, remarkably, he took the attitude that it was all too difficult and the settlement had to proceed. We are satisfied Mr Dowding made that decision knowing that problems were likely to continue after settlement and that Mr Edwards was against proceeding at that time. In addition to the warning from Mr Edwards and Mr Lloyd, at about the same time Mr Parker also received, indirectly, a warning from Mr Fischer of the R&I Bank. Mr Fischer had telephoned him to complain about the manner in which the R&I Bank had been pressured into providing the \$4.5 million facility to Rothwells a day or so earlier. In the course of that complaint, he told Mr Parker that he understood Rothwells would be unable to repay that amount from the proceeds of the PICL settlement. While in everyday terms \$4.5 million was a large amount, in the context of Rothwells' commitments \$4.5 million was a relatively small sum. The suggestion that Rothwells would not be able to meet that commitment after the PICL settlement should have rung loud alarm bells with Mr Parker. According to Mr Parker, however, he had already been told by Mr Beckwith that Bond Corporation would meet any ongoing liquidity requirements. This undertaking was later denied by Bond Corporation.

21.1.129 By this time, Mr Dowding and Mr Parker were confronted with a firm recommendation from Mr Edwards not to proceed. That recommendation was given against the background of the failure of injections of hundreds of millions of dollars since October 1987 to solve Rothwells' problems. In addition Mr Dowding held the belief that, from the outset in October 1987, the Government had been misled. Mr Dowding did not trust Bond Corporation. In these circumstances, Mr Dowding, with the acquiescence of Mr Parker, decided that it was "all too difficult" not to proceed. He chose to proceed. His conduct in so doing speaks for itself. Mr Dowding's decision to further risk the public purse in a final attempt to be rid of the political disaster that was Rothwells, was one of the high points in a sustained course of improper conduct involving himself, Mr Parker and Mr Grill.

21.1.130 While Mr Parker was told, and undoubtedly advised Mr Dowding, that Rothwells would not receive as much from settlement as had been anticipated, he was not told before settlement that only \$1 million net cash would flow to Rothwells after

settlement. According to Mr Lloyd, this became apparent by the close of business on Friday 14 October. Mr Edwards acknowledged that he was probably aware of this situation prior to settlement. He took the view, however, that the difference between an anticipated \$12 million net and \$1 million would not have caused Mr Dowding or Mr Parker to alter their decision to proceed. In that view we believe he was correct, but he and Mr Lloyd should have advised Mr Dowding and Mr Parker of the revised estimate.

21.1.131 Intensive negotiations occurred during the week preceding settlement and, on Friday, 14 October, an agitated Dr McKee met with representatives of SECWA in an endeavour to arrive at an agreement to which both SECWA and Bond Corporation would agree. During the course of the evening, Dr McKee and Mr White spoke with Mr Parker and both were left under no misapprehension as to Mr Parker's attitude. He was adamant that agreement had to be reached in order for settlement to proceed on 17 October. When negotiations did not resolve the issue on Friday, 14 October, they continued almost non-stop throughout the weekend. We are satisfied that, in the early hours of Monday 17 October 1988, Mr Parker instructed Dr McKee to agree to the terms of the contract between SECWA and Bond Corporation and, if necessary, to do so in accordance with the wishes of Bond Corporation. This was yet another example of an improper action in the chain of inexcusable events. Mr Parker's dominating concern was to ensure that Rothwells did not collapse, thereby embarrassing the Government. If Mr Parker paused to consider the wider interests of the public, which must have been clearly evident to him, he did not pause for long.

21.1.132 When settlement occurred on 17 October 1988, \$50 million was paid to Dempster Nominees and, of the balance of \$350 million paid to Rothwells, the proceeds were applied as follows:-

\$150,000,000.00	NAB	
	Bell	\$50,883,561.56
	Bond Corporation Finance Limited	\$107,446,366.54
	Bond Media	\$ 26,346,301.37

After those payments in respect of the Government and Bond Corporation, Rothwells received a net \$15,323,770.45. That balance was applied by Rothwells as follows:-

Cheque in favour of Katanning Holdings	\$9,500,000
Cheques in favour of Spedleys	\$4,900,000
Cheque in favour of Paragon Resources	\$700,000
Other sundry disbursements	\$228,094
	<hr/>
Total	\$15,328,094
	<hr/> <hr/>

Katanning Holdings was paid \$9.5 million because, as part of the settlement, Mr Connell was obliged to purchase shares held by Bond Corporation in Rothwells since the October 1987 rescue. Notwithstanding that the parcel of shares was worth many millions of dollars less than the \$17.5 million paid by Bond Corporation in 1987, Katanning Holdings, in which Rothwells held a 30% interest, purchased those shares for \$17.5 million. It required financial assistance and a withdrawal from Rothwells to do so.

21.1.133 Mr Lloyd's predictions proved to be correct. Immediately following settlement, Rothwells was unable to meet a debt of \$4 million due on Wednesday, 19 October 1988. Bond Corporation refused to assist. Although Mr Parker said that Mr Beckwith had agreed that Bond Corporation would meet short term liquidity difficulties after settlement, it appeared that Bond Corporation personnel denied that any such commitment had been made. Prior to being advised that Bond Corporation would not meet its requirements, Rothwells had issued cheques in excess of its overdraft.

21.1.134 A meeting was held in Rothwells' office on the evening of Wednesday, 19 October. Mr Dowding was called to the meeting and became very angry. This meeting has achieved some notoriety because of Mr Dowding's behaviour, which it is unnecessary to repeat. Mr Dowding wanted a full briefing and it was arranged that Mr Lloyd would provide it the following day.

21.1.135 On Thursday, 20 October 1988, SGIC provided further assistance by depositing \$5.5 million with Spedleys, which was immediately onlent to Rothwells. We have rejected Mr Rees' evidence that this particular deposit was approved by Mr Parker.

We are satisfied that Mr Rees approved the payment. He may have done so as the result of a direct request from Mr Lloyd, but it is more likely that the request came through Mr Edwards. The use of those funds in that fashion by Mr Rees and Mr Edwards was improper and not in the best interests of SGIC. The commercial interests of SGIC were not given any consideration at all, only the need to assist Rothwells. Mr Rees acted as though the SGIC were a department of Government under the direction of the Premier. He appears not to have had a proper appreciation either of the role of the SGIC or of his own as its chairman.

21.1.136 Mr Dowding was given a full briefing during the evening of Thursday, 20 October 1988. By this time, Mr Lloyd was of the view that Rothwells was "effectively" or "technically" insolvent and had received advice to that effect from Mr Musca. We accept the evidence of Mr Wiese that Mr Lloyd indicated that if the Tryart fee was fully recovered, Rothwells would have net assets of \$60 million. If no amount was recovered, the asset position would remain at minus \$40 million. Mr Wiese expressed his confidence that the prospects of success in recovering that fee were good. Mr Lloyd told the meeting that there was an immediate need for \$18 million in order for Rothwells to open the next day and, in the longer term, a total of \$75 million would be required. The point was also made, either by Mr Lloyd or by Mr Hilton with Mr Lloyd's concurrence, that should a run on Rothwells develop there could well be a need for as much as \$100 million or \$125 million. Mr Dowding was prepared to consider yet another rescue package, in conjunction with Bond Corporation, and agreed to meet with Mr Bond the following morning.

21.1.137 We accept the evidence of Mr Grill that, during the meeting on 20 October, the possibility of letting Rothwells collapse was discussed, but the view was expressed that it would be a "very messy business". In addition, the problem of preferences was discussed in the context that there was a possibility NAB would be required to repay \$150 million to Rothwells and it would look to the Government for payment of that \$150 million. In that event the Government would have paid two amounts, each of \$150 million, with no prospect of recovery. The situation was obviously desperate.

21.1.138 It is unnecessary to canvass the details of the breakfast meeting with Mr Bond on 21 October 1988. While it was occurring, arrangements were made with Spedleys for a daylight advance to be provided to Rothwells, which enabled Rothwells to open its doors that day. This was later to pose a problem for Rothwells and the

Government representatives, however, because Spedleys had to be repaid the same day. The meeting with Mr Bond concluded with agreement in principle that each of Bond Corporation, the Government and Spedleys would provide \$25 million in order to create a \$75 million rescue package. It was envisaged that SGIC would make available the Government contribution. As part of the deal, it was agreed that SGIC would extend the indemnity that had been granted to Bond Corporation in connection with the settlement of the NCSC inquiry into the Bell Group share transaction. There were other basic conditions agreed concerning the management of Rothwells and the cessation of any involvement by Mr Connell. Notwithstanding Mr Dowding's denial that it was agreed SGIC would be used or that the indemnity would be extended, we have found that he was prepared to agree to those matters in principle without consulting SGIC because he believed Mr Rees and the Commissioners would comply with his wishes. In view of Mr Rees' previous compliance, Mr Dowding had every reason to have confidence in this view.

21.1.139 It is impossible to avoid the conclusion that, once again, Mr Bond held the upper hand. While Bond Corporation's funds were also at risk because of preference problems, Bond Corporation had secured an interest in a project on exceptionally favourable terms where the Government bore all the risks associated with the construction phase of the project. The Government, however, faced an exceptionally difficult economic and political dilemma of its own making, and was desperate to avoid the collapse of Rothwells with all the implications such a collapse held for its political fortunes, and, in particular, those of the Premier and Ministers involved, in pursuing this project.

21.1.140 When Mr Lloyd was told that agreement in principle had been reached for the provision of a \$75 million facility, and Spedleys made its daylight advance thus enabling Rothwells' account to be brought within overdraft limits, Mr Lloyd contacted the Brisbane and Sydney offices of Rothwells and advised that cheques could be issued. A letter was written by Robinson Cox to Rothwells of 21 October 1988, confirming the agreement for provision of a total of \$75 million upon conditions concerning the future management of Rothwells. The letter asked that the board of Rothwells signify acceptance of the arrangements. In what became known as the battle of the letters, later in the day, on the instructions of Mr Dowding, when it appeared that the agreement could not be satisfactorily arranged, Robinson Cox wrote to Rothwells purporting to withdraw "the offer such as it was". Rothwells purported to accept the offer. It has been unnecessary for us to resolve that dispute.

21.1.141 During the afternoon of Friday, 21 October 1988, a meeting was convened at Mr Dowding's office, attended by Mr Rees, numerous Government personnel and solicitors representing the Government. When Mr Dowding gave the instructions to withdraw the offer, Mr Edwards argued that such actions would expose Mr Lloyd, and possibly others, to a breach of the Companies Code because they had accepted deposits in circumstances where there was no certainty that Rothwells could pay off its creditors. SGIC provided further assistance to Rothwells via Spedleys that day with a deposit of \$11 million, which was onlent to Rothwells. During the course of the meeting, Mr Rees outlined the total exposure of SGIC. It is to be remembered that Spedleys had lent \$18 million to Rothwells that day on the understanding that at least \$15 million would be repaid the same day. Mr Edwards made it clear to the meeting that Spedleys would have to close its doors if it was not repaid with consequent repercussions for Rothwells. The payment could not be made by Rothwells without assistance. There was thus an immediate need for at least \$15 million, and everyone accepted there was a long term requirement of at least \$75 million.

21.1.142 It was accepted during the meeting that the \$75 million agreement could not be put in place so as to have immediate effect. The suggestion was made first by Mr Bowe, then by Mr Heron, that \$15 million could be raised if SECWA and Western Collieries entered into an agreement for a prepayment for coal by SECWA for the amount of \$15 million. At this time, Western Collieries was a wholly owned subsidiary of Rothwells. It was assumed that Mr Lloyd would ensure that the \$15 million to be paid to Western Collieries would, by some means, reach Spedleys that day and thereby benefit Rothwells. When the payment was made later that day, Mr Lloyd deposited the cheque directly with Spedleys. While we are satisfied that, although Mr Dowding and the others at the meeting were not told expressly of Mr Lloyd's intention in that regard, armed with the knowledge that Rothwells had a liability to repay Spedleys that day, they must have realised the funds might be deposited directly with Spedleys.

21.1.143 We have discussed the circumstances and the deficiencies attending this arrangement at some length, and it is unnecessary for us to repeat all our findings. Mr White, the Commissioner of SECWA, was not prepared to do the Government's bidding without a lawful direction. We have no doubt, that the course adopted was taken over Mr White's objections and was improper. SECWA, as the SGIC and GESB before it, was again treated as if it were a department of Government subject to day-to-day political control. Thus we have practical application of the "whole of government"

approach to governmental practice espoused to us by Mr Edwards and others, and much favoured during the Burke administration.

21.1.144 The problems for Rothwells did not abate. On 27 October 1988, Mr Lloyd again used Western Collieries for the benefit of Rothwells. He sought, and obtained from the R&I Bank, a \$6 million facility without first discussing the matter with Mr Crawford or any of his fellow directors other than Mr Hilton, who was not concerned with the interests of Western Collieries. Bond Corporation and the Government had agreed to meet jointly the liquidity shortfalls, and this \$6 million facility was required as the Government's contribution. Mr Lloyd's conduct in respect of the payment of \$15 million from SECWA and the obtaining of the \$6 million facility demonstrated his willingness to use Western Collieries for the benefit of Rothwells without obtaining the approval of his fellow directors. When the board of Western Collieries met on 28 October, Mr Lloyd did not mention the facility he had obtained the previous day.

21.1.145 On 24 October 1988, an agreement had been signed by the Government and Bond Corporation, providing that each of the State, Bond Corporation and Spedleys would provide \$25 million to Rothwells for a total package of \$75 million. There were a number of conditions related to overcoming any difficulty if Spedleys was unable to fund any part of its contribution. Other conditions concerned the future management of Rothwells and the lack of any role for Mr Connell. Any hope that the agreement would succeed was, however, short lived. On 26 October, Robinson Cox advised Mr Grill of information received that Spedleys had not signed the undertaking and was not committed to assisting by way of funding or management of the company.

21.1.146 Robinson Cox had, by letter of 24 October, recommended that the State appoint an independent accounting expert to report on the financial status of Rothwells in order to ensure that the State was in possession of an objective and complete assessment of the financial position of Rothwells. Mr Love was retained and arrived in Perth until Friday, 28 October. After a briefing from solicitors of Robinson Cox, he quickly came to the conclusion that there was something significantly wrong with the company. He formed the view that a major problem had not been fixed despite significant efforts to do so. He advised the solicitors of his initial view. It is likely that Mr Dowding was informed of Mr Love's view during that day. In any event, the position of Rothwells was clearly most precarious. Notwithstanding that position, however, Mr Dowding directed SGIC to deposit a further \$12.5 million in Rothwells in

order to ensure that Rothwells was able to continue in business until Mr Love had completed his assessment. The funds were obviously at risk, but Mr Dowding was reluctant to admit to the Commission that he was required to engage in any assessment of that risk.

21.1.147 During October, essentially \$50 million had been provided to Rothwells by the Government in the following manner:

20 October	SGIC-Spedleys	\$5,500,000
21 October	SGIC-Spedleys	\$11,000,000
21 October	SECWA-Western Collieries (deposited to replace \$15 million provided by Spedleys)	\$15,000,000
27 October	R&I Bank-Western Collieries	\$ 6,000,000
28 October	SGIC	\$12,500,000
		<hr/>
	Total	\$50,000,000
		<hr/> <hr/>

21.1.148 As we have previously pointed out, the commonly used description of the problems of Rothwells as "basically sound but with some liquidity problems" was a nonsense and must have been recognised as such, probably as early as November 1987 but certainly by April 1988. Hundreds of millions of dollars had been provided to Rothwells prior to the PICL settlement on 17 October 1988. Still the problems continued. The PICL settlement did not resolve the problems. It was anticipated that a total of \$75 million or more would be needed in the long term, but no-one was able to verify the accuracy of that figure. In respect of the later payments, the agreement for a further rescue package had fallen through and there were no positive signs to indicate that it was likely to be resurrected.

21.1.149 As mentioned previously, Mr Love was quickly able to arrive at a tentative view. In the course of his work, he said he was staggered by the poor documentation. There was an alarming inability on the part of anyone in Rothwells to provide him with a summary of the position as it existed in October. He took the obvious fundamental steps that should have been taken in October 1987 or shortly thereafter. He made the commonsense observation that a liquidity crisis and an asset deficiency tend to be linked together and that a chronic liquidity crisis would certainly indicate the existence of a problem with the type of the asset or its quality.

21.1.150 There were strenuous efforts to put together a further rescue package, but the figures required continued to grow. Bond Corporation was unable to provide a sufficient contribution and, ultimately, all negotiations broke down. On 3 November 1988, the directors of Rothwells petitioned the court in Queensland for the appointment of a provisional liquidator and Mr Ferrier and Mr Tuckey was appointed.

21.1.151 We acknowledge that Mr Parker was overseas when Cabinet met on 28 July 1988 and two issues were renegotiated in his absence. The essential scheme had, however, been agreed in principle when he was in Western Australia and actively involved, with Mr Grill, in agreeing to the proposals on behalf of the Government. The total course of conduct in which Mr Dowding, Mr Parker and Mr Grill engaged with respect to PICL was grossly improper.

21.1.152 The Government had a legitimate interest in endeavouring to attract a petrochemical project to Western Australia. Such a project had been justifiably perceived for a number of years as of great benefit to the State. However, in determining its course of conduct with respect to the PICL project during 1988, the Government was totally consumed by its concern to save Rothwells for its own electoral advantage and denied itself the opportunity of objectively assessing the extent of support that was justified having regard to the interests of the State. The creation of an artificial value was seriously inimical to the interests of the State. The Commission cannot emphasise too much that the entire course of conduct by those in Government that we have identified had its genesis in the decision to determine the value of PICL by reference to the perceived needs of Rothwells and to artificially confer that value on PICL by the device of Government support mechanisms.

21.1.153 Ultimately, however, Mr Burke and Mr Dowding must accept the responsibility for a distressing episode in the history of Government of this State. The decision to lend Government support to the rescue of Rothwells, was principally that of Mr Burke. It was a decision borne of his entrepreneurial approach to the practice of Government and the special relationship he developed with Mr Connell during his Premiership. When Mr Burke retired as Premier in February 1988, Mr Dowding inherited a political problem the dimensions of which he soon fully came to appreciate. The disastrous series of decisions for which Mr Dowding and his senior Ministers, Mr Parker and Mr Grill, were responsible until the final collapse of Rothwells in November 1988, confirmed Mr Dowding's realisation of the enormity of that problem.

Unfortunately, when leadership was called for, none was shown. When the public demanded openness, the truth was concealed from it.

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20.1 Events immediately following settlement

20.1.1 Within two days of the PICL settlement of 17 October 1988, Rothwells experienced difficulties. According to Mr Lloyd, a deposit of about \$4 million was called on Wednesday, 19 October 1988 and, as Rothwells would have difficulty in meeting the payment, he contacted Mr Judge seeking assistance. Later that day he was told that no assistance would be forthcoming. Prior to being advised that Bond Corporation would not meet the requirements, Rothwells had issued cheques in excess of its overdraft. Mr Lloyd then spoke with Mr Edwards.

20.1.2 During the evening of Wednesday 19 October 1988, a number of people attended a meeting at the Rothwells' office including Mr Lloyd, Mr Hilton, Mr Hare, Mr Lucas, Mr Musca, Mr Edwards, Mr Wiese, Mr Grill and, later, the Premier. Although Mr Hilton was somewhat unsure of the order of meetings, his evidence suggests that he had met earlier with Mr Lloyd, Mr Edwards and Mr Grill. He said the refusal of Standard Chartered to rollover particular bills had been discussed and it was agreed that Mr Parker, who was in London, should be contacted with a request that he intervene directly with Standard Chartered. A subsequent approach in London on Friday, 21 October by Mr Parker to Standard Chartered was unsuccessful. Mr Hilton also recalled that he and Mr Grill met a Mr Ferrier, a London director of Standard Chartered who happened to be in Perth, but to no avail. In addition, it appears from Mr Hilton's evidence, that there may have been a meeting with Bond Corporation personnel during which Bond Corporation offered to assist in some way if SGIC would assist by varying the terms of the Bell Group share indemnity. He said this proposal was rejected. At that meeting a reference was made to the commitment of Bond Corporation to Mr Parker that Bond Corporation would take care of short-term cash flow requirements and the Government the more fundamental cash flow problems. This commitment was denied by the Bond Corporation representatives.

20.1.3 As to the evening meeting of 19 October, not surprisingly the various witnesses have different recollections as to the sequence of events and details of what was said. Considerable discussion had obviously occurred prior to the arrival of Mr Dowding. We accept the evidence of Mr Hilton that Mr Lloyd initially spoke of the problems with the Standard Chartered facility and the absence of funds to meet that commitment, following which it was agreed that the Premier should be made aware of the difficulties. Mr Dowding told the Commission he was at home, unwell, when contacted by Mr Grill at about 9.30 pm or 10.00 pm. He was advised that problems had arisen and that he should be involved in the discussion.

20.1.4 It is unnecessary to canvass all the evidence given as to the content of that meeting. We are satisfied that Mr Lloyd advised Mr Dowding of the difficulties being experienced by Rothwells. He told Mr Dowding that assistance was required because of the \$4 million deposit being recalled and a \$20 million Standard Chartered facility maturing the following day that would not be renewed. We also accept Mr Lloyd's evidence that he advised Mr Dowding of the arrangements he believed were not being honoured by Bond Corporation and that Mr Dowding was extremely upset. Mr Dowding undoubtedly became angry and claimed to have been misled. He remonstrated with Mr Edwards and Mr Lloyd. They responded by reference to their visit to Mr Parker at Parliament House the previous week when they had outlined the situation and warned Mr Parker that the Government should not proceed with settlement unless it was prepared to provide continuing liquidity support to Rothwells. They referred to the fact that Mr Parker had seen Mr Dowding and the decision was made to proceed. Mr Lloyd said that Mr Dowding did not respond to that retort. He interpreted the absence of a response as a concession by Mr Dowding of the accuracy of what they had said.

20.1.5 Not long after the Premier's arrival, the Rothwells' representatives Mr Hilton, Mr Hare, Mr Lucas and Mr Musca left the room. In their absence Mr Dowding became particularly angry. Those who had left went into an adjoining office. According to Mr Hilton, after hearing some indistinct conversation, he heard Mr Dowding start shouting and there were clear banging noises as though a desk was being slammed or furniture kicked. He said he heard Mr Dowding say words to the effect: "How can Rothwells possibly require any more money after we have just spent \$400 million or \$350 million purchasing something not worth one cent?" During the outburst he also heard Mr Dowding say: "And who are we keeping out of gaol now?" Voices then returned to more normal levels and he did not hear clearly anything further that was said.

20.1.6 Mr Musca said that from the adjoining office, after hearing voices but being unable to discern what was said, the following occurred:

"I heard banging, what appeared to be furniture being kicked or banged or knocked about. Mr Dowding's voice was very high, very audible. He sounded very angry and what I heard him say was that -- in a very loud voice 'We have just paid \$400 million for --' and he interspersed obscenities starting with the letter f in a couple of places -- "We've just paid \$400 million for a PICL

project worth nothing. You're now telling me you want more money". He said 'I'm surrounded by liars and cheats. Who are we saving from going to gaol now' or 'this time?' I haven't -- I've given that evidence without looking at my note which is the second document you've produced to me."

The note to which Mr Musca referred was a handwritten notation that he made on an envelope immediately after the words were spoken. In addition to the matters given in evidence in the above quote, the note included a reference to Mr Dowding saying: "We're back to where we started". Mr Musca did not accept that he could have misinterpreted Mr Dowding's statement to the extent that Mr Dowding might have said something to the effect that they had been through the exercise for nothing or the exercise had been worthless. He made other notes of the evening and recorded the arrival of Mr Dowding at 11.40 pm.

20.1.7 Mr Lloyd was unable to recall much of the conversation. He said Mr Dowding remonstrated with him and Mr Edwards and claimed he had been misled. Mr Lloyd responded to that claim. Mr Edwards initially said Mr Dowding was throwing a tantrum, but later said that statement went "a bit far" although he felt Mr Dowding "was going a bit far in some of the suggestions". He asserted that Mr Dowding moved to distance himself from everything, saying that people had not told him things. Mr Edwards said he took exception to a suggestion by Mr Dowding that no one had told him these sorts of problems were possible. He pointed out to Mr Dowding that he and Mr Lloyd had been to Parliament House specifically on that issue. According to Mr Edwards, Mr Dowding was then abusive towards Mr Wiese, and Mr Grill had to calm him down a bit. He recalled Mr Dowding questioning why all the money that had been put into PICL was not enough when he had been told it was. Mr Edwards thought Mr Dowding was missing the point and confusing real net worth with liquidity.

20.1.8 Mr Wiese said he received a phone call from Mr Edwards at about 10.30 pm asking him to attend a meeting because Rothwells was in trouble. When he arrived, Mr Grill was having a conversation on a speaker telephone with Mr Beckwith. They were discussing the value of Mr Connell's art collection, apparently with the intention of trying to work out what assets Mr Connell might have available to be sold immediately to inject further funds into Rothwells. Mr Edwards advised Mr Wiese that only \$1 million net had found its way into Rothwells instead of the anticipated \$25 million because of the financing of Katanning and other outgoings. Mr Wiese said the position presented was desperate. Shortly after he arrived Mr Dowding attended and

the circumstances were explained to him by Mr Lloyd and Mr Edwards. Having heard them through, Mr Dowding was obviously very angry. Mr Wiese said Mr Dowding indicated he had been misled and that Mr Lloyd and Mr Edwards had allowed themselves to be duped or cheated again.

20.1.9 The response of Mr Dowding to the explanations by Mr Lloyd and Mr Edwards was described by Mr Wiese as a "very emotional outburst". He agreed that, during the course of the outburst, Mr Dowding said something to the effect of: "Who are we trying to save from gaol now?" He said Mr Dowding was genuinely very angry and no-one ventured to respond to that particular statement. Mr Wiese did not remember any statement by Mr Dowding that PICL was worth nothing. He said Mr Dowding was concerned that the PICL transaction had been done for nothing because it had not produced one of the results anticipated by those who had supported it. He said there was a good deal of noise in anger and thought that "furniture being rearranged" was an appropriate description.

20.1.10 According to Mr Wiese, following the outburst, Mr Dowding called him and Mr Grill into a side office for a private conversation. Mr Wiese was instructed to act for Mr Grill as the Acting Minister for Economic Development and Trade. Mr Wiese was not prepared to divulge the discussion because it occurred in circumstances giving rise to legal professional privilege and the claim to privilege had not been waived. He said no voices were raised nor was there any banging during the private meeting. He said that in the side office, or perhaps in a similar meeting the following day, Mr Dowding telephoned Mr Brian Burke in Ireland. Mr Dowding asked Mr Burke whether there was any way in which pressure could be applied to Bond Corporation to honour what Mr Dowding understood to be the arrangement that Bond Corporation would provide fundamental capital stability for Rothwells. Mr Wiese understood that the phone call was a waste of time because Mr Burke did not know how, nor was he prepared, to assist.

20.1.11 Mr Grill confirmed Mr Dowding's general reaction toward Mr Edwards and Mr Lloyd and said that Mr Dowding pointed his finger at Mr Wiese. He said his own attempts to calm Mr Dowding were not very successful. Mr Dowding appeared to be very angry and might have banged the table. Mr Grill, however, would not describe Mr Dowding's behaviour as a tantrum, although he did think he overdid it a little. Mr Grill said Mr Dowding did not say PICL was worthless and he did not recall any statements to the effect of "Who are we trying to save from gaol now?" or "I'm

surrounded by liars and cheats". He said Mr Dowding gave the impression he had been misled and wanted a full briefing. When Mr Dowding indicated that Mr Burke did not have any answers, Mr Grill asked whether that was expected and Mr Dowding replied to the effect that Mr Burke should bear part of the burden. Mr Grill understood that unless something was done urgently, Rothwells would have to close its doors.

20.1.12 Mr Dowding confirmed he was angry and said he had a sense of "utter disbelief". He denied he was trying to distance himself from the matter. He agreed he had no knowledge on certain aspects and felt that he might have been misled by Rothwells and Bond Corporation. He accepted he might have expressed disquiet about the apparent inability of Government people to negotiate with Bond Corporation and win. Mr Dowding had no recollection of making the statement "Who are we trying to save from gaol now", but he did not deny that he made it. While appreciating that the statement might carry with it the implication that he had saved someone from gaol previously, he did not recall having that view nor could he reconstruct circumstances that he might have had in mind. He said he did not take issue with the suggestion that he might have said he was surrounded by liars and cheats, but he was certain that he did not believe PICL was worthless and would not have said words to that effect. He accepted that he might have suggested that the exercise, which had been designed to ensure that the Government replaced a potential liability with the opportunity for profit, had been worthless. In a statement prepared in about May 1989, "Mr Dowding had said it was this meeting at which he was told that Western Collieries was a wholly owned subsidiary of Rothwells and in a position to generate substantial cash flow for Rothwells. In evidence to the Commission, he was not sure whether Western Collieries was mentioned during the evening of 19 October 1988 or the following day.

20.1.13 As already indicated, it is not surprising that different recollections of the meeting have emerged. There is a clear conflict as to some of the statements made by Mr Dowding. The evidence of Mr Wiese that Mr Dowding's outburst occurred before the private meeting might appear to be inconsistent with the memories of Mr Hilton and Mr Musca that they had left the meeting before the outburst. Mr Wiese, however, was referring to a private meeting that excluded Mr Edwards and Mr Lloyd and involved only himself, Mr Dowding and Mr Grill. We are satisfied the outburst occurred in the presence of Mr Edwards and Mr Lloyd, but after Mr Hilton, Mr Musca, Mr Hare and Mr Lucas had left. We have no doubt that Mr Hilton and Mr Musca were in an adjoining office when they heard Mr Dowding's raised voice. We are satisfied that Mr Dowding said words to the effect, "[w]ho are we trying to keep out of gaol now?",

and that he must have had some previous episode or information in mind when he made that statement. A number of possibilities arise on the evidence, including the matters raised in Mr Lloyd's notes, prepared after discussion with Mr Edwards, and to which we have referred in section 18.3 of chapter 18. In our view it is likely that Mr Dowding had Mr Lloyd in mind. For example, when Mr Parker was asked whether there had been talk about keeping people out of gaol or preventing criminal charges, he responded that, having placed Mr Lloyd in Rothwells, the Government had to decide whether it was going to tell him to get out or give support. He said Mr Lloyd could not be left in Rothwells with it running in a way which was unacceptable from a legal point of view. That situation was very clearly brought home to Mr Parker at about the time of the crucial meeting in late June or early July 1988. The other occasion on which Mr Parker recalled this topic being mentioned was the visit by Mr Edwards and Mr Lloyd to Parliament House a few days before the PICL settlement. He said they pointed out to him that, if the Government decided not to proceed with the PICL settlement, Mr Lloyd's legal position could be in some jeopardy. He said he did not know if it was discussed in terms of gaol, but it was certainly talked about in terms of potential charges.

20.1.14 The evidence of Mr Musca and Mr Hilton that Mr Dowding indicated the PICL project was worth nothing is in dispute. Mr Dowding and Mr Wiese raised the possibility that Mr Dowding said the exercise had been for nothing or worthless and that those words were misinterpreted by Mr Hilton and Mr Musca. Mr Hilton and Mr Musca heard specific words uttered in a raised voice from the adjoining room. Their attention was concentrated on the words. In addition, Mr Musca immediately made a note and we accept that he recorded accurately what he believed had been said. We are not satisfied, however, that the possibility of misinterpretation by Mr Hilton and Mr Musca has been excluded. In any event, if Mr Dowding made such a statement, it was made in the heat of the moment and we would not attribute to Mr Dowding, as a consequence of that statement, a reasoned belief at that time that the project was worthless.

20.2 Thursday, 20 October 1988

20.2.1 On Thursday 20 October 1988 SGIC provided further assistance to Rothwells by depositing \$5.5 million with Spedley Securities Ltd. That amount was immediately on-lent to Rothwells. It appears from an entry made by Mr Rees in his

diary for 20 October 1988, that he met with a person or persons he regarded as from Government, but he was unable to recall who attended the meeting. He wrote:

"Short 3 pm meeting with government and advance to Spedleys 5.5 million. Received Paragon third party security on bills at discussion about workout for liquidity potential. "

In subsequent evidence Mr Rees said that matter, and particularly the aspect of a need for third party security, could have been discussed prior to the meeting but it was resolved at the meeting on 20 October. He thought the deposit followed that meeting. Mr Rees had a recollection of a discussion with Mr Parker but was unable to be specific as to the date. Because Mr Edwards was, at this time, responsible to Mr Parker, Mr Rees had the feeling that this and other deposits were cleared with Mr Parker. In his report of 27 September 1990 to the Deputy Premier, Mr Ian Taylor, Mr Rees said this deposit was made in circumstances similar to those of the deposit of 31 August 1988. In the report he described the deposit of 31 August as solicited by Mr Edwards on the basis that it would be of indirect benefit to Rothwells. Specifically as to the deposit of 20 October 1988, Mr Rees reported that he checked with the Deputy Premier, then Mr Parker, to confirm he was aware that the deposit had been solicited. He said Mr Parker approved the deposit being made.

20.2.2 Mr Parker was overseas from 13 to 23 October 1988 and Mr Rees acknowledged that he did not speak with Mr Parker while he was overseas. Asked whether he could be in error as to Mr Parker approving the deposit, he said that if Mr Parker was overseas there might be some doubt about the actual date, but he recalled a telephone conversation at about that time and before the deposits of 20 and 21 October were made. The latter deposit is discussed later in section 20.3 of this chapter. While unable to recall when Mr Edwards approached him concerning the deposits, Mr Rees said he did not think it was as long as weeks before 20 October. In an interim report of 26 September 1990, which was attachment 1 to the report of 27 September 1990, Mr Rees stated that at a meeting in October 1988 with Mr Parker, Mr Edwards and Mr Lloyd it was said that a deposit with Spedleys would prove of assistance to Rothwells. On reflection, Mr Rees thought that meeting occurred in late October 1988, but that reflection came after he had been made aware that Mr Parker was overseas until 23 October 1988.

20.2.3 Mr Edwards said his only involvement was to indicate the paperwork required. He said the issue of deposits with Spedleys was discussed by the whole

Ministry. Mr Lloyd was unable to recall specifics, but said deposits that found their way into Rothwells from Spedleys arose out of arrangements that had occurred some weeks earlier as a replacement for previous transactions. He could not recall seeking assistance from SGIC directly or indirectly on 20 or 21 October 1988 or thereabouts. According to Mr Lloyd, it was not a matter of seeking assistance. He recalled being aware that the liquidity support for Rothwells had to be arranged in a different way from the manner in which it had been done previously.

20.2.4 Mr Parker said he was overseas and denied the evidence of Mr Rees. Mr Stephen Fraser, of Spedleys, said he received a telephone call from Mr Ted Davies of SGIC at about 4.30 pm on 20 October 1988 who indicated he had a cheque for \$5 million for Mr Fraser which was to go to Rothwells. Mr Fraser said he did not know what Mr Davies was talking about but, because of the late hour, he said he would send someone down to collect the cheque and attempt to find out what was happening. The cheque was made out to Spedleys and was banked in the Spedleys account at the ANZ Bank. Mr Fraser said he rang Mr David Jones at Rothwells seeking clarification and was told Rothwells "had a bit of a problem that day". Mention was made of Rothwells being about \$20 million short of balancing because Standard Chartered had refused to renew a bill endorsement line and the R & I Bank had demanded repayment of \$10 million. Mr Fraser later had an assistant sign one or two blank cheques which he took with him to Rothwells' office. At Rothwells he agreed to pay out West Coast Securities which was pressing Rothwells and/or L R Connell & Partners for payment in respect of some Paragon share purchases. Mr Fraser said he agreed to make the cheque out in exchange for keeping some security for a particular deal that had matured that day. He paid about \$1.84 million to West Coast Securities and waited in the office of Mr Lucas "to hear Rothwells' fate". He was told people from Government were coming down for a meeting and that a rescue was being put in place for \$75 million to solve Rothwells' problems once and for all. Eventually he went home without any further payment being made. Mr Jones said he was on holidays from 17 to 27 or 28 October 1988 and, therefore, was not involved in those particular transactions.

20.2.5 We are satisfied that while Mr Parker was overseas, Mr Edwards was a central figure in organising further support for Rothwells. Either Mr Lloyd dealt directly with Mr Rees or he did so through Mr Edwards. We find the latter is more likely and that Mr Edwards made arrangement with Mr Rees for the indirect deposit to be made on 20 October through Spedleys. There is no doubt that the only purpose of

the deposit with Spedleys was to assist Rothwells. It is our view that Mr Rees and Mr Edwards acted improperly and not in the best interests of SGIC.

20.2.6 During the evening of Thursday 20 October 1988, on Mr Dowding's insistence a meeting was held for the purpose of giving him a full briefing on the situation. It was attended by essentially the same people who had been present the previous evening, together with Mr Mitchell and Mr Judge as representatives of Bond Corporation. By this time the situation was critical because Rothwells had been unable to meet its commitments. It was the view of Mr Lloyd that, at the close of business on Thursday 20 October 1988, Rothwells was "effectively" or "technically" insolvent. We unhesitatingly accept that Rothwells was then insolvent. Mr Musca noted advising Mr Lloyd on Wednesday 19 October that if, as he was told by Mr Lloyd, Rothwells was unable to meet a \$10 million bill maturing that day, Rothwells was in a state of technical insolvency. He said Mr Lloyd should advise the Sydney and Brisbane managers not to incur further credit or accept deposits. Mr Lloyd said that advice was given to him by Mr Musca on the following day, Thursday 20 October.

20.2.7 Although uncertain, Mr Dowding recalled that Mr Lloyd, with the assistance of Mr Hilton, gave a presentation concerning liquidity problems. At some time he became aware of an immediate need and, potentially, a larger need. According to Mr Hilton, Mr Lloyd explained how the proceeds from the sale of PICL had been disbursed. There was discussion about the amount of \$75 million which Mr Lloyd indicated would be Rothwells' cash shortfall requirement over the ensuing months. Mr Hilton said at some stage he, together with Mr Dowding, Mr Wiese and, he thought, Mr Grill, went into Mr Lloyd's office for a private conversation. Mr Hilton was asked by Mr Dowding or Mr Wiese if he was certain \$75 million was enough. He said he responded that it would be sufficient if another run was avoided but, if there was a run, an additional \$50 million could be required.

20.2.8 Mr Lloyd used a whiteboard to assist in explaining the financial position of Rothwells and the Tryart fee was discussed. Mr Wiese recalled he conveyed to the meeting his view that the prospect of success with respect to the Tryart fee was good. He said Mr Lloyd indicated the swing was from net assets of \$60 million, in the event of full recovery, to minus \$40 million if Rothwells failed to recover the fee. There was discussion as to the immediate liquidity requirement, which Mr Wiese thought was put at \$25 million, but Mr Grill recalled the immediate need suggested was in the vicinity of \$11 million or \$12 million.

20.2.9 As to other possible sources of cash for Rothwells, there was a discussion about disposing of Rothwells' interest in Western Collieries. Mr Hilton and Mr Edwards recalled the Premier talking about "warehousing" Western Collieries in the sense that it was politically difficult for the Government to be seen to be involved. Mr Wiese was unable to recall who made the suggestion, but said it emerged from someone other than Mr Dowding that perhaps SECWA or the Government could buy Western Collieries temporarily and then on-sell it. He said that proposition was dismissed by Mr Dowding. Mr Edwards described the comment from the Premier as "an off the cuff remark" and did not think anything should be attributed to it. Mr Lloyd said Western Collieries was discussed as an asset and Mr Dowding suggested that perhaps the Government might take an option over the company as the price of giving assistance. He said the proposal did not receive any serious consideration.

20.2.10 Mr Hilton told the Commission that he was concerned by Mr Dowding's remarks. He said he spoke to Mr Lloyd about the matter after the meeting saying that the energy trust was critical to Rothwells' longer term solutions. This is consistent with the view expressed by Mr Hilton in his memorandum of 1 July 1988, which we have set out in paragraph 18.3.8 of chapter 18. Mr Hilton said he thought at the time that the coal trust was still "on the cards". We have referred in paragraph 16.16.7 of chapter 16 to Mr Lloyd's contrary view.

20.2.11 While Mr Dowding may well have discussed Western Collieries, we make no finding with regard to the suggestion that he made a remark about warehousing. Even if he made such a remark, in the circumstances we would not attach any significance to it. The possibility of selling Rothwells' interest in Western Collieries was not a practical solution to the immediate problem. When the sale ultimately occurred some months later, no warehousing was involved. There is no suggestion that any serious or further consideration was given to the concept of warehousing.

20.2.12 Mr Lloyd said he explained the problem in Rothwells to the meeting on 20 October 1988 in the following terms:

"... There was an immediate requirement absolutely of \$18m to open the next day and that's because of additional deposits being recalled the previous day and so on, but that there was probably a need to make allowance for a maximum -- given some certain assumptions and we went through the detail of those assumptions, but certain assumptions including the retention of a particular

deposit level, that \$75 million ought to be provided in total, although not immediately required. Mr Hilton, I believe, although certainly I concurred with it, made the point that should a run develop on the company there could well be a need for as much as \$100 million or \$125 million."

20.2.13 Mr Musca advised the meeting that he had been talking to Mr Lucas, who had spoken to Mr Brian Yuill of Spedleys, and Mr Yuill had agreed that he would participate in a rescue package for Rothwells. In particular, Mr Musca conveyed that Mr Yuill would be prepared to take over the running of Rothwells. According to Mr Lloyd, it was suggested by Mr Musca that Mr Yuill was well known and favourably viewed in the financial community in Australia and overseas and would be able to raise funds on Rothwells' assets. Rothwells was unable to do so alone because of its position and reputation at that time. Mr Musca made a note of discussing that proposal which had been put to him by Mr Lucas. He recalled Mr Dowding asking who Mr Yuill was and someone responding.

20.2.14 Ultimately Mr Dowding expressed the view to the meeting that the Government would not put any further funds into Rothwells, but said he was prepared to meet Mr Bond the following morning to consider the matter further. According to Mr Grill, during the course of a private meeting with him and Mr Wiese, Mr Dowding indicated he would be prepared to consider being involved if Bond Corporation played a proper role. Unfortunately, Mr Wiese was unable to assist us with the content of that private meeting because he had been instructed to maintain the claim to legal professional privilege. Mr Lloyd understood there was a willingness by the Government to consider participating in a rescue package with Spedleys and Bond Corporation.

20.2.15 According to Mr Grill, there was talk about letting Rothwells collapse, but the view was expressed that it would be a very messy business. The question of preferences was discussed in the context of the possibility of NAB being required to repay the \$150 million and the Government, therefore, having to pay out an additional \$150 million to NAB. He said the real discussion was about solving both short and long term problems with the same mechanism. While accepting Mr Grill's evidence as to what was discussed, there was, in reality, only one problem, namely, a gross preponderance of liabilities over assets.

20.2.16 Mr Musca said Mr Dowding became quite angry from time to time, particularly toward the end of the meeting after Mr Hilton or Mr Lloyd said that if

Rothwells was not given an injection of liquidity by the following morning it would have to close its doors that day. Mr Dowding then said words to the effect that he might as well resign and, if he resigned, he would call an investigation. According to Mr Musca, as he left the room Mr Dowding said if the meeting with Mr Bond did not turn out successfully, he would resign. Mr Musca also said that as Mr Wiese was following Mr Dowding from the room, Mr Wiese commented that he would have a long night ahead of him because he could see he would have to prepare a winding up petition.

20.2.17 Mr Wiese said Mr Dowding indicated he was inclined to think about resigning if Rothwells could not be saved. Although unable to recall mention of any investigation, he did not argue with the evidence that, in the context of resigning, Mr Dowding said he would call an investigation. However he did not consider there was any particular air of anger or excitement at that time. His own comment about preparing a winding up petition was meant as a joke.

20.2.18 It was agreed that Mr Dowding and Mr Grill would meet Mr Bond at Mr Bond's home early the following day. It is perhaps indicative of the Government position throughout this sorry affair that the Premier and a Minister of the Crown waited upon Mr Bond.

20.3 Friday, 21 October 1988

20.3.1 On 21 October 1988, the breakfast meeting involving Mr Bond, Mr Grill and Mr Dowding commenced at about 6.00 am at Mr Bond's home. Mr Bond said Mr Dowding was very agitated and restless. He said he displayed anger toward Mr Grill. He said there were conversations back and forth between Mr Dowding and Mr Grill about the need for \$75 million. They indicated they wanted him to contribute and he refused. It was then suggested that there be contributions from Spedleys, the Government and Bond Corporation, but Mr Bond persisted in his refusal. He said there was talk about funding against guarantees.

20.3.2 According to Mr Bond, there was much conversation between Mr Grill and Mr Dowding. They talked about the \$15 million that was required that morning. While they were discussing the \$15 million, both SECWA and Western Collieries were named, but Mr Bond could not recall any mention of pre-payment for coal. Mr Bond said he refused to assist. Mr Dowding and Mr Grill indicated that arrangements had

been made or could be made for the \$15 million. Mr Grill made a telephone call at about 7.30 am or 8.00 am and there was an incoming call from Mr Edwards. Following a discussion between Mr Dowding and Mr Grill, they agreed they had to provide the \$15 million.

20.3.3 Mr Bond said that, in the context of the contribution of \$25 million from each of Spedleys, the Government and Bond Corporation, it was indicated that SGIC would be used by the Government. When he persisted with his refusal to assist, he said there was an agitated discussion and a lot of pressure was applied. It was put to him that if Bond Corporation did not contribute, it would be difficult for the Government to honour its commitment in relation to the petrochemical plant and the SGIC indemnity. Mr Bond said he agreed to look at the proposal for a contribution of \$25 million, provided the indemnity put in place at the time of the June NCSC settlement concerning the Bell Group shares was extended. As to how Bond Corporation would be repaid, he said Mr Grill indicated the Government would be able to repay from a transaction it was doing with Western Collieries. From Mr Bond's perspective, by the end of the meeting there was a consensus concerning a contribution of \$25 million from each of Bond Corporation, the Government and Spedleys on the basis that the indemnity would be extended. He conceded Mr Dowding might have said an extension would have to be on commercial terms. Settlement of the matter was also subject to Spedleys' ability to raise the funds and the securities Bond Corporation would have for its contribution. He said Mr Dowding and Mr Grill left together, Mr Dowding having given the instruction to Mr Grill to follow up the matter of the \$15 million and make sure it was attended to by 10.00 am.

20.3.4 According to Mr Grill, Mr Bond indicated he had spoken with Mr Yuill. Mr Grill took a call from Mr Edwards and was told that Spedleys would probably be prepared to enter into the proposed arrangement. He was unsure whether Mr Edwards mentioned that Spedleys had paid \$3 million into Rothwells or whether he received that information later in the day. He said they discussed with Mr Bond the three way proposal and it was contemplated that the \$75 million package would be put together that day. Mr Grill was unable to recall any discussion of an immediate need for \$15 million, although everyone was aware of the immediate problem. He said neither he nor Mr Dowding indicated to Mr Bond they had ideas for providing immediate liquidity and there was no mention of SECWA or Western Collieries in that context. Mr Grill denied that he or Mr Dowding applied any pressure. In particular, he said there

was no implied threat that if Mr Bond did not participate there could be difficulty in the Government or SGIC honouring its obligations pursuant to the indemnity.

20.3.5 Notwithstanding that he said in his May 1989 statement that he told Mr Grill and Mr Wiese on 20 October 1988 that Mr Bond should be approached, in evidence Mr Dowding said he reluctantly agreed to go and see Mr Bond. He said he spent a lot of the night prior to the meeting thinking about the position and decided that the Government would not be alone in providing support for Rothwells. In his view, unless others who had a commercial interest in Rothwells continued to play a similar role, he would argue against the provision of further funds from the Government. He said Mr Grill was less firm in his attitude and sought to talk him around from a hard position to one where the Government might be more amenable to providing some levels of support. As to whether he took the view that the Government would not lead, but only provide support if someone else was the leader, Mr Dowding said he did not recall that expression but it correctly reflected his position in the sense that the Government would participate but not as the sole provider.

20.3.6 Mr Dowding said he attended the meeting with Mr Bond and Mr Grill with a belief that \$75 million was required. He did not think there was any discussion about a need for \$15 million or making arrangements for that amount. He thought Western Collieries was first mentioned during the course of another meeting later that day. He was sure he did not say the Government would be prepared to fund Spedleys through SGIC, although he and Mr Grill might have talked about having discussions with SGIC because it was a commercial arm of Government with an interest in the matter. He said Mr Bond raised the issue of the SGIC indemnity, but he made it clear these were matters for SGIC. He denied agreeing in principle that he would support the proposition that the indemnity be extended. He said he was firmly of the view these were issues for SGIC and would have expressed it in that way to Mr Bond.

20.3.7 When first asked whether any pressure was applied to Mr Bond by reference to the difficulty of honouring the commitment to the petrochemical plant and SGIC indemnity, Mr Dowding gave an interesting answer. He said he could recall no such pressure and that it was a relatively affable meeting. He also said, however, that he was very tense and there was no doubt he was seeking to convey unequivocally to Mr Bond his commitment there would be no rescue that was solely led by the Government. Asked again whether he applied pressure in the manner suggested by Mr Bond, Mr Dowding responded in the negative.

20.3.8 There is documentary evidence that assists in determining what was decided at the Friday breakfast meeting. Mr Grill prepared a draft agreement that morning in which he wrote that the following had been agreed at the meeting:

- "(a) each of the S.G.I.C. and Bond Group make available \$25,000,000 to Rothwells and Spedley Securities either make available or accept liability for \$25,000,000 of credit facility to Rothwells;
- (b) the funds (except \$22,000,000 of the Spedley Commitment) will be advanced as soon as practicable bearing in mind the requirements of all parties concerned;
- (c) within a short period, the remaining \$22,000,000 from Spedley will be advanced;
- (d) the terms of the accommodation are to be agreed, but as between the three organisations making the accommodation, all rights and obligations are to be *pari passu*.
- (e) The S.G.I.C. continue to hold its shares in the Bell Group for a further yet to be agreed period from today's date. Bond Corporation to continue to indemnify the Commission against loss on sale of its shares at the end of that period on the same conditions as they are presently indemnified and held.

We presume that the extended period would be the same as mentioned in your draft letter of 18th October to the S.G.I.C. We would await your advice on this matter.

- (f) Spedleys would provide \$3m cash of the \$25m liability today.
- (g) Brian Yuill on behalf of Spedleys has indicated the following terms which were discussed at this morning's meeting:-
 - (i) Brian Yuill or a nominee would be appointed to run Rothwells and given complete and unfettered control of the day to day operations of the company.
 - (ii) Spedleys would provide \$3m cash today.

- (iii) S.G.I.C. and Bond Corp to provide funds today to payout Standard Chartered bills of \$10m today and provide sufficient further liquidity to carry on today.
- (iv) L.R. Connell to cease to be a member of the board and is not to have any direct or indirect involvement with the management of the company.
- (v) L.R. Connell to give to Brian Yuill acting on behalf of the parties providing the above mentioned accommodation, an irrevocable power of attorney over his shares in Rothwells.
- (vi) L.R. Connell to give to an agreed nominee of the parties an irrevocable power of attorney over his own personal assets.
- (vii) Authorised representatives of the three organisations are to have access to all of the books and records of the company to assess its financial status and to monitor its progress."

A copy of that draft was sent by Mr Grill to Mr Wiese by facsimile transmission on 21 October 1988.

20.3.9 In subparagraph (e), Mr Grill conveyed an understanding concerning agreement as to the extension of the indemnity that is clearly in conflict with the evidence of Mr Dowding. If this was Mr Grill's understanding, Mr Dowding said he disagreed. He also disagreed with subparagraph (a) which referred to SGIC making available \$25 million. He said there might have been a proposal that SGIC be involved in funding, but it would have been in the context that it was an entity exposed to Rothwells. A reference to SGIC providing the funds also appeared in a letter of 21 October 1988 from Robinson Cox to Rothwells. Mr Dowding regarded that suggestion as incorrect and repeated that he was not making a commitment on behalf of SGIC. Mr Wiese said the reference to SGIC in the letter of 21 October 1988 was an error.

20.3.10 Mr Grill prepared the draft on the same day and within a very short time of the meeting. We see no reason to doubt the accuracy of his evidence and the draft. We are satisfied that, at the end of the meeting, it had been agreed in principle that SGIC would be the vehicle to make the Government's contribution and that the

indemnity would be extended. Mr Dowding's denial is an attempt to avoid the obvious conclusion that he was prepared to commit SGIC without consulting it. In our view he was prepared to do so because he believed Mr Rees and the Commissioners of SGIC would comply with his wishes. Yet again, Mr Dowding has not been frank with us.

20.3.11 As to whether the immediate need for liquidity in the vicinity of \$15 million was discussed at the meeting, the evidence of Mr Edwards is of assistance. He said he was telephoned by Mr Yuill at about 5.00 am on the morning of Friday, 21 October 1988, and he explained to Mr Yuill the mechanics of the proposal for a tripartite agreement. Mr Yuill agreed he would make an \$8 million "daylight" advance immediately and was to contact Mr Bond and Mr Dowding at Mr Bond's house. The advance was provided on the basis it would be repaid the same day. Mr Edwards said he rang Mr Grill at Mr Bond's house and told him of that development. According to Mr Edwards, a total of \$15 million was deposited by Spedleys with Rothwells on Friday, 21 October and, as a consequence, at the end of that day Spedleys would be in difficulty if Rothwells did not repay the \$15 million.

20.3.12 Mr Yuill said Mr Lloyd rang on the morning of 21 October 1988 seeking a \$3 million deposit and a daylight overdraft. Although he was unable to remember the details of the conversation, as a result of the request by Mr Lloyd, he agreed to a \$15 million daylight overdraft plus the \$3 million deposit. The total of \$18 million was to be repaid that day. Having agreed the matter with Mr Lloyd, Mr Yuill said he left it to Mr Fraser to handle the details.

20.3.13 According to Mr Fraser, on the morning of 21 October 1988, he was advised by the Sydney office of Spedleys to arrange a bank cheque for \$8 million payable to Rothwells in order to clear Rothwells' overdraft at NAB. He understood that Spedleys was to be reimbursed \$5 million from either the Government or Bond Corporation the same day. The cheque was either given to Rothwells or banked directly. Mr Lloyd later requested that Spedleys provide a \$10 million bank cheque to meet Rothwells' bills that fell due the previous day. According to Mr Fraser, Mr Lloyd said he was arranging for funds in reimbursement to be deposited into the Spedleys account that afternoon. Mr Fraser concluded from those comments that the money was coming from a Government source. In reliance on Mr Lloyd's assurance, Spedleys bought a bank cheque from the ANZ Bank for \$10 million and paid it direct to the R & I Bank which owned the bills.

20.3.14 It is to be remembered that Mr Lloyd said he had advised Mr Dowding, Mr Grill and others at the meeting of 20 October 1988 that there was an immediate requirement of \$18 million if Rothwells was to open the next day. We accept that evidence and have no doubt Mr Dowding and Mr Grill had this in mind when they met with Mr Bond early on 21 October 1988. In addition we accept the evidence of Mr Edwards that, while the breakfast meeting was in progress, he told Mr Grill of Mr Yuill's agreement to make a daylight advance of \$8 million. It would be most surprising if Mr Grill did not pass on the information to Mr Dowding. In these circumstances it is highly likely that some conversation occurred about the immediate need. We accept the evidence of Mr Bond that Mr Dowding and Mr Grill talked about an immediate need that day for \$15 million.

20.3.15 As to whether Mr Dowding and Mr Grill mentioned SECWA and Western Collieries in the context of the provision of immediate liquidity for Rothwells, this matter was probably the subject of conversation between Mr Grill and Mr Bond later in the day. There is a real risk Mr Bond was mistaken as to the time at which this information was conveyed to him. While there had been mention of Western Collieries prior to 21 October 1988, it appears that the discussions with Mr Bond on 21 October centred on the use of Spedleys to meet the immediate liquidity needs of Rothwells. In our view it is likely that Mr Bond did not hear of the use of Western Collieries until he spoke with Mr Grill during the afternoon of Friday 21 October 1988.

20.3.16 The application of pressure to Mr Bond in the manner he described is denied by Mr Dowding and Mr Grill. There would not appear to be any reason for Mr Bond to fabricate this part of the conversation. Given all the circumstances, particularly the fact that Bond Corporation had been paid from the PICL settlement proceeds and had a "no risk" project with which to proceed, it is not surprising that Mr Bond would have resisted the overtures of a Premier and a Minister who had gone to him early in the morning seeking his financial assistance. The plight and desperation of the Premier must have been perfectly obvious to Mr Bond. Once resistance was met, we do not find it surprising that Mr Dowding and Mr Grill should attempt to find means of persuading Mr Bond to participate. In such tense circumstances, a statement such as that attributed by Mr Bond to Mr Dowding and Mr Grill is by no means unlikely. We accept Mr Bond's evidence on this aspect. While the remarks may be viewed as inappropriate, in the context of the total transaction and tense negotiations, we do not regard them as particularly significant.

20.3.17 Mr Grill said that following the meeting, he and Mr Dowding went to Mr Grill's flat. Although Mr Dowding indicated he was prepared to go ahead with the proposal, he wanted to ensure that all of Mr Connell's assets were fairly and squarely on the line and better management was in place. In accordance with Mr Dowding's instructions, Mr Grill went to Rothwells and told Mr Lloyd, Mr Hilton and Mr Edwards of the arrangement. He set about drafting an agreement designed to reflect the discussions that had taken place. He also spoke with Mr Connell, who was in Sydney, and indicated that the Premier was demanding he place "on the line" every single last asset and that a list be provided so that security could be taken over those assets. Mr Connell protested that the Government was sending him bankrupt.

20.3.18 Mr Wiese understood that, if something was not done quickly by way of providing funds to Rothwells, it would be insolvent and should be wound up. He said he received a telephone call from Mr Dowding giving him instructions which he was not at liberty to disclose because of legal professional privilege. As a consequence of those instructions, the letter of 21 October 1988 was written to Rothwells by his partner, Mr Neville Owen. This letter indicated that agreement had been reached that each of the SGIC, Bond Corporation and Spedleys would make \$25 million available to Rothwells and terms were set out. The letter stated it was a requirement that the Board of Rothwells acknowledge and agree to arrangements in relation to the management of the company, namely, that Mr Yuill or a nominee of Spedleys be given complete and unfettered control of the day to day operations of Rothwells. In addition, Mr Connell was to cease to be a member of the Board and was not to have any direct or indirect involvement with management. It was also a condition that authorised representatives of the three organisations had access to all the books and records of the company to determine its financial status and to monitor its progress. Mr Wiese said the reference to SGIC was an error as Mr Dowding had instructed that the State rather than SGIC would participate.

20.3.19 According to Mr Lloyd, at about 9.00 am on Friday 21 October 1988, he was advised by Mr Wiese that agreement had been reached between the three parties to provide a \$75 million facility and a letter to that effect would be forthcoming. The letter of 21 October was provided by Robinson Cox and Spedleys made an advance to enable Rothwells' account to be brought within overdraft limits. In those circumstances, Mr Lloyd contacted the Brisbane and Sydney offices of Rothwells and advised that cheques could be issued.

20.3.20 Mr Lloyd said that when the letter from Robinson Cox arrived he convened a Board meeting of Rothwells and Mr Musca attended by invitation to present legal advice. Mr Lloyd tabled the letter and advised the Board of his view that the proposal for the provision of \$75 million should be accepted because the alternative was to stop trading. He said he indicated he had no personal reservations about handing over control of the company to another person. The Directors generally accepted the idea, but concern was expressed about divesting complete and unfettered control and whether that was consistent with the Companies Code. Mr Musca was given instructions to speak with Robinson Cox about that issue and to arrange wording which recognised that the arrangements were not intended to be outside the provisions of the Code. Mr Lloyd said the Board reconvened early that afternoon and Mr Musca advised that he had not been able to progress very far with Robinson Cox. Mr Musca suggested it would be a good idea to accept the proposal contained in the letter and the Board resolved to do so. At about 3.30 pm Mr Lloyd received a call from Mr Edwards who said it would be advisable to accept the proposal. According to Mr Lloyd, Mr Edwards said the agreement between Bond Corporation and the Government in relation to the matter was getting a "bit sticky". In addition Mr Edwards advised him that it was intended SECWA would make a prepayment to Western Collieries for coal.

20.3.21 During the afternoon of Friday, 21 October 1988, a meeting was convened in Mr Dowding's office. A number of people were involved from time to time, including Mr Dowding, Mr Berinson, Mr Grill, Mr Edwards, Mr Bowe, Mr Heron, Mr Rees and solicitors from Robinson Cox, Mr Wiese and Mr Owen. Mr Dowding said he asked Mr Wiese and Mr Owen to work out of the Government office because of the pressure and "tremendous sense of urgency". According to Mr Grill, when he arrived early in the afternoon, Mr Rees was outlining the SGIC exposure to Rothwells as between \$80 million and \$90 million. The position of Spedleys was discussed, in particular whether Spedleys would be able to finance its contribution to the rescue package. He said, as the meeting progressed, Mr Dowding was becoming less and less inclined to proceed and ultimately instructed Mr Wiese and Mr Owen to draft a letter to bring to an end any understanding that might have been created by the earlier letter to Rothwells. Mr Grill said an argument then ensued between Mr Edwards and Mr Dowding because Mr Edwards took the view that the Government had already entered into an agreement. He said Mr Edwards argued that cancellation would expose Mr Lloyd, and possibly others, to a breach of the Code because they had accepted deposits in circumstances where there was no certainty that Rothwells could pay off its creditors. He said Mr Dowding conferred with the solicitors, but he could not remember

the response which was "a bit heated". Mr Grill thought Mr Dowding said the situation was so uncertain that he could not proceed where one of the parties did not appear to be fully committed.

20.3.22 Mr Wiese said it became apparent by about 3.30 pm that the agreement as reflected in the letter from Robinson Cox to Rothwells of 21 October 1988 was not going to succeed. He said "... we arranged to withdraw the offer such as it was". There was an exchange of letters in which Rothwells accepted the offer and the Government withdrew it. This has been referred to as "the battle of the letters". Rothwells was maintaining that a valid agreement existed, particularly in view of part performance by Spedleys. It is unnecessary for us to endeavour to resolve this issue.

20.3.23 Mr Wiese understood Rothwells would be insolvent at the close of business on Friday 21 October 1988 because the Government had withdrawn the offer of support. We have no doubt that everyone at the meeting that afternoon was fully aware of that position. This knowledge provides an important background to the events that followed in connection with the prepayment of coal from Western Collieries. In addition, as Mr Edwards pointed out, the assistance given by Spedleys that day had been given on the assumption that Bond Corporation and the Government would fix the problem in Rothwells during the day so Spedleys could be repaid. When the original agreement was not to be pursued, Mr Edwards was of the view that something had to be done to assist Spedleys because he believed Spedleys would collapse if the \$15 or \$18 million advanced by Spedleys was not repaid that day. If Spedleys collapsed, SGIC would have been adversely affected.

20.3.24 With respect to the effect on SGIC of a Spedleys collapse, not only had SGIC made a deposit of \$5.5 million on 20 October, but a further deposit of \$11 million was made by SGIC with Spedleys on 21 October 1988. Both amounts were immediately on-lent to Rothwells. In his report of 27 September 1990 to Mr Ian Taylor, as with the previous deposits, Mr Rees said the deposit of 21 October occurred following a meeting he attended with Mr Parker, Mr Lloyd and Mr Edwards. He reported that Mr Lloyd and Mr Edwards suggested the provision of funds by SGIC to Spedleys would somehow be of assistance to Rothwells. His report stated that Mr Parker was clearly aware of the solicitation of the funds and approved of the deposit being made by SGIC with Spedleys. In this respect Mr Rees was in error because, as already discussed, Mr Parker was overseas. We are satisfied that this was a continuation of the general policy followed by the Government of using SGIC to

provide, indirectly, funds for the assistance of Rothwells. It is likely that Mr Edwards was made aware of the need for funds by Mr Lloyd and that he organised the deposits with the assistance and approval of Mr Rees. For the reasons discussed previously, this conduct on the part of Mr Rees and Mr Edwards was improper.

20.3.25 As to the risk involved in depositing funds with Spedleys, in his notes prepared in about June 1988 after discussion with Mr Edwards, Mr Lloyd wrote that, in the event of Rothwells collapsing, the "... GPI/Spedleys Group would probably not survive". He observed that the group had a deposit base similar to that of Rothwells. The notes reflected a discussion between Mr Edwards and Mr Lloyd. Mr Edwards was, therefore, aware that funds deposited with Spedleys were at risk. Bearing in mind that Mr Edwards canvassed the major points of the notes during the crucial meeting of late June or early July 1988, and that Mr Grill and Mr Parker attended the crucial meeting, there is no reason to doubt that these ministers were apprised of the Spedleys risk.

20.4 SECWA and Western Collieries - \$15 million prepayment for coal

20.4.1 We are satisfied that Mr Rees advised Mr Dowding, Mr Grill and others at the meeting during the afternoon of Friday, 21 October 1988, that SGIC's exposure to Rothwells was in the region of \$75 million. That figure included the deposits with Spedleys, but we are unable to say whether he explained that fact to the meeting. After the PICL settlement, there also existed the prospect of preference claims if Rothwells failed. Mr Dowding, Mr Grill and Mr Edwards were acutely aware that the payment of \$150 million to NAB would be set aside as a preference and NAB would look to the Government for \$150 million pursuant to the indemnity. They appreciated the Government would probably be obliged to meet that claim. In that event, the Government would have had to acknowledge a total payment of \$325 million, in addition to the losses of approximately \$75 million sustained by SGIC. These gloomy prospects were undoubtedly prominent in the thinking of Mr Dowding, Mr Edwards and Mr Grill and provided incentive additional to all the factors previously discussed that led to the PICL deal.

20.4.2 It was Mr Bowe who first suggested the possibility of a prepayment for coal. He said that when he arrived at the meeting on 21 October 1988, there seemed to be some confusion about what had been agreed in connection with the \$75 million rescue package. Mr Dowding expressed the view that he would not be further involved,

partly because of the uncertainty about what had been agreed. Mr Bowe recalled Mr Dowding was quite forceful in stating that the Government would no longer be involved in Rothwells. Mr Bowe said he maintained it was not a function of Treasury to put money into Rothwells and Mr Rees indicated SGIC would not assist. According to Mr Bowe he mentioned, by way of an aside, that if the Government felt it needed to deposit funds into Rothwells for temporary liquidity purposes, it might wish to consider the forward acquisition of coal by SECWA from Western Collieries. He understood Rothwells was taking over Western Collieries and it was to become a wholly owned subsidiary of Rothwells. He said he assumed that Western Collieries would help the parent company by providing some liquidity. He believed it was a commercial proposition and a reasonable course to take. His suggestion was not taken up at that time.

20.4.3 The idea was probably in Mr Bowe's mind because of earlier discussions with Mr John Cahill, a manager in SECWA's Treasury section. As discussed below in paragraph 20.4.5, by letter of 10 October 1988, Western Collieries had submitted to SECWA broad details of a prepayment proposal. Mr Cahill had discussed funding with Mr Bowe and reported by memorandum of 21 October 1988 to Mr F Oliver, general manager of SECWA finance and administration. Mr Bowe had indicated to Mr Cahill that, should SECWA elect to proceed, there would not be any problem with temporary funding, provided the financing did not cross reporting dates.

20.4.4 According to both Mr Bowe and Mr Heron, the discussion on 21 October 1988 proceeded on the basis that there was a need to provide \$15 million to Rothwells that day. Mr Heron said that after his arrival Mr Bowe told him he had raised the possibility of advancing funds to Western Collieries on the security of future supplies. He asked Mr Heron to raise the matter again with Mr Dowding and Mr Heron did so. Mr Heron believed it was reasonable to assume that the funds would go to Rothwells because those funds would be put into a position where Rothwells would have control. According to Mr Heron, there was reference in the discussion that followed to a previous letter from Western Collieries to SECWA which offered an agreement for the prepayment for coal. It is apparent, however, that no one inquired as to the circumstances of that offer.

20.4.5 Mr Crawford, the Managing Director of Western Collieries Ltd, had written to Mr Norm White, the Commissioner of SECWA on 10 October 1988. He submitted broad details of a \$24 million prepayment proposal and, before going into too

much detail, he sought a response from SECWA as to whether it would be amenable in principle to such an arrangement. Mr Crawford said the idea emanated from Mr Lloyd because Rothwells was due to meet the \$76.5 million balance of the purchase price of Western Collieries on 25 November 1988. He said it was Mr Lloyd's idea that Western Collieries should borrow the necessary funds for on-lending to Rothwells so that Rothwells would be able to complete the purchase. Various approaches had been made to financial institutions and the mechanism of an advance payment of \$25 million by SECWA was seen as partly achieving the desired funding result. Mr Crawford acknowledged that the only interest being served was that of Rothwells. He said Western Collieries did not need the \$25 million other than for the purpose of providing it to Rothwells and these arrangements would not have been entertained but for the needs of Rothwells.

20.4.6 The sale of Western Collieries by CSR Limited ("CSR") to Rothwells had occurred on 26 May 1988. Mr Crawford, thereafter, reported to Mr Lloyd, but Mr Lloyd did not have any part in the day to day operations of Western Collieries. According to Mr Lloyd, in about September he considered the possibility of obtaining advance payments of coal from SECWA to provide Western Collieries with funds which could be used for its acquisition by Rothwells. He spoke with Mr Parker who agreed it was worth pursuing and discussing with Dr McKee. He and Dr McKee had agreed that an approach should be made by Mr Crawford to the managing director of SECWA. Mr Lloyd said he did not have a firm view about how the matter should be progressed because it was a fallback position. He had a couple of discussions with Mr Crawford and asked him to write to SECWA. At first Mr Lloyd was to draft the letter but later it was agreed that Mr Crawford would do so. Mr Lloyd approved the content. Initially, Mr Lloyd acknowledged the inaccuracy of the statement in the letter to the effect that by this arrangement Western Collieries would be able to more effectively plan and execute its capital equipment acquisition programme. He thought it was put in those terms to make it attractive to SECWA. During subsequent questioning by his own counsel, however, Mr Lloyd modified his answers about the inaccuracy of the letter. He said his previous answer was correct to the extent that he interpreted the question as referring to the immediate use of the funds. He claimed, however, that the financial package would allow Western Collieries to more effectively plan and execute its capital equipment acquisition programme because such a programme was incorporated within the financing package. We find Mr Lloyd's belated explanation unconvincing. His idea that Western Collieries borrow \$25 million to on-lend to Rothwells had nothing to do with the planning and execution of the capital equipment acquisition programme for

Western Collieries. The letter deliberately misstated the position in order to disguise the true purpose.

20.4.7 Following the letter of 10 October, Mr Crawford had spoken with both Mr Blackman and Mr White of SECWA. Mr White indicated concern as to the security of the proposed arrangements and Mr Blackman questioned whether SECWA could enter into an arrangement that involved payment rolling from one financial year to the next. A meeting had been arranged for 28 October 1988, but, by then the proposal had not progressed any further. The proposal was clearly at the most initial and tentative stage when the meeting occurred on 21 October 1988.

20.4.8 Nobody at the meeting was aware of the background. No attempt was made to contact anyone from Western Collieries to negotiate the terms of a prepayment or to ascertain what view Western Collieries might take of a suggestion that the funds be applied in some way to the benefit of Rothwells. According to Mr Heron, nobody took the Western Collieries point of view that to deposit funds into Rothwells would not ordinarily be seen as in the best interests of Western Collieries. Mr Heron said it was specifically stated that it was up to Western Collieries what it did with the funds. He said the attitude was taken that funds could be provided to Western Collieries by this legitimate commercial transaction, but the Government would not try to influence Western Collieries in any manner whatsoever. Mr Heron said he did not know why contact was not made with Western Collieries to ensure that the funds would be applied to the benefit of Rothwells. His view was summed up in the following question and answer:

Q: Did everyone assume that because Mr Lloyd was wearing the hat for Rothwells -- the Government, that he would ensure that Western Collieries went along with the arrangement? Was that really it?

A: I think that's it in a nutshell.

20.4.9 Mr Edwards said the idea was presented as a way of solving the day's liquidity problems because the \$15 million could be deposited with Rothwells. As to whether there was any talk about depositing the funds with Rothwells he said: "Oh, yes. I mean, that's what we were doing". He was then reminded of the evidence of other witnesses that the discussion was all about payment to Western Collieries and it had been specifically said that whatever Western Collieries did with the money was its

business. Mr Edwards responded, "[w]ell I think that's stretching your credibility a bit". In his view there was a degree of semantic artificiality. He was aware that Mr Dowding was careful to have advice from solicitors that it was proper to proceed. Mr Edwards said he spelt out to the meeting that the real problem concerned the advance of \$15 million by Spedleys to Rothwells in accordance with the earlier agreement and, in the absence of assistance, one or other of them would have to shut its doors. Mr Edwards conceded, however, that it was possible that some of those present considered it was just a Rothwells' issue and might not have understood that these funds were, in effect, replacing the funds that Spedleys had advanced earlier that day. Mr Edwards did not see anything improper in what was eventually done by way of prepayment.

20.4.10 Once the decision was made that the prepayment was an appropriate course to adopt, Mr Heron advised of the need to contact Mr White. The nature of this investment required a decision of the SECWA Board, which was unlikely to be achieved in the time available. Mr Heron told Mr Dowding he believed SECWA would require a direction from the Minister before proceeding. Mr Heron said he rang Mr White who expressed concern about the nature of the payment and indicated he did not want to do it. Mr Heron explained the problem with Rothwells and then Mr Grill spoke with Mr White. Mr Heron said he understood that Mr White confirmed with Mr Grill that he would require a direction. After discussion with the Premier, who agreed that a direction should be given, Mr Grill gave the direction to Mr White.

20.4.11 Mr White prepared and signed a statement dated 4 November 1988, and also an annexure dated 11 November 1988, because he accurately predicted that the issue of the \$15 million payment would end up in legal proceedings. According to his statement, which we accept, he was telephoned by Mr Heron at about 3.15 pm and advised of the serious liquidity problem within Rothwells. He was told that the Government had to arrange for an injection of funds before the close of business that day. He said Mr Heron explained that, unless the funds were deposited, Rothwells would fall and a whole series of extremely serious events would follow. A proposal was put to him that SECWA should prepay for approximately 300,000 tonnes of coal for which SECWA would receive a discount from the then current contract price. The coal would be part of the existing coal contract and not additional coal. Mr Heron estimated the value would be in the order of \$12 million to \$15 million. Mr White said he informed Mr Heron of the preliminary discussions, including his advice to Mr Crawford that he saw considerable problems with the arrangement because of the inability to

obtain satisfactory security, particularly in view of the publicised poor financial position of the Rothwells group. According to Mr White, he advised Mr Heron that the current proposal had the same problems of security. Although Mr Heron agreed with Mr White, he suggested that SECWA should reconsider in view of the seriousness of Rothwells' liquidity problems. Mr White informed Mr Heron he was not prepared to make the payment because he believed it would expose SECWA to substantial commercial risk.

20.4.12 Mr White said Mr Grill spoke with him at the suggestion of Mr Heron. Mr Grill told Mr White he realised it was a difficult matter, but requested that Mr White make the payment. Mr White said he refused and advised Mr Grill of problems concerning a lack of security and absence of authority to approve such a deal without board approval. Mr Grill responded that he understood he could give a direction and Mr White confirmed he could do so under the Act. Mr Heron took over from Mr Grill and Mr White understood that others at Mr Heron's end were discussing the legal implications of the Government giving a direction. Mr Grill then returned to the telephone and said: "I'm sorry but I have to direct you to do so". Mr White said he pointed out that any direction would have to contain some clause to protect the Commission if the deal went bad. Mr Grill agreed such a clause would be included.

20.4.13 Mr Grill recalled Mr Dowding instructing Mr Heron to contact Mr White and Mr Heron left the meeting apparently to do so. When Mr Heron returned to the meeting, he indicated Mr White would not proceed without a direction. Mr Grill said there was a short discussion as to whether Mr Grill had the authority as acting Minister to give the direction. He was told he had that authority and was asked by Mr Dowding to speak to Mr White. He said he did so and Mr White advised him in fairly brief terms that he did not believe that SECWA would accede to the prepayment without a direction. Mr Grill said he asked Mr Dowding whether he should give the direction. After a short discussion Mr Dowding instructed him to give the direction and he did so.

20.4.14 Mr Grill denied that Mr White said it was a high risk deal because of the lack of security. In a radio interview on 17 August 1989, Mr Grill said the Government had been in a very unenviable position and had to make a decision whether to support Rothwells or allow it to go under. In that interview he said "... it was thought by Government, and not by me on that particular occasion, but by Government ...", that the purchase was a correct and proper thing to do as part and parcel of the Rothwells rescue.

In evidence he said his radio interview was not meant to indicate that on the 21 October 1988 he did not support the arrangements.

20.4.15 Given the circumstances of the meeting, it is not surprising that details of it could be forgotten. We accept the evidence of Mr White in preference to that of Mr Grill. We are satisfied that those at the meeting were aware that Mr White did not approve of the proposal and that he was concerned about security. They were also aware that a direction was required before SECWA would complete the transaction that day. Mr Grill denied both that Mr White said any direction would have to contain a clause to protect SECWA if the deal went bad and that he agreed to such an inclusion. Again we accept the evidence of Mr White in this regard. The written direction and a letter signed by Mr Grill were subsequently handed to Mr White by Mr Parker on 25 October 1988. Although the direction does not contain such a clause, the following paragraph appears in the letter:

"I also confirm the assurance which I gave to you that in making this pre-payment the Government understands that SECWA's commercial and financial position must be secured and that in the event WCL is unable to meet its commitments under the arrangement for pre-payment outlined in the attached letter dated 21st October, 1988 then SECWA will not be disadvantaged."

Mr Grill acknowledged that he signed the letter. He said, however, that the paragraph must have been included because it was something SECWA wanted in the letter, but it did not accurately reflect the conversation he had with Mr White. Mr Grill suggested there was a further inaccuracy in an earlier paragraph which confirmed that Mr White advised him he was unable to comply with the Government's request without the approval of the board, and that a formal direction would be required because it was impracticable to convene a meeting. Mr Grill said he recalled signing the letter and thinking the reasons set out were not correct, but he thought if it was what SECWA wanted he was happy to sign it. As indicated, we accept the evidence of Mr White in preference to that of Mr Grill. We find the letter accurately reflects the conversations. In addition, we are satisfied that, before he gave the assurance, Mr Grill would have obtained the approval of Mr Dowding.

20.4.16 Our conclusions in this regard are confirmed by the addendum to Mr White's statement signed on 11 November 1988. Attached to the addendum was the draft ministerial directive prepared by Mr White and the Commission solicitor, Mr May.

It was faxed from SECWA to the Under Treasurer late in the afternoon of 21 October 1988. According to Mr White's statement, he received a telephone call from Mr Heron at about 9.30 am on 24 October and was advised that the draft directive was not acceptable as the Minister could not commit the State to a guarantee. The paragraph to which Mr Heron objected was in the following terms:

"I confirm that if Western Collieries Ltd does not perform the terms and conditions contained in the said letter, then the moneys so paid by the State Energy Commission of Western Australia, on behalf of the State of Western Australia, will be reimbursed to the State Energy Commission of Western Australia by the State of Western Australia."

Mr White repeated his concerns about lack of security to Mr Heron who proposed a clause acceptable to Mr White which ultimately became part of the letter. That clause is quoted above in paragraph 20.4.15.

20.4.17 Mr Heron said that, once the direction had been given, he spoke with someone in the Treasury section of SECWA to make sure sufficient funds were available. He said Mr Wiese began preparing the document to evidence the agreement. Mr Heron thought he spoke to one of the SECWA officers responsible for coal purchases in an endeavour to arrive at the precise amount of coal for incorporation in the document that was being prepared. He acknowledged they had to calculate a discount on the price of the coal because SECWA was paying for it in advance. As to how that could be worked out in order to create an agreement between SECWA and Western Collieries, Mr Heron said Mr Lloyd was the only person contacted and he assumed it was something spoken of between Mr Bowe and Mr Lloyd.

20.4.18 Mr Bowe said he telephoned Mr Lloyd and advised him "the Government has decided that they are prepared for SECWA to forward purchase coal to the value of \$15 million, three months supply". He was not sure whether he went into details with Mr Lloyd. He said he told Mr Lloyd that he, Mr Lloyd, needed to discuss it with SECWA from then on because time was running out and the cheque would be made out to Western Collieries. He thought this was about 5.00 pm or later. He said Mr Lloyd acknowledged the decision and said he would get on to the matter immediately. There was no mention of Spedleys.

20.4.19 According to the evidence given by Mr Lloyd at his trial, his first knowledge of the suggestion of a prepayment came from Mr Edwards at about 3.30 pm that day during a telephone conversation. They discussed Rothwells accepting the \$75 million proposal. In addition Mr Edwards advised that "... they were considering and intended to make a prepayment of coal from SECWA to Western Collieries and that they were talking to SECWA to arrange that at that time". Mr Lloyd said he believed Mr Edwards mentioned a figure of \$15 million. He was later contacted by Mr Edwards and told that he should speak with Mr Cahill at SECWA about delivery of the cheque. When he spoke with Mr Cahill he was advised that it was still being arranged. Mr Lloyd said he went to the offices of SECWA where he signed a letter of offer and received the cheque. He said he believed the funds belonged to Western Collieries and he signed the letter on behalf of Western Collieries believing he had the right to do so as a director of the company. In our view, there was no basis for any such belief, if in fact Mr Lloyd held it.

20.4.20 Mr Cahill recorded the sequence of events at SECWA in a file note dated 2 November 1988. He noted that shortly after 4.00 pm he received the first of a number of phone calls from Mr Heron. He was told that \$15 million had to be paid to Western Collieries by 5.00 pm that day as a prepayment for coal. Mr Heron confirmed with Mr Cahill that the cheque was to be made payable to Western Collieries and that Mr Cahill should make arrangements to have a cheque delivered to Mr Lloyd at the 23rd floor, Allendale Square, 77 St George's Terrace. This was the office of Rothwells, not Western Collieries. The draft letter of offer was faxed by Mr Heron to Mr Cahill and Mr Heron advised him that it had been prepared by a solicitor. According to Mr Cahill's note, Mr Lloyd rang him at approximately 4.45 pm, but neither the cheque nor the letter was ready and Mr Lloyd offered to collect them. Mr Lloyd telephoned again shortly before 5.10 pm and advised Mr Cahill that he had about nine minutes to get the cheque to the bank. Mr Lloyd attended and read and signed the letter in Mr Cahill's presence. According to Mr Cahill's note, Mr Lloyd stated he would sign it in his capacity as a director of Western Collieries and this fulfilled the instruction issued by Mr Heron to Mr Cahill. He handed the cheque to Mr Lloyd.

20.4.21 When Mr Lloyd collected the cheque, he wrote the words "agreed and accepted" at the bottom of the letter and signed it as a director. The letter was in the following terms:

"21 October 1988

The Manager
Western Collieries Ltd
c/- 23rd floor
77 St. George's Terrace
PERTH, W.A. 6000

Dear Sir,

FORWARD COAL SALE OFFER

The State Energy Commission of Western Australia (SECWA) hereby offers to purchase from you approximately 300,000 tonnes of open cut and deep mine coal from your Collie mine for delivery over the 4-month period commencing on the date of this letter.

The purchase price paid will be adjusted at the conclusion of deliveries to take account of:

- (a) the actual tonnage of each grade of coal delivered;
- (b) the standard contract price for each grade of coal delivered;
and
- (c) the cost of funds to SECWA in making payment in advance, calculated on the basis of the R&I Bank Large Overdraft Base Rate from time to time.

The coal will be deliverable to SECWA in accordance with the standard terms in place between us.

The payment terms offered are payment in full on your written acceptance of this offer. If this offer is accepted by you, please indicate accordingly by signing at the foot of the duplicate of this letter and returning it to us."

20.4.22 Mr Lloyd deposited the cheque with Spedleys. We will discuss his actions later. We accept that those who participated in the meeting earlier that afternoon were not told that Mr Lloyd intended to deposit the \$15 million directly with Spedleys. As indicated previously, however, nobody inquired about the background of the matter

nor was confirmation sought from Western Collieries or Mr Lloyd as to how the funds would be applied. The letter of 21 October 1988 signed by Mr Lloyd purports to represent an agreement between SECWA and Western Collieries, but it is so vague as to the calculation of the purchase price that it is meaningless. From a commercial point of view, the whole procedure adopted was totally inept. It comes as no surprise that difficulties subsequently emerged. They are discussed later in paragraphs 20.4.50 and 20.4.52.

20.4.23 Mr Dowding made the decision that Mr Grill should direct SECWA to pay \$15 million to Western Collieries. He understood there was a measure of commercial advantage to SECWA and there did not appear to be any risk. He said Treasury personnel and others advised that Mr White's objections were not valid. He said he believed the transaction was in the best interests of the State and, therefore, accepted the suggestion that Mr Grill give the direction. Mr Dowding said he did not give any consideration to the position in which Western Collieries might find itself. He said he was not making a decision that Western Collieries would put money into Rothwells as that was for Western Collieries to decide. He asserted that he did not apply his mind to the issue except to the extent of contemplating that whatever Western Collieries did was a matter for Western Collieries. Mr Dowding agreed that he was making the decision about the prepayment in the context of Rothwells' needs, but said he was not applying his mind to the mechanics of how it would be done. He denied it was careless of him not to apply his mind to those mechanics and said he had a clear impression in his mind of saying that he had lawyers and Treasury people involved to make sure it was carried out properly. Mr Dowding was asked why, if the whole purpose of the exercise was to assist Rothwells, he did not ensure that the arrangement would result in the necessary benefit or assistance flowing to Rothwells. He replied it was not a matter on which he was then being called to make a judgment. He denied that the matter for his judgment was whether the arrangement would in fact assist Rothwells. Mr Dowding thought he was not aware of any suggestion emanating from Mr Edwards that the funds were required to repay Spedleys. The Commission was unable to accept Mr Dowding's evidence in this regard.

20.4.24 Mr Grill acknowledged that the whole purpose of the transaction was to solve the immediate liquidity crisis in Rothwells. He said there was no discussion in detail as to how the payment of \$15 million to Western Collieries could benefit Rothwells, but there was a clear understanding that, as Western Collieries was a wholly owned subsidiary of Rothwells, it "... had the ability to deposit those funds with Rothwells". There was an assumption it would do so. Mr Grill accepted there was always a possibility that Western Collieries might refuse to place the funds to the benefit of Rothwells because it might not be in the best interests of that company to do so. He thought, however, that such a refusal was "quite unlikely" because it was a wholly owned subsidiary. Mr Grill understood that Rothwells would have to close its doors if the \$75 million package was not put together and, as that package seemed to have come apart for the moment, the future of Rothwells was highly uncertain. He was aware that Mr Lloyd would be filling two roles, but he did not think it was simply Mr Lloyd's involvement that gave rise to confidence that Western Collieries would use the money

to assist Rothwells. He acknowledged that Western Collieries was facing a very grave risk of losing the \$15 million if Rothwells went into liquidation, but said this was not discussed.

20.4.25 All the difficulties that were experienced in connection with these transactions served to emphasise the highly improper nature of the arrangements that were concluded. It is quite apparent that these were desperate days for Mr Dowding and others who were required to make the decisions. The commonly used description of the problems of Rothwells as a "short term liquidity crisis" was totally inappropriate and should have been recognised as such, at the latest, from April 1988. Before the decision was taken on 21 October 1988 to provide \$15 million to Western Collieries, the matter should have been the subject of full and detailed consideration with Mr White and Mr Crawford or someone else in authority from Western Collieries. Notwithstanding discussions at the meeting concerned with the commercial issues and advice from solicitors, we are satisfied that, in reality, Mr Dowding and Mr Grill were not concerned to ensure that the arrangements were in the best interests of the public. Their one concern was to prevent a collapse of Rothwells. There were many reasons why Mr Dowding and Mr Grill should not have proceeded as they did, including the following:

- (a) the injection of hundreds of millions of dollars into Rothwells, including the proceeds from the PICL settlement, had failed to rectify the problem.
- (b) Advice had been received that a total of \$75 million or more would be needed in the long-term.
- (c) No-one in Government was able to verify that the figure of \$75 million was accurate, nor did they have advice that there was not some other problem more fundamental to the viability of Rothwells of which the Government was not aware. In this regard, Mr Lloyd had not proved reliable and Mr Dowding believed that, from the beginning in October 1987, the Government had been seriously misled about the problem in Rothwells.
- (d) The agreement for a further rescue package had fallen through. There were no positive signs to indicate that it was likely to be resurrected.

20.4.26 It is perhaps indicative of the desperate situation in which those present in the meeting on Friday afternoon believed themselves to be that they were determined to proceed without any attempt to communicate with Western Collieries. We are satisfied there was a conscious decision by Mr Dowding and Mr Grill to avoid discussing the use of the funds with Western Collieries. They made no attempt to communicate with the Managing Director of Western Collieries because they

appreciated that he would not approve of the proposal. The depositing of Western Collieries' funds with Rothwells or Spedleys was obviously completely contrary to the interests of Western Collieries. We are also of the view that Mr Dowding and Mr Grill were aware that this procedure would place Mr Lloyd in a very difficult position because he had a clear conflict of interest. We have no doubt it was taken for granted that the interests of Rothwells and the Government would prevail in the mind and actions of Mr Lloyd.

20.4.27 In all the circumstances discussed, particularly those referred to above in paragraphs 20.4.25 and 20.4.26, the actions of Mr Dowding and Mr Grill were highly improper. The implications of our finding in this paragraph are discussed in a confidential appendix to this report.

20.4.28 Although Mr Berinson was present at the meeting at which the decision was made that SECWA should pay \$15 million to Western Collieries, he had been asked to advise on a different issue. We accept his evidence that he was not an active party to the discussions concerning the \$15 million. He did not have a sufficient understanding of what was being proposed to contribute to any discussion and he was, therefore, not in a position to address the propriety of the decision. It was not an occasion on which it could realistically be said that Mr Berinson had a duty to inform himself or seek to participate actively in the discussions, particularly bearing in mind that the Premier was in direct control and had the advice of solicitors in attendance. In these circumstances there was no impropriety attaching to the limited role played by Mr Berinson.

20.4.29 As to depositing the cheque with Spedleys, at his trial Mr Lloyd said he made a judgment that the cheque should be placed with Spedleys. Aware of the necessity to endorse the cheque, he obtained a list of bank signatories. The usual practice was to deposit the surplus funds with Rothwells, but Mr Lloyd said he was not happy to follow that practice and he gave this explanation:

"I also recognised that Spedleys Securities had a very serious problem that day if we were not going to get performance of the \$75 million agreement because they had advanced to us \$18 million earlier that day with the expectation of being repaid \$15 million that day and so that they would be \$15 million or so outside overdraft and the indication [was] that Spedleys only had \$3 million spare cash to provide us ... so I saw this was a way of solving Spedleys' liquidity problem by placing it on deposit with them."

20.4.30 At his trial, Mr Lloyd indicated he did not see any risk in placing the funds with Spedleys. In evidence before this Commission, however, he said there was some risk, but he believed the effect of the PICL transaction was to put Rothwells in a positive balance sheet situation and, to the extent to which Spedleys was exposed to Mr Connell, that substantially improved its position. He did not believe Spedleys was

in financial difficulty apart from the problem of liquidity if the \$15 million was not repaid as promised. At his trial Mr Lloyd said he believed "... absolutely that I had the right to do what I did". He regarded the transaction as being for the benefit of both Western Collieries and Spedleys and hence there was also a benefit to Rothwells in assisting Spedleys in that manner. He said he did not obtain any legal advice, but he understood that Mr Grill and Mr Dowding were being advised by Mr Wiese. It was Mr Lloyd's view that those who had the benefit of legal advice would not have entered into the transaction if there was something wrong with it. The Commission does not know what legal advice was given because of the claim for legal professional privilege.

20.4.31 As discussed previously, Mr Lloyd was in a difficult position. In dealing with the affairs of Western Collieries, he had a duty to act in the best interests of that company. We are satisfied, however, that his overriding concern was the problem in Rothwells which inextricably involved Spedleys. He did not consult Mr Crawford or any of his fellow directors of Western Collieries.

20.4.32 According to Mr Crawford, he arrived in Perth from Bunbury late on the afternoon of 21 October 1988 and found messages to telephone Mr Lloyd and Mr Michael Egert, the Secretary of Western Collieries. He spoke first with Mr Egert and was told that Mr Lloyd might wish to speak with him about the authorised bank signatories. On contacting Mr Lloyd, he was told by Mr Lloyd that he was about to attend at SECWA and receive a \$15 million cheque. Mr Lloyd asked whether two signatories would be available to remain behind at Western Collieries to countersign the cheque. He indicated that he intended to deposit the \$15 million with Spedleys. Mr Crawford expressed the view that such a deposit was inappropriate. Mr Lloyd responded that the money would be at call and if Mr Crawford had any concerns it could be withdrawn the following week and placed in different financial institutions. Mr Crawford said the conversation was cut off by Mr Lloyd before he could make any inquiries as to the nature of the transaction. He was not aware that it related to the prepayment of coal. He and another signatory remained available but Mr Lloyd did not arrive. Mr Crawford said he contacted Mr Lloyd at the offices of SECWA and Mr Lloyd indicated there was no need for the signatories to remain because he had found another way to handle the transaction. As Mr Lloyd was in a hurry, the conversation ended. It was not clear to Mr Crawford that the \$15 million was being paid to Western Collieries.

20.4.33 During his trial Mr Lloyd said Mr Crawford had some questions which Mr Lloyd believed he answered satisfactorily. In evidence before the Commission, he agreed that Mr Crawford had reservations. He disagreed that he cut off the conversation before Mr Crawford had a chance to become satisfied. We have no hesitation in accepting the evidence of Mr Crawford in this regard. Mr Lloyd would not have wished to discuss the full details with Mr Crawford because he knew the proposal would be rejected.

20.4.34 After 21 October 1988, various meetings occurred in an effort to put together a rescue package. We will discuss those later in the chapter as it is convenient

to continue with events related to Western Collieries. Mr Crawford was understandably concerned that events were occurring in connection with a major customer of Western Collieries about which he had no information. He was first told by an officer of SECWA at a social function on 26 October 1988 that a cheque for \$15 million had been drawn by SECWA in favour of Western Collieries as a consequence of a ministerial directive to SECWA. On 27 October a report appeared in the media that Rothwells was negotiating with Griffin Coal for the sale of Western Collieries. Mr Crawford and other directors called a meeting for that day at which a fairly heated discussion took place about the Griffin issue. The matter of the \$15 million was not raised because, after speaking with other directors, Mr Crawford decided that he should canvass the matter privately with Mr Lloyd. A meeting was arranged with Mr Lloyd for 28 October 1988, but Mr Lloyd was unable to attend. A board meeting was convened for the afternoon of 28 October and Mr Lloyd attended.

20.4.35 We have no doubt that Mr Lloyd knew from 21 October 1988 that an adverse reaction to the events was likely from members of the Western Collieries' Board. Notwithstanding that knowledge, without consulting Mr Crawford or any director of Western Collieries other than Mr Hilton, on Thursday 27 October 1988 Mr Lloyd sought and obtained from the R & I Bank an overnight facility for Western Collieries of \$6 million. By letter of 27 October 1988, as Directors of Western Collieries, Mr Hilton and Mr Lloyd requested the R & I Bank to place \$6 million on deposit with Rothwells. Neither of them was a bank signatory for Western Collieries. Mr Crawford first knew of the facility on Monday, 31 October when advised by the Company Secretary, Mr Michael Egert, that there appeared to have been mistake because of a \$6 million debit and credit.

20.4.36 We have not had the benefit of Mr Lloyd's evidence in respect the \$6 million transaction. He was charged with an offence against section 229(4) of the *Companies (Western Australia) Code*. Mr Edwards was charged with being knowingly concerned in the offence committed by Mr Lloyd. After a joint trial in March 1991, they were convicted. On 3 June 1992 and 15 October 1992, the High Court ordered that the convictions of Mr Edwards and Mr Lloyd respectively be quashed. Mr Lloyd faces the prospect of a new trial. He did not give evidence at his trial and has objected to being questioned before this Commission as to that transaction. We determined that, in all the circumstances, we would not compel Mr Lloyd to answer questions in respect of this transaction.

20.4.37 Mr Edwards said Rothwells was due to make payments of \$12 million on 26 October 1988. Bond Corporation had made a contribution of \$6 million but the Government had not arranged its share. He said he spoke with Mr Rees, but it was too late in the day. He telephoned Mr Grill, who was in the Premier's office, and Mr Edwards assumed there were others present. He said he explained the situation to Mr Grill and asked what was being done to arrange the funds. Mr Grill was a bit mystified because he thought Mr Parker was attending to the matter and said he would speak to the R & I Bank.

20.4.38 According to Mr Grill, he was telephoned late in the day by Mr Edwards who indicated Rothwells had a \$6 million liquidity problem. He said Mr Edwards told him of a tentative arrangement with Mr Phillips, then a director and Deputy Group General Manager of the R & I Bank, to provide accommodation, but attempts late in the afternoon to contact Mr Phillips had been unsuccessful. Mr Edwards asked Mr Grill whether he would be prepared to ring Mr Phillips to ascertain whether the accommodation would be made available. Mr Grill said he rang the R & I Bank at about 5.00 pm or later. Unable to speak with Mr Phillips, he spoke on a conference telephone with Mr Fischer, then the Chairman and chief executive of the bank, and Mr Gordon, then a director and Group General Manager. He said he put to them the request as relayed to him by Mr Edwards, but Mr Gordon indicated that the Rothwells' overdraft was fully drawn and the bank would not provide any further accommodation. Mr Grill said he advised them that Mr Edwards knew more about the matter and that he would report back to Mr Edwards. He did not apply pressure to the bank.

20.4.39 Mr Edwards said that when he was told by Mr Grill that the bank was not prepared to assist, Mr Grill indicated he had advised the bank that Mr Edwards would telephone and explain the situation. Accordingly, he spoke with Mr Fischer and Mr Gordon on a conference telephone. He explained the agreement between the Government and Bond Corporation, and why \$6 million was needed in a hurry to meet the Government's obligations pursuant to that agreement. He said Mr Fischer and Mr Gordon indicated that this situation had not been explained to them by Mr Grill, but they had a problem because of a board resolution preventing them from giving the facility directly to Rothwells. According to Mr Edwards, it was the suggestion of Mr Fischer and Mr Gordon that the facility could be provided to Western Collieries. They said they would advise the R & I Board at a later time.

20.4.40 Mr Phillips said his first contact with the matter was a telephone call from Mr Lloyd while he was attending a meeting at the R & I Property Trust Management Group. Mr Lloyd asked if it would be possible to arrange a \$6 million facility for Rothwells and Mr Phillips responded in the negative. Mr Phillips said Mr Fraser from Spedleys was with Mr Lloyd and on the conference line. Mr Fraser commented that he could not lend the funds to Rothwells and Mr Lloyd then asked whether the R & I Bank would be prepared to grant a facility to Western Collieries. Mr Phillips responded that Mr Lloyd could make an application in the appropriate way. Mr Phillips contacted Mr Prokojes, the Corporate Lending Manager, and asked him to contact Mr Lloyd. Mr Phillips had nothing further to do with the application and left the office at about 5.00 pm.

20.4.41 According to a statement made by Mr Prokojes, which he confirmed in evidence was accurate to the best of his ability, at about 3 pm on 29 October 1988 Mr Prokojes was advised by Mr Phillips of a request received from Mr Lloyd for an overnight facility. He spoke with Mr Lloyd who told him that Rothwells urgently required an overnight facility of up to \$10 million before the banks closed that day. He said Mr Lloyd requested that the funds be advanced to Western Collieries and then placed on deposit with Rothwells. Mr Prokojes prepared the lending submission and,

in the course of doing so, he received by facsimile the letter dated 27 October and signed by Mr Lloyd and Mr Hilton as directors of Western Collieries.

20.4.42 Mr Fischer said it was nonsense to say that it had been their idea to provide the facility to Western Collieries. He maintained that he and Mr Gordon between them had sufficient Board authority to approve the loan to Rothwells. He said they had authority to approve it even if there had been a Board resolution against the provision of further facilities to Rothwells, but they would have been required to "front" their fellow directors the next morning. He said the telephone call came from Mr Grill while he was visiting Mr Gordon's office. Mr Grill asked if they would approve the facility and said it was very urgent. He and Mr Gordon were not inclined to accede to the request and Mr Grill said he would put Mr Edwards on the telephone because Mr Edwards understood more than he did. Mr Fischer said Mr Edwards explained there was a desperate need for \$6 million and a \$75 million facility was being put together which would come in equal parts from the Government, Spedleys and Bond Corporation. Mr Edwards said most of it was in place, except about \$7 million required from Spedleys and, because of the time of the day, it was not possible to get that amount through. Mr Edwards asked if the bank could provide an overnight facility of \$6 million. Mr Fischer said they agreed to do so on that basis. He reminded Mr Edwards that the Government had been a little dilatory in meeting their promises in respect of the transfer of the R & I Bank's interest in the State Government's superannuation scheme to a private scheme and said they hoped in this particular case the Government would be rather more prompt in meeting the repayment the next morning. Mr Fischer said they approved the \$6 million loan to be written on Western Collieries paper, but he did not know how that came about. It was after the conversation with Mr Edwards that he was informed by Mr Prokojes that this was the way the transaction would take place. In evidence given at the joint trial of Mr Edwards and Mr Lloyd, Mr Fischer said he had been told by Mr Gordon, prior to speaking with Mr Edwards, that the Bank was being asked to provide a loan for Rothwells through the medium of Western Collieries.

20.4.43 Mr Gordon said his first knowledge was a telephone call at about 5.20 pm from Mr Lloyd who told him that he had spoken with Mr Phillips and made application for a \$6 million facility in the name of Western Collieries to assist Rothwells. Mr Gordon was certain Mr Lloyd told him it was an application to provide funding to Western Collieries as opposed to funding directly to Rothwells. He understood Mr Lloyd had spoken with Mr Prokojes. Mr Lloyd told him that a rescue package of \$75 million was being put together and the facility was needed by 6.00 pm that evening if Rothwells was to survive. Mr Gordon said he told Mr Lloyd he did not have a lending delegation and the request was unreasonable. According to Mr Gordon, he told Mr Lloyd he could not see a way in which to accede to the request. Mr Lloyd responded that Mr Grill would be ringing someone in the bank.

20.4.44 Mr Gordon said he briefed Mr Fischer about the telephone conversation with Mr Lloyd. While with Mr Fischer, a telephone call came from Mr Grill which was held on the conference line. Mr Grill told them that an assessment had been made of

a need for \$12 million, of which \$6 million was still required. After a break in the conversation Mr Grill asked if they had any suggestions to which Mr Gordon replied "No", and Mr Grill then said Mr Edwards would telephone.

20.4.45 According to Mr Gordon, Mr Edwards telephoned and the conversation was again on the conference line. He said Mr Edwards explained that Rothwells needed funds that night, otherwise it would be in very grave difficulties. He thought Mr Edwards used the words "finished". They were told that \$6 million was needed and a package of \$75 million was being put together by Bond Corporation, the Government and Spedleys. Mr Edwards said that Mr Grill had signed on behalf of the Government and Bond Corporation had signed, but there was a difficulty with Spedleys being in the Eastern States. He mentioned Spedleys had put in \$18 million. It was said by Mr Edwards that a package was being put together which would enable the group to survive providing it could get through the night. Mr Gordon said he responded by indicating that he was unhappy with the request and Mr Edwards said the facility could be repaid the next day. This was the first Mr Gordon had heard of that suggestion. He said the R & I Bank had \$17.5 million owing by Rothwells and, if the facility would enable Rothwells to survive, then the bank's \$17.5 million would have some protection. In those circumstances he said he and Mr Fischer agreed to provide the facility. According to Mr Gordon, it was only at the end of the conversation with Mr Edwards that the identity of the entity in whose name the facility would be granted was mentioned and that occurred after Mr Fischer and Mr Gordon had told Mr Edwards that the facility would be granted. Mr Gordon said it was then that Mr Edwards asked whether the facility would be for Rothwells or Western Collieries and he was told it would be Western Collieries because that was the request that had been made by Mr Lloyd. It was not Mr Gordon's understanding that the suggestion of a loan to Western Collieries originated from him and Mr Fischer.

20.4.46 Mr Hilton said Rothwells had a shortfall of \$12 million on 27 October 1988. He said Mr Judge had produced a cheque for \$6 million on behalf of Bond Corporation and the Government was required to match that amount. He was not involved in attempting to make arrangements for the Government's \$6 million. At about 5.00 pm Mr Lloyd advised him the Government would provide its \$6 million through Western Collieries. He said Mr Lloyd produced the letter dated 27 October and asked Mr Hilton to sign it. Mr Hilton said he signed it in accordance with the request by Mr Lloyd.

20.4.47 Notwithstanding the disadvantage of not having heard from Mr Lloyd and, contrary to the evidence given by Mr Edwards, we are satisfied that it was Mr Lloyd who requested that the funds be advanced to Western Collieries and then placed on deposit with Rothwells.

20.4.48 Mr Lloyd obtained the \$6 million facility on 27 October 1988 and met with Mr Crawford and the directors on 28 October. Mr Crawford said that on 28 October the first issue raised was whether any agreement had been entered into with SECWA. Mr Lloyd tabled the letter of 21 October from SECWA to Western Collieries

on which he had noted and signed his agreement and acceptance as a director of Western Collieries. Mr Crawford said that, from Western Collieries point of view, the arrangement was "entirely unsatisfactory". The details were simply insufficient to know what the arrangement was. It appeared to him that Western Collieries would receive payment for the 300,000 tonnes of coal, but then receive no further income for the following three or four months. In addition, Western Collieries did not know the financing costs. While Mr Crawford was unable to say whether Mr Hilton had any prior knowledge of the document or the arrangement before it was tabled at the meeting, he said that Directors Mr Alfred Fogarty and Mr Tony Ivankovich were not aware of it prior to tabling. Mr Fogarty and Mr Ivankovich have confirmed that position. Mr Crawford said discussion followed as to whether one director could change a contract because the new arrangement amounted to a change in the long-term coal supply agreement between Western Collieries and SECWA. Mr Lloyd responded that it did not constitute a variation to the coal supply contract. Mr Crawford said Mr Lloyd maintained that his actions were within his authority and, if others had a different view, then the matter should be pursued to ensure that the legal position was clearly understood. There were quite heated exchanges about the actions of Mr Lloyd and how the operations of Western Collieries were potentially jeopardised. In particular, Mr Fogarty and Mr Ivankovich spoke of working hard to build up a company of substance and of their belief that there were certain ways things should be done. The view was expressed that everybody should be aware of what was intended and issues should be properly discussed at board meetings and approved. According to Mr Crawford, Mr Lloyd said he believed that the \$15 million would be to the commercial benefit of Western Collieries by placement on deposit with Spedleys where it would earn a commercial interest. Mr Lloyd indicated that if Western Collieries needed cash then the deposit could be withdrawn. He suggested it would be in the longer term interests of Western Collieries because it might have been used as part of the funds required at some time in the future for the purchase of the company. Mr Lloyd made the point that it was to the overall benefit of the Rothwells Group, of which Western Collieries was a part. Mr Crawford said Mr Lloyd did not explain why there had been no consultation with the Board before the arrangement was made, but did apologise to other Board members for any indiscretions and for not doing things in the proper manner. He said Mr Lloyd was quite humble about having done something that obviously upset the other directors of the company. It was agreed that a further meeting would be convened for the following week when Mr Lloyd would provide the full details to the Board.

20.4.49 During the meeting on 28 October 1988, Mr Lloyd did not mention the \$6 million facility obtained the previous day. We accept the evidence of Mr Crawford, Mr Fogarty, Mr Ivankovich and Mr Egert that they were unaware of that transaction. We have no doubt that Mr Lloyd knew they would have disapproved. As Mr Lloyd acknowledged, Rothwells was "technically" insolvent and everybody was aware that the rescue package had come apart for the moment and was a long way from being successfully put together. Rothwells was perilously close to permanent failure. The placement of \$6 million with it in those circumstances was open to serious question.

20.4.50 The relevance of the transaction to our inquiry is found in the fact that Mr Lloyd did not consult anyone in Western Collieries, other than Mr Hilton, before proceeding with the transaction. Mr Hilton's position within Rothwells prevented him from possessing any semblance of independence. In conjunction with the use of the \$15 million, this transaction demonstrates a determination on the part of Mr Lloyd to use Western Collieries to the advantage of Rothwells without proper recourse to the Board of Western Collieries. Mr Lloyd's actions in this regard are not surprising. They serve to confirm that his first priority was the saving of Rothwells. He was not alone in that attitude.

20.4.51 Mr Crawford said \$6 million was cleared back into the account of Western Collieries on either 31 October or 1 November 1988. He said Western Collieries objected to the whole transaction and the bank reversed all fees associated with it. He had a meeting with Mr Lloyd on the evening of 1 November 1988. Mr Lloyd advised him he thought it was going to be difficult for Rothwells to continue funding the acquisition of Western Collieries. He did not expand on why it would be difficult. Mr Crawford said he indicated he wanted to draw down the \$15 million deposit with Spedleys but Mr Lloyd said that, although it was at call, Western Collieries should not seek to draw it down straight away. He said \$1 million or \$2 million could probably be drawn but, if it was left for a period, Western Collieries stood a good chance of recovering 80% or 90% of the deposit. If, however, an attempt was made to draw it all down at that time, Spedleys would not be able to pay and other problems would follow. Mr Crawford said he became fairly angry at that time and told Mr Lloyd he wished to refer the whole matter to the directors of Western Collieries to keep them fully informed. He did not take it further with Mr Lloyd. Mr Crawford said he then indicated to Mr Lloyd that he wanted to discuss the \$6 million transaction and its circumstances, but he did not receive an explanation. Subsequent attempts to arrange meetings with Mr Lloyd were unsuccessful. Mr Lloyd never provided an explanation because the appointment of the provisional liquidator intervened.

20.4.52 The difficulties created by the \$15 million transaction soon became apparent. Mr White wrote to Mr Crawford on 28 October 1988 confirming the arrangement and payment. He suggested a meeting as soon as possible concerning the coal price discount. Mr Crawford responded by letter of 1 November 1988 advising there were a number of issues to be resolved, including the requirement that a variation to the coal supply contract had to be considered and dealt with by the Board of Directors of Western Collieries. He advised that the Board would be meeting on 4 November to discuss whether changes to the contract were warranted. Mr White reported to Mr Parker by memorandum dated 1 November that Western Collieries did not support the deal. He advised that the arrangement had been made by Mr Lloyd without consultation with or the approval of Western Collieries. In addition, he registered his concern and doubts that SECWA was adequately protected in the event that Western Collieries was unable to complete the deal. Mr White wrote that "... this was the basis for my unwillingness to agree to the proposal when Bill Heron and Julian Grill asked that the payment be made".

20.4.53 SECWA wrote to Western Collieries on 3 November 1988 indicating it expected Western Collieries to honour the obligations under the agreement. In an internal memorandum to Mr White of 4 November, Mr Sleeman, Manager, Fuel Supply of SECWA, raised a matter that had concerned Mr Crawford, namely, that SECWA having paid in advance for coal to be delivered over the four month period commencing 21 October, it could make no further payment on a weekly basis during that period. He added that the option of such non payment could be expected to result in litigation because Western Collieries' cash flow might be insufficient to meet ongoing costs. On 8 November 1988, Mr Crawford wrote to Mr White indicating that Western Collieries was gravely concerned that SECWA had failed to make a payment due on 7 November pursuant to the coal supply contract. He advised that non payment had serious implications for the company's cash flow projections. He went on to record a number of points related to the transactions and expressed the view that Mr Lloyd had no authority to negotiate the variation to the coal supply contract nor to receive the payment of \$15 million. Mr Crawford argued that the payment was not made to Western Collieries at all. It had been deposited with Spedleys without authority. By letter of 9 November 1988, Mr White rejected the various points made by Mr Crawford and maintained that Mr Lloyd had acted with full authority.

20.4.54 As discussed in section 16.16 of chapter 16, Rothwells had purchased Western Collieries from CSR in May 1988 but still owed the bulk of the purchase price. It appears that Mr E Herbert, the Deputy Managing Director of CSR, met with Mr Parker on Friday, 4 November 1988. The meeting is referred to in a letter from Mr Herbert to Mr Parker of 9 November 1988 in which some of the difficulties are outlined as well as the events surrounding attempts to recover the \$15 million. It is unnecessary for us to canvass the details of the negotiations that led to the final settlement in respect of the \$15 million. Ultimately SECWA was credited with \$15,182,416.44 on 18 November and Mr Parker issued a media release that day announcing the repayment of \$15 million to SECWA and the decision not to proceed with "... the advance purchase of coal".

20.5 Corporate Affairs investigation

20.5.1 Finally, in respect of the \$15 million payment involving Western Collieries, we heard evidence concerning certain aspects of the investigation carried out by officers of the Corporate Affairs Department ("CAD"). While there is no allegation of impropriety against any person, the evidence requires detailed examination, because of a possible imputation that Mr Berinson's conduct in relation to that investigation was inappropriate. The investigation commenced in November 1988.

20.5.2 The two officers conducting the investigation, Mr Robert Jacobs and Mr Ian McNulty, advised their director, Mr William Dunlop, of their intention to interview Mr Dowding and Mr Grill. Mr Dunlop said that he learned this on 1 December 1988 and that he then reported it to Mrs Janet Martin, acting Director of Investigations, and Mr Michael O'Connor, acting Commissioner for Corporate Affairs. Mr Dunlop said that Mr O'Connor responded that he would "advise Joe of our proposed

interview". There is no doubt that, if Mr Dunlop's recollection is correct, Mr O'Connor was referring to the Attorney General, Mr Berinson. Mr Berinson was the Minister responsible for the Department. He was also the State's representative on the Commonwealth/State Ministerial Council providing political oversight of the National Companies and Securities Commission ("NCSC"). It is possible that Mr Dunlop is mistaken in his recollection of reporting the matter to Mr O'Connor and receiving the latter's response. Mr O'Connor left Perth at 7 am on Thursday, 1 December, in company with Mr Berinson, to travel by air to Canberra for a meeting of the Ministerial Council and associated officers to be held in that city on Friday, 2 December. There is no suggestion by Mr O'Connor that he was told of any firm intention to conduct the interviews on 1 December before he left or that he received any telephonic advice to that effect after leaving Perth.

20.5.3 As we have said, Mr Berinson and Mr O'Connor left Perth for Canberra early in the morning of 1 December. According to Mr O'Connor, while in transit in Melbourne Mr Berinson was paged. He left Mr O'Connor and did not rejoin him until the latter had already boarded the plane. Apparently, there was no discussion of the Western Collieries investigation during the flight from Perth to Melbourne. However, Mr O'Connor said that, following take-off from Melbourne, Mr Berinson raised the matter of the \$15 million. He described Mr Berinson as "quite nervous and agitated about the matter".

20.5.4 In the course of his evidence, Mr O'Connor had the benefit of notes to refresh his memory. Although he could not recall precisely when he had prepared the notes, it is likely that he did so after retiring to his hotel room for the night on 1 December. The notes purported to record two conversations between Mr Berinson and himself, the first during the flight from Melbourne to Canberra and the second in Mr Berinson's room in the hotel before they went out together for dinner, probably with other persons gathering in Canberra for the meeting the next day. Since Mr O'Connor admitted in cross-examination that his evidence of what passed between Mr Berinson and himself in these conversations, apart from what was revealed in the notes, was a mixture of recollection and reconstruction, the contents of the notes assume considerable importance. It is desirable to record the material parts of them. They read as follows:

"... during the course of briefing the AG on the plane today relating to Minco [the Ministerial Council], Mr Berinson raised the \$15m cheque matter. It was my perception that he had spoken to the Premier whilst we were in transit in Melbourne and had been told that it was rumoured on the grapevine that a Minister was to be interviewed by the CAD in relation to the matter. Mr Berinson asked whether it was true that a Minister was to be interviewed. I advised that I was not certain. The investigation had proceeded rapidly and we had interviewed some officers from the SEC. I indicated it was likely that a Minister (we did not discuss names) would be interviewed but that I did not know

when. Mr Berinson then asked me the basis upon which I considered ministerial involvement relevant ..." [Mr O'Connor then explained the possible application of section 229(4) of the *Companies Code*.]

The notes proceeded:

"We continued the discussion in Mr Berinson's room at the hotel in Canberra. Mr Berinson indicated that whilst he did not want politics to enter my decision making and whilst he did not wish to become involved in our administration, he thought that some degree of care needed to be taken to ensure that over-enthusiasm did not enter the issue and that overcaution should be avoided in relation to the pursuit of avenues. He also suggested that timing of investigation activities and timing in relation to any charges should be carefully chosen, particularly given the fact that there appeared to be information about the investigation being leaked. He also expressed surprise that the \$15m cheque matter had been given priority over other matters.

In response I agreed that over-enthusiasm and overcaution should be avoided. I indicated that my role had been to let investigations occur in the normal course with regular reports on progress to me and that I was satisfied that, as an investigation, the matter was being conducted properly. I also agreed that timing was important, specifically in relation to the laying of charges, if any, and that it was my view that regard would need to be had to the overall objectives in the investigation as a whole before charges were laid as premature charges could impact on subsequent investigations ..."

20.5.5 The remaining notes do not require citation. However, they, particularly those with respect to events of 9 December 1988, portray clearly the confusion and tension that developed during this investigation. The Department was obliged to follow the instructions received from the NCSC. It was first requested to conduct inquiries into the \$15 million cheque matter in the early part of November. On that occasion, Mr O'Connor remonstrated with NCSC over the priority being accorded to this issue when "...[t]here seems to me to be other priorities". The notes reflected differences between CAD and NCSC over a number of matters pertaining to the investigation, including the NCSC's determination to proceed with a hearing into the matter and the failure to pursue Mr Heron, then seen to be a witness of some importance. To put it in colloquial terms, the two agencies appeared to be getting in each other's way. From time to time, both Mr Bosch, of NCSC, and Mr O'Connor reported to Mr Berinson on the progress of matters relating to the investigation.

20.5.6 In his evidence, Mr O'Connor said he made two responses to these discussions with Mr Berinson on 1 December. One was to telephone Mrs Martin in the CAD office in Perth with an instruction to the investigators to "hold fire" until he got back on Monday. He said he thought he did this at the suggestion of Mr Berinson but we doubt this recollection. It finds no corroboration either from Mr Berinson or from Mr O'Connor's notes. Admittedly, those notes may not be a complete record, but it would be surprising if such a significant aspect of the conversation was not recorded. He could not remember whether he made the call on the Thursday evening or during the Friday, but there is no doubt from other evidence that the instruction was given on the Friday. The second response to which Mr O'Connor testified was that he indicated to Mr Berinson that he would give consideration to the question as to whether ministers would be interviewed personally or by written questions. Certainly, when Mr O'Connor returned to his office on Monday, 5 December and discussed the matter with his officers, there emerged, according to Mr O'Connor, "a consensus" that the investigation should proceed so far as the ministers were concerned by written questions initially. However, there is some ground for concluding that his investigators were not pleased. Mr McNulty said that some time later he spoke with Mr O'Connor on an informal basis and asked why they were not able to interview Mr Dowding and Mr Grill. He was told that the instruction had come from the Minister who he took to be Mr Berinson. There is no support in the evidence for such a statement. Mr O'Connor says there was no direct instruction. Indeed, it is questionable whether the method of interrogating the ministers was discussed at all in Canberra. Mr Berinson denies that he made any such suggestion. It must be remembered at that time Mr O'Connor knew no more than that it was "a possibility", or "likelihood" or "probability", depending on which part of his evidence one relies upon, that a minister or ministers would be interviewed. Had the question been discussed in the conversation in the hotel, it would have been seen as an issue of major importance; yet there was no mention of it in Mr O'Connor's notes. We should add that we do not accept the evidence of Mr McNulty or of Mr Dunlop to the effect that the instruction received from Mrs Martin on Friday, 2 December was to proceed to prepare questions in writing for submission to Mr Dowding and Mr Grill. We have no doubt that the instruction given to Mrs Martin was to hold everything until Monday. We are satisfied that, at the time of his telephone call to Mrs Martin, Mr O'Connor had not thought of proceeding by written questionnaire. Indeed, although his evidence with respect to this matter was not always consistent, when it was put to him in cross-examination that the manner in which information was to be extracted from the ministers was not a live issue at the time of the Canberra discussion, he replied "I think that's a fairly accurate assessment".

20.5.7 Mr O'Connor was examined at considerable length by counsel assisting the Commission and by counsel granted leave to appear for Mr Berinson, with particular reference to Mr O'Connor's perception of the Attorney's purpose in engaging in the hotel discussion in Canberra. He described the "thrust of the conversation", having regard to the fact that a politician might be involved, as:

"to make sure that there was a suitable level of balance and objectivity in the way the investigation was being conducted."

20.5.8 Mr O'Connor was asked what he understood by Mr Berinson's comment that "the timing of the investigation and charges should be carefully chosen". He replied:

"... the message seemed to be that the timing of activities could cause embarrassment to either the witnesses personally or to the government and that care should be taken in managing that ... it was quite clear that there was an election around the corner ... the concern was that if, because of what Mr Berinson described as 'undue over-enthusiasm' or 'undue zeal' the matter progressed in a manner that was out of the ordinary or in a manner that wasn't required having regard to the circumstances of the particular case, that damage might be caused which was unnecessary or otherwise avoidable."

He explained that he did not think that the conversation had proceeded to the point where he felt it was necessary to respond to Mr Berinson directly by suggesting that the conversation was in an area of some difficulty. Nor did he consider it necessary to say that he could not let political considerations enter into his decision-making process. Mr O'Connor said it was a common feature of Mr Berinson's conduct that he kept very much at arm's length from investigations and was at pains to indicate that political considerations did not play a role. On this occasion, however, Mr O'Connor found Mr Berinson's conversation and approach to be somewhat at odds with what he understood to be his general and usual position. Notwithstanding his belief that Mr Berinson was applying subtle pressure, Mr O'Connor said Mr Berinson did not overstep the bounds of propriety. He maintained there was nothing that he would describe as being improper.

20.5.9 Mr O'Connor's attention was drawn to the note which recorded that he had agreed that "timing was important, specifically in relation to the laying of charges". In his evidence, he elaborated on this:

"The point there was that the \$15 million cheque matter was one of a number of matters being investigated in the context of Rothwells, that you don't simply proceed to lay charges as they come off the production line. You really need to view them in the overall context to get the timing right, for example, by laying charges on one matter may well start with your ability to continue with investigations into other matters. Basically, playing the hand early."

20.5.10 More generally, Mr O'Connor spoke about his relationship with Mr Berinson in connection with the \$15 million matter. Asked whether Mr Berinson ever directly attempted to interfere with the course of the investigation, Mr O'Connor

said this was a "fairly difficult question to answer". He said there were no formal instructions or directions given touching on the conduct of the investigation, but:

"... it was quite clear from the many discussions that we had, that the Attorney had views on how the matter was progressing, or on how it should be conducted and I certainly was apprised of the Attorney's views from time to time. The dividing line between an instruction and being aware of a view can be fairly blurry on occasions."

He confirmed that he did not at any time take any expressions of view as an instruction, notwithstanding that, as he observed, the statute conferred a power to give directions on the responsible Minister.

20.5.11 Mr O'Connor was asked whether he ever took Mr Berinson's expressions of view as any "subtle form of pressure" to adopt a particular course of action and replied:

"Yes, I did. There were a number of occasions when we had discussions relating to this particular matter and others where I felt very uncomfortable and where I felt that the Attorney was perhaps getting very close to treading into an area that I thought was really the province of the department, as the body conducting the investigation. But I was fairly careful in identifying those sorts of pressures and making sure I was able to deal with those appropriately."

In subsequent evidence he said:

"Um, there -- there were constant references in a number of conversations to, er, "timing" and -- and "undue zeal" - are both terms I can recall well. They were terms that Mr Berinson tended to use and which I didn't; they're ones that stick in my mind - and there certainly were a number of conversations subsequent to the Canberra where those terms were used. I took those as being indicative of the same types of pressures that had arisen at the Canberra meeting."

According to Mr O'Connor, it was not the normal practice of Mr Berinson to take the degree of interest and express views as he did in respect of this particular inquiry. He pointed out, however, that Mr Berinson was involved with NCSC in a number of matters associated with Rothwells, the collapse of Rothwells being a matter that was quite unique in many respects.

20.5.12 On 9 December 1988 Mr O'Connor spoke with the Chairman of the NCSC, Mr Henry Bosch, who commented on a conversation he had with Mr Berinson

in which Mr Berinson spoke of a proposed interview with Mr Heron being cancelled on two occasions. Mr Berinson had apparently suggested to Mr Bosch that Mr Heron's evidence was at the heart of the matter. Mr Bosch conveyed to Mr O'Connor that Mr Berinson questioned why Mr Grill and Mr Dowding were being pursued when Mr Heron had not been interviewed. Mr O'Connor met with Mr Berinson that day in response to Mr Berinson's request. He said Mr Berinson indicated he was confused by recent events as he appeared to be getting different stories from Mr Bosch and Mr O'Connor. Mr O'Connor replied that he was similarly confused. They discussed the problems Mr O'Connor was having with the NCSC. Mr Berinson raised the issue of Mr Heron and indicated he was at the heart of the matter. He expressed surprise that Mr Heron had not been interviewed, and questioned how the NCSC could decide on a hearing involving Mr Grill and Mr Dowding when they had not inquired of others deeply. Mr Berinson suggested to Mr O'Connor that Mr Bosch had said that Corporate Affairs investigators were pushing for a hearing.

20.5.13 On 9 December 1988 after meeting with Mr Berinson, Mr O'Connor spoke with Mr Bosch who commented that Mr Berinson was an honourable person. Later that day Mr Berinson rang Mr O'Connor and was apprised of the conversation between Mr O'Connor and Mr Bosch. Mr Berinson expressed surprise that Mr Heron had been summoned for the following Tuesday. Mr O'Connor described Mr Berinson's demeanour that day as "relaxed and inquisitive". On 23 December 1988, Mr O'Connor advised Mr Berinson that the \$15 million cheque matter was unlikely to proceed.

20.5.14 Mr O'Connor saw Mr Berinson on 14 September 1989 in response to a request from Mr Berinson. He was shown a question asked in the Legislative Council about further ministerial investigations. Later that day Mr Berinson rang Mr O'Connor and said he was concerned that he was getting different stories. He said it appeared that one of the Corporate Affairs officers was carrying out the investigation. Mr O'Connor confirmed the accuracy of Mr Berinson's impression and Mr Berinson expressed concern about the motives of the officer. Mr O'Connor said he agreed with Mr Berinson's concern and Mr Berinson suggested that the person be removed from the team but Mr O'Connor counselled against it. Mr Berinson conveyed to Mr O'Connor concern that a member or members of the investigation team appeared to have been caught up in the politics of the matter and there was a level of undue zeal.

20.5.15 Evidence was also given of an incident that occurred after this Commission was established. Detective Bill Boaks said he was with Mr McNulty in August 1991 when they met Mr O'Connor in St George's Terrace. This was about twelve months after Mr O'Connor had severed his connection with the CAD and the public service. He said Mr McNulty told Mr O'Connor that he intended to mention to the Royal Commission the instruction given by Mr O'Connor that he was not to interview Mr Dowding or Mr Grill. Mr O'Connor replied that he did not have a problem with it "... but a bloke named Joe might have". While unable to recall the exact text of the language he used in speaking with Mr McNulty, Mr O'Connor did not deny that he may have said that the instruction not to interview Mr Dowding and Mr Grill had come

from the Minister. However, he said there had been no direct instruction from the Minister.

20.5.16 Mr O'Connor was aware of the serious implications of his evidence. He was asked to comment on whether there was room for the possibility that Mr Berinson was not applying subtle pressures but, rather, that he had misinterpreted what was said in view of the fact that he, Mr O'Connor, only temporarily occupied the position of Commissioner for Corporate Affairs and was seeking permanent appointment. In response, while not resiling from his view that he correctly identified the existence of subtle pressure, Mr O'Connor acknowledged that in the early stages he was unduly sensitive and very finely attuned to the political problems. He conceded that, initially, there was scope for misinterpretation of the situation. He said he gained greater confidence over time and his sensitivity had gone by mid 1989. Mr O'Connor maintained that he still detected those pressures from time to time after his sensitivity had abated. He said there were no other matters in his history of employment in the CAD in which he discerned subtle pressures from the Attorney General.

20.5.17 It was apparent from Mr O'Connor's evidence that tension existed between the NCSC and the CAD as to their respective roles in this matter. There was considerable uncertainty for some time. In addition, there were difficulties associated with leaks of sensitive information to the media, suspected to have emanated from time to time from both sources. This gave rise to concern as to the existence of political bias motivating one or more officers within the agencies. We stress we have not endeavoured to investigate these matters directly. Their relevance is found in the perceptions of Mr O'Connor and Mr Berinson that these problems existed. There were, in consequence of the perceptions, conversations concerning issues that would not have arisen in the course of normal investigations. Mr O'Connor conceded that, in view of the previous leaks of information, Mr Berinson could possess a legitimate concern that persons were seeking to utilise the very fact of the investigations adversely to those investigated and, in that context, the timing of activities was important.

20.5.18 As Mr O'Connor readily acknowledged, at issue for the Commission is Mr O'Connor's perception of subtle pressure. There was no direct or implied instruction. The concepts of timing and zealotry were of particular importance to him in this regard. In addition, it was the context and manner in which the discussions on 1 December 1988 occurred following the telephone call received by Mr Berinson during the stop-over in Melbourne that made Mr O'Connor feel as though he was being placed under some subtle pressure. We note that Mr O'Connor did not ever raise these matters with Mr Berinson, but we do not find that failure of any particular significance. On the assumption that Mr O'Connor did feel uncomfortable, or believed that he had been subjected to subtle pressures, we can readily understand and accept his explanation for not raising the issue with Mr Berinson. He said that, in view of the preamble in which Mr Berinson indicated that political considerations should not be taken into account, he would find it extremely difficult to raise the matter in the absence of any direct or implied instruction.

20.5.19 Mr Berinson, at his own request, gave evidence immediately following Mr O'Connor. He began by making a statement that he was genuinely surprised and intensely aggrieved by a number of Mr O'Connor's references to him. He indicated that he had often been placed in a difficult position in the course of his portfolio duties. In order to meet that situation, he said he had invariably refrained from intervening in the detail of any investigation or prosecution decisions. As part of making sure that a proper distance was kept, he regularly prefaced discussions with senior officers by saying that they were to tell him at once if a discussion on any matter should not be pursued.

20.5.20 Mr Berinson asserted there was nothing subtle about what he was attempting to convey to Mr O'Connor on 1 December 1988 during their trip to Canberra. He found the priority given to the Western Collieries investigation quite extraordinary and said in evidence that one did not have to be paranoiac to suspect a political motivation within the system, or at least a conscious effort to accommodate the Opposition emphasis on that particular issue. He said it was self-evident that, with an election due within two or three months, the continuing investigation was occurring at the most sensitive possible time. He believed a leak of the fact of an investigation could cause irreparable and grossly unfair harm to a Minister. Mr Berinson said the department had been leaking like a sieve. He had pointed out to Mr O'Connor that confidentiality was essential and the investigation should proceed on its merits without being coloured by the political enthusiasm of any officers. Either Mr O'Connor or Mr Berinson suggested in the circumstances that Mr O'Connor should give closer supervision to the investigation in order to ensure that it was kept on a proper professional basis.

20.5.21 The principles by which Mr Berinson said he was guided in his dealings with investigatory authorities within his portfolio were discussed in his evidence. He recognised the particular sensitivity of the investigation because it involved Ministers and he accepted there was a special need to avoid interfering or conveying the impression that he was interfering. Mr Berinson maintained that the concerns he expressed to Mr O'Connor were proper. He said he had not endeavoured to interfere or apply subtle pressures and nothing he had said or done in its totality could reasonably have led Mr O'Connor to gain the perception that he was attempting to apply subtle pressure.

20.5.22 Mr Berinson was present at the meeting on 21 October 1988 when the decision was taken to direct SECWA to pay \$15 million to Western Collieries. We accept, however, that he played no role in the decision and was unable to participate because he was not familiar with the issues being discussed. Prior to the trip to Canberra, he was aware that officers of the Corporate Affairs Commission were investigating the matter of the \$15 million that had been discussed at the meeting of 21 October. Mr Berinson said that, prior to the trip to Canberra, it had not occurred to him that Mr Dowding and Mr Grill might be regarded as witnesses, and it did not occur to him, while talking to Mr O'Connor, that he might be considered in the same light. He said the possibility that investigators might wish to question him did not occur to him

until 12 December 1988, the date on which he wrote a memorandum concerning the matter.

20.5.23 On 30 November 1988 a question had been asked in Parliament as to whether a Minister or servant of the Government had been approached and questioned by the NCSC. The question was not related to any particular matter, but it caused Mr Berinson concern because it tended to indicate that the Opposition might have access to information of which he was unaware. He thought his first inquiry about it was of Mr O'Connor in the course of their travel the following day. Mr Berinson said it became apparent to him in the course of the conversation with Mr O'Connor that the Ministers were the subject of an investigation. He said, however, it did not occur to him he might be regarded as either a witness or, at the worst, that he might be dragged into the investigation in the same manner as Mr Dowding and Mr Grill.

20.5.24 With respect to Mr O'Connor's evidence of Mr Berinson being paged and taking a telephone call while in transit at Melbourne on 1 December 1988, Mr Berinson said he had no memory of that call and that the issue of the investigation simply arose in the course of their conversation. While there is always room for the possibility that Mr O'Connor has made errors in recording his recollections later that day, we do not accept that there is any realistic possibility that he could be in error in respect of this particular issue of the phone call. We accept the evidence of Mr O'Connor in this respect. We are satisfied Mr Berinson has forgotten the manner in which this conversation arose. We are also satisfied that he did not appreciate that the manner and circumstances of the conversation might be capable of conveying the impression he was endeavouring to apply subtle pressure.

20.5.25 It is unnecessary to canvass the details of the conversations between Mr O'Connor and Mr Berinson as recalled by Mr Berinson. He did not contest much of what appears in Mr O'Connor's notes, although he did not have a memory of many of the details. He put a different complexion on his interest, however, from that which could be inferred from the evidence of Mr O'Connor. In particular, he was adamant that his remarks concerning the timing were of a general nature that the investigation could not have come at a more sensitive time. As explained by Mr Berinson, such an observation would have been properly made in conjunction with the observation that any leaks of the fact of the investigation could do irreparable and unfair damage to the Ministers concerned.

20.5.26 Mr O'Connor's evidence has received the Commission's serious consideration. It is appropriate to commence our review of the matter by citing Mr O'Connor's own summation of it. In cross-examination his attention had been drawn to particular matters referred to in the notes he made of the Canberra conversation. It was put to him by counsel that he did not suggest that the conversation was in any way improper. Mr O'Connor replied:

"Those aspects of the conversation as you portray them are certainly not improper."

Thereafter, Counsel Assisting the Commission concluded his re-examination by reminding Mr O'Connor of this answer. The transcript continues:

"Were you intending to limit your answer or qualify it in any way? -- No, I wasn't.

Do you suggest that the totality of the conversation that Mr Berinson had with you, given your perceptions of subtle pressure, was improper? -- Well, propriety I guess is a relative thing. I certainly felt uncomfortable and felt the pressures but I don't think Mr Berinson went so far as to overstep the bounds. There was no formal instruction or direction given to me in relation to the matters and there was nothing that I would describe as being improper."

The Commission has come to the same conclusion, namely, that Mr Berinson was not guilty of any impropriety. The considerations that lead us to this conclusion may be summarised as follows:

- (a) It is not surprising that Mr Berinson was in fairly close contact with both Mr Bosch and Mr O'Connor. Indeed, it is clear that they each took the initiative in keeping him informed. The history of Rothwells in its closing stages gave rise to a number of issues of considerable sensitivity and complexity. With reference to Mr Berinson's greater than usual involvement, Mr O'Connor described it as a unique situation. It was quite proper of him to ask in general terms how an investigation was going and to be informed of any developments and problems, if any, in its progress. We see no problem in his asking questions or offering suggestions. It would, of course, be improper of him to intervene in an investigation in such a way as to prejudice the fair outcome of it.
- (b) There was reason for Mr Berinson to be concerned about the investigation into the \$15 million cheque matter. It appeared to have assumed a priority over other Rothwells issues and was proceeding with unusual rapidity. The question put to him in Parliament on 30 November suggested that the Opposition was in possession of information touching the investigation that was not available to him. It tended to confirm, not only that the CAD was prone to leaks, but the existence of political bias within the agency. Both aspects were matters of serious concern and particularly so when the investigation involved persons close to the Government. It would have been remiss of Mr Berinson not to offer advice to the Commissioner on the need for close supervision of the operation. It must also be remembered that Mr O'Connor was only acting as Commissioner and was limited in his

experience of the responsibilities of the position. As he himself acknowledged, he may have misinterpreted Mr Berinson's motives.

- (c) On the critical question as to Mr Berinson's motives in speaking about the importance of the timing of the investigation and charges, both Mr O'Connor's own notes and his evidence make it clear that he agreed with the statement. The need for careful timing was necessary because "premature charges could impact on subsequent investigations".
- (d) We are satisfied that Mr Berinson did not try to influence the course of investigation for political ends. We have already found that the idea of interrogating the ministers by a written questionnaire rather than by interview did not come from Mr Berinson, save insofar as it occurred to Mr O'Connor by Monday, 5 December as a result of Mr Berinson's encouragement to minimise the risk of leaks from the Department. Mr O'Connor says that a reason for the decision to administer written questions was because there was less likelihood of publicity compared with an interview either at the Department's office or elsewhere.
- (e) We find that Mr O'Connor's reference to the influence which he described as "subtle pressures", a term first used by counsel, is a result of reconstruction rather than direct recollection. This conclusion finds support in the fact that, like the idea of written questions, there is no mention of it in the fairly extensive notes made of the discussions on 1 December. As Mr O'Connor said, he would expect those notes to record anything raised in the conversations that was of a "major" kind. In our opinion, both the matters to which we have referred satisfy that description.
- (f) We accept Mr Berinson's emphatic statement in evidence that there was nothing subtle about his intentions in his conversations with Mr O'Connor. As he put it:

"What I was saying was that I didn't want a political drive to be exerted either way and that the matter should be dealt with professionally and on its merits."

20.6 21 October to 3 November 1988

20.6.1 We return to the chronological order of events. There was a meeting on 21 October 1988 held after the decision had been made with respect to the \$15 million prepayment. It was attended by Mr Grill, Mr Wiese and senior Bond Corporation executives. Mr Grill thought Mr Mitchell, Mr Oates and Mr Judge were present. He said they wanted to go through the arrangements and discuss the deferment of the indemnity period concerned with the Bell Group shares and SGIC. Mr Grill said the real question was the position of Spedleys and who would provide the finance in the event that Spedleys could not immediately marshal all its funds. Subject to

Mr Dowding's approval, agreement was reached that they would try to resurrect the rescue package and there would be discussions with SGIC concerning a deferment or an extension of the indemnity.

20.6.2 Mr Bond's diary indicated he was scheduled to meet Mr Grill at 4.30 pm on 21 October, but he was unsure whether they met or spoke on the telephone. He had difficulty recalling what was said. He acknowledged that, in his evidence during Mr McCusker's inquiry, he had said Mr Grill telephoned him and advised the \$15 million had been organised and Western Collieries was to pay that amount. Although, in his initial evidence to the Commission, Mr Grill had not mentioned Mr Bond as attending the later meeting on 21 October, in subsequent evidence he said Mr Bond was present and the \$15 million from Western Collieries was mentioned. Prior to the meeting, the decision had been made by Mr Dowding that Mr Grill should direct SECWA to pay \$15 million to Western Collieries. We accept that the payment by SECWA to Western Collieries was mentioned.

20.6.3 On Saturday 22 October 1988 there were a series of negotiations. Bond Corporation was represented at various times by Mr Bond, Mr Oates, Mr Mitchell and Mr Judge. Conducting the negotiations for the Government from time to time were Mr Dowding, Mr Grill, Mr Edwards, Mr Rees, Mr Wiese and Mr Owen. According to Mr Edwards, Mr Lloyd was present briefly. Mr Grill recalled the main stumbling blocks being the question as to who might be responsible for the commitments of Spedleys in the event that Spedleys could not meet them immediately, together with the issue of the extension of the indemnity period. He said they came very close to resolving the issue concerning the indemnity period and, during the weekend, an agreement was basically put in place. Mr Edwards agreed the indemnity was the subject of negotiation. He said the Government was prepared to grant the extension, but there was debate about the detail and it was made more onerous than the previous agreement. Mr Edwards said that agreement was reached on the Sunday. He recalled Mr Bond telling Mr Oates to sign for Bond Corporation and Mr Dowding telling Mr Grill to sign for the Government. He said there were other small discussions to tidy up. It was left on the basis that Mr Oates and Mr Grill would get together because, although a rough draft had been adopted, the solicitors had to finalise the documentation.

20.6.4 Mr Judge said on Sunday, 23 October discussions occurred concerning the indemnity before Mr Dowding arrived. He was aware of Mr Bond and Mr Dowding being in an adjacent room, but he was not privy to any discussions. He thought agreement was reached concerning the indemnity which involved a fee.

20.6.5 Mr Dowding said he attended on both days at the offices of Robinson Cox where the meetings were being held. He said the issue of the SGIC indemnity was discussed on the Sunday and he believed that Bond Corporation and SGIC reached agreement. He went off to the Blessing of the Fleet. Later he rang Mr Rees who said he felt a sensible commercial outcome had been reached. Mr Dowding said he left the negotiations to the others. He could not recall the state of any agreement concerning the

\$75 million rescue package because the events were piled on top of one another and in the following week there were a series of meetings.

20.6.6 Mr Rees said he was asked to attend a weekend meeting. He said discussions concentrated upon a potential further injection of funds into Rothwells, but he indicated SGIC would not participate in any manner without direction by the Minister. This statement was made in the context of a document circulating which indicated that the State would be likely to join with Bond Corporation and Spedleys in a potential injection of funds into Rothwells. Mr Rees said he left nobody in any doubt that, if the Government was playing a role, it would not be through SGIC. He recalled seeing Mr Dowding on the Saturday night and again on the Sunday. He thought he had a discussion with him about a proposal related to the Bell Group share matter. According to Mr Rees, a proposal was made for a variation of the indemnity between SGIC and Bond Corporation concerning the Bell Group shares. He said these changes were brought to the attention of the Commissioners on Monday, 24 October. The minutes of the meeting of Commissioners held on 24 October record the following:

"2. PROPOSAL ON BELL GROUP LIMITED
SHAREHOLDING

The Chairman outlined details of the offer by Bond Corporation to extend the Commission's existing Indemnity Agreement (dated 3 June 1988) with respect to the Bell Group Limited shares.

It is proposed that the existing arrangements in the agreement between the parties be varied to achieve the following result:

- (a) the period during which sales by the Commission will attract the indemnity obligation of Bond Corporation will be extended to 24 April 1989;
- (b) Bond Corporation will have the right to elect to extend the period of the indemnity to 24 October 1989. The extension will be subject to Bond Corporation having made progress satisfactory to the Commission on the commercialisation of the convertible bonds and conversion bonds of the Bell Group Limited and Bell Group Finance Pty. Ltd., held by the Commission.
- (c) the indemnified price will remain \$2.70 per share escalated at 12% p.a. from the closing date of the Astraint bid for Bell;
- (d) Bond Corporation will pay a front end fee to the Commission of \$3.0 million for the extension; and

- (e) to the extent that the Commission realises in excess of the indemnified price for the Bell Group shares on any sale to which the indemnity would otherwise have applied, the Commission shall pay to Bond Corporation a fee, in consideration of the indemnity, equal to 50% of that excess.

RESOLVED to accept the proposal by the Bond Corporation to extend the Commission's existing Indemnity Agreement with respect to the Bell Group Limited Shares as outlined above."

20.6.7 Mr Bond said he did not recall a meeting on Saturday, 22 October but attended one on Sunday, 23 October 1988. He agreed he had a discussion with Mr Rees concerning the extension of the indemnity, but he was unable to recall the details of that discussion. He said he also spoke with Mr Dowding about the matter in a private conversation in a room separate from the main meeting. He maintained Mr Dowding said an extension would be agreed if required. He disagreed that Mr Dowding said it was a matter for SGIC and not for Mr Dowding. Mr Bond said his evidence to Mr McCusker was correct that Mr Dowding had said the situation was not politically palatable and both Bond Corporation and Spedleys had to be involved. In that context Mr Dowding had said:

"We might be able to fund the thing around the back, although our agencies are running short of cash."

20.6.8 As previously indicated in section 20.3 of this chapter, we are satisfied that, at the breakfast meeting on 21 October 1988, Mr Dowding agreed in principle that the indemnity would be extended. We are also satisfied he confirmed that agreement with Mr Bond on Sunday, 23 October 1988. In so doing, we find he was motivated solely by his concern to reach an agreement with Bond Corporation for a further rescue package. Notwithstanding his reference to commercial terms, Mr Dowding did not approach the matter from the perspective of whether an extension was in the best interests of SGIC. In addition, we are of the view that Mr Dowding was considering the use of SGIC to either assist Spedleys or fund the Government contribution directly. Such thinking could well have led to a statement such as that attributed to Mr Dowding by Mr Bond, but it is unnecessary to reach a concluded view.

20.6.9 In his notes, Mr Lloyd recorded that he attended the meeting on Sunday, 23 October 1988 and was informed in general terms of the conditions under which the \$75 million facility would be made available. Those terms included a "work out/wind down" situation for Rothwells and procedures governing payments to companies associated with Mr Connell and/or Rothwells. Mr Lloyd noted that he agreed with the various arrangements and discussed the details with Mr Judge and Mr Oates. He then noted that during the next few days procedures were put in place in line with that agreement. No cheques were issued without the signature of Mr Fraser and, other than repayments of deposits to third party depositors, all payments were cleared by Mr Judge. According to Mr Lloyd's notes, cash shortfalls were met by equal deposits

arranged by Bond Corporation and the Government and, when on Thursday 27 and Friday 28 October 1988 significant calls were made, the Bond Corporation and Government credit providers continued to meet cash shortfalls on a daily basis.

20.6.10 On Monday 24 October 1988 an agreement was signed by Mr Oates on behalf of Bond Corporation and by Mr Grill for the Government. It recited that the State, Bond Corporation and Spedleys ("the providers") had agreed to provide a total of \$75 million financial accommodation to Rothwells. It also recited that, ultimately as between themselves, the State and Bond Corporation were to share the risk equally. In essence, the agreement provided that each of the providers would commit \$25 million to Rothwells and, if Spedleys was unable to find any part of its contribution, the State would assist Spedleys to obtain a facility in order to enable it to do so. In that event, Bond Corporation would either give an indemnity on a several basis equally with the State in favour of the provider of the Spedley facility, or would indemnify the State as to one-half of any loss to the State upon any shortfall on repayment of the Spedley facility. There were a number of other conditions associated with the management of Rothwells and the role of Mr Connell. In summary, Mr Yuill or some other person agreed by the providers, was to assume control over the management of the day to day operations of Rothwells and Mr Connell would cease to be a director. Each of the three providers agreed to use reasonable endeavours to cause Mr Connell to take the necessary action in order to ensure that he ceased to have any role in Rothwells and that he agreed to the appointment of an administrator to manage and conduct a review of his financial status and that of all "Connell entities". The providers were also to endeavour to have Mr Connell execute a power of attorney in favour of the administrator over all his personal assets and those of the "Connell entities". It was recorded that it was the intention of the providers that a complete and thorough review be conducted of the financial status of Rothwells.

20.6.11 Mr Edwards said that Mr Fraser and Mr Judge occupied offices at Rothwells from the Monday morning, 24 October 1988, and spent a lot of time there, although not on a full-time basis. Asked how Rothwells was run for the next few days, he said it was "... essentially under management by the Government and Bond Corporation and Spedleys". No-one was formally nominated by the Government, but, in the absence of anyone else, Mr Edwards was called. He said Mr Lloyd was still Managing Director but, in respect of approving payments, it was assumed that he, Mr Edwards, would take the role effectively as the informal Government nominee to approve payment. He agreed that under this regime, together with Mr Judge, he approved payments. We see no reason to doubt the reliability of that evidence.

20.6.12 On Monday 24 October 1988, Robinson Cox wrote to Mr Grill enclosing a copy of the agreement executed by him and Mr Oates together with a copy of the undertaking to go to Spedleys for execution. The solicitors confirmed their advice that the "State" ought to appoint an independent accounting expert to report on the financial status of Rothwells in order to ensure that the State was in possession of an objective and complete assessment of the financial position of Rothwells, something that the solicitors indicated the State lacked at that time. The letter advised that Mr Andrew

Love, of Ferrier Hodgson, chartered accountants of Sydney, had indicated he would be prepared to accept such an appointment. It appears that Mr Wiese gave advice to Mr Dowding about the matter and Mr Dowding agreed that Mr Love should be retained to assist. Mr Love was appointed but did not arrive in Perth until Friday, 28 October.

20.6.13 On Wednesday, 26 October 1988 Robinson Cox wrote to Mr Grill advising that Mr Owen had spoken that morning with Mr Judge who advised that Mr Yuill of Spedleys had not signed the undertaking. Mr Yuill had apparently told Mr Judge that he had never committed Spedleys to the funding or to management of the company; he had only agreed he would review the position and make a decision as to what he would do both as to management and the commitment of funds.

20.6.14 While the lack of commitment from Spedleys was impeding the finalisation of a rescue package, the inability of Rothwells to meet its commitments without assistance continued. As previously discussed, \$12 million was required on Thursday, 27 October 1988 and the Government share of \$6 million was provided when the R & I Bank was persuaded to grant the \$6 million facility to Western Collieries. On Friday, 28 October 1988, SGIC provided a further \$12.5 million to Rothwells. Mr Rees had an entry in his diary for 28 October that referred to a late afternoon discussion with Mr Dowding concerning a "... special advance of 12.5 million secured by bills Paragon, Intellect". According to Mr Rees, Mr Dowding telephoned him late that afternoon and indicated that Rothwells needed a short term advance for liquidity purposes. He said Mr Dowding authorised an advance of \$12.5 million from SGIC. He discussed the matter with Mr Michell and they insisted on obtaining satisfactory security. Bills from Paragon and Intellect were provided and Mr Rees recalled that, in due course, Paragon met its \$10 million obligation. As to the nature of the authorisation from Mr Dowding, Mr Rees said he took it as a verbal direction but it was never confirmed in writing. He said he did not ask for written direction or confirmation, but he thought the Premier made a statement about the matter in Parliament.

20.6.15 Mr Rees said that, prior to making the deposit of \$12.5 million, SGIC's exposure to Rothwells was in the order of \$74.6 million. He disagreed with the evidence of Mr Dowding that they had discussed the \$12.5 million deposit at a meeting. He was positive the conversation was by telephone and that he confirmed it immediately with Mr Michell. In Mr Rees' view, the advance was not improper or unlawful.

20.6.16 Mr Michell confirmed that, at a meeting of the SGIC Commissioners on 24 October 1988, Mr Rees summarised exactly where SGIC stood with regard to the exposure to Rothwells and advised that he had made clear to Mr Dowding that SGIC could not be called upon to provide any further funds to Rothwells. That position was supported by the Commissioners. According to Mr Michell he believed a direction had been made to invest the \$12.5 million with Rothwells and SGIC had no option but to comply.

20.6.17 As to why the decision was made to inject a further \$12.5 million, Mr Grill said:

"Much the same situation, the Government hadn't finally made up its mind as to whether it should support a further rescue package. There was even uncertainty at the end of the week, and to tide the situation over, the Premier arranged for the SGIC to make available about \$12 million."

Mr Grill said the \$75 million arrangement had come to a temporary halt and, although there were quite extensive efforts to resolve the matter, it had not been resolved at the time the \$12.5 million was injected. Mr Grill was asked whether, at the time the \$12.5 million was injected, there was a very high risk that no deal would be struck and Rothwells would go into liquidation. He responded that the longer the matter went on, the higher the risk became, but, as to whether it was a fair description to say there was a high risk of liquidation and a loss of \$12.5 million, he said:

"I really don't want to use that language at the extreme end of the scale, because it really has connotations to it which I don't think are fair. I think that there was a risk; that the Government was aware of that risk; but it needed to balance a whole range of factors and that the Premier and the Government generally took the view that on balance it was a risk worth taking".

Mr Grill went on to say that the Government was in the process of obtaining some better understanding of the financial situation from Mr Love who was commencing the process of an assessment. He said it was decided that while the assessment was occurring the Government should endeavour to ensure that Rothwells did not fall over. He thought Bond Corporation also contributed \$12.5 million. It was suggested to Mr Grill that, given the background, the injection was totally unjustified and that this was a desperate Government trying to avoid a collapse which could be seen as disastrous to it. Mr Grill did not agree. He said it was a very concerning situation and the Government was attempting to obtain better information and to rationally weigh up the various risks involved. Given the risks to the investors within Rothwells and the position of SGIC, he said it was thought that a further \$12.5 million was not an unreasonable sum to put in place. In Mr Grill's view, the range of factors considered was reasonable and responsible and political factors were well down the list.

20.6.18 Mr Edwards recalled that on Friday 28 October 1988 he assisted in drafting a document for Mr Dowding to sign directing SGIC to deposit \$12 million or \$12.5 million in Rothwells in order to repay the R & I Bank. He was not certain what was done with the document and said perhaps Mr Rees took it with him. He understood it was signed by Mr Dowding. He said the money was deposited with Rothwells so that a cheque for \$6 million could be drawn and given to the R & I Bank. This appears to have cleared the \$6 million facility granted to Western Collieries. Mr Edwards said the balance of \$6 million was matched by a \$6 million contribution from Bond Corporation in accordance with the agreement.

20.6.19 Mr Dowding explained his position in the following evidence:

A: ... on the 28th was the day that Andrew Love was to commence his analysis of the Rothwells position and it was put at one of these large meetings that I've described to you, - that no agreement had been finalised, that the 12 million was absolutely necessary and, in discussion with Mr Rees and the others present, I was persuaded of the view that we had Mr Love to give us advice about whether or not this organisation should go into liquidation or not and what its position was and what money was required and so on, and we really just had to accept the responsibility to keep things going until we were able to make that determination.

Q: At that time, was it apparent to you that if the rescue package that had been talked about, or something similar - 75 million - did not end up being put together, Rothwells would have to go into liquidation?

A: No. We were not - - we just didn't know at that time. In fact, the information was that its assets exceeded its liabilities but that it just did not have the cash to meet the demand of the day.

Q: How close was it to going into liquidation at that point when you made the decision that SGIC - - to approve or whatever you want to call it - approve the deposit of 12.5 million? How close was Rothwells to going into liquidation?

A: I couldn't say that. I am sorry.

Q: You must have had a fair idea that any amount deposited in Rothwells at that point in time was a risky investment?

A: I don't know what you mean by "a risky investment".

Q: Surely, whatever funds - -?

A: I mean it speaks for itself that you would not make, if you were choosing where to put your \$12 million - all other things being equal - - you would look to another organisation to deposit them, but we were awaiting this information. The information may well have showed what some of the preliminary suggestions had showed and that was that Rothwells was as it had been described, and if that were the case it may have been irresponsible to have held out against supporting it during the course of the next few days.

Q: Why did it need support in the next few days?

A: Well, you'll have to ask it or them.

Q: Well, what was your understanding at the time that you approved - -?

A: Well, you'll have to ask it or them.

Q: Well, what was your understanding at the time that you approved - -?

A: That it needed support that day.

Q: To the degree of 12.5 million?

A: Well, 12 million or 12.5, yes.

Q: And what was your understanding as to what would happen if you said: "No, we won't give you this support"?

A: Um - - well, I - - I would - - I'm not making a very informed judgment here, but I gathered that Rothwells would not open - - would not necessarily be able to open its doors.

Q: Were you told in reality that it would not open its doors?---

A: It may have been put in those terms, yes - -

Q: Yes; you see, what - -?---

A: - - but my position was - and I think Mr Rees' was: "Look, we're told they must have 12 million; we have our expert over who's only just started this task; it's going to be a few days before we have - -", I think actually the weekend before we were going to have some idea of the real position, and this was a holding decision until the real position emerged.

Q: Yes. What I'm exploring with you are the alternatives and the circumstances in which you made that holding decision. Now, one circumstance was that if you didn't make the decision in all probability Rothwells would close its doors - or it might have even been put as inevitable; is that fair?---

A: Yes, that's possible; yes.

Q: The other circumstance was that any money going in at that time was at risk because it might turn out that there could be no rescue package put together and Rothwells would have to go into liquidation?---

A: Well, the range of alternatives was as broad as - -

Q: No - -?---

A: - - and would include that as a possibility, but I - - I would say to you that the real problem we were faced with was we were on the verge of knowing the truth and it was a question of whether we took a decision which pre-empted the examination in the sense that Rothwells did not open following the Friday.

Q: Right. Did you have any concept or any understanding as to how much had gone to Rothwells from the PICL settlement at the end of the day?

A: How much of the 25 million that you - -

Q: Exactly?

A: Oh, well, I'm sure that was known .

Q: Yes. You see, I just ask you whether in fact you were really just postponing the inevitable at that point, because if you looked at the history of it and all the money that had been pumped in whether in reality it was a hopeless cause?---

A: Well, a speech that I am sure I made on numerous occasions during the course of the week, Mr Martin, but it didn't address the real problem on that Friday. And the real problem on that Friday was, we were - - we had put in place finally the mechanism to determine the real position. And the question was as it was presented to me then, do we pre-empt that and not provide this fund or do we do it from a holding perspective so that inquiry can proceed. And on the advice of those there present, and I believe entirely with Mr Rees' concurrence, I said to him; "This is a decision which at the end of the day I will take the political responsibility for because it is clearly in my view a no alternative position. And on the basis of your advice and all of those who support this proposition I accept that." And as

you know I made that clear in my statement to another place."

20.6.20 During the meetings of 20 and 21 October and subsequently, Mr Dowding was clearly considering whether to take part in one form or another in a further injection of funds. But when Mr Dowding was asked whether the Government was considering that issue, he responded "[n]o, I don't think so" and went on to discuss the history of the matter. When it was then put to him that the Government was still considering whether it would participate, that it was one of the things it was considering, he responded "[w]ell you may answer it that way. I would answer it the way I have". He said he discussed the parameters with SGIC because it was one of the groups exposed. As to whose idea it was that SGIC should inject the \$12.5 million, Mr Dowding said he did not believe that it was anyone's idea, rather, it simply emerged in the course of the discussions. He did not recall considering an injection of funds by any other Government body or the Government itself but said it may have been considered. In subsequent evidence, Mr Dowding said SGIC was chosen because it had the major exposure to Rothwells. In the context of using Government funds, we accept the evidence of Mr Bowe that on 21 October 1988, at the meeting concerned with Western Collieries and SECWA, he had advised that it was not the function of Treasury to be putting money into Rothwells. He advised that, even if Treasury had "the inclination to do so", it did not have the necessary legislative power.

20.6.21 Mr Dowding said he was not aware of the deposits of \$5.5 million and \$11 million made by SGIC with Spedleys on 20 and 21 October 1988, but he had a reservation about expressing that lack of knowledge because there were discussions about the exposure and it could have been mentioned in that context. To the best of his knowledge he was not informed of specific deposits or that by depositing those sums in Spedleys there was any assistance being granted to Rothwells.

20.6.22 Mr Dowding was reluctant to acknowledge that on 28 October he was involved in making a judgement as to how risky it was to invest the funds in Rothwells. He did not think any consideration was given to the Government indemnifying SGIC. Asked whether it was his position that he did not direct the SGIC to make the deposit, Mr Dowding said, "... you would have to draw your own conclusions from the circumstances". He said those circumstances were his discussion with Mr Rees in which he asked what he thought and Mr Rees responded "[w]ell I think it's the right thing"; Mr Dowding then said to Mr Rees "[w]ell, then, let's do it and I'll take responsibility for it". Mr Dowding said the decision was not made for the purpose of trying to keep Rothwells afloat, rather, it was for the purpose of making a deposit because a failure to do so might put at risk opportunities for SGIC and the Government to protect their investments. As to why SGIC funds might have been at risk but for a deposit of \$12.5 million, Mr Dowding said he understood from the advice that was coming from the group that failure to provide the funding might destroy the opportunities for an orderly work out. As to why it might destroy the opportunities, Mr Dowding said "[y]ou have to ask them. I'm sorry". Finally, when it was put that

surely he understood it would destroy those opportunities because Rothwells would otherwise have to close its doors, Mr Dowding answered "[y]es. Of course".

20.6.23 As to his motivation and the risk involved, Mr Dowding gave the following evidence:

Q: Mr Dowding, your motivation was, wasn't it, to keep Rothwells afloat long enough for Mr Love to put his view, his position, to you?---

A: No, no, that wasn't my motivation. My motivation - - I mean, the advice that I had - - my motivation was to do what was the right thing and the right thing was whatever the advisers said was the right thing, and the right thing according to the advisers was not to have Rothwells close its doors because the SGIC and the government may well do better to have an orderly work-out and an orderly work-out could not be assured until a great deal more work had been done. That's as I understood what was being said to me but you've had some of the witnesses; you may not have had them all - I don't know.

Q: In any event would you acknowledge that you were aware that the funds, the \$12.5 million, were at risk? There was a real risk that those funds would be lost?---

A: Well, not that they would be lost. There was a commercial risk in the judgment whether you put the money in an allow an examination with a view to an orderly work-out or whether you don't put the money in and there is some alternative, and if you put the money in and you don't achieve an orderly work-out there may be some consequences but not that the 12.5 million was at risk as such.

Q: To that extent it was at risk because there was no guarantee that anyone would be able to achieve an orderly work-out, was there? ... What was the advice ... That they didn't know or that it was realistic or it was an outside chance? What was the advice?---

A: That it was a matter to be properly examined.

Q: That's not an answer to my question. ... What was your advice and - -?---

A: Oh, the Under Treasurer, I believe, Mr Rees, I think Mr Heron may have been present. There may have been other ministers there as well, ... but I don't remember the full range but there was - -

Q: And you say there was no suggestion that you wouldn't get the 12.5 million back? Did I understand you to say that?—

A: No; it was not a suggestion that you would lose the 12.5 million although there was a - - I mean, that depended on what Rothwells real position was. Mr Love's view, I think at that time, but I can't be certain about the actual hour because things changed rapidly, but he thought that there was positive net worth at that time or that there was a prospect that there was positive net worth, in which case it wasn't at risk.

Q: What advice were you given as to the prospects of an orderly work-out, as to whether they were realistic prospects - a good chance, slim chance ... or if you weren't given advice then please say so?---

A: I don't think - - I don't think people were able to say at that stage. I believe what people were saying was that it was a prudent commercial step to take because of the real need to examine closely the possibility of the orderly work-out.

Q: Did it occur to you that from the point of view of SGIC that payment of \$12.5 million may not have been authorised within their Act. It may have been either unlawful or inappropriate in any way?---

A: No; it was never suggested in that meeting at all.

Mr Love had not given a positive view before Mr Dowding made the decision. As discussed later in this section, he was initially briefed by Mr Wiese and Mr Owen and, within an hour, he had advised them of his view that there appeared to be something significantly wrong with Rothwells.

20.6.24 In the context of whether the funds were at risk, we note Mr Dowding's statements in a radio interview of 4 November 1988, the day after the appointment of a provisional liquidator. He was asked whether it was silly for depositors to leave funds with Rothwells in view of warnings that had been sounded. The following exchange then occurred:

"DOWDING: Well I don't know how many warnings you have to give. The Government withdrew its guarantees....

SATTLER: Three weeks ago.

DOWDING: ...three weeks ago. The Liberal Party has been certainly doing and saying things which indicated that there were some real concerns, and there was a run on the bank. So that I - I don't know what you have to do to try and make people recognise that there are safer places to put their money.

SATTLER: Three weeks ago, without being able to tell us at the time, did you think that the bank was headed for the rocks, headed for at least receivership?

DOWDING: No, but shortly after that, when they approached us about their liquidity problems, they indicated to us that they were solvent, that is that their assets exceeded their liabilities, but that they would have massive liquidity problems and they would be problems that would be ongoing.

SATTLER: What did they ask you to do when they came to you for help - what did they want?

DOWDING: Well significantly, they wanted deposits so that they could act as a buffer against the runs that the political controversy was creating.

SATTLER: They wanted you to plonk in a deposit did they?

DOWDING: They wanted more money on deposit, that's correct.

SATTLER: How much?

DOWDING: Oh, well, I mean, that was the problem. How much was enough? The problem was

that we could have been looking at 25,75,200
...

SATTLER: Did they name a figure?

DOWDING: Well from time to time, different figures were mentioned, but at one stage it was a day by day situation. In the end, I authorised - the S.G.I.C. came to me and said to protect our commercial position, we need to get some more information and we certainly need to get a few days. So do you have any objection if we put in this extra \$12.5 knowing that it may well be a risk.

And we assessed the situation and decided that it was worth it, because we brought in some independent people through our solicitors who did a full examination of the situation, and then gave me a report.

SATTLER: And they advised you to put another - that the S.G.I.C. should put another \$12.5 million in?

DOWDING: No, no. The S.G.I.C. came to me and said to protect their commercial position, could they do that in order to preserve the situation for a few days while we got that advice. They put the money in, we got the advice, and in the end result I had to say that although you could talk about Rothwells being able to survive as it had sufficient liquidity, the real question was whether the Government was under an obligation, had a responsibility, or ought to have provided that liquidity. And the very difficult decision I had to make was that it did not have that role."

20.6.25 In evidence Mr Dowding said it was not his attitude that the withdrawal of the indemnity was a warning. He said the statement on radio arose out of one of those situations when, put in a position by an interviewer, answers are not thought

through carefully. He said, "I don't think it's a very satisfactory answer". He then volunteered:

"I suppose it would be fair to say that, given all the publicity - - really what I think may have been in my mind at the time, and I think is correct, and it just beggars belief - - how on earth, with all this adverse publicity, people could have retained their funding in Rothwells, despite all of it? It leads to a view about the sort of decisions that people make, none the least being my neighbour, who had his money in there, and it was interesting to explore with him why he had his money in there. One of the factors, that at that time he'd said to me, when he came around even after the appointment of the liquidator and told me that his money was still in there and when was he going to get it back - - I recall having a lengthy discussion with him about it and just being amazed and seeing then, in his mind, the importance of the guarantee, and the conflict that we really have when we remove the guarantee but then allow the commerciality of Rothwells to persuade us to not say anything about its fabric at that time."

Mr Dowding then acknowledged that, deliberately, the attitude that emanated from the Government on about 17 October 1988 was one of confidence in Rothwells.

20.6.26 Mr Dowding's statements on radio were in marked contrast to the impression conveyed of Rothwells in July 1988 and on 6 October 1988 at the news conference. It was quite wrong to say the Government had given a warning by withdrawing its "guarantees". In addition, it was misleading, and deliberately so, to say that SGIC went to Mr Dowding and asked if he had any objection if it deposited an extra \$12.5 million.

20.6.27 Yet again we have found Mr Dowding's evidence most unsatisfactory and peppered with prevarication. He was initially unwilling to acknowledge the obvious that, as everybody involved was well aware, if the necessary funds were not provided, Rothwells would have to close its doors. He was also unwilling to acknowledge the obvious existence of a grave risk that the \$12.5 million would be lost and that he was required to make a judgment in that regard. All the factors to which we have referred in section 20.4 of this chapter as the background to the \$15 million payment on 21 October were equally applicable at the time that Mr Dowding made this particular decision. We have no doubt he was well aware of the very serious risk that Rothwells would close its doors within a very short time of that deposit. The appointment of Mr Love was a last effort to obtain information about Rothwells which would justify its continuance. Mr Dowding and Mr Grill were aware of the huge losses facing the State should Rothwells collapse. Thus the commercial interests of the State, which had been so seriously jeopardised by an improper course of conduct, must then have been prominent in their thinking. In addition, we are satisfied they believed that a failure of Rothwells at this time would be politically disastrous. They were well aware the

Government would have been perceived as not only losing \$150 million due to the indemnity, but as having to pay that amount twice because the payment by Rothwells to NAB would be set aside as a preference and NAB would seek that amount from the Government. A Rothwells failure would disclose the other support that had been provided by the Government through its instrumentalities. This support would have been perceived as "secret" and, therefore, discreditable. Further, it was likely the various matters referred to by Mr Lloyd in his handwritten notes would be exposed. Finally, there was a real risk the true nature of the PICL deal would be revealed, particularly the Government support and its relevance to the "value" of the project and the price paid for PICL.

20.6.28 Reference has been made to an assessment by Mr Love. He was contacted by Mr Wiese on 20 October 1988 concerning the possibility of providing independent financial advice as to the position of Rothwells. He travelled to Perth with an employee, Mr Turner, on 28 October 1988. He had not had any prior dealings with Mr Connell, Rothwells or any of the parties involved.

20.6.29 Mr Love said he and Mr Turner were briefed by Mr Wiese and Mr Owen as to the background of Rothwells. This included the 1987 rescue, the further assistance required during 1988 and the PICL settlement. At that stage he indicated his view to the solicitors that there had been a significant amount of money injected over two occasions and Rothwells was still suffering liquidity problems "so that there appeared to me to be something more significantly wrong with the company". He drew the conclusion that there was a major problem somewhere that had not been fixed despite significant efforts from a number of parties to do so. That conclusion was drawn from the bare facts presented in the briefing by Mr Wiese and Mr Owen and, coming after the first hour, Mr Love thought it was a fairly significant conclusion. Following those observations, he was advised of the difficulties experienced by Rothwells immediately following the PICL settlement.

20.6.30 During the afternoon of Friday 28 October 1988, Mr Love was taken to Rothwells where he met Mr Lloyd. He was given a one page consolidated balance sheet and left on his own for an hour-and-a-half or two hours. He advised Mr Wiese or Mr Owen that he was not getting the co-operation he needed to perform his task. Although Mr Lloyd appeared to understand his concerns, he was distracted by other urgent issues. That night Mr Love prepared a five page list of requisitions he regarded as the bare minimum of the fundamental sort of material that he needed.

20.6.31 Mr Love worked through Saturday, 29 October and late into the evening and, further, from early Sunday morning until about 3.00 pm. That afternoon he told Mr Dowding, Mr Parker and Mr Grill of his view that, not only was Rothwells facing a liquidity crisis, but it was insolvent on whatever test was used. On a liquidity basis it could not meet its debts when they fell due and, similarly, it was insolvent on an assets less liabilities test. Mr Love explained to the meeting that, unless steps were taken to inject further liquidity into Rothwells, a liquidator would inevitably be appointed within a week or two. He said on examination of the liabilities profile of the

company, he found approximately \$260 million worth of liabilities would fall due within 7 to 14 days, but a large part of that \$260 million was able to be called virtually immediately. He advised those at the meeting at least \$100 million would be needed to resolve the problems of the next 7 days and that he was unable to specify an upper funding limit because he had not had sufficient time to examine the affairs of the company. In addition he referred to recent transactions that would be reversed if a liquidator was appointed, including the repayment of \$150 million to NAB and other transactions involving Bond Corporation, Bell Resources and Spedleys.

20.6.32 Although he did not say so at the meeting, it was Mr Love's opinion that it would be very unlikely that Rothwells could trade out of its difficulties. He had examined the loan portfolio by being provided with information on individual debtors. He was "staggered at the poor documentation" and the fact that the representative of the company could not give a summary to him of the overall position on the receivables. Mr Love expressed the view that the step of examining the major assets was the first and most obvious step to be taken in an assessment of the situation at Rothwells. Put in the circumstances of October 1987, and asked to consider the viability of Rothwells, he said from an accounting exercise the step of examining the state of the loan book would quite clearly seem to him to be a significant step for anyone who was considering investing and was conducting an examination of Rothwells.

20.6.33 As to how difficult it was to arrive at the view that significant problems existed with the major assets, Mr Love said he had been able to form the view that there were problems with the loan book in a relatively short period of time. In a general sense he was able to obtain an idea of the magnitude of the problem with the loan book. He said there were a range of standard questions that needed to be answered in order to reach a quick general assessment in relation to each transaction. Mr Love set about the fundamental exercise of assessing recoverability by examining each of the individual debtors with the officers who were primarily responsible for the loan book and asking particular questions. In the main, the information was provided by Mr Hare and Mr Lloyd. As to the overall position of recoverability, Mr Love concluded that the book was in a "very parlous state". This was the view he expressed to the meeting on Sunday, 30 October 1988 attended by Mr Dowding, Mr Parker and Mr Grill.

20.6.34 As to the future, Mr Love examined the available options of liquidation or an orderly workout and considered that the workout was likely to produce better results as opposed to leaving Rothwells to attempt, itself, to trade out of difficulty. He envisaged major creditors controlling the company and collecting assets over a period of time, but removed from a liquidation environment. In order for a workout to be achieved, there was a need to ensure that sufficient funds would be available to discharge the claims of creditors as they fell due. In his view, the workout could not commence without the injection of a minimum of \$100 million within the next week, and there was a need to find out what the upper limit was because he had not had enough time to do so. He said Mr Dowding was very concerned at the Sunday meeting that the amount being discussed was again significantly in excess of the figure conveyed by Rothwells as required to fix the problem. The view was generally expressed in

favour of exploring the workout option. There was agreement to meet the following day to discuss firming up the numbers. Subsequent meetings occurred but, ultimately, no agreement could be reached.

20.6.35 Mr Love defined a liquidity crisis in the context of Rothwells in the following terms:

"... an increasing level of demands being placed upon the company to repay liabilities that had fallen due and an environment where the company did not have sufficient liquid assets, in the form of cash or assets that it could turn into cash in a short period of time, to meet those liabilities and those demands being placed upon the company."

He said an asset deficiency existed "... where the liabilities of the company exceeded its assets". Asked how he would satisfy himself that what on the surface was a liquidity crisis was not a consequence of an asset deficiency, Mr Love responded that generally the two tend to be linked together. As to whether there was cause for concern that a liquidity crisis existing for months and months might reflect an asset deficiency he said:

"Well, it would certainly indicate that there is a problem with the type of asset or the quality of assets that you may have in that particular company because, quite clearly, if there is a liquidity crisis, the company has an inability to turn its assets, whether they be short term or long term, into cash to meet the demands of its creditors, meet its obligations."

20.6.36 Mr Lloyd said he responded to information sought by Mr Love in most instances by providing officers of the company to give him information rather than doing it himself. He said he was very busy and giving priority to the completion of the audit because he had given an undertaking to Mr Schoer to complete the audit by 31 October. He could not recall seeing the list prepared by Mr Love. He said Mr Love advised that it was almost always the case that an orderly realisation and wind down of a company was more beneficial to the creditors than a formal liquidation.

20.6.37 As to the evidence of Mr Love that he was staggered at the poor documentation in relation to the loans, Mr Lloyd acknowledged that it was not by any means perfect. He said, for example, that if a loan had originally occurred without a formal proposal, Rothwells' employees did not attempt to create the proposal which should have been on the file to begin with. Mr Lloyd was also asked to comment on Mr Love's evidence that, when he asked for a summary of the overall position on receivables, the representatives of the company couldn't give it to him and all he was given were various sheets of paper which were said to represent the total loan book of the company when added together. Mr Lloyd responded with an explanation concerning the computer system and the fact that he was directing the officers to give priority to finalising the audit. He said the audit work involved another complete examination of

the receivables which required those officers to provide a lot of records to the audit team. Mr Lloyd said in that situation they were not holding any records back from Mr Love, but he did not believe that Mr Love was able to carry out a thorough examination. Mr Lloyd acknowledged that the \$350 million portfolio sold to Mr Connell included some of the worst loans in terms of documentation. Mr Love, therefore, was examining loans that one might expect to be, relatively speaking, the better in terms of documentation and recoverability, but Mr Lloyd repeated that they were not in the business of creating documentation that should have been prepared at the commencement of a loan.

20.6.38 We have no hesitation in accepting the evidence of Mr Love. We find Mr Lloyd's explanation totally unconvincing and are satisfied that Mr Love's view accurately reflected the state of Rothwells' records. He was one of the partners responsible for reviewing the receivables after Mr Ferrier had been appointed the provisional liquidator. He said it became apparent that new staff had been employed at Rothwells in 1988 in order to assist the debt recovery aspect of the business and there had been a reallocation of employees within Rothwells away from other tasks toward debt recovery. There was evidence of documents that had not been originally stamped or registered which were subsequently stamped, thus ensuring that securities could be enforced in recovery actions. There was also evidence of additional securities being obtained. As to the state of the files, however, he said his later work confirmed the initial observations that they were in a "... poor state overall". We accept his evidence that no one was able to provide him with a summary of the position in October. He was understandably "staggered" by that inability. Given the history and state of affairs that then existed, that inability is a damning indictment indeed. We reject Mr Lloyd's explanation that this inability was due to the work being done with the audit team.

20.6.39 During the meeting on Sunday, 30 October, Mr Lloyd disagreed with Mr Love's view that at least \$100 million was required to fix the problem for the next week rather than \$75 million. Mr Love said Mr Lloyd worked through the numbers and came up with about \$97 million and he did likewise with a result of \$102 million. In the course of the discussion Mr Love said he focussed on why, after the PICL settlement, there remained a problem. He concluded that Rothwells ultimately received about \$1 million net from the PICL settlement. Mr Lloyd was, of course, aware on 16 October, the day before the PICL settlement, that only \$1 million net would flow to Rothwells and problems would continue. Mr Love said the PICL transaction, therefore, meant little on a cash basis and Rothwells' liquidity problems continued. The end result of the meeting was an arrangement for Mr Love to meet with representatives of the major creditors at Observation City on the following day, Monday 31 October 1988.

20.6.40 In addition to Mr Love, the meeting at Observation City on 31 October was attended by representatives of Bond Corporation and Arthur Young together with Mr Wiese and Mr Owen. Mr Love thought Mr Grill attended the meeting later in the morning. He said the assets and liabilities were discussed, together with the immediate cash requirements. Mr Beckwith agreed that somewhere between \$120 million and \$130 million might be needed immediately, with an upper limit in the vicinity of

\$150 million. He considered the prospect of a work out should be explored further. He said the meeting concluded around lunchtime. That afternoon Mr Love met with Mr Dowding and advised him of the outcome. He said Mr Dowding remained very concerned that the funding being discussed was in excess of information previously given to him and expressed the view that matters appeared to be getting progressively worse.

20.6.41 Mr Love said that later on Monday, 31 October, he was told that Mr Hilton was suggesting Mr Love had made a major error with his figures and had not been provided with certain receivables which would change the result when added to the assets of the company. Together with the auditors, Mr Hilton and Mr Lloyd, Mr Love further examined the receivables and it was clear that not all of the information requested had been provided to him. In particular, receivables of \$60 million had not been provided. Mr Love concluded that, although these additional receivables would reduce the overall deficit he had projected, they would have very little, if any, effect on the immediate cash requirement. He said it was not as easy as simply subtracting \$60 million from his original estimate of \$100 million. Mr Mitchell of Bond Corporation attended that Monday evening and the new numbers were assessed through a computer model that Mr Mitchell had prepared. Mr Love said he explained to Mr Wiese and Mr Owen that, basically, the position had not changed in the context of the immediate urgency concerning the problems of Rothwells.

20.6.42 There were further meetings on Tuesday, 1 November 1988. Mr Love thought it was accepted that about \$150 million would be needed, \$75 million from each of the Government and Bond Corporation, but Mr Dowding found completely unacceptable a suggestion that the Government advance Bond Corporation's share in cash. Discussions continued on Wednesday, 2 November 1988, in particular as to the elements of what was necessary for a workout. The issues of who was to publicly lead the rescue and who would put up Bond Corporation's share were not resolved. Mr Love was told that Bond Corporation was still endeavouring to raise its \$75 million contribution. At about midnight he was telephoned by Mr Mitchell who advised that Mr Bond was in London and had seen the proposal. Mr Mitchell told him that Bond Corporation had managed to raise \$37.5 million, but, as a condition of going forward, if they raised the full \$75 million they would require audited accounts of the company and a certificate from Ferrier Hodgson that \$150 million was all that was needed to fix the problem. Mr Love responded that Mr Mitchell had been involved for a year in contrast to Mr Love's five days and said that under no circumstances would Ferrier Hodgson give such a certificate.

20.6.43 Mr Love's evidence that discussions occurred on 2 November 1988 concerning the \$75 million and Bond Corporation's inability to raise the full amount appears to be confirmed by a memorandum from Mr Mitchell to Mr Bond of 2 November 1988. In addition, on 2 November 1988, the Acting Under Treasurer sent a memorandum to Mr Dowding, as Treasurer, concerning his discussions with Mr Berinson, as Minister for Budget Management, as to the appropriate means of providing \$65 million to Rothwells if the Government decided to proceed with such

assistance. From Mr Grill's perspective, the ultimate stumbling block was the fact that the amount needed began to escalate during that week. Mr Grill did not argue with Commissioner Brinsden's proposition that, given all that had gone before, he had a suspicion "... that pumping more funds into Rothwells was about as useful as ... giving a blood transfusion to a skeleton".

20.6.44 Early on Thursday, 3 November 1988 it was clear to Mr Love that there was not going to be a workout because the necessary pre-requisite relating to funding could not be met. Rothwells petitioned the Supreme Court in Queensland that day for the appointment of provisional liquidators. Mr Ferrier and Mr Tuckey were appointed. On the same day the Government announced that it would not provide any further assistance. Mr Ferrier and Mr Tuckey were appointed joint liquidators of Rothwells on 22 September 1989.

20.7 Matters arising in the liquidation

20.7.1 The statutory report as to affairs of Rothwells was presented to the provisional liquidators on 8 December 1988. It showed a deficiency of assets of \$63.3 million and estimated the return to unsecured creditors to be 67 cents in the dollar. In an explanatory memorandum, issued on 9 December 1988, the provisional liquidators advised that they would "continue to explore the prospects of implementing a Scheme of Arrangement directed towards improving the amount and time of the ultimate return to creditors, particularly depositors". In fact, by 8 December 1988, Mr Ferrier had essentially reached agreement with Mr Connell as to a settlement of claims and counterclaims between the provisional liquidators, Mr Connell, Mrs Elizabeth Connell and various companies associated with either or both Mr and Mrs Connell. The settlement, which was subject to the approval of a scheme of arrangement, was formalised in a deed dated 17 January 1989. The nature of that settlement has been the subject of evidence from Mr Love and Mr Ferrier. Mr Connell disputed any liability to Rothwells. Settlement for a deferred payment of \$12 million payable in 1992 gave the creditors some prospect of recovering that amount. To refuse a settlement and pursue Mr Connell through legal processes was not, in Mr Ferrier's view, in the best interests of the creditors. Such processes would have been complex and expensive, and the possibility existed that Mr Connell and Mrs Connell would not have been held liable for any amount.

20.7.2 The Commission was impressed with Mr Ferrier's evidence and is satisfied that the settlement reached was realistic in the circumstances and that no impropriety was involved.

20.7.3 Mr Ferrier gave evidence that he met with Mr Dowding and Mr Parker on "a few occasions". Mr Dowding and Mr Parker were concerned about the interests of depositors and expressed the hope that they would be paid. Mr Ferrier shared their concern. He said the proposition that depositors be preferred over other creditors was put to the major unsecured creditors and was met with almost unanimous approval. It was, of course, necessary to obtain formal approval of the creditors before the Court

could be expected to approve a scheme of arrangement favouring one category of unsecured creditor over another. The Scheme of Arrangement approved by the Supreme Court on 19 July 1989 provided for the depositors of Rothwells to be paid 100 cents in the dollar for the first \$1 million deposited. Amounts in excess of \$1 million were to rank with the claims of other unsecured creditors. Mr Ferrier denied that the Government placed him under any pressure to make special provision for depositors. He said he did not take into account political considerations such as the impending elections.

20.7.4 As part of the PICL settlement of 17 October 1988, Rothwells paid \$150 million to NAB which, in turn, discharged the Government indemnity that had been provided as part of the October 1987 rescue. The provisional liquidators demanded repayment by NAB of the \$150 million. Following negotiations, Mr Ferrier accepted \$33 million from NAB in full settlement of that claim. Mr Ferrier explained that there were a number of factors to be considered in arriving at that settlement. First, NAB was vigorously contesting its obligation to repay which created a real prospect of lengthy and expensive legal proceedings with no guarantee of success. Secondly, if, for example, NAB had returned \$100 million to the company, it would then have proved in the liquidation for that amount. It was then estimated that the dividend to be paid to unsecured creditors would be 67 cents in the dollar, hence NAB would be paid \$67 million. As part of the agreement to accept \$33 million, NAB agreed to not prove in the liquidation. Between NAB and the Government it was agreed that, of the \$33 million, NAB should pay \$10.5 million and the Government \$22.5 million.

20.7.5 The Commission accepts that, in the context of the provisional liquidation and in the circumstances confronting Mr Ferrier and Mr Tuckey, the settlement effected with NAB was commercially realistic and in the best interests of the creditors of the company.

20.7.6 Prior to the appointment of the provisional liquidators on 3 November 1988, Rothwells had purchased the coal mining company, Western Collieries Ltd ("Western Collieries") for \$131 million. Mr Ferrier agreed this was regarded as a very high price for the company at the time. The provisional liquidators offered Western Collieries for sale at \$145 million, a price well above its value. At the final date for offers, 7 April 1989, there were three bidders, including Wesfarmers Ltd ("Wesfarmers") for \$95 million.

20.7.7 At the same time as negotiations for the sale of Western Collieries were taking place, SECWA was conducting negotiations with the three companies which supplied it with coal, including Western Collieries. In summary, from documents provided to the Commission, it appears that on 7 April 1988 SECWA and Western Collieries signed a letter of understanding which anticipated that SECWA would exercise options under its existing contact with Western Collieries to significantly increase its purchases of coal. SECWA formally approved that arrangement on 19 April 1988. On 20 April, representatives of the provisional liquidators met with representatives of Wesfarmers in an attempt to persuade it to increase its bid for

Western Collieries from \$95 million to \$145 million. The increased purchase of coal by SECWA was used as a selling point. On 10 May 1989, a contract for the sale and purchase of all issued shares in Western Collieries was executed between the provisional liquidators and Wesfarmers for \$125 million, plus a further sum according to a formula based on future profits.

20.7.8 There has been considerable press and other public speculation on the nature and timing of the contractual obligations to purchase coal entered into by SECWA with Western Collieries in April 1989. The Commission has gathered considerable material but has not had time to fully investigate the allegation that is central to that speculation, namely, that the contractual obligations were entered into not primarily to meet the power generation needs of SECWA but, rather, to enhance the value of Western Collieries for the ulterior purpose of increasing its sale price and hence the money available to the provisional liquidators of Rothwells. Nor has the Commission had time to call evidence in public hearing and to permit that evidence to be properly tested by cross-examination by interested parties.

20.7.9 A number of complex issues were raised by the material and evidence which the Commission has considered and serious questions have been raised as to the bona fides of the transaction. Accordingly, it is the recommendation of the Commission that the transaction whereby SECWA ordered additional coal from Western Collieries in April 1989 be referred to a body with the power to fully and publicly investigate any allegations arising from that transaction.

20.7.10 Mr Ferrier denied any knowledge of any attempt on the part of SECWA or the Government to enhance the value of Western Collieries by increasing the order for coal.

20.7.11 We are satisfied that the calling of further witnesses as to the conduct of the provisional liquidation and liquidation is not justified. The evidence does not provide any basis for further investigation other than in respect of the Western Collieries matter. Time constraints have necessarily dictated that the Commission's inquiry into this aspect be limited.

20.8 Donations by Bond Corporation and related entities

20.8.1 The issue of donations is discussed in chapter 26, but it is appropriate to mention those from Bond Corporation and related entities ("Bond Corporation") because of the timing of amounts paid in 1988 and 1989. A complete list compiled from the ALP Donations Register disclosed the following:

"	DATE	IDENTITY	AMOUNT	CREDITED TO
1	01-Jul-82	Swan Brewery Co Ltd	\$3,000.00	ALP State Labour Organisation ("SLO")
2	15-Jun-84	Bond Corp	\$25,000.00	ALP SLO
3	10-Oct-84	A Bond	\$100,000.00	John Curtin Foundation

4	12-Jun-85	Leighton Holdings	\$10,000.00	ALP SLO
5	28-Jun-85	Endeavour Res Ltd	\$150,000.00	T&C Adv #1
6	28-Jun-85	N.K Investments	\$150,000.00	T&C Adv #1
7	11-Jul-85	Romel Pty Ltd	\$50,000.00	T&C Adv #1
8	04-Nov-85	Leighton Holdings	\$70,000.00	T&C Adv #1
9	02-Mar-86	A Bond	\$100,000.00	John Curtin Foundation
10	11-May-87	Bond Corp	\$50,000.00	T&C Adv #1
11	15-Jul-87	Bond Corp	\$200,000.00	T&C Adv #1
12	15-Jul-87	North Kalgurli Mines	\$200,000.00	T&C Adv #1
13	23-Mar-88	Bond Corp	\$200,000.00	T&C Adv #5
14	01-Jul-88	Bond Corp	\$30,000.00	ALP Admin
15	21-Dec-88	Bond Brewing	\$200,000.00	ALP SLO
16		[Deleted - not Bond]		
17	13-Jan-89	Bond Corp	\$100,000.00	Stating Campaign
18	13-Jan-89	Bond Corp	\$100,000.00	Dowding Campaign
19	13-Jan-89	Bond Corp	\$100,000.00	ALP Pth
20	13-Jan-89	Bond Corp	\$100,000.00	T&C Adv #1
21	13-Jan-89	Bond Corp	\$100,000.00	ALP SLO"

\$2,038,000.00 [excluding the deleted amount]

20.8.2 Within a month of Mr Dowding becoming Premier, Bond Corporation donated \$200,000.00. Mr Dowding said that after he became Premier it was decided to run a campaign "... to elevate the image of the Premier". He had not approached anyone from Bond Corporation seeking a donation but Mr Beckwith saw him very soon after he became Premier and expressed the view of Mr Bond and Bond Corporation in the following terms:

A: That the government had done a great deal since 1983 and that the Bond group as an international group felt that they had performed most creditably, that Mr Bond himself had very deep personal antipathy to the performance of the Liberal Party and their inability to make decisions and that in particular Mr MacKinnon's vacillation and running hot and cold at the time of the rescue had been something which made Mr Bond think that he was not to be - - not a good leader and that the Bond group as a whole would support the campaign that I would inevitably have to run at the beginning of my premiership, and then or a day later he delivered a cheque for the first of the amounts that concerned me.

Q: That's the 200,000?---

A: 200,000, yes.

Q: And you arranged for that to be deposited?---

A: Yes. I mean, I was quite - I was staggered at the amount frankly and he - - within a day or two Mr Burke spoke to me and said that he'd

arranged for the Bond group to make a donation and that I should also speak to a couple of people who would be able to assist in fund raising for what might be needed for the balance of the campaign.

Mr Bond did not recall donating to such a campaign and regarded \$200,000 as within the range of Mr Beckwith's discretion.

20.8.3 During December 1988 and January 1989, a period regarded as the lead up to the February 1989 election, Bond Corporation donated a total of \$700,000, of which the ALP recorded \$100,000 as for "Dowding Campaign". Mr Bond said a proper perspective could only be gained by also considering their policy of donating \$5 million a year to charity. Generally a budget existed for donations but ad hoc payments were also made. He said with a turnover of billions of dollars this amount was well within the scope of Mr Beckwith's discretion. Mr Dowding said he did not approach anyone in Bond Corporation for donations. He thought one of the Ministers may have done so but he did not know who. He eventually became aware that Bond Corporation had made large donations but he did not know the precise amounts involved.

20.8.4 Notwithstanding Mr Bond's explanation, the total of \$700,000 was a very large contribution. There is no evidence that the fact or size of the donations was pre-arranged in connection with business dealings between Bond Corporation and the Government or individuals in Government. We note, however, that arrangements with SECWA were not finalised by January 1989 and, as discussed in section 19.16 of chapter 19, Mr Judge said he was told by Mr Beckwith that Bond Corporation should sign the SECWA contract because Mr Parker had undertaken to direct SECWA to modify the contract if the Government was returned to power in the forthcoming election. Bond Corporation was thereby provided with a strong motive to assist the Government with its election campaign.

20.9 The demise of PICL

20.9.1 As previously indicated, in view of the limitations of time and the existence of civil proceedings between the Government and Bond Corporation, we have not embarked upon an investigation of the demise of PICL.

20.10 Postscript — Where did all the money go?

20.10.1 Our terms of reference have required us to inquire into the funding of Rothwells by the Western Australian State Government and, as we have seen, hundreds of millions of dollars were involved. We have not attempted to audit the outflow of money from Rothwells during the period of Government involvement in it. We have, however, undertaken a detailed investigation into the withdrawal of some \$400,000 in cash from accounts in false names at Rothwells shortly after the October 1987 rescue. Our investigations suggest that illegal conduct was involved. We have therefore referred the matter to the DPP. We have also investigated an allegation made to the Commission that a payment was made out of Rothwells shortly after the rescue in

October 1987, which may have fallen within our terms of reference. Despite a detailed investigation we have found no evidence of corruption or illegal conduct other than that which we have referred to the DPP.

20.10.2 It must be appreciated that the opportunities for concealing an improper payment made by Rothwells were enormous. In order to say positively that no such payments were made it would be necessary to audit not only Rothwells' books but also the books of every person or company which received a payment from Rothwells during the relevant period. Even if full records had been available the task would have been enormous. As we have noted, very substantial payments were made in the 12 months following the October 1987 rescue, to a number of borrowers to enable them to continue trading. Some of those companies had business interests overseas. In many cases, therefore, it would have been beyond the reach of this Commission to identify the ultimate payees. In the course of our investigations we have identified complex overseas money trails, involving many millions of dollars, which it has been impossible to unravel.

20.10.3 Rothwells' problems in October 1987 commenced with a run caused by depositors seeking to withdraw funds. The withdrawals continued after the rescue weekend. The \$370 million injected into Rothwells over the rescue weekend and much of the liquidity provided to it subsequently, were utilised to repay depositors. This was necessary because Rothwells was unable to recover from its borrowers the funds which had been advanced to them. Hence the "bad book" or "hole" in its receivables amounting to some \$500 million. \$350 million of the receivables were assigned to Dalleagles as part of the overall PICL transaction. For that reason, there has never been any investigation into the disbursement of those receivables by the original borrowers.

20.10.4 In short, therefore, most of the money injected into Rothwells from Government sources was used to repay depositors whose funds had already been lost. Substantial funds were used to pay or repay Bond interests. In addition many millions of dollars were advanced to existing borrowers to enable them to continue trading. The policy of "keeping Connell whole" also contributed to the outflow. The investigation carried out by Commission accountants revealed that during the period 16 October 1987 to 3 November 1988, over \$62 million cash flowed from Rothwells to L R Connell & Partners and Oakhill. No doubt, much of this expenditure was incurred in implementing the policy.

20.10.5 Many millions of dollars were used by Rothwells to purchase shares in Paragon or were advanced to borrowers to enable them to purchase such shares. These acquisitions are the subject of pending charges and we have not therefore attempted to calculate the amounts involved. There must be included in the total outflow the \$7.5 million advanced to Dempster Nominees and the \$10.5 million advanced to Beltech, to which we referred in paragraphs 16.7.3 and 16.7.4 of chapter 16.

20.10.6 Of course, much of the money which flowed into Rothwells from Government sources was repaid. For example, GESB recovered its \$50 million and

SGIC recovered some money, including that which had been advanced through United Credit. Ultimately, SGIC's exposure to Rothwells was some \$90.8 million, although we were told that it expected to recoup some of that when the liquidation had been completed. SGIC's exposure to Spedleys, also in liquidation, was \$30.5 million.

20.10.7 The readily identifiable direct losses of the Government were \$175 million in relation to the PICL project, including the \$150 million paid to NAB to discharge the indemnity, and the \$22.5 million paid to Rothwells' liquidator to settle the preference claim against the NAB. To these must be added the indirect net losses on share trading, particularly the overall loss of \$372 million suffered by SGIC in relation to the Bell Group shares. This is referred to in section 17.9 of chapter 17.

20.10.8 The property transactions involving GESB and SGIC raise different considerations. Some were Rothwells-related and some involved loss. Others in that category were profitable. While it would be satisfying to identify the overall cost to the community of Rothwells, that has not been the object of this Commission and in any event, would never had been possible.

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19.1 July presentation to the public

19.1.1 On 28 July 1988 Bond Corporation released a statement to the media announcing that agreement had been reached in principle to participate jointly with the Government in the development of the petrochemical project. It indicated that the ultimate size of Bond Corporation's equity had not been finalised and conveyed the impression that the price Bond Corporation would pay was the subject of negotiation and would be finalised in the near future. Literally, it was correct to say these matters were not finalised because an enforceable agreement had not been concluded and some relatively small adjustments to the figures might occur. However, although agreement in principle had been reached on percentages and basic prices, the contrary impression was conveyed.

19.1.2 The Government also released a media statement on 28 July stating that it had taken a decision in principle to participate in the first stage of the project. Not unnaturally, the release concentrated on the positive aspects of the project, but some features of the release are of concern. It was said that "... the Government had been anxious to secure the future of the project following a restructuring of the ownership of Petrochemical Industries Company Ltd (PICL)" and "the Bond Group would acquire a significant interest in the project from the original participants, Mr Laurie Connell and Mr Dallas Dempster". These statements may have been literally correct, but in their context and considered in the totality of the release, they tended to give a misleading impression as to the true reason for the Government's decision to participate in the project and as to the joint nature of the exercise that had been undertaken between the Government and Bond Corporation.

19.1.3 In addition the following appeared:

"The Premier said the changes in the ownership of the project had been a factor in the restructuring of Rothwells which would see the earlier retirement of the Government's \$150 million guarantee provided to the bank last October.

"The original agreement provided for only half the guarantee to be retired in October this year. The Government's decision to assist in the Rothwells rescue package and save the deposits of thousands of investors had been justified, Mr Dowding said."

19.1.4 Prior to this release, Rothwells had released a statement on 15 July, 1988 which conveyed the total impression that the motivation for the sale of the portfolio of loans was to take the first step in the company's change in direction. Mr Parker agreed that such an impression was not true. He also agreed that the total impression conveyed in the two paragraphs of the Government's release quoted above was not accurate. He said, "I wouldn't say it was strictly accurate, no", meaning it suggested that the Government's exposure to Rothwells was being "orthodoxly retired". Mr Dowding initially said nothing came to mind that could be considered misleading in the two paragraphs quoted but, on further questioning, agreed it could be misleading to the extent that a reader would not have a full appreciation of what had occurred, meaning the background within Rothwells. He disagreed with Mr Parker's view that it was not strictly accurate because it suggested the indemnity was being "orthodoxly retired". He said it was putting the best light on events and "it's an interpretive thing and I would think that the interpretation is open to discussion". He agreed that an impression that could be read into the document was that Rothwells had in fact done better than anticipated since the first rescue because it was retiring half of the guarantee a year early, but he did not know that it was intended in that way. He said he was not its author, but adopted it in the sense that it would have been read to him and he would have approved it. Mr Dowding maintained he would have used whatever words he could have truthfully and honestly used to avoid conveying the impression that Rothwells was having financial problems because he did not wish to place the depositors and the State at risk.

19.1.5 The release also stated:

"The economic strength of the project had allowed a base price for gas to be negotiated which was commercially competitive.

Because of the ability of the project to consume significant quantities of North West Shelf gas, the Government had been willing to negotiate an energy tariff which related to rises and falls in the prices of the products produced by the petrochemical complex."

19.1.6 As Mr Dowding knew, those paragraphs were misleading. The lack of economic strength of the project and a desire to enhance the value of the project had required the abandonment of the commercially competitive pricing agreed in November 1987. The willingness of the Government to negotiate an energy tariff related to rises and falls in product prices had nothing to do with the ability of the project to consume

significant quantities of North West Shelf gas. The project was not viable and could not obtain finance unless such assistance was given by the Government.

19.1.7 While appreciating the difficult position in which the Government was placed and which we will canvass later in this chapter when dealing with the news conference of 6 October 1988, in our view the contents of the release viewed in their entirety were totally misleading and it was improper of Mr Dowding to permit a release in those terms. It set the tone for the overall presentation to the public from July to October 1988.

19.2 July-October 1988

19.2.1 Extensive negotiations occurred after the July signing of the memorandum of understanding through to the weekend preceding settlement on 17 October 1988. That weekend was frenetic. The precise details and reasons for what appears to have been an extensive delay have not been explained fully, but it is apparent that a renegotiation of some of the contracts was considered necessary. In particular, SECWA was anxious to revert to its former position as reflected in the November 1987 heads of agreement. Notwithstanding the publicity given on 3 August 1988 to the statement by Mr Parker that he would be undertaking the negotiations as opposed to Mr Edwards, Mr Parker said that Mr Edwards was co-ordinating the negotiations for the Government and was reporting to him and Mr Grill. According to Mr Edwards, the negotiations were principally conducted by Mr Parker, Mr Grill and himself.

19.2.2 On 29 July 1988, Mr Dowding publicly announced the establishment of a special and "high powered" task force to carry through the negotiations, and he placed some emphasis on its role during his evidence. The role of the task force was, however, quite ill-defined and it appears to have had very little impact. Mr William Heron, a former Assistant Commissioner of SECWA and then Deputy Under-Treasurer, was extensively involved in negotiations from early August 1988 until settlement on 17 October 1988. He was unable to recall the term "task force" being used. He said various people were involved with differing expertise and Mr Edwards was to be responsible for the overall co-ordination of the State effort needed to settle the obligations between Bond Corporation and the Government. From Mr Heron's perspective, there was no task force and he could not recall an announcement along the lines of the media statement of 29 July nor the article in *The West Australian* of 3 August 1988. Mr Edwards described the task force as "a bit of a press release exercise"

and said it did not really exist. He maintained there was never a formal task force set up and no resources or capacity was given to anyone to do so. In Mr Edwards' words, "... it was just a series of people who were called in to help as required" meaning to help him, Mr Heron and the SECWA Chairman, Dr John McKee. Dr McKee described the title as a "misnomer". Mr Dowding entirely rejected that this was a press release exercise, but we accept the evidence of Mr Edwards which considerably undermines the impression conveyed in the media release of a "high-powered task force" chaired by Mr Parker. We also accept, however, that Mr Dowding expected and required that the appropriate expertise would be brought to bear on the negotiations under the overall control of Mr Parker and Mr Grill, together with Mr Edwards being responsible for co-ordinating the Government effort. By a Service Agreement dated 31 August 1988, Mr Edwards was employed by WAGH from 1 September 1988. Mr Parker was the Minister to whom Mr Edwards was then responsible.

19.3 SGIC assistance

19.3.1 From July to October 1988, SGIC continued to provide financial assistance to Rothwells. A summary of Rothwells related commercial bills transactions, which included deposits with United Credit and Spedleys, recorded SGIC's exposure as \$72,975,000 as at 31 July and \$86,569,421 as at 31 August 1988. On 30 September it was \$85,091,421.

19.3.2 On 11 July 1988 Mr Parker wrote to Mr Rees, as Chairman of SGIC, indicating that the Government, through WAGH, intended to purchase PICL in conjunction with Bond Corporation and, in order to ensure that ongoing commitments of PICL could be met in the short term, it had been agreed that the Government provide an advance of \$5 million on the project. The letter requested that SGIC make the provision as a charge against PICL and indicated that Mr Parker anticipated funds would be in place within 14 days at which time SGIC would be repaid. SGIC obliged on 11 July 1988 but the funds were not repaid to by SGIC until 30 June 1989.

19.3.3 PICL deposited the \$5 million with Rothwells on the same day it received the funds from SGIC, the deposits being in amounts of \$3 million and \$2 million. While Mr Parker said he would not have been surprised if the funds had ended up in Rothwells, he understood the funds were to enable PICL to continue its work in engineering and other areas. Mr Parker said the suggestion came to him from

Mr Edwards because he, Mr Parker, was one of the two Ministers responsible for PICL.

19.3.4 Mr Edwards had a memory of receiving a telephone call about this matter while he was in Tokyo, but acknowledged that he could not remember who had telephoned. He had no memory of the information imparted during the call. By reconstruction he thought that it was probably Mr Parker who telephoned. Mr Edwards said it was no secret that this was an indirect deposit in Rothwells. He gained that understanding from the telephone call and said it was not surprising that the letter did not refer to the use to be made of the funds for the assistance of Rothwells.

19.3.5 Mr Lloyd was uncertain but thought it was an arrangement to provide liquidity reached in a joint discussion with Mr Edwards and Mr Rees, but he acknowledged there were many meetings and his memory was indistinct. Mr Lloyd said that he spoke to Mr Rees regularly about a range of matters within the topic of the financial relationship between Rothwells and SGIC, but he had no specific memory of

a conversation reflected in a facsimile transmission from Mr Rees to Mr Heron at WAGH of 28 September 1988. That transmission advised Mr Heron:

"I have spoken to Tony Lloyd and advised him about position as:		
		\$ millions
Advance to - Petrochemical (Working Capital)	5	
Spedley Securities Ltd	14	
"R" Bills	21.6	

	Total	\$40.6

Endorsement on Bills as contingent liability (NAB by 31-10-1988)	\$50	

Note - We have securities under "R" Bills with a percentage shares est. about \$4 mil

- A comfort letter for direct settlement at Spedleys for \$4 mil

I hope that this may explain our overall position."

19.3.6 Mr Rees said he recalled sending the transmission at the request of Mr Heron to indicate any potential exposure that SGIC might have had in Rothwells' associated matters. This was the sort of information that he conveyed to the Minister responsible for SGIC from time to time. He claimed the document was not necessarily related to SGIC's exposure to Rothwells. For example, to the best of his knowledge the "Advance to Petrochemical" of \$5 million noted as working capital was nothing to do with Rothwells. However, that amount was also included on a document headed "Summary of Funds Lent and On-lent to Rothwells" and Mr Rees could not explain why it was on that sheet because that was not his knowledge. We do not accept the evidence of Mr Rees in this regard.

19.3.7 While we cannot be certain who arranged the deposit, we are satisfied that the request for the funds would have emanated from Mr Lloyd and that all involved, including Mr Parker and Mr Rees, were well aware that it was intended that the funds be deposited with Rothwells. This again was an improper use of the funds of SGIC.

19.3.8 On 11 July 1988, the same day that Mr Parker wrote to SGIC, Bond Corporation confirmed directly with Rothwells that \$5 million would be advanced that day by Bond Corporation to Rothwells on the basis of repayment on 15 August 1988. The concurrence of these events reflects an agreement between the

Government and Bond Corporation to each provide the necessary liquidity to Rothwells until the PICL settlement. The difference was in the manner of payment. Whereas Bond Corporation made its contribution directly to Rothwells, the Government used SGIC and disguised its involvement by contributing via PICL on this occasion and Spedleys on others.

19.3.9 As discussed in section 16.12 of chapter 16, the first deposit by SGIC with Spedleys for on-lending to Rothwells was \$10 million made in February 1988 to mature on 21 March 1988. This deposit was effectively rolled over throughout 1988. On 30 August 1988 an additional \$4 million was deposited through Spedleys. At maturity on 30 September 1988 this amount was also rolled over to 31 October 1988. A further roll over then occurred to 25 November 1988.

19.3.10 We have already referred to Mr Rees' report of September 1990. In that report he said the \$4 million deposit was solicited by Mr Edwards on the basis that it would be of indirect benefit to Rothwells. Mr Rees claimed that he obtained the approval of Mr Parker. In an attachment to a letter of 17 October 1990 to Mr Ian Taylor, the Deputy Premier, Mr Rees stated that an increase of \$4 million in SGIC's exposure to Spedleys was regarded as acceptable and, while circumstances were such as to lead to an inference that the deposit might be used to fund additional assistance from Spedleys to Rothwells, the purpose of Spedleys was not the concern of SGIC. On 31 August 1988, the day after the deposit with Spedleys, Mr Lloyd wrote as Managing Director of Rothwells to Mr Rees indicating that first call on the anticipated cash surplus of \$25 million from the PICL transaction would be in repayment of the Spedley account in order to enable a reversal of the \$4 million transaction. Although confronted with those documents, Mr Rees was still reluctant to acknowledge that he was aware the \$4 million would be on-lent to Rothwells.

19.3.11 In evidence Mr Rees said he would have contacted Mr Parker by telephone at about the time of the \$4 million deposit. Mr Parker, however, said he had no memory of such a call and pointed out that he was not the Minister responsible for SGIC. We observe, however, that Mr Parker agreed that, at about this time, he spoke with Mr Rees about SGIC's purchase of Paragon shares from Rothwells. He agreed it was a remote possibility that it was discussed with him and he had now forgotten that discussion. Mr Edwards denied that he solicited this deposit.

19.3.12 Generally we were unimpressed by the evidence of Mr Rees. We are not satisfied that he sought the approval of Mr Parker nor that this deposit was solicited by Mr Edwards. Although Mr Lloyd had only a rather indistinct memory of discussing this matter with Mr Rees and agreeing the manner by which it would be effected, his letter to Mr Rees of 31 August 1988 clearly suggests they had previously discussed it. It also suggests that Mr Rees was concerned about repayment. In our view it is likely that this transaction was arranged directly between Mr Lloyd and Mr Rees, and the latter improperly agreed to provide further indirect assistance through Spedleys.

19.3.13 Rothwells obtained further assistance from SGIC at about this time, by selling Paragon shares for a total price of \$4,419,940. Two parcels were sold, 3 million on 26 August and 3.5 million on 16 September. Mr Rees' evidence was that SGIC purchased the first parcel of Paragon shares after an approach by Mr Lloyd who said:

"We have some shares for sale in Paragon; we are selling some of our assets; it's a sale of some items that could be useful; you don't have any gold stocks or interests in Western Australia in that form and it could be within your portfolio if you'd like to consider it."

According to Mr Rees, Mr Lloyd then told him a second parcel could be available which would "round off" SGIC's holding to 2.1% of Paragon. Mr Rees said he understood from Mr Lloyd that Rothwells was selling the Paragon shares in order to improve its liquidity. Mr Rees went on to say that SGIC did not, in fact, hold any Paragon shares at the time and that before agreeing to the purchase, he obtained Paragon's latest accounts and a report on Paragon from a sharebroker. He thought also that he discussed at least the purchase of the second parcel with Mr Parker. According to Mr Parker's evidence, that came about because Mr Lloyd asked him to speak to Mr Rees about the matter. That was consistent with Mr Lloyd's recollection that he discussed Rothwells' liquidity with Mr Parker and told him of a proposal to sell shares to SGIC. Mr Parker said that when he spoke to Mr Rees, the latter told him there was "good value" in the shares and that SGIC might buy some as an investment. Mr Parker's evidence was that, at the time, he was aware Rothwells had an ongoing liquidity problem, but of a less serious nature than previously. He said liquidity was "certainly an issue" in the sale. He was, of course, aware by then of the ongoing negotiations in relation to the PICL project to which we have referred in chapter 18.

19.3.14 Mr Rees had a different recollection of his discussion with Mr Parker. He said he had a specific recollection of discussing a potential "rounding off" of the holding. When asked why he had spoken to Mr Parker, he gave a typically obscure answer. He said:

"My recollection would have been merely because of development in the State coming from Rothwells. It was a local company with a new mine being developed in Western Australia, although it had a resource in New South Wales, and it would be that type of background and with knowledge of a sale or disposal by Rothwells."

19.3.15 Mr Edwards said he may have discussed the purchase of Paragon shares with Mr Rees: "but I think it would have been essentially done by him". Mr Edwards went on to say that the purchase was made by SGIC:

"... to get money into it [Rothwells]. I mean, that's why we bought them, but what I'm trying to say is, at the same time. We thought they were a good asset so there was a, sort of, mutual benefit."

19.3.16 Mr Rees agreed that SGIC would not have purchased the Paragon shares had it not been for the Government's desire to assist Rothwells, but said he did not regard the acquisition as improper, because the shares were inherently valuable and were a good investment.

19.3.17 Mr Lowry, SGIC's finance director, was rather more candid. He said SGIC purchased the shares only because it was part of the Rothwells' "bail out". Mr Lowry went on to say that although SGIC did purchase speculative stock it would not normally have acquired such a substantial holding in a speculative gold mining company. His view is reflected in the minutes of the meeting of SGIC's investment subcommittee on 30 September 1988 in which it was noted that SGIC's current holding in Paragon was 2.1% of the company and that the investment should be reviewed with the objective of reducing the holding when profitable to do so. Mr Lowry said the objective of reducing the holding was to recover SGIC's funds.

19.3.18 We accept Mr Lowry's evidence and find that Mr Rees acted improperly in agreeing to utilise SGIC funds to purchase Paragon shares for the purpose of assisting

Rothwells, particularly when the shares were speculative. The evidence was that SGIC had retained the shares. We note that they are trading currently at about 2 cents. Mr Parker's role in the transaction is unclear. It may be that he was requested by Mr Lloyd to encourage Mr Rees to acquire the shares. There is, however, insufficient evidence on which to make a finding in this respect.

19.3.19 There remain three unresolved questions in relation to these transactions. The first is whether the market for Paragon shares was being manipulated at the time. The second is whether, if the market was being manipulated, Mr Lloyd was aware of that fact when he offered the shares to SGIC. These questions are the subject of some 30 charges which are pending against Mr Lloyd and Mr Connell in respect of alleged breaches of section 124 of the *Securities Industries Code*. The charges arise out of the fact that, while Mr Lloyd was managing director of Rothwells, it purchased a substantial number of Paragon shares and, in addition, advanced funds to borrowers to enable them to purchase Paragon shares. According to a memorandum dated 8 August 1988 from Mr Jones, Rothwells' Treasurer, to Mr Lloyd, some \$12.8 million had been outlaid by Rothwells down to that date in relation to the direct and indirect acquisition of Paragon shares. Mr Lloyd's evidence was that since November 1987 it had been "an accepted strategy" of Rothwells to merge with Paragon and that shares were acquired by Rothwells and its subsidiaries with that objective in view. Mr Lloyd said also that the purchases of Paragon shares were not necessarily detrimental to Rothwells' liquidity because there were a number of arrangements in place for financing the purchases by way of put and call options. Mr Lloyd would admit only the possibility that Rothwells liquidity requirements were greater as a result of the outlay of funds for the acquisition of Paragon shares than would otherwise have been the case.

19.3.20 It was, however, undoubtedly in Rothwells' interest that the price of Paragon shares should not fall below 70 cents. At the time, some 60% of Paragon was owned by Oakhill which had borrowed \$100 million from Standard Chartered Bank and \$45 million from NZI. Paragon shares had been given as security for these loans. In addition, Standard Chartered Bank had been granted options which enabled it to put the shares to a Bond company and to NZI if the market price of Paragon fell below 70 cents per share. There was also an agreement between Bond Corporation and Rothwells whereby Bond Corporation could put to Rothwells any Paragon shares which it was obliged to acquire from Standard Chartered Bank. In that event, as Mr Lloyd acknowledged, Rothwells may have had to acquire a considerably greater number of Paragon shares at 70 cents than it was buying privately. Mr Lloyd maintained, however,

that as far as he was concerned, Rothwells did not seek to purchase Paragon shares at 70 cents on the market in order to maintain the price. Having regard to the pending charges, we refrain from expressing any view as to these questions. We observe only that if Mr Lloyd was aware, when he offered Paragon shares to SGIC, that the market price was being maintained artificially, his conduct would have been quite improper.

19.3.21 The third issue arises from the fact that although SGIC believed at the time of the purchases of the Paragon shares that Rothwells was the vendor, that may not have been so in respect to the second parcel. According to Mr Rees, SGIC discovered later that the vendor may have been West Coast Securities. This was a share broking firm in which, according to Mr Lucas, Mr Connell had a small interest. Mr Lucas said that West Coast Securities borrowed from Rothwells earlier in 1988, to enable it to purchase Paragon shares. If it was the case that SGIC purchased the shares from West Coast Securities, it is not clear how that came about, nor what became of the proceeds, although we note the evidence of Mr Steven Fraser of Spedleys, who played a role in the management of Rothwells' funds later in 1988, that West Coast Securities was then pressing Rothwells and/or L R Connell and Partners for payment in respect of some Paragon share purchases. We have not investigated this issue.

19.3.22 We are satisfied that if Mr Lloyd was aware that the market price of Paragon shares was being manipulated, SGIC was not aware of that fact when it made its purchases. Neither was it aware, if it was the case, that West Coast Securities was the vendor of the second parcel.

19.4 First Boston's valuation

19.4.1 Mr Dowding insisted that a valuation of PICL be obtained. Early in August 1988, First Boston Corporation ("First Boston") was retained by the Government to establish a value range of the Government's interest in the project and to assist with the financing. First Boston was a highly reputable international merchant bank. Mr Edwards said the Premier wanted the valuation for the purposes of public presentation. The scope of the work envisaged to be undertaken by First Boston was set out as follows in a draft letter of 10 August 1988 from First Boston to Mr Parker:

"Scope of Work

The following major activities will be undertaken:

1. Valuation

We would work with the Government to verify the computer model constructed by the owner of the Project, Petro-Chemical Industries Company Limited ("PICL"), and suggest appropriate sensitivity analyses of the Project.

We would also undertake our own analysis of the market for the Project's output, and of comparable production facilities, to establish a value range of the Government's interest in the Project and of the being assumed by the State.

This would be presented in the form of a Report.

2. Financing

First Boston will audit all financing proposals generated by the Government's partners in the Project, Bond Corporation ("Bond"), and advise on their commerciality, their impact on the State's risk/returns, the need for completion guarantees and possible alternate funding strategies.

3. Disposal of the Government's Interests in the Project

First Boston will, as the Government's sole representative, market the Government's interests in the Project. First Boston will identify and evaluate buyers and assist in the negotiations to sell-down portions of the Government's interest. First Boston will also advise on appropriate financial structures to encourage investment in the Project."

19.4.2 The role of First Boston was subsequently redefined in a letter of 31 August 1988 from Mr Nicholas Johnson, then the head of First Boston's European project finance and corporate advisory business, to Mr Heron as Chairman of WAGH in the following terms:

"PETROCHEMICAL PROJECT ADVISORY ASSIGNMENT

Further to First Boston's letter of August 10 and subsequent meetings between us, the likely scope of work associated with the valuation of the Government's interest in the Petrochemical Industries Company Limited ('PICL') has been defined more precisely. Consequently we are submitting this letter as a

redefinition of the arrangements currently agreed between WAGH and First Boston.

1. Valuation

We are working with the Government to verify the computer model constructed by the Department of Resources Development and are helping to develop appropriate sensitivity analyses plus, where appropriate, alternative analysis methodologies.

We are concurrently developing our own project computer model. This model will provide both an independent check on the main logic blocks used in the DRD model and allow for the specific analysis of alternative funding structures necessary to identify an optimum financing plan for the project.

We anticipate that by early next week there will be a reasonable consensus of the range of likely revenues for the project and, thereby, of the expected value of the overall project cashflows. At that stage we would plan to start the preparation of our detailed analysis and review of the various risk factors influencing the final equity valuation report.

During this period of project investigation, analysis and evaluation we will maintain a close dialogue with you and the project team and provide continuing advice on alternative negotiating strategies in respect of equipment and construction procurement contracts, the product off-take contracts and the shareholder/management agreements.

Based on our clearer understanding of the scope of this work, our proposed fee is \$US400,000 payable within fifteen days of submission of the written valuation report.

2. Other Work

We appreciate the suggestion made by you and Kevin Edwards that First Boston should assume responsibility for arranging the debt finance for PICL. We have agreed with you to revisit this issue over the next several weeks when the exact nature and size of funding requirements are confirmed and when the planned revisions to the equipment, construction and off-take contracts have been negotiated. It will then become evident whether our involvement in the fund arranging is practical and what the costs would be.

In any event, First Boston remains committed to assisting the Government and protecting your interests throughout the financing period of the project. We have already indicated our interest in advising WAGH throughout the negotiation of a financing package and, if appropriate, of acting as your agent in the sale of a portion of the Government's equity interest in the project. Our proposals in those areas remain valid but will

need further discussion with you depending on the outcome of our prior talks in respect of the possible fundraising role for PICL.

3. Costs and Expenses

First Boston will be reimbursed directly for out-of-pocket expenses (including travel, accommodation, telephone, telex etc.) and including any legal or accounting fees agreed with you that are incurred in relation to the assignment. Travel arrangements will be subject to your prior approval.

Expenses will be billed quarterly in arrears and on the date of completion of the valuation work or; if appropriate, of the Debt Financing.

4. Indemnity

Since we will be acting on your behalf, WAGH should agree to indemnify and hold First Boston (including any affiliated companies and their respective officers, directors, employees and controlling persons within the meaning of Section 15 of the Securities Act of 1933 or Section 20 of the Securities Exchange Act of 1934) harmless from and against all claims, liabilities, losses, damages or expenses except to the extent they result from actions taken or admitted to be taken by First Boston in bad faith or from its negligence.

Would you please sign and return the attached copy of this letter as acknowledgment of your acceptance of these terms and conditions.

We are pleased to be working with you and your team on this assignment."

19.4.3 Mr Edwards thought he made the first contact with Mr Michael Fitzpatrick of First Boston and, according to an entry in the diary kept by Ms Kate Kent, Mr Lloyd's assistant, there was a meeting on 29 July 1988 between Mr Lloyd and Mr Fitzpatrick. Ms Kent recalled that Mr Fitzpatrick came to the office. According to Mr Edwards he informed Mr Fitzpatrick that the Government had its own valuation generated through Chem Systems and needed a merchant bank of First Boston's standing to support that valuation.

19.4.4 Mr Johnson was first contacted early in August 1988 by Mr Fitzpatrick, who said he had been asked by Mr Lloyd and others to give an opinion about a new project. Mr Fitzpatrick described PICL and explained that the Government seemed to be quite heavily involved in the proposed ownership and financing structure and therefore it seemed appropriate that he seek Mr Johnson's assistance. Mr Johnson recorded in notes and correspondence of 9 August 1988 a number of serious concerns

and the view that "WA are really in a potentially serious position". Copies of his notes and correspondence were sent to Mr Heron and, at about the same time, he spoke with Mr Heron and repeated the various concerns.

19.4.5 Mr Johnson said he estimated he spent between two and three hours analysing the papers before reducing his comments to writing. It was not a very difficult set of documents in which to identify the shortcomings. He pointed to the undesirable possibility that, if the project undertook loans which matured in one year, then on repayment the Government might have to come up with the same amount. He recommended there must be a long-term financing plan before work commenced on the project otherwise the Government might be put in the position of funding the whole project from the outset. He was also concerned about what he described as the "cash deficiency undertaking", namely, the obligation placed on WAGH to meet any deficiency. He perceived this as an apparently open ended obligation. If the project cost more than estimated, and if it was not completed by the target date, further funds would be required which would come from WAGH. Mr Johnson regarded that situation as undesirable because WAGH was undertaking a completion risk without control over the costs. Whoever controlled the construction might prove incompetent thus causing a loss of control over costs, or advantage could be taken of the situation by the controller enhancing a project specification thereby increasing the costs which would be met by the Government. Understandably Mr Johnson regarded giving an open cheque book to the controller of the project as an undesirable commercial arrangement.

19.4.6 Mr Johnson made a number of sensible suggestions including that WAGH request full control over the financing arrangements for the project because, ultimately, it was the only party affected by the arrangements. It is unnecessary to repeat all the concerns and suggestions put forward by Mr Johnson, but they were obviously of sufficient magnitude to warrant serious attention by the Government representatives. The fact that a position so disadvantageous to the Government was being contemplated, accurately reflected the respective bargaining positions of Bond Corporation and the Government which were revealed in a number of other areas. It was generally acknowledged that the Government was on the back foot during the negotiations.

19.4.7 On Monday 15 August 1988 Mr Johnson met with Mr Lewi, Mr Wiese, Mr le Roux, Dr McKee and Mr Heron during which he was given an understanding of some of the antecedents of the project and he repeated his concerns. It appeared to him that the project was to proceed, but the parameters of the support to be provided by the

Government were not clearly defined in the original memorandum of understanding. He saw his task as acting to try to minimise the adverse consequences to the Government.

19.4.8 During a meeting with Mr Edwards on 18 August 1988, Mr Johnson reiterated the consequences of what the Government was proposing and expressed the opinion that it was a "commercially undesirable financial structure to be going forward with". According to Mr Johnson, the manner in which the Government's involvement had arisen from a series of Rothwells related transactions was explained by Mr Edwards who expressed the view that, as far as he was concerned, the deal was a "done deal". They discussed what could be done within the structure to minimise the adverse consequences. In particular, the fact that any advances made by the Government to the project should bear interest at a commercial rate was raised, but Mr Edwards said he had discussed this issue previously with Mr Mitchell of Bond Corporation and they had agreed that any such advances would not carry interest. Mr Johnson observed that such an agreement merely made a mockery of the commercial arrangements whereupon Mr Edwards indicated it was something they would have to re-address.

19.4.9 It appeared to Mr Johnson that Mr Edwards had some influential role in the political process and his knowledge of the detail suggested he fully understood the financial ramifications. In addition he said Mr Edwards portrayed himself as having great influence on Government policy decisions. From his own observations Mr Heron had a similar impression of Mr Edwards' influence.

19.4.10 Mr Edwards generally agreed with the evidence of Mr Johnson concerning their meeting, although he could not recall discussing the issue of Government advances bearing interest.

19.4.11 Later, on the same day, Mr Johnson met with Mr Heron and Mr Dowding. According to Mr Dowding, he made clear that he wanted a genuine response on the question of value. In addition he asked Mr Johnson to provide him with the comfort of knowing that the Government was taking a sensible step. In evidence given before Mr Johnson was called, Mr Dowding said he did not know whether he mentioned the figure of \$400 million in discussions with Mr Johnson, but a context in which he might have mentioned it was in advising Mr Johnson that this price had been suggested as an amount that the project was worth. He said he made it absolutely clear that he was not inviting Mr Johnson to take his instructions as requiring a valuation that suited other

people's views. Mr Dowding said he regarded the issue of the valuation as so fundamental that he instructed Mr Heron that, although Mr Parker had responsibility for the matter, he wanted to be separately informed. He recalled discussing a whole range of issues with Mr Johnson, including the manner in which the project was being handled, its viability and whether it was in the best interests of the State. He said Mr Johnson was very enthusiastic about the project. Mr Dowding agreed he would have made known to Mr Johnson that the Government involvement in the project had arisen from Rothwells' problem. He would also have conveyed the Government's belief in the project and its desire to proceed. It was Mr Johnson's view that altered Mr Dowding's perspective about the public presentation of the matter and, as a consequence, he believed it was necessary to give the project as much independence from Rothwells as possible because of the matters explained by Mr Johnson which related to the sensitivity of bankers and that type of commercial factor.

19.4.12 Mr Johnson gave evidence after Mr Dowding and said he advised Mr Dowding that the transaction as contemplated was disadvantageous in a commercial sense. He canvassed issues of concern, including that of unauthorised payments and the publicity about payments to Gofair. Those payments are discussed in section 19.15 of this chapter. Mr Dowding indicated he would not approve a project associated with any hint of unauthorised payments of that nature. Mr Johnson said the conversation proceeded:

"He then asked me what I thought the project was worth, to which I said I didn't have the faintest idea at that stage. He said did I think it was worth \$400 million and I repeated that I had no particular reason to think anything. He said that it was very important to him that the valuation result should demonstrate that the project was worth at least \$400 million at some time, whether today or in the future. I commented that \$400 million of value in 5 years time was not the same as having a project which is worth \$400 million today. He said he didn't mind too much about that and didn't understand the difference between \$400 million today or in 5 years time. He would, however, like to be sure that at some point it would be worth \$400 million.

I said that neither I nor CS First Boston would enter into any valuation type work which was then being contemplated for us on the requirement that a certain result had to be achieved. We were not in the habit of

doing that sort of assignment for people, if he wanted a rubber stamp he should just get --- rubber stamp, I suppose.

The meeting, more or less, terminated in that way. He indicated that he was favourably inclined to us negotiating a role to do this work and accepted the fact that various things could be negotiated with Bond Corporation within the framework set out by the memorandum of understanding and that he would encourage us to do everything we could to improve the Government's position subject to the caveat that the basic MOU was not a changeable document."

In cross-examination Mr Johnson agreed it was not inconsistent with his recollection that mention of the \$400 million was made in the context of a remark that the Government was contemplating a \$400 million expenditure and, before that was done, Mr Dowding would wish to know the project was worth \$400 million.

19.4.13 According to Mr Johnson, Mr Dowding appeared very interested in a graphical presentation and Mr Johnson drew some "pictures" on the whiteboard. He demonstrated how the cash flows accrued and attempted to illustrate visually how the debt would blow out if there was a "cash blow out" and how ultimate returns could be pushed out many years into the future. Mr Johnson said he was endeavouring to communicate his concerns to Mr Dowding in a fashion with which he believed Mr Dowding was more comfortable.

19.4.14 As to whether Mr Dowding sought his opinion as to the desirability of the Government entering into the project, Mr Johnson said Mr Dowding made a brief comment at the outset that he was eager to establish that the project was good in its own right, but there was no substantive discussion on that aspect. In his notes of the meeting Mr Johnson recorded receipt of categorical instructions not to proceed "... if First Boston concluded the investment is not sensible" but he could not recall that specific discussion. He accepted that the concept was conveyed by Mr Dowding to Mr Heron in his presence.

19.4.15 In further evidence given after that of Mr Johnson, Mr Dowding was most trenchant in his criticism of Mr Johnson's evidence. He said he felt "very betrayed by Mr Johnson" and believed he had "very dishonestly characterised" their discussions. He went on to say that he was "appalled" at the way Mr Johnson had given his evidence

and said it did not represent the truth of that conference. It was Mr Dowding's recollection that Mr Johnson was full of enthusiasm for the project and he unequivocally invited Mr Johnson to make contact directly with him if Mr Johnson thought the Government was doing something which was not sensible. He disagreed with Mr Johnson's view that the memorandum of understanding was not a changeable document, and said Mr Johnson was endeavouring to cover his position. Mr Johnson's enthusiasm for the Government position had been one of the significant issues in Mr Dowding's belief that the Government was not doing anything wrong. He did not believe Mr Johnson conveyed reservations about the position in which the Government was placed, although he believed it was said that there would be some tough commercial negotiations ahead.

19.4.16 Mr Johnson was a most impressive witness. We are unable to accept Mr Dowding's evidence where it is in conflict with that of Mr Johnson. Mr Heron agreed that Mr Johnson had made it clear to him from the outset that there were a number of matters of concern to him and that the Government was potentially in a most disadvantageous position in a number of respects. Given the expression of that view by Mr Johnson to Mr Heron, it would be most surprising if such concerns were not conveyed to Mr Dowding. Although Mr Heron could recall the general outline of the meeting, he was unable to recall Mr Johnson making comments about the disadvantages in a commercial sense but added, "that's not to say he didn't make them". Mr Heron recalled Mr Dowding said it was important that they had a valuation that reflected the apparent purchase price. Both he and Mr Johnson made it clear to Mr Dowding that it was not possible to go into an evaluation process with a predetermined answer. He said Mr Dowding seemed to accept that position. Mr Dowding instructed Mr Heron and Mr Johnson to prepare the valuation with the final comment to the effect that, in the event that the valuation did not stand up, or the project was not able to pay for itself without a strong chance of government funds being required, then they should report back to Mr Dowding and he would make "the hard political decision". When the evidence of Mr Johnson quoted above in paragraph 19.4.12 of this chapter was put to Mr Heron, he said he did not remember the emphasis being the way it was set out by Mr Johnson but, rather, that Mr Dowding made some reference to the fact that \$400 million was being paid and it was certainly ideal from his point of view or the Government's point of view that \$400 million was achieved. He said it was made plain from thereon, almost as a rejoinder to Mr Dowding's opening remarks, that the valuation would be whatever was determined from the information available. He agreed with the remainder of Mr Johnson's evidence concerning that meeting. Mr Heron said that he

had no doubt the whiteboard was used because that was Mr Dowding's habit, and he thought it was with Mr Dowding that there were some graphs shown concerning issues such as the effect of delayed start up and slower cashflow.

19.4.17 It is to be observed from Mr Johnson's evidence which we have accepted, that Mr Dowding displayed considerable knowledge. In particular, their conversation reflects a different approach on the part of Mr Dowding to the memorandum of understanding from that conveyed in his evidence. It was Mr Johnson's evidence that he was instructed to "do everything we could to improve the Government's position subject to the caveat that the basic MOU was not a changeable document".

19.4.18 In the weeks leading up to a briefing on 23 September 1988, there were numerous meetings, including one at the home of Mr Ken Judge, of Bond Corporation, on Sunday 28 August 1988. Mr Johnson said his most substantive recollection of that meeting was Mr Mitchell, on behalf of Bond Corporation, repeating on several occasions that the only reason Bond Corporation was involved was at the Government's insistence and, therefore, he was disinclined to change the structure of the deal from that which had been negotiated at the end of July. Mr Edwards was present, but Mr Johnson did not recall him or anyone else disputing the statement. Reliance on the memorandum of understanding was a standard position successfully adopted by Bond Corporation.

19.4.19 Mr Parker was also made aware of Mr Johnson's concerns and issues requiring attention by a memorandum dated 28 August 1988 which was provided to Mr Parker on 31 August 1988. Mr Johnson referred to the options of losing \$175 million of public funds by paying out in connection with "various guarantees" or purchasing the 44% interest and extinguishing the liability associated with Rothwells. While observing the first meant a certain loss of \$175 million, importantly Mr Johnson warned of the potential for additional costs to the Government in proceeding with the second option because of "poor project scoping contractual negotiations by the previous sponsors". He said Mr Parker read the memorandum while Mr Johnson talked about the subject matter and that Mr Parker agreed the document presented a fair assessment of the options.

19.4.20 Mr Johnson also identified specific risks in a memorandum to Mr Heron of 1 September 1988 and commented on the issues of guarantees as follows:

"RE: PICL - TO WHAT EXTENT ARE
'GUARANTEES'
NECESSARY?"

As a general comment, banks lending to a project need a high level of certainty in their ultimate payment prospects. For most projects, this certainty comes from the inclusion of risk-taking equity capital, the amount of which is set to be commensurate with the perceived riskiness of the business venture.

In the case of PICL, which is to be 100% debt financed, there needs to be additional credit enhancements of sufficient strength to replace the notional equity capital appropriate for the riskiness in the project. If the project is eventually shown to be highly risky, both in terms of completion, operational technology and project price volatility, then a far higher level of credit enhancement will be needed.

At this stage, however, it is wholly inappropriate to accept the Bond proposal that a public Government guarantee needs to be provided for the project to be financeable. The fact is that the riskiness in the project has not yet been established and much of the work which Bond/WAGH will do over the next month should be aimed at filtering out or minimising identified risks.

If the negotiations with contractors, off-takers and an appropriate financing plan are successful, and the overall project economics are broadly unchanged from today's, then there is every reason to believe that banks will be receptive to provide 100% finance with a package of credit enhancements along the lines discussed between us.

Quite frankly, if the risks cannot be controlled within boundaries where the extent of credit enhancement requires a full guarantee, then it is likely that First Boston will anyway advise the Government not to proceed with the project as currently structured. If the project is to be so risky, then why accept 100%

unconditional responsibility for the risks with only 45% of the equity?

In summary, therefore, we do not at present see the evidence to support Bond's contention that the project needs a Government guarantee.

Perhaps the credit enhancement package may need minor improvements, such as another Government vehicle or a more strongly capitalised WAGH, coupled perhaps with a guaranteed repayment schedule closer to the target repayment schedule in the early years. It is inappropriate for Government to agree to provide further support at this stage until the project scope and risks are clarified over the next few months."

19.4.21 On the issue of value, Mr Johnson expressed the view, which we accept, that immediately before the Government support was put in place, it would be hard to see the project as worth more than \$20 or \$30 million. This is the range that was also contemplated by Mr Clemens. The Government support was obviously crucial to the value and viability of the project and to its capacity to obtain finance. According to Mr Johnson, neither Mr Parker nor anyone else involved in the project, wished to reveal the guarantee structure, that is, the Treasurer's guarantee of the obligations of WAGH and the WAGH cash deficiency arrangement. Mr Johnson advised Mr Parker that they should come out in Parliament and say what they were going to do as it did not seem to First Boston to be wholly indefensible and, in their view, keeping a guarantee a secret in this way was not going to succeed. Mr Heron had the same understanding. Mr Parker said this arose for reasons of commercial confidentiality, not because the existence of the guarantee structure would be the subject of criticism. We do not accept Mr Parker's explanation. Commercial confidentiality did not provide a reason for declining to disclose the existence of the guarantees and we accept Mr Johnson's evidence that he advised against secrecy. In our view secrecy was desired because of the risk of criticism and the possibility that disclosure would reveal the true effect of the guarantee structure.

19.4.22 Work on the matter included travelling to Japan where according to Mr Johnson, the question of project management was the subject of several heated discussions involving representatives of Bond Corporation. There was urgency on every side and the Government representatives were indicating that this transaction needed to be formalised as quickly as possible "... so that any knock-on effects back to Rothwells

could be crystallised rapidly". The unease of Japanese equipment suppliers about the change of ownership also required a quick finalisation of the outstanding issues.

19.4.23 On Friday 23 September 1988, Mr Johnson made a formal presentation to members of the Government including Mr Parker, Mr Grill and Mr Berinson. Slides for the presentation included a demonstration of the consequences if the project was not built on time or on budget and if the cash generated was not enough to repay the loans. Significant further expenditure was demonstrated and Mr Johnson explained that Bond Corporation was arguing that WAGH was to put up the money which resulted in a "huge open-ended obligation on the Government". He described Mr Berinson as "fairly distressed" by this demonstration and Mr Berinson asked how the Government could possibly be in a position to underwrite this amount of cash injection into the project. Both Mr Grill and Mr Parker assured Mr Berinson that this was a fair representation of the Government's position and Mr Berinson indicated he had no recollection of this having been explained or discussed in Cabinet. However, Mr Parker and Mr Grill were very relaxed and indicated they would discuss it with him later.

19.4.24 Mr Johnson said it was his objective to make the group understand the inherent risks in the project and matters that could go astray, particularly those which might cost more money and therefore precipitate payments from the Government under the cash deficiency agreement. In order to do this he used a number of slides which included a statement reflecting the concern of Mr Johnson about the role of Bond Corporation in the management of the project.

19.4.25 Mr Johnson said most of those present sat fairly passively while he explained the background of risks and he moved to the central question of whether it was realistic to expect to raise 100% debt finance for between \$900 million and a billion dollars. He explained his belief that the money was there but it had to be arranged and settled from day one rather than altered on the way through. He was attempting to help design the approach to the banking market. He discussed the question as to meeting the cost overruns from either WAGH or standby credits and expressed the opinion that there should be an effort to arrange a bit more than needed to avoid WAGH putting in funds. He explained the WAGH support being used as a credit enhancement. One of the slides demonstrated the opinion that \$1,200 million could be raised if costs and revenue were roughly in balance as forecast, but on the proviso that Bond Corporation gave up the management of both construction and operations and reduced its equity interest below 50%.

19.4.26 As to evaluation of the project and the share of WAGH, while Mr Johnson explained to the meeting that the numbers had to be treated with great reservation because they were only a numerical exercise based on the imprecise data available at that time, he expressed the view that on an examination of future cash flows, and allowing an appropriate discount rate, the project had a value of between \$302 million and \$418 million. This estimate put a value of between \$131 million and \$186 million on the 44% share of WAGH. These rates reflected a return appropriate for the project as then structured, that is, a project which had the Government support arrangements in place and not a project a split second before the support arrangements were in place. Although Mr Johnson did not canvass at the meeting what Bond Corporation would be willing to accept as an appropriate rate of return, he explained in evidence what is set out in his eventual report to the Government that higher rates applicable to higher project risks were unlikely to be sought because the WAGH support mechanism effectively removed most of the risk for Bond Corporation.

19.4.27 Two of the slides were devoted to illustrating the possible cost to the Government or benefit to Bond Corporation should the tentative assumptions on which they were operating at that time turn out to be better or worse than expected. Of great concern to Mr Johnson was the adverse case in which there was not only extra funding of \$250 million from WAGH but the fact that most of it was still left outstanding at the end of the nine year debt repayment period. It was Bond Corporation's interpretation of the documentation that WAGH would have to write off whatever was owing at that time. In addition no interest was payable on the advances and, understandably, it was Mr Johnson's view that any funds advanced by WAGH should bear interest at a commercial rate. At that time he thought he was " ... a voice in the wilderness" when talking about interest on the advances, and he was concerned that, if several things went wrong together and Bond Corporation's interpretation was correct, the Government would have to write off a significant amount of extra money. He said Mr Berinson, in particular, was concerned about the adverse case and asked what might cause the set of events to happen. It was explained that the items on which the adverse case was based were commodity prices lower than expected, higher capital expenditure and a six month delay in construction. Mr Johnson advised that if more was spent than hoped, and if there was a slight delay in completion, the figures could be knocked out of order very badly. The Government's interests were dependent on Bond Corporation. He said the Government could not allow that to happen as it was too dangerous because of the consequences demonstrated in the adverse case. According to Mr Johnson, he explained that the Government had to get rid of Bond Corporation as the construction and

operating manager and reduce Bond Corporation's equity to below 50% in order to prevent it from controlling where the money was being spent. He said the project had to be made bankable, which it would not be at that time because not enough banks would deal with Bond Corporation. As to funds that might remain outstanding at the end of the nine year period, with the aid of slides Mr Johnson canvassed alternatives aimed at avoiding Bond Corporation's interpretation which could result in a very large loss to WAGH. He discussed alternatives such as the possibility that residual loans should convert into priority loans to the project at that date or, at the very least, they should convert into equity to rank *pari passu* with other Government and Bond Corporation equity. In his view the Government certainly could not walk away from a potential \$200 million or \$300 million subvention payment which might be outstanding at that time. He also suggested that an extension of the debt repayment period might assist the problem. He was trying to give Mr Parker and Mr Grill something with which to negotiate.

19.4.28 Mr Johnson described the meeting as ending in a somewhat fragmented manner as people were leaving. Mr Berinson was indicating his disturbance over the potential exposure of the Government and reliance on Bond Corporation. It was the desire of everyone to get a full written report from Mr Johnson as quickly as possible and he was asked to proceed with that task.

19.4.29 Mr Heron agreed with the substance of the evidence given by Mr Johnson as to the presentation on 23 September 1988. Mr Berinson was disturbed by the potential financial exposure for the Government but Mr Grill did not show any concern. It was his impression that either or both Mr Parker and Mr Grill intended to discuss the matter separately with Mr Berinson. He said Mr Berinson expressed concern that advances by WAGH would not attract interest and any residual balance owing to WAGH at the end of the debt repayment period would be written off, but Mr Heron understood these matters had been agreed in principle in the memorandum of understanding.

19.4.30 In his evidence to the Commission Mr Berinson confirmed his concern. He maintained he had no memory of the approval given to the memorandum of understanding in July 1988. He said he had a very powerful recollection that his introduction to the matter was in September 1988 and has always had a memory that the September meeting of Cabinet came shortly before the briefing from Mr Johnson. That was a meeting during which he found himself uncharacteristically upset and he had

difficulty in focusing on what was said. He had thought Rothwells was "bedded down" months ago and was taken aback by reference to Rothwells. It was only during the briefing by Mr Johnson on 23 September that he came to appreciate there was a memorandum of understanding. He was given the impression in the September Cabinet meeting that the project would not involve anything in the nature of a Government guarantee or Government support. This part of Mr Johnson's presentation shortly thereafter gave rise to his concern because the description of the possible events seemed to have the potential for a result inconsistent with the information he had received at Cabinet in the sense of a liability falling directly on WAGH and hence eventually on the Government.

19.4.31 Mr Berinson thought he asked a question during the briefing and the explanation given was by way of a comment that his understanding was not in tune with that of others. He said there was discussion about extending the period for repayment and thus reducing the risk of ultimate liability. There seemed to be a view that there was "no realistic prospect of a risk". Mention was made of issues that called for renegotiation. Some people seemed to be describing the memorandum of understanding as something that really bound the Government more than Mr Berinson thought would follow from that document. Mr Berinson said he made a comment to the meeting that he could not see why the project should not pay off the debt left outstanding at the end of the debt repayment period or alternatively that any liability be shared by the partners in the proportion of their ownership. Nobody argued with that proposition and he thought it would be added to the list of the renegotiation points. This was a matter that he discussed briefly and emphasised with Mr Parker as they left the meeting.

19.4.32 The evidence of Mr Berinson that a briefing was given to Cabinet in September derives some support from Mr Dowding who said he had in mind that during one of the PICL discussions Mr Parker gave Cabinet very detailed information about numbers using the white board. He said it did not appear that this occurred at the 28 July or 6 October meetings because no one else could remember it and it might have been the September meeting referred to by Mr Berinson.

19.4.33 Mr Parker disagreed with the evidence of Mr Johnson as to the tenor of his presentation in that Mr Johnson conveyed in evidence that he was very cautious and very reserved during the briefing. While it was Mr Parker's recollection that Mr Johnson raised issues which needed resolution, he described him as "... nevertheless quite extremely bullish at the time about the project". He said Mr Johnson drew their

attention to the risks and presented the worst possible result if everything went wrong, but that was not the tenor of the briefing. Mr Parker accepted Mr Berinson's evidence that the latter expressed concern. He recalled that the timing of the briefing resulted from concern expressed by Mr Berinson at a Cabinet briefing a week or two earlier and Mr Dowding might have asked Mr Parker to organise a briefing to bring Mr Berinson up to date. He did not have a specific recollection of a briefing in Cabinet shortly before the meeting with Mr Johnson, but said there were ongoing briefings for Cabinet. He found it hard to accept that Mr Berinson would have had no knowledge until that time but accepted that he might not have been fully abreast of all the issues.

19.4.34 Mr Berinson's lack of knowledge was not limited to the possible liability to be borne by the Government. He said he was unaware that the starting point for the price of \$400 million had been the \$300 million needed in Rothwells, although there was a reference to the relationship of the payment to Mr Connell and it was said this would be a solution to any outstanding problem in Rothwells. He said it was not explained or suggested that the catalyst for the Government becoming involved was the need in Rothwells for a substantial injection of funds. He believed that the starting point had always been that the venture was a highly desirable development and there was an opportunity to ensure that the development could proceed at a price to the Government which was supported by a valuation. Mr Berinson thought that it should have been part of the information to Cabinet that the catalyst was the discovery in Rothwells of the \$300 million or \$350 million hole and that this project was the means of curing it. In addition, he said there was never any discussion about the value of PICL if the Government support mechanisms were removed.

19.4.35 From Mr Dowding's perspective those who were present at the July meeting must have understood that the problem in Rothwells was the catalyst that set this procedure in train. Mr Grill said the existence of the "big hole" in Rothwells was clear at the Cabinet meeting in July and it was explained that the problem was the catalyst. Similarly Mr Parker said there was no doubt about the problem in Rothwells being the catalyst and he did not think one had to be in Cabinet but it could be read in the newspapers. If the issue of the catalyst was refined to the point of the Government becoming involved because of the problem at Rothwells, Mr Parker accepted that Mr Berinson might not have known the background of the meetings that had occurred. He referred to his great respect for Mr Berinson, but said that he found it hard to imagine how anyone in Cabinet at that time could not have known what was going on.

At the least, if anyone had been paying attention at all, he said they would have known there was a problem but might not have been aware of the precise figures.

19.4.36 We are not prepared to reject Mr Berinson's evidence concerning his lack of knowledge. We have found that he was not at the meeting on 28 July 1988. There was no procedure for advising Ministers, other than the responsible Minister, of the proceedings in Cabinet. Among those who did attend there is considerable uncertainty as to what was said at that meeting and a lack of recollection of particulars. Mr Pearce confirmed in his written answers that there was discussion concerning the \$300 million in bad or doubtful debts which could be solved by the purchase of PICL at a price which would enable Mr Connell to acquire those debts. Mr Wilson recalled advice concerning a discrepancy of some hundreds of millions of dollars and he thought \$300 million was mentioned. There is no evidence to suggest that Mr Berinson was involved with or informed of the negotiations between 28 July and the briefing on 23 September. It is likely that discussions after the July meeting proceeded on the assumption that everyone was aware of the essential background.

19.4.37 Mr Johnson provided a valuation to Mr Heron as Chairman of WAGH under a covering letter of 29 September 1988. A number of the matters that had been highlighted in the briefing of 23 September were repeated and the valuation commenced with an executive summary as follows:

"Executive Summary"

First Boston has undertaken a major review of the likely risks and future return to Government associated with its proposed 44% equity participation in PICL. Our full risk analysis and assessment of the equity values of the PICL shareholding is set out in this report.

Major points contained in this report are as follows.

1. This report uses data made available to First Boston by WAGH as at 10th September. The certainty of some of the data is, in our opinion, sufficiently unsure as to make our analysis less precise than we would normally recommend to clients as adequate for a reliable equity valuation. We have therefore submitted this report by the 30th September deadline set by Government with the

recommendation that an updated valuation during October would be desirable.

2. Subject to the foregoing reservations concerning quality of data and the recommendation for an updated valuation as more reliable data becomes available during October, First Boston currently estimates the value of the Government's 44% equity stake is in the range of A\$130 million - A\$185 million. If this was the price of the Government's investment, it could yield between 6% - 8% in real terms (i.e. 13 - 15% in nominal terms).
3. A real return, on investment of 6% - 8% is consistent with the investment hurdle rate applied by the Government in evaluating other Western Australian state investments. The hurdle rate they have set yields a positive return over the Government's cost of borrowing as a partial reflection of project risk.

Although a major role of Government is to stimulate economic growth in the State, First Boston would not necessarily endorse an investment which achieved apparent social/economic benefits at the expense of incurring financial losses on the investment. The proposed 44% equity investment in PICL is however financially sound as well as providing an additional social benefit to the State.

4. The currently proposed extent of involvement from a third party investor could, if maintained, be materially prejudicial to the equity value of the Government's shareholding in PICL and to the prospects of successfully financing the project with commercial loans on a stand alone basis.

Project debt financing for PICL should only be anticipated if a recognised chemical plant builder and a recognised chemical plant operator are retained to provide technical skills in the construction and subsequent operation of the plant. Syndication prospects would be strengthened if, additionally no third party's equity interest is allowed to exceed 49.9%.

Specifically, First Boston recommends the Government only proceeds with a major investment in this technical complex project with adequate construction/operational management.

In that event First Boston would be confident of arranging 100% debt finance for the project on the basis of the proposed security structure.

5. Project revenues will be earned totally in US\$ while costs could, potentially, be incurred almost entirely in A\$. Such a structural currency imbalance results in PICL's net profit being potentially highly vulnerable to small movements in the A\$/US\$ exchange rate.

We recommend that PICL management initiate an early FX [Foreign Exchange] hedging programme to convert the majority of its operating and financing costs to US\$. This hedging can be achieved through a mainly US\$ debt programme with additional US\$ liabilities created either through conventional financial market swaps or, more rationally for WA, by negotiating US\$ denominated energy supply contracts with SECWA which should, in turn, be attracted to a source of US\$ revenues.

6. The financial analysis and equity valuation anticipates, inter alia, on-time plant completion, efficient plant operation, successful elimination of structural FX exposures, VCM/EDC/Caustic sales prices at least equal to the "le Roux" forecasts and energy prices rising in the longer term at a rate of 1% under Australian CPI.
7. PICL may need access to liquidity management credit facilities to cover temporary cash shortfalls during the primary operating period (before commercial loans are fully repaid). It would be possible to arrange additional commercial standby loans to replace the currently anticipated WAGH liquidity management facilities without materially affecting returns to Government or to Bond.

8. Only in relatively extreme adverse circumstances is WAGH required to convert loans outstanding at the end of the primary operating period into a secondary loan repayable solely from dividends receivable by WAGH from PICL (or through a cash payment from WAGH to PICL)."

19.4.38 During the course of the valuation it was emphasised that the report was submitted by 30 September 1988 deadline requested by WAGH and, in view of the continuing negotiations and the lack of an updated independent chemical price forecast from Chem Systems, the financial analysis and valuation work was much less precise than First Boston would normally complete or recommend to clients as adequate for a reliable equity valuation. It was pointed out that the division of equity returns between WAGH and Bond Corporation was not necessarily divided *pro rata* to their respective equity holding because of the nature of the contingent financial support arrangements. The observation was made that the support mechanism effectively removed most of the project risk from Bond Corporation. Cash flow forecasting was said to have inherent deficiencies and potential for error.

19.4.39 While it was said that the petrochemical project appeared to have reasonable prospects for success, the report observed that it was unusual for a company such as PICL, producing a commodity for a highly volatile market, to be capitalised with 100% debt finance and that market practice of established major US chemical companies was to manage their debt levels at between 30% and 50% of their total liability. Because PICL had a highly limited capacity to respond to sustained adverse events, the contingent Government support arrangements were recognised as substitution for an appropriate equity reserve. It was reported that there were various project risk areas, many of which had been clearly identified and were currently the subject of major efforts by Bond Corporation and WAGH to contain the associated adverse effect on the project cash flows, but in spite of those efforts and the encouraging success to date there remained significant uncertainty in the ultimate costs and revenues associated with the PICL project. That uncertainty had been translated by First Boston into a wider range of estimated equity values for the shareholding of WAGH plus an increase in the probability of the contingent financial support arrangements from government being required. The concerns of Mr Johnson as to the use of Bond Corporation in construction management and plant operation were repeated. It was said that retaining an experienced petrochemical project construction manager was vital to the success of financing a stand-alone project. The concerns over the technology and management structure were explained because of their possible effect on the completion date which represented the major financial risk. Any failure to complete the

plant by the scheduled date would adversely affect the project economics. Having observed that Bond Corporation had initially assumed it would undertake the operation of the plant once completed, as this had been agreed in earlier negotiations with the Government, the opinion was expressed that the prospects of successfully financing the project depended on the appointment of a recognised industry expert as plant operator. Failure to do so would result in less certainty of highly efficient and reliable operations being achieved and might substantially reduce the value of the Government's equity. It was observed that in the latest discussions between WAGH, Bond Corporation and First Boston, it was understood that the introduction of an appropriate qualified operator was accepted by all parties.

19.4.40 A number of other risk factors and recommendations were discussed in the valuation, including the need for adequate standby credit facilities to be arranged as part of the initial project financial programme in order to avoid a call on WAGH pursuant to the contingent financial support arrangements. The view was again expressed that no single shareholder should have an equity interest above 49.9% unless that shareholder was the Government. It was pointed out, in the context of the potential liability of WAGH pursuant to the support arrangements, that the interpretation of the original loose document setting out the terms of the agreement under which the PICL shares were to be transferred between Bond Corporation and the Government was still uncertain in some areas and further negotiations were pending on several unresolved issues. Eight particular areas described as the key features of the agreement were discussed. The view was expressed that the Government financial support arrangements added material support to the financing prospects of the project and that, without such support, 100% debt financing could not be arranged. It was said that with support, there was good reason to anticipate it would be successfully financed subject to the comments in the valuation concerning the need for construction and operational management. The following view was expressed:

"The support arrangement has two main elements in the subordinated loan liquidity management facility and in the possible later conversion of various commercial and subordinated loans to a new loan facility.

We view the liquidity management facility as providing 'nearly-commercial' (i.e. commercial pricing but possibly subordinated to commercial lenders) standby loans and as such a reasonable involvement of State

Government to encourage development of a world-scale project.

We consider that looked at in isolation, the possible later conversion of loans into a new facility supported entirely by WAGH dividends from the project is harder to justify. In the context of the acquisition price paid for PICL shares the Government may however reasonably argue that any such conversion of loans is simply a deferred equity payment which, in present value terms, would cost the Government less than paying a higher price today to acquire its PICL interests. Also, the sensitivity analyses in this report do provide an indication of the likelihood and possible magnitude of any such loan conversions. It is for Government to judge if the risk of these `deferred equity payments' being made is acceptable in the context of stimulating the development of a major new industry in the State.

In summary therefore we think it is a commercial decision for Government as to whether the potential cost of the credit enhancements provided by support arrangements is an acceptable price to encourage new industry and, indeed, for the Government to acquire a major equity stake in the PICL project."

19.4.41 The valuation then proceeded with a detailed discussion of the prospects of obtaining finance together with recommendations. The following section was headed "Equity Valuation Conclusions". This section highlighted the risks associated with 100% debt funding and the likelihood that new investors would apply a higher discount rate in valuing the equity, which would have a marked adverse effect on the value. This section also demonstrated how factors such as delay in construction and price fluctuations would significantly affect the value of the project. The section was as follows:

"The First Boston financial analysis has focussed primarily on the range of forecast cashflows from the PICL project, as described more fully in Section IV, Methodology. Based on that analysis, on the assumptions used as the basis for the computer model set out in Section IX and subject to our various reservations surrounding the quality of data and introduction of industrial experts to manage the

construction and operational phases of the project, we present the following conclusions as to PICL's equity value to WAGH, to Bond or to a prospective third party investor.

1. The project economics are exceptionally sensitive to small movements in foreign exchange, inflation and interest rates. The reason for this sensitivity is the high reliance on 100% debt funding plus a potential structural operating exposure to FX movements resulting from the US\$ denominated revenue stream (and possibly liability structure) and A\$ operating cost structure.

If the management of PICL allows the abnormal financial risk exposure to continue, then the range of equity values will widen and will be the subject of uncertainty and debate with prospective third party investors. Investors viewing the A\$ as declining steadily against the US\$ will be inclined to pay a premium for the effective (highly geared) long US\$ open currency position. Investors with a more optimistic view of the strength of the A\$ would attach a lower value of an investment incorporating the long US\$ open currency position.

Historically, few parties have predicted with any accuracy A\$ to US\$ currency movements. Conventional wisdom is to obtain a natural hedge for debt obligations through the currency of revenue. The value of the profit will ideally be neutral to A\$/US\$ exchange rate movements provided revenues, debt obligations and costs are correctly structured from a currency viewpoint.

2. PICL management can (but may not) act to neutralise the structural long US\$ currency position and thereby raise equity values through the removal of earnings volatility. Strategies for removing the structural exposure require the introduction of more US\$ future payment obligations into PICL's operations. The structural hedge would require that all debt be borrowed in US\$, that energy supply contracts with SECWA be negotiated (or equivalent financial hedges attached) to equate to a US\$ denominated contract (e.g. that PICL and SECWA

might agree that energy should be purchased in A\$ on the basis of a formula which, say, links future energy rises to US\$ CPI but which adjusts the amount of the energy payments by the future actual depreciation of the A\$ against today's rate of 0.785), and that residual A\$ costs (mainly labour) are regularly hedged into US\$ through the medium term financial swap market.

The First Boston financial analysis and equity valuation assumes that PICL management does act to remove volatility and that all domestic operating costs are converted into US\$ as proposed above. If such strategy is not implemented then, on balance, equity values will be reduced both to WAGH, Bond and to prospective third party investors.

The net effect of converting the A\$ cost structure to a US\$ exposure is assumed by First Boston to result in an underlying equivalent cost inflation of 4.0% p.a. after 1989 as compared to the 3.5% p.a. implied inflation escalator applied to US\$ revenue growth. The 1/2% residual premium is a reflection of the notional hedge transaction costs.

3. Consistent with the preceding comments on FX volatility, PICL equity values would be maximised for all investors by removing interest rate volatility, i.e. by borrowing as far as possible at fixed rate or by swapping floating rate debt to fixed rate.
4. The Equity value will rise sharply at completion if VCM prices are higher than currently forecast and if mechanical completion is on schedule.

The fall in equity value associated with a drop in VCM prices and/or a delay in mechanical completion has a proportionately less severe impact on equity values since the flexible bank repayment structure effectively extends the period for which project leverage is maintained and during which residual equity values are enhanced.

5. We have argued that WAGH may rationally apply a real discount rate of 6% for its equity valuation, bearing in mind the differing risk/reward objectives

and measurements for the Government as shareholder of WAGH, and that for this non-standard investment, Bond might exceptionally apply a real rate of 10%.

New investors would initially apply an even higher real rate of 10% or more to reflect their necessarily less precise understanding of the risk/return balance in the project. We would, however, expect experienced chemical industry investors to lower their discount rates (and raise their implied equity values) if the project structure and the equity potential is carefully marketed to them. In other words, a new investor may view the project as having greater uncertainty than those more closely identified with it (i.e. WAGH and Bond). Accordingly, they will discount projected net cash flow at a higher discount rate.

6. The use of higher discount rates has a pronounced effect on the calculated equity values. The cash returns to a new investor in PICL are unlikely to be paid until the late 1990's and their present value is naturally much reduced by the compounding effect of applying higher interest discount rates.

First Boston's equity valuation of the cashflows likely to flow from PICL to investors in a "central" forecast is summarised as follows:

A\$ million		
	Total Project	WAGH 44%
Real Discount Rate	Equity Value	Equity Value*
6%	418	186
8%	302	131
10%	221	92
12%	163	64
14%	121	44

NB * WAGH pro rata equity value adjusted by the costs of the contingent support arrangements.

These equity values anticipate, inter alia, on-time plant completion, efficient plant operation, successful elimination of structural FX exposure, VCM/EDC/Caustic sale prices at least equal to "le Roux" forecasts and

energy prices rising in the longer term at a rate of 1% under Australian CPI (before swapping in US\$). The nominated real discount rates of 6%, 8% and 10% for the respective parties adjudging profit net present value necessarily encompass the degree of uncertainty they see, respectively, with projected project parameters.

In this central forecast the maximum incremental funding shown to be required by PICL is A\$138 million in 1996. In fact this amount would be reduced in practice either by deferring loan repayments of perhaps A\$100 million and of drawing standby facilities.

If any of these anticipated events is not achieved then future equity values are likely to be affected. The magnitude of the possible impact on equity values from project sensitivity analyses is summarised below.

A\$ million using 6% Real Discount Rate
(in 1988 dollars)

Event Equity Value	Project Equity Value	WAGH
- Central Case	418	186
- Prices 5% higher than forecast	492	213
- Energy prices rising at CPI	392	176
- 6 month completion delay	391	177
- Capital cost A\$850m	370	172
- Prices 5% lower than forecast	341	159
- Adverse case	334	104
- Capex @ A\$850mm		
- Prices down 5%		
- 6 months completion delay		

The "Adverse" case illustrates how the support mechanism is activated to maintain overall project economics through substantial WAGH contributions which combine to materially worsen the equity value to WAGH.

An indication of the possible magnitude of WAGH liquidity management advances to the project is summarised below. We would expect these maximum values should be reduced in practice by up to A\$100 million through an appropriate revenue-linked bank repayment schedule.

Residual Event WAGH Loans	Maximum WAGH Advances to PICL	
	A\$m	A\$m
After 9 years		
Central Case	138-	
Prices 5% higher than forecast	86-	
Energy prices rising at CPI	147-	

6 months completion delay	161-
Capital cost A\$850m	224-
Prices 5% lower than forecast	214-
Adverse Case	361243

Finally we repeat our recommendation that the equity values be constantly reviewed during the period of contractual negotiations which is expected to continue through October. An updated value would be especially appropriate by the end of October when most of the final contractual revisions should be completed and when the Chem Systems revised price forecasts will be available."

19.4.42 Bearing in mind the reliance placed on the valuation by the Government, paragraphs 5 and 6 of those conclusions are of particular importance. The observation was made that new investors were likely to apply a higher discount rate than the 6% to 8% applied from the perspective of WAGH which would result in a valuation less than \$131 million for the 44% interest of WAGH. In addition those assessing the matter should have taken particular note of the various qualifications applied in assessing the equity values. These included completion of the plant on time, efficient plant operation, successful elimination of structural foreign exchange exposure, product prices at least equal to certain forecasts and energy costs rising in the longer term at a rate of 1% under Australia CPI before "swapping in US dollars". It was observed that if any of these or other anticipated events were not achieved, then future equity values were likely to be affected. Those likely effects were taken into account in selecting the discount rate of 6%. If the higher discount rate of 8% was used, the likelihood of a result well below the \$175 million paid by the Government was greatly increased. No doubt the Government was also concerned not to disclose the table of maximum WAGH advances to PICL.

19.4.43 In the letter accompanying the valuation, First Boston pointed out that it was relying on information provided to it which it had not independently verified. The inherent uncertainty in the data resulting from the continuing negotiations was highlighted and a number of major items were set out. The view was expressed that subject to those qualifications and the various assumptions and limitations set out in the detailed report, the value to the Government of the 44% equity investment in PICL was between \$130 million and \$185 million. The letter went on to discuss the prospects of 100% debt funding which it said would be heavily influenced by the involvement of a recognised chemical plant builder in the construction management role and a recognised chemical plant operator in the operation of the plant after completion. It observed that given the inclusion of those experts, the prospects for successful loan syndication of

100% debt funding could be anticipated with reasonable confidence having regard to the various credit enhancements proposed by the Government.

19.4.44 Mr Johnson's evidence and the valuation graphically demonstrate both the extraordinarily difficult position into which the Government had placed itself and the low value of PICL before the Government support mechanism was put in place. It allowed Bond Corporation to control the situation. Commercially speaking it was quite indefensible and absurd for the Government to pay a price created by its own value enhancement. This was the result of impropriety due to the fact that the Government was so desperate to avoid a collapse of Rothwells.

19.4.45 From Mr Johnson's perspective, First Boston's mandate terminated on delivery of the report. In the following week the revised Chem System data became available and, on 4 October 1988, Mr Johnson forwarded a memorandum to Mr Heron concerning his review and analysis of that additional material. In the memorandum Mr Johnson sought confirmation of the revised data and observed that the combined effect of that information was favourable to both the project and the Government economics. That remark, however, was hedged with a highlighting of additional possible adverse influences on the project in the form of the steadily worsening outlook for interest rates, which he observed was bad for a 100% debt funded project, together with the oil price outlook which might both depress the product prices and improve the relative competitive position of naptha based producers. By way of summary, Mr Johnson expressed the view that compared with the September forecast of \$186 million based on a 6% discount rate the interim forecast was now \$220 million.

19.4.46 According to Mr Johnson, he spoke with Mr Heron on 5 October and received a positive response that Mr Heron and others were encouraged to see the impact on the project economics of the new data. He asked whether the Government was intending to take notice of the advice concerning the project operator and was told that it would act on the advice by ensuring that Bond Corporation reduced its equity and brought in an independent construction plant manager. Mr Heron requested that Mr Johnson summarise the essence of the memorandum of the 4 October in a more formal letter to Mr Dowding. When Mr Johnson asked why Mr Dowding wanted a letter, Mr Heron responded that Mr Dowding would like it in a form so that he could talk about it with other people in Government in a more formal sense. Mr Johnson asked if that was all and Mr Heron replied that he thought so but added, "... you never know where these letters end up".

19.4.47 The request for the letter occurred because Mr Heron had been contacted by the Premier who sought a letter which was not as comprehensive as the letter of 29 September, which had accompanied the valuation, and would be suitable for use as part of the launching of the project. According to Mr Heron, Mr Dowding pointed out that the letter referred to a detailed report which he did not want to make available. The letter of the 29 September was qualified in a manner which Mr Heron would normally expect in an exercise of this nature. He agreed with the qualifications.

19.4.48 Mr Parker said the prime purpose of the valuation was to determine whether there was any real prospect of getting value into the shares. It was the Premier's view that if the valuation did not approach \$400 million the Government would not proceed. Mr Parker acknowledged that Mr Dowding was keen to have the valuation as part of the ammunition for a public announcement and wanted something simpler than the letter of 29 September. He did not agree that some passages in the letter were politically awkward, but accepted it was not considered desirable to expose to the public that the Government was to be involved in "various credit enhancements".

19.4.49 Mr Dowding said he recalled something of the discussions giving rise to the letter of 6 October as he requested a short letter that could be made public. He said there were a number of reasons why the letter of 29 September could not be made public, but he said he was prepared to make the public aware that the valuation was subject to the qualifications related to the inherent uncertainty of the data. He said he might have felt a bit frustrated by some of the qualifications. He would not have thought he would be concerned about the qualification related to the uncertainty of the data, but he could not discount it because he had no recollection of it. Mr Dowding agreed with the evidence of Mr Heron that he, Mr Dowding, had referred to wanting a less comprehensive letter to be used in launching the project.

19.4.50 We have no doubt the letter of 29 September 1988 was unsuitable from Mr Dowding's point of view because of the heavy qualifications it contained and its reference to the various credit enhancements proposed by the Government. Hence Mr Dowding sought the further letter which was faxed to him at his home on 6 October 1988. This was the letter that was first presented in public. From Mr Johnson's perspective, the letter of 6 October was worded in a manner intended to stop it in any sense forming a stand alone document. He said he would have discussed the contents with Mr Heron as to whether it was the sort of document which Mr Dowding wanted or was expecting, and he gained the impression that Mr Dowding

wanted some good news to talk about with his colleagues. A letter from First Boston incorporating the latest financial data could certainly be seen as good news. He said First Boston was very concerned that the letter might intentionally be put into Parliament as a stand alone document, which is what subsequently happened. He sent the letter directly to Mr Dowding by fax at the request of Mr Heron who gave him the number.

19.4.51 Mr Dowding said he was not aware that figures had been done nor that it was known the valuation would be in the vicinity of \$400 million. Nevertheless, the Commission is satisfied that Mr Dowding, Mr Parker and Mr Edwards were confident that the valuation would be in the vicinity of \$400 million, given the level of Government support and the figures produced in July 1988 by Dr Saunders and Mr le Roux. As Mr Edwards observed, the valuations were really determined by figures generated by him and others so they knew the valuation would approximate that figure. Mr Edwards said that although the Government team was comfortable with its own model that the project was capable of supporting the \$400 million level of equity, as is quite common "... for presentational reasons it's nice and also for banking reasons its nice to have a big name attached to that type of thing so you ask for a second opinion". He said if First Boston had come back with a figure well below \$400 million, Mr Dowding's attitude would have been the same as the rest of them, namely, to go back to square one and either put Rothwells into liquidation or think of something else.

19.4.52 The use of First Boston by the Government to give credibility to the proposal was to convey a false impression in the absence of disclosure of the enhancement of value by virtue of the Government support mechanisms. In addition, Mr Edwards said he was aware the project could not obtain finance without credit enhancement and we have no doubt Mr Dowding, Mr Parker and Mr Grill were similarly aware. The contrary impression conveyed of a viable project that could stand alone was misleading. In our view the Government should not have proceeded to commit itself publicly in view of the various reservations and issues that First Boston indicated required resolution. The public announcement on 6 October in these circumstances was premature and provides a further demonstration of Mr Dowding's determination to proceed in the absence of very powerful reasons to the contrary and to proceed with the utmost urgency because of the perilous position of Rothwells.

19.5 Negotiations 28 July to 3 October 1988

19.5.1 Following the signing of the memorandum of understanding on 28 July 1988, negotiations proceeded in difficult circumstances for those representing the Government. Mr Heron was closely involved and aware of those circumstances. He became involved in the first week of August 1988 when he attended a meeting in the office of Mr Parker with Mr Parker, Mr Grill, Mr Edwards, Dr McKee, Mr White and Mr Blackman. The meeting was told by Mr Parker that WAGH was to be the vehicle by which the Government would take up its shareholding in PICL and the Government had decided that Dr McKee, Mr Edwards and Mr Heron would become directors of WAGH. Mr Heron understood from Mr Edwards that Mr Edwards and Mr Lloyd had conceived the solution to the Rothwells problem and that the Government was purchasing an interest in PICL in order to clear the Rothwells' position. Mr Heron was also told by Mr Edwards that if the Government walked away from the project, Rothwells would have to close its doors. Mr Dowding made clear to him that if the project could not pay its own way he would take the "hard political decision", meaning he would walk away from the project. Mr Heron believed from discussions that, whatever might have appeared in the memorandum of understanding concerning the use of SECWA as a means of subsidising the project, SECWA would not be used to provide the support but WAGH would be the vehicle to do so. He understood those support mechanisms were for the purpose of providing a guarantee to Bond Corporation that it would have a debt free project within nine years.

19.5.2 Mr Heron said there was no doubt that the memorandum of understanding and the annexure, while not "inviolable", formed a very tight boundary within which he and others had to try to negotiate and it made things extraordinarily difficult. They had been "dealt a poor hand" and he agreed they were always at a disadvantage. He and Mr Johnson raised the difficulty of the position with Mr Dowding when they met on 18 August 1988. Mr Dowding encouraged them to try to improve their position. Similar encouragement was given by Mr Parker. Mr Heron had the belief, however, that they were constrained by the circumstance that the transaction had to proceed and they had no alternative unless the valuation failed to reach the figure stipulated by Mr Dowding. Mr Heron did not ever suggest that the Government decline to proceed with the project because he had the very clear impression that the rescue of Rothwells was paramount and involvement in the project was a means of achieving that aim. As far as he was concerned, the Government was fixed on a course, subject only to the

valuation. He was given the impression by Mr Edwards that the substance of the agreement as reflected in the memorandum of understanding could not be altered.

19.5.3 Mr Heron confirmed the evidence of Mr Johnson that Bond Corporation constantly relied on the memorandum of understanding as fixing the position between the parties. He said Mr Mitchell was disinclined to change the deal from that which had been negotiated. Whenever the Government attempted to renegotiate Mr Mitchell, together with Mr Judge and Mr Beckwith, would refer to the project being the Government's initiative and not that of Bond Corporation. Mr Heron could not recall Mr Edwards or anyone else from the Government disputing that proposition.

19.5.4 Mr Edwards expressed the view that the evidence of Mr Heron that it was a "done deal" and the ability to negotiate was restricted was a fair comment because they were bound by the spirit and basis of the memorandum of understanding. He agreed they were on the back foot but said that was because they had taken a position of less than 50% interest.

19.5.5 Mr Parker agreed the memorandum of understanding had a restrictive effect constraining the areas in which they were able to negotiate. To that extent he agreed it had put them at a disadvantage and there were a number of occasions when propositions to improve the Government position put to Bond Corporation were met with the response that Bond Corporation would not agree and relied on the memorandum of understanding. As to a proposition that it was open to the Government to walk away from the venture as a whole, Mr Parker agreed, but indicated that the Government would not do so other than in the most exceptional circumstances. While acknowledging that the disclaimer clause meant that if the Government walked away it could do so without being sued for breach of contract, Mr Parker said "... but if we were going to go ahead with the project, then the memorandum of understanding was obviously the understanding that had been reached between the parties".

19.5.6 Mr Dowding did not agree with Mr Heron's impression that there was really no choice but to proceed other than in the event of a negative worth valuation. He said if Mr Heron had that impression it was not one Mr Dowding wanted him to have and he would have expected Mr Heron to tell him if he had the view that in the overall context it was not the right thing to do. He accepted there may have been, from time to time, a broad impression that Bond Corporation really had the whip hand because the Government had a major political and economic problem to resolve.

However, Mr Dowding would not agree that the Government was at the mercy of Bond Corporation because the Government had committed itself to the project whereas Bond Corporation had not done so. Although he said if necessary he would have been prepared to say that the Government would not proceed if the conditions precedent were not met, he also acknowledged:

"We were at the mercy of the circumstances that we'd created for ourselves. We had made a decision in principle to go ahead with the debt to equity proposal, to take a position in the Petrochemical project, and that there were some clear and unequivocal requirements to be met before we would finally commit".

19.5.7 We accept the evidence of Mr Heron and have no doubt he gained a correct impression of Mr Dowding's attitude. Subsequent events confirm that view.

19.5.8 It is unnecessary to canvass the negotiations in detail. Two of the principal issues of concern expressed by Mr Johnson were the fact that no interest was payable on advances by WAGH and any amount owing to WAGH at the end of the debt repayment period would be written off. Mr Heron was told by Mr Judge and Mr Mitchell that these matters had been agreed with the Government and this was an occasion when Bond Corporation relied on the memorandum of understanding. He correctly viewed the decision by the Government in this regard as so extraordinary that it had to be referred back to Mr Parker. He was unable to recall the precise words but Mr Parker's response was to confirm the comments of Mr Judge and Mr Mitchell that agreement had previously been reached. Government officers made strenuous but unsuccessful efforts to change the position and, according to Mr Heron, they "... went the amelioration route" which did not result in any change with respect to interest on the advances, but the debt repayment period was increased from nine to twelve years. The likelihood of significant amounts remaining due to WAGH at the end of that the debt repayment period was thus reduced. Mr Heron said that the matter was raised with Mr Parker and he eventually accepted the compromise with a full understanding of the ramifications. Mr Parker agreed the position with respect to these two issues was most unsatisfactory, but said that position was set by the memorandum of understanding which had been concluded in his absence.

19.5.9 Mr Judge, a solicitor, joined Bond Corporation on 1 February 1983 as an Executive Assistant to Mr Beckwith, the Managing Director. He was given a wide

range of tasks concerned with mergers and company and asset acquisition and disposal. His first involvement with PICL was attending the meeting in London on 9 July 1988 between Mr Beckwith, Mr Mitchell and Mr Bond. He had no further involvement until the latter half of July 1988 when he was asked to remain in Perth and assist Mr Mitchell.

19.5.10 Mr Judge was extensively involved in the negotiations following the signing of the memorandum of understanding. He said the issue of the advances from WAGH being interest free was discussed on a number of occasions and he did not believe the positions of Bond Corporation and the Government were different until Mr Johnson became involved and suggested that interest should accrue. He said he and Mr Mitchell expressed the Bond Corporation position succinctly. Mr Mitchell said there could be no misunderstanding that Bond Corporation was in the deal at the request of the Government on certain terms and conditions, one of which was that no interest would be incurred on the advances. Mr Mitchell made it absolutely clear that the issue was not open for debate. According to Mr Judge there was no demur from the suggestion that Bond Corporation was in the project at the request of the Government and, as to the interest, there was a half-hearted attempt by Mr Edwards to pursue it. This discussion had taken place on a Saturday in July 1988. Mr Johnson was not happy and the matter was pursued a couple of times in the week following. Eventually Mr Johnson was instructed by Mr Edwards that the issue had been agreed as part of the deal. In late September or early October 1988, on the instructions of Mr Dowding, Mr Edwards made another attempt to resolve the issue without success.

19.5.11 According to Mr Judge, the issue of WAGH writing-off any amount outstanding at the end of the debt repayment period was a "pretty hot topic". He said as far as Bond Corporation was concerned there was no debate because it was never contemplated that those amounts would be repayable beyond reference to the original structure of the deal, namely, if there was surplus in the cash flow available after debt service and operating costs such surplus would be available to repay the contributions made by the Government. It was part of the original deal that any outstanding balances at the end of the debt repayment period had to be written-off and Mr Judge expressed the view that Mr Johnson had been sent in to try to win an unwinnable battle because Bond Corporation would not proceed with the deal if it was not done on the basis that had been agreed. Mr Judge said he was given absolutely no latitude on any of these issues by Mr Mitchell who was in charge of the negotiations and referred to these matters as "our cardinal principles".

19.5.12 As to the role of Bond Corporation, according to Mr Judge it was accepted by Mr Johnson that Bond Corporation could have a role in construction management. Mr Judge maintained that Bond Corporation was never going to be the project operator, the latter issue being a matter which many people seemed to confuse. He agreed that Mr Johnson expressed the view that he would prefer to see an international petrochemical company in the project with a focus on operations because it would make lenders more comfortable. He also agreed the view had been expressed that others did not want Bond Corporation to have more than a 50% interest, a concept to which Bond Corporation agreed. Eventually Bond Corporation disposed of a percentage to Mr Zoltan Merszei, the former Chairman of Dow Chemical, which sale had the effect of reducing Bond Corporation's percentage to below 50%. Mr Judge acknowledged that Mr Merszei was also a director of the Bond Corporation, but understood that he was at arm's length from Bond Corporation in connection with his holding in PICL.

19.5.13 The negotiation process included discussions in Japan during July and September 1988. It is unnecessary for us to refer to these discussions in detail. Mr Johnson described vigorous differences of opinion between himself and Mr Judge in Tokyo about the role of Bond Corporation, a matter on which Mr Judge had a different perspective. It is not necessary for us to endeavour to resolve the differences between them.

19.5.14 The difficulties of the negotiations were not assisted by the problems at Rothwells which did not abate. By 20 September 1988, Mr Anderson was indicating that he felt once the Government indemnity was removed, he wanted to have his money out as well. Mr Parker met with him and Mr Beckwith on 20 September to discuss the issue. Mr Parker said the meeting did not progress to any finality, but it was a general discussion in which he and Mr Beckwith explained to Mr Anderson what was occurring and what they expected the position would be. He thought Mr Anderson was fairly obdurate at that time. Mr Parker acknowledged that toward the end of September there was a feeling that the PICL agreement had to be finalised urgently. It had always been anticipated that settlement would occur by the end of September.

19.5.15 On 27 September 1988 Mr Lloyd as Managing Director of Rothwells wrote to the R & I Bank seeking a \$5 million overdraft facility. He advised that during the next 30 days Rothwells intended to carry out a major financial restructuring which would result in its total balance sheet liabilities being reduced from approximately

\$680 million to approximately \$324 million. This was explained as the result of a sale of a portfolio of loans to Mr Connell for \$350 million and a further sale to Markland House for \$110 million of debts with a current book value of \$110 million. Mr Prokojes of the R & I Bank said he spoke with Mr Lloyd and more information was provided in a further letter of 27 September 1988. This included advice that the target date for settlement of the PICL transaction was currently 30 September, but realistically, it was unlikely to be achieved and the latest date for settlement was 14 October 1988. The application for the \$5 million overdraft facility for a short period was not granted, but was ultimately approved to a limit of \$3 million because cheques had already been drawn by Rothwells on its account at the bank for that amount. If the application had been refused, those cheques would not have been met on presentation and it was the view of Mr Prokojes that if the cheques were returned unpaid it could have resulted in a collapse of Rothwells. If those cheques had not already been drawn he would have recommended that the application be refused. That facility was to be cleared by 14 October 1988 at the latest.

19.6 WAGH debentures - SGIC

19.6.1 After the signing of the memorandum of understanding on 28 July 1988 and, prior to Cabinet meeting on 3 October 1988, the decision was made to use WAGH as the vehicle by which the Government would purchase its interest in PICL and provide additional support to SECWA and the project. On 29 September 1988, as Chairman of WAGH, Mr Heron wrote to SGIC referring to a previous meeting and indicating that WAGH had been requested by the Government to undertake an economic analysis of a major development project which would require a significant capital injection and that the company intended to issue seven Government-guaranteed debentures each of \$25 million for a total of \$175 million to enable it to undertake the project. He wrote that he would like to offer the Commission the opportunity of purchasing the debentures. The SGIC minutes of 29 September record a tabling of the letter from WAGH and a resolution to approve the taking up of the debentures for a nine year term. Mr Rees wrote to WAGH accordingly on 30 September 1988 accepting the proposal.

19.6.2 Originally it had been envisaged that SECWA, SGIC or some other Government agency would be used. When Mr Parker returned from overseas he made known his view that it was out of the question to use SECWA. Discussion ensued as to which agency should be used and WAGH was suggested. Mr Parker thought Mr Edwards made the suggestion and no-one raised any reason why that was

inappropriate. Mr Edwards thought they canvassed the possibility of direct legislation and the fact that the Government did not have a majority in the Legislative Council which militated against that course of action. He did not think any concerns were expressed as to the use of WAGH.

19.6.3 According to Mr Wiese the proposition that WAGH be used was developed during meetings of what was referred to as "the task force" over a short period after 4 August 1988. He did not know why the use of SGIC was rejected and presumed, although he did not know, that Mr Edwards made the decision. As to the reasons given for the use of WAGH, Mr Wiese said it was perceived to have the legal capacity to engage in the project and it appeared on the face of it that the Treasurer could guarantee the obligations. In addition the use of WAGH obviated the need for special legislation. No one regarded legislation as desirable because of the prospect of failure and the time it would take to achieve the result. Although the course adopted avoided legislation, there was never any view expressed that the use of WAGH was a means of avoiding parliamentary scrutiny of the project. Mr Wiese confirmed, however, that he had a similar understanding to that of Mr Heron and Mr Johnson that the Government did not want the existence of its support mechanism to be publicly known. He did not know whether that understanding was formed at that time or later. He thought it was based on the way in which questions were being answered in Parliament.

19.6.4 Mr Wiese did not have any doubt about the capacity of WAGH to enter into the commitment contemplated, but he was not prepared to disclose any advice that he gave because he had been instructed by WAGH to maintain a claim to legal professional privilege. Mr S E K Hulme QC of Melbourne gave an opinion dated 29 August 1988 expressing the view that it was likely a guarantee given by the Treasurer of obligations to be undertaken by WAGH to PICL would not be valid and enforceable. He also raised other issues. Mr Wiese said the issues raised by Mr Hulme in his opinion were addressed, but again he regarded the discussions as privileged.

19.6.5 Bond Corporation had obtained the opinion from Mr Hulme because of doubts about the Treasurer's capacity in the matter. In an opinion of 16 August 1988, the Solicitor General expressed the view that the Treasurer could lawfully give the guarantee of the obligations undertaken by WAGH. He repeated that conclusion in a further opinion of 1 September 1988. This was followed by a second opinion from Mr Hulme of 9 September 1988 in which he reaffirmed his view that he was doubtful as to the enforceability of the guarantee.

19.6.6 Mr Berinson said he was aware of the opinions given concerning the validity of any Treasurer's guarantee, but no one expressed doubts about the capacity of WAGH to enter into a commitment of the nature contemplated and no one raised the doubts expressed by Mr Hulme in his opinion of 29 August 1988. In particular, policy issues canvassed by Mr Hulme were not mentioned and, while agreeing such matters were serious, Mr Berinson said the Government was entitled to rely on the opinion of the Solicitor General. The proposal had been presented to Cabinet on the basis that WAGH would be used. He did not know why it was chosen.

19.6.7 Mr Dowding said the questions of what vehicle to use and how the matter would proceed were considered by others and it had proceeded in accordance with their advice. He said WAGH was chosen because of that advice and he did not think it was chosen because he did not want to tell Parliament about the transaction. It was not a question of whether there was a need to obtain parliamentary approval but whether they were advised that there was such a need. He thought there was advice from the Solicitor General on this issue and the proper procedures to be followed, and he accepted that advice. Mr Edwards confirmed reliance on the advice of the Solicitor General.

19.6.8 On 30 September 1988 Mr Ross Bowe, the Under Treasurer, wrote to the Treasurer indicating that WAGH had estimated it would incur costs totalling \$4 million in "... proving up the viability of the proposed petrochemical plant ..." and that the company had no revenues to fund the costs. He indicated the directors were seeking an undertaking from the State that it would meet the expenditure should the project not proceed and observed that the commitment was necessary to enable the directors to fulfil their responsibilities and obligations under the Companies Code. He sought an undertaking which was given by letter of 3 October 1988 from Mr Dowding as Premier and Treasurer to WAGH. Mr Dowding undertook that, should the project not proceed, he would recoup to the company reasonable expenditure up to \$4 million necessary to carry out the feasibility study of the project. Further, Mr Wiese agreed that, when it was conceived WAGH would be the vehicle, it had no means independent of recourse to the State to meet its obligations. He agreed the choice of WAGH presupposed that its sole shareholder, the Treasurer of the State, would support it.

19.6.9 As to the enforceability of any guarantee given by the Treasurer, although Mr Hulme had expressed doubts, the Government had contrary advice from the Solicitor General. It has been unnecessary to hear evidence from the Solicitor General or

Mr Hulme. We are firmly of the view that, as to the propriety of using WAGH insofar as it involved a guarantee from the Treasurer, the Government was entitled to rely on the opinion of the Solicitor General. Given that view, we see no useful purpose in debating the legal issue as to whether the Solicitor General was correct in his opinion. For our purposes we assume that he was. However, the fact that there was a division of opinion between senior counsel rendered it more difficult to finance the project.

19.6.10 As acknowledged by Mr Bowe and Mr Wiese, WAGH did not have the financial capacity to undertake the obligations, but those obligations were guaranteed by the Treasurer and it cannot be said that the directors were acting improperly in this regard.

19.7 Cabinet meeting of 3 October 1988

19.7.1 Negotiations were still continuing when Cabinet met to consider the matter on about 3 October 1988. A number of important issues had not been resolved. It also appears that very little consideration had been given to the long-term viability of Rothwells, even assuming a successful PICL settlement with a net benefit to Rothwells of millions of dollars after repayments to NAB and Bond Corporation. Mr Judge was alert to the possibility that payments out of Rothwells as a consequence of the PICL settlement might be set aside as preference payments should Rothwells not continue for at least six months beyond the date on which the transaction took place. He had not been given any specific information about Rothwells, but was prompted on this issue because of the insistence by Mr Edwards that the position in Rothwells was critical and settlement had to occur urgently. He said he suggested to Mr Beckwith that an independent report be obtained and, after initially appearing not to appreciate the issue, Mr Beckwith agreed that something should be done. A member of the Bond Corporation team was instructed to contact a number of firms and ultimately Arthur Young was asked to undertake the task. Eventually a draft report dated 7 October 1988 was presented and Mr Judge first saw it on Friday 11 October. He understood from recent discussions with Mr Humphreys of Arthur Young that the draft was not delivered until 11 or 12 October 1988. Mr Edwards recalled the suggestion emanating from Bond Corporation and he spoke to Mr Parker concerning an independent report. He understood that Mr Parker reached agreement with Mr Beckwith on the matter. We will return to that report in the chronological sequence of events.

19.7.2 Among the issues yet to be resolved were the debts to be assumed as part of the purchase and the contract with SECWA for the supply of energy. The negotiations concerning the SECWA contract are canvassed later and it is sufficient to observe that, as at the beginning of October, they were far from settled. That contract was a crucial feature of the project. Other important matters unresolved included the reduction of Bond Corporation's interest below 50% and the involvement of a major petrochemical company in the project. These two matters had been repeatedly emphasised by Mr Johnson and were addressed in a draft briefing paper prepared by Mr le Roux dated 27 September 1988 and sent on that day by facsimile to Mr Edwards and Mr Howard Rosario, the secretary of WAGH. Bond Corporation would not proceed with the project unless the SECWA contract was settled in accordance with the annexure to the memorandum of understanding, a position being resisted by SECWA. It should have been readily apparent to Mr Dowding, Mr Parker, Mr Edwards and Mr Heron that the project should not proceed unless the other matters were resolved in accordance with the advice given by Mr Johnson.

19.7.3 Why in these circumstances did Mr Dowding take the matter to Cabinet on 3 October 1988 seeking approval to proceed and follow that approval with a public announcement on 6 October 1988? The answer is found in the continuing critical problem in Rothwells and the determination of Mr Dowding, Mr Parker and Mr Grill that Rothwells must not collapse. That this view was taken is further demonstrated by the letter from Mr Parker to Standard Chartered of 11 September 1988. He requested that the bank not take steps to institute proceedings for default in respect of an outstanding facility to Oakhill in order to allow the sale of the portfolio of loans to be finalised and wrote that he regarded the matter of such importance that he would be prepared to travel to London at short notice to discuss the matter personally.

19.7.4 As to the presentation to Cabinet on 3 October 1988, we accept the evidence of Mr Parker that his presentation was basically in accordance with briefing notes which had been provided to him. The notes had been dictated by Mr Edwards and transcribed by the secretary of WAGH, Mr Rosario. As the notes provide the best record of what was conveyed to Cabinet they are set out in full:

" Kwinana Petrochemical Project

Notes for a Cabinet Briefing by the Deputy Premier on
Monday, 3 October 1988 at 10.15 am

1. The Kwinana Petrochemical Project is owned by Petrochemical Industries Company Ltd (PICL) which is owned by interests associated with L. Connell and D. Dempster.
2. The Bond Corporation Holdings Group (BCH) and the WA Government will acquire PICL for \$400 million.
3. The WA Government will pay \$175 million to acquire a 43.75% holding in PICL.
4. BCH will pay \$225 million to acquire a 56.25% holding in PICL.
5. The WA Government's interest in PICL will be held by Western Australian Government Holdings Limited (WAGH), formerly Northern Mining Corporation N.L., a wholly government-owned unlisted public company.
6. WAGH has direct government support for all of its obligations through the Northern Mining Corporation (Acquisition) Act 1983.
7. There will be 6 Directors on the PICL Board. BCH and WAGH will nominate 3 each.
8. The petrochemical plant construction contract with JGC Corporation of Japan has been renegotiated on a basis acceptable to all parties and satisfactory performance guarantees have been obtained. PICL will be acquired as a party to these acceptable arrangements.
9. The First Boston Corporation has estimated the value of the WAGH's proposed equity in PICL in the range of A\$130 million - A\$185 million and has indicated that in this price range WAGH's investment could yield between 6%-8% in real terms (i.e. 13%-15% in nominal terms).

10. The plant construction cost is projected as follows:

	\$ million
As contracted	700
Contract and engineering supervision costs including management fees	65
Contingency for overruns	105
	<hr/>
	\$870 million
	<hr/>

11. Construction will commence on acquisition of PICL and should be completed some time between 30 June and 30 November 1991 i.e. in 33 to 38 months.
12. At the commencement of operations the plant will cost around \$1 billion inclusive of capitalised interest.
13. By accepting financing of the project on a non-recourse basis (i.e. without recourse to the proposed shareholders BCH and WAGH) the syndicate of Banks will be effectively assuming responsibility for a completion guarantee of the project. Before funds are provided they will need to be assured of the capacity of the Contractors to complete and commission the plant. First Boston are of the opinion that arrangements in place following the recent Tokyo negotiations will ensure that a syndication of Banks is achievable.
14. In principle agreement has been reached between BCH and WAGH on conditions that will allow the project to be 100% financed on a non-recourse basis.
15. The Government, through WAGH, has undertaken to assist the project to raise the required construction finance by providing a credit support mechanism to ensure that the cash flow from operations is adequate to meet loan principal and interest repayments over the

10 year life of the loan. Neither BCH nor WAGH will receive any dividends during the loan repayment period i.e. for some 10 years after the plant is constructed and commences operation.

16. BCH will manage construction of the plant for a fee structured as follows:

On the contract sum - 4%

On overruns - 2%

On the unexpended contingency
for overruns - 6%

17. The plant construction management contract requires BCH to retain an advisor, with internationally acknowledged expertise in the construction of petrochemical plants, under a technical services agreement. This advisor is likely to be Foster Wheeler.
18. The plant being constructed will produce Vinyl Chloride Monomer (VCM), Ethylene Di-Chloride (EDC) and Caustic Soda.
19. The feasibility of extending the currently planned plant to produce Poly Vinyl Chloride (PVC) is being assessed. The study will be completed within 60 days and is likely to be positive. A decision to proceed should commercially enhance the project and reduce environmental concerns. The cost of the extensions to produce PVC will probably add \$150 million to the cost of the plant.
20. BCH has agreed to sell-down its interest in PICL to 50% or 25% forthwith if an internationally acknowledged petrochemical operator agrees to purchase its stake. Action to achieve a sale is underway. B.F. Goodrich, and ICI Australia Ltd (ICI) and Ethylene Vinyls Corporation (EVC) jointly, have been identified as suitable purchasers. It is proposed that the plant will be operated by PICL with technical assistance from the third equity participant. First Boston

Corporation have advised that these arrangements would lower the rates of interest at which project finance is obtained.

21. Environmental Protection Authority and Town of Kwinana approvals for the project have been issued subject to stringent conditions which can be met.
22. WAGH will raise the \$175 million required for its equity participation in PICL by issuing debentures to the State Government Insurance commission (SGIC) which are supported by the Treasurer's guarantee.
23. The \$400 million acquisition price will be allocated as follows:

To Mr Dempster's interests	\$50 million
To Mr Connell's interests	\$350 million

24. The \$350 million made available to Mr Connell's interests will be applied through Rothwells Ltd as follows:

\$ million	
To retire the guarantee to the National Australia Bank Ltd	150
To repay deposits - BCH	100
Bond Media	25
Bell Resources	50

The remaining \$25 million will be retained by Rothwells Ltd for liquidity.

25. Rothwells Ltd has been subject to an independent examination by Arthur Young & Co., Chartered Accountants. This examination confirms that Rothwells Ltd will have real net worth after these transactions.
26. The Government through the SGIC will have no direct exposure to Rothwells Ltd after these transactions.

SGIC exposure will be:

\$ million

Contingent liability to the National Australia Bank Ltd for facilities granted to Markland House Ltd	50 *
Advance secured by equity in Western Collieries Ltd	18
Spedleys	14
PICL (under BCH/WAGH ownership)	5

* This liability is further secured by a charge granted to the SGIC over sound assets transferred to Markland House Ltd by Rothwells Ltd.

27. PICL's arrangements with the State Energy Commission of WA (SECWA) are consistent with commercial terms offered to large users in similar circumstances. The gross income to SECWA from these arrangements will be around \$80 million per year."

19.7.5 The briefing notes do not refer to the problem within Rothwells or the size of it. Not having attended the meeting of 28 July 1988, Mr Parker said he assumed that such background had been given to Cabinet at that meeting which approved the signing of the memorandum of understanding. He agreed it was important for Cabinet to be aware of the background and the reason for the Government involvement in the project, but, as to whether anyone displayed a knowledge of those matters, Mr Parker was unable to be specific except to refer to objections by Mr Barry Hodge which resulted in Mr Hodge arguing with the Premier and leaving the meeting. Bearing in mind that the draft Arthur Young report was not provided until some days after the meeting, Mr Parker said both Mr Edwards and Mr Beckwith had told him of the view referred to in paragraph 25 of the briefing notes that the examination by Arthur Young had confirmed that Rothwells would have a real net worth after the transactions. Mr Parker thought a figure of between \$40 million and \$70 million or \$80 million had been mentioned without recourse to the Tryart fee which, if paid, would result in a higher figure. He did not agree with the recollection of Mr Edwards that \$40 million net worth assumed payment of a certain percentage of the fee and would reduce to \$10 million if no amount was paid.

19.7.6 Of interest is the inclusion in paragraph 26, as part of the SGIC exposure to Rothwells, of a figure of \$14 million which had been paid by SGIC to Spedleys. Mr Parker was unable to explain this inclusion. In response to a suggestion that it was included because everyone knew the money had been lent by SGIC to Spedleys and on-lent to Rothwells, he said that he did not know if everyone knew that, he did not write

the notes and it was known that Spedleys had a connection with Rothwells. Mr Parker said it may have been the feeling of Mr Rosario or Mr Edwards that there should be a report concerning anything that had a connection with Rothwells. He said he became aware at some time that the Government had been involved in indirect funding with SGIC lending money to Spedleys, but he was not the Minister responsible and it occurred without his knowledge. On the matter of the exposure, we accept the evidence of Mr Edwards that there was no doubt the funds went to Spedleys from SGIC in order to allow Spedleys to put Rothwells in funds. Mr Edwards said it was proper to raise it in the notes and hence he just categorised it in that area.

19.7.7 The briefing notes were faxed by Mr Edwards to Mr Grill on 3 October and marked urgent and, although Mr Grill acknowledged it was quite possible that Mr Parker presented the matter to Cabinet on 3 October, he did not have a memory of it. Mr Berinson did not attend that meeting. The varying recollections of other Ministers who responded in writing to written questions from the Commission are generally less detailed but consistent with the briefing notes. A general theme recalled by those Ministers is that Mr Dowding and Mr Parker recommended the project as one of significant benefit for the State.

19.7.8 Mr Dowding thought the meeting did not take place on Monday 3 October because of a funeral at Northam attended by Cabinet members. He acknowledged that a meeting occurred at about that time and had a memory that Mr Parker gave a presentation during which he was present for at least some part. He agreed that by and large the briefing notes contained the sort of information presented to Cabinet. He accepted that Mr Parker would have told Cabinet of the figures canvassed in paragraphs 2 to 4 and that at least broad valuation assessments and construction costs would have been mentioned together with paragraph 15 concerning the Government support mechanism. Similarly he thought paragraph 20 concerning Bond Corporation's agreement to reduce its interest and paragraph 22 as to the method of raising finance might have been mentioned. Paragraph 23 as to the allocation of \$350 million to Mr Connell and \$50 million to Dempster was probably canvassed. As to the obvious disparity between amounts to be paid to Mr Connell and Mr Dempster, Mr Dowding could not recall any previous discussion on that topic. He acknowledged that it could appear a bit odd, but said he was not interested in the relationship between Mr Connell and Mr Dempster.

19.7.9 Mr Dowding was unable to recall any reference to Arthur Young or the net benefit to Rothwells as set out in paragraphs 24 and 25, but he thought a comment was made about Rothwells having a net worth. He could recall discussion at great length on a number of occasions concerning the Tryart fee, but did not know whether that discussion occurred at Cabinet. Similarly he did not have a memory of any discussion about SGIC's exposure as set out in paragraph 26 and, as to the placement of \$14 million paid to Spedleys under the heading of SGIC's exposure, Mr Dowding said he believed he did not have an understanding that there had been indirect funding of Rothwells by SGIC through Spedleys.

19.7.10 Paragraph 27 of the briefing notes stated that PICL's arrangements with SECWA were "... consistent with commercial terms offered to large users in similar circumstances". Mr Dowding thought this topic had been mentioned and agreed it was an important aspect of the presentation. If that statement was made in its literal form and without a proper explanation of the arrangements set forth in the memorandum of understanding, it was incomplete and misleading and failed to tell Cabinet of SECWA's strong opposition to the *fait accompli* with which it had been presented.

19.7.11 Mr Dowding was not sure whether this was the occasion when Mr Hodge left the meeting or whether it occurred during an earlier meeting, but, in broad terms, he remembered the departure from a Cabinet meeting during a discussion about PICL. According to Mr Dowding, Mr Hodge indicated he was sick of Rothwells and discussions about Rothwells and was not going to stay and discuss the matter further. He had some of his constituents at Parliament House waiting for lunch and they were more important to him and "he was off". Mr Dowding said he told Mr Hodge rather firmly that Cabinet had to give careful consideration to these issues and that he, too, was sick of Rothwells and would like to go off to lunch but everyone had a responsibility to stay and make the decision. He said he thought Mr Hodge took considerable umbrage at that, departed and declined to return. Mr Dowding said he was very angry with Mr Hodge because he thought he had displayed a selfish attitude, but pointed out that they spoke later and returned to their previous relationship. In cross-examination by counsel for Mr Hodge, Mr Dowding agreed it was possible that his recollection as to the mention of going to lunch was mistaken and that, in the context of the discussion on the PICL project, Mr Hodge was opposed to anything to do with Rothwells or the project and voiced his opposition at the meeting. He went on to say that Mr Hodge was a very hardworking decent minister and they had a really strong disagreement at a moment of great tension around the Cabinet table. Mr Hodge was the only person whom

Mr Dowding could recall voicing opposition. Mr Dowding said it was clear that Mr Hodge was frustrated and his frustration led to his words which increased the frustration felt by himself and in turn led to his words, following which Mr Hodge left.

19.7.12 As to what Cabinet was deciding, Mr Dowding expressed, to say the least, an interesting view. He said Cabinet indicated that they would support the recommendation by Mr Dowding and Mr Parker "... that we would go forward to give effect to the project as David [Parker] had described it". He disagreed that Cabinet had decided to commit \$175 million to the project but did accept that to "go forward" included either specifically or implicitly a decision to commit \$175 million to the project. He thought it was the Treasurer in these circumstances who had to make the decision to commit the State to spend \$175 million, not Cabinet giving an authority to commit the State to that expenditure. He said Cabinet was only expressing approval and support of the decision that Mr Parker and Mr Dowding had to take in relation to the next step in the matter. Mr Dowding was asked whether a Cabinet decision that the Government should not commit itself to the project, but should let Rothwells cease to operate, would have been followed. He responded that "... Cabinet doesn't have a voice like that". He said that if, after exhaustive discussions, differences had remained unresolved and the majority said they believed proceeding was wrong, the individual Ministers with responsibilities would have had to reflect on their position. In that situation he believed he and Mr Parker would not have proceeded. As to whether there were any circumstances in which Caucus would have a role, Mr Dowding said he probably did not see one but, if he was still in the Ministry, he would no doubt buy an argument with Caucus on that issue.

19.7.13 In the context of the nature of the decision being taken by Cabinet, Mr Dowding conceded it was a very important decision in the sense of deciding whether to support him and Mr Parker in proceeding. However, when later asked, regardless of how it was phrased, whether it was obviously a very important decision for Cabinet, Mr Dowding said:

"Not as such. It was a terribly important issue to the members of Cabinet and it was of enormous importance to the Government."

19.7.14 In this context Mr Dowding was asked whether it was the type of decision that should, in the ordinary course of events, have been recorded. He responded that it was recorded. Mr Dowding was obviously referring to the fact that the decision was made public. He was deliberately not answering the question properly. Asked whether

it should be recorded formally in Cabinet records, he replied in the negative and said that to suggest otherwise was to misunderstand the process. Mr Dowding referred to earlier evidence he gave on the topic of Cabinet records that major economic decisions did not always go through a formal Cabinet process, but if they did:

"Um, you would often find a record of them, but Cabinet had had a number of processes. Firstly, our Government from 83, was not hidebound by the sort of formalities that we understood had existed previously, and Cabinet was an important opportunity for ministers to gather and formulate a view. Now, that view was sometimes an approval of what a minister was doing, and it was not uncommon for that view and approval not to be recorded. If it were the case that there was a Cabinet decision which would flow into action as opposed to the minister's decision which would flow into action, and if there'd been a Cabinet minute prepared, then I would have thought you'd have a record, but if there was no Cabinet minute you would normally have a discussion and an outcome and it would be known to all and the minister would then act on it.

Q But if there was a Cabinet decision to approve, to act, if you like, even without a minute, if it had been walked in as a matter of urgency, would you normally expect some record to have been made of that decision?

A Well, you - - you - - it could be - - Sorry to be pedantic, but it could be walked in as a matter of urgency without a Cabinet minute, or it could be walked in as a matter of urgency with a Cabinet minute.

Q My question was directed at without a Cabinet minute?

A Without a Cabinet minute it was not, in my experience, necessary that there should be always a Cabinet decision noted in the formal Cabinet records.

Q Would you regard that as satisfactory?

A In some cases, yes, and in other cases it may not be."

19.7.15 We disagree with Mr Dowding's view that it was unnecessary to record formally the Cabinet decision made on 3 October 1988. It was a decision to commit the State to the project and to a very large expenditure. It should have been recorded formally.

19.7.16 In some important respects Cabinet was misled and still not properly informed. Cabinet was misled as to arrangements with SECWA. It was not told of the risks associated with the support mechanisms. As with the July meeting, no explanation had been given as to the relationship between the determination of the purchase price and the size of the problem at Rothwells, nor had Cabinet been advised that the Government was enhancing the value of PICL, and improving its capacity to obtain finance, by the support mechanism and guarantees. Cabinet should have been advised of that situation. It was improper of Mr Dowding and Mr Parker to fail to do so. As in the Cabinet meeting of 28 July 1988, Mr Grill, being fully informed of the true situation, sat by passively allowing Cabinet to be misinformed. He was thereby implicated in the same impropriety.

19.8 Mr Dowding's understanding

19.8.1 In the context of the Cabinet meeting of 3 October, and against the background of our findings as to Mr Dowding's involvement in negotiations during July and his use of the whiteboard to discuss details, referred to in sections 18.4 and 18.8 of chapter 18, it is appropriate to refer again to Mr Dowding's professed understanding at about 3 October 1988. He said he understood the end result of the transaction would be that Rothwells would be whole, which meant to him "... that it would be a commercially sound organisation and it would have its liquidity issue adequately addressed". Prior to seeing the briefing notes he was unable to recall what figures had been provided as to the net cash that would flow to Rothwells after payment of debts but that was clearly explained in paragraph 24 of the briefing notes as being \$25 million. Surprisingly, but also before he had the briefing notes drawn to his attention, Mr Dowding said although he understood the Government's indemnity would be released, he did not believe he had an understanding that, to do so, \$150 million of the purchase price would be paid to the bank. He said he did not know what the state of the account was between Rothwells and the bank. We are unable to believe that evidence. We are satisfied Mr Dowding knew that Rothwells had fully utilised the \$150 million facility and required that amount to enable it to repay NAB and hence secure the discharge of the indemnity. Paragraph 24 of the briefing notes clearly explained the

disposition of the proceeds by Rothwells. Mr Dowding's professed lack of a full understanding is another example of his attempts to distance himself from the mechanics of the proposal.

19.8.2 Mr Norm Taylor was an adviser to Mr Dowding who worked closely with him. He said that, by 28 July 1988, he understood that Bond Corporation had acquired PICL and the Government would purchase its share from Bond Corporation. As a consequence of the entire transaction, he believed \$350 million would be paid to Mr Connell and \$50 million to Mr Dempster. He acknowledged an awareness that \$150 million would be paid to Rothwells to enable the discharge of the debt to NAB which in turn would secure the release of the Government from its indemnity. He also understood that debts of Rothwells to Bond Corporation would be repaid.

19.8.3 It is most unlikely that Mr Dowding was left in the dark while Mr Taylor reached an understanding of these matters. Mr Taylor acknowledged it was a characteristic of Mr Dowding's method of operation as Premier that, when he became interested in something, he would make himself very knowledgeable about the topic. We have no doubt that Mr Dowding was fully aware of all details and ramifications of the transaction and the methodology by which the transaction would provide assistance to Rothwells and result in payment to NAB and the release of the indemnity.

19.8.4 During his evidence concerning the Cabinet meeting, Mr Dowding was asked whether by that time he had an understanding that \$350 million was being paid to Mr Connell because that was the sum that was required to make Rothwells sound. He replied:

"No. It had the consequence of it and that was necessary before this project commitment could proceed."

19.8.5 Of course, it was one of the conditions laid down by Mr Dowding that the Government exposure had to be eliminated, but, as to whether he took a further step to the point of saying it was a condition that Rothwells had to be sound after settlement, Mr Dowding said he assumed that as part of the requirements.

19.8.6 For various reasons discussed earlier as to information given to Mr Dowding, and in view of the other matters we are about to mention, we do not accept Mr Dowding's evidence that he was not aware that \$350 million was being paid

to Mr Connell solely because it was believed that was the amount required to make Rothwells sound.

19.8.7 Paragraph 23 of the briefing notes made clear that \$350 million was to go to Mr Connell and \$50 million to Mr Dempster. Mr Dowding thought it was probably mentioned, but he was unable to recall any prior discussion about the disparity. He acknowledged it appeared a bit odd and was the subject of comment, but said that he was not interested in the relationship between Mr Connell and Mr Dempster and why the disparity existed. In our view the reason for that lack of interest is obvious, namely, a realisation that Mr Connell had to be paid \$350 million so that sufficient funds would be paid to Rothwells to cure the believed deficiency.

19.8.8 In the context of Mr Dowding's understanding of the need for \$350 million to be paid to Rothwells, it is appropriate to consider his evidence as to whether he ever discussed with Mr Parker or Mr Grill the possibility of a purchase at a lower price. At the outset of questioning on this topic he said:

"Well, I would take it that they put their minds to that from the beginning *if that were practicable in the overall scheme of things* [our emphasis] - but, you know, you're touching on a range of matters which may be irrelevant to the Commission but —".

19.8.9 Mr Dowding went on to say that one could not talk about the attitude of SECWA to the supply agreement as a static issue. There was what he described as a "huge mix" of issues and powerful reasons why he felt the Government should enter the petrochemical project. Asked then what he meant by his answer that he was sure it would have been considered if it were practicable in the overall scheme of things, he responded:

"If it were in order to retire the State's risks in other areas that 175 was more than was required, I would have expected them to have used that in the determination of the final arrangements."

Mr Dowding was then asked whether that was the nub of the problem, that Bond Corporation and the Government could not negotiate a lower figure because \$350 million was needed to solve the problem in Rothwells plus the \$50 million to pay Mr Dempster. He said:

"Well I can't say that. And I would have thought that the question of what the real position was, was carefully examined during July by those people who were required to make the final recommendations."

Mr Dowding did not accept that \$400 million was the required figure and said it was one of the roles of the people who were working on the issue to determine the required amount.

19.8.10 Mr Dowding's evidence in this regard was full of circularity designed to evade the obvious conclusion, accepted by other witnesses, that the possibility of negotiating at a lower price was never considered because it would not fix the problem in Rothwells. We have no doubt Mr Dowding was well aware of this position, but was not prepared to admit it during his evidence. His prevarication continued when asked whether it would be improper for a Government to start with a view that \$400 million was needed, together with a recognition that a valuation at that figure could not be achieved without a Government mechanism put in place, and then to measure the extent of that support by reference to the amount required. He initially responded by saying he did not think that was the approach taken and nor did it ever occur to him that it was. Asked again whether it would be improper to adopt such an approach, he said he did not know. As to why he had difficulty in answering whether it would be improper, he said he was asked to make a judgment without necessarily being in possession of all the facts. Mr Dowding was then asked whether such an approach would have been improper on the assumption of those essential facts. He responded:

"Well, you would have to add to that, for me to answer the question, the question of advice about the impact of the failure to reach that figure on two things. One is the viability of the project and, two, and most importantly, would be the financeability of the project, because it was futile -- it was a futile exercise to go into this at all if this project were not to be a real bankable project."

That statement, of course, was not an answer to the question.

19.8.11 Mr Dowding went on to say that it was not simply a question of saying this or that was improper but a question of balancing the interests of the State. He said "... you cannot divorce the solution to the dilemma from the way in which you solve

the dilemma". After further extensive questioning, Mr Dowding finally responded "... well I would say desirably you would not proceed down that path".

19.8.12 Mr Dowding was subsequently asked to comment should the suggestion be made that it was improper for the Government to approach the project on the basis that "350" was needed to rescue Rothwells plus "50" to pay out Mr Dempster, and hence enough Government support would be given to reach a valuation of \$400 million because the Government perceived it to be in the interests of the State to save Rothwells and believed that the project was viable. He responded that he would first ask the Commission to determine whether that was the position, as he did not believe it was, and that if the Commission found it was the facts of the case then:

"... The Commission would have to examine the issue of public interest in the light, not of what flowed from the 17th October, but in the light of what was believed to be the outcome of a decision such as you've described and I would say to you unequivocally that the task, the difficult task, of the Commission is to make that sort of assessment without the benefit, the most considerable benefit, of not only the information that this Commission has flowing to it, but the passage of three years in which Australians' attitude towards these issues has changed."

19.8.13 We have reached the clear conclusion that Mr Dowding's presentation in evidence before us was not the manner in which this issue was approached by him and others involved in 1988, particularly Mr Grill, Mr Parker and Mr Edwards. As indicated previously, we have no doubt that the figure of \$400 million was arrived at in the crucial meeting of late June or early July because it was believed that \$350 million was needed for Rothwells plus \$50 million to purchase Mr Dempster's interest. We are satisfied that Mr Dowding subsequently agreed in principle to that figure with full knowledge of how it had been determined. This approach also resulted in an agreement being reached, in principle, that sufficient support would be provided by the Government to enhance the value of PICL to the region of \$400 million and ensure access to finance. That agreement was reached with the full knowledge and concurrence of Mr Dowding, Mr Parker, Mr Grill and Mr Edwards. In our view those actions were motivated by a determination to avoid the collapse of Rothwells. That determination existed because such a collapse was perceived as electorally disastrous for the Government. No consideration was given to the interests of the public. The entire approach was grossly improper.

19.9 Presentation to the public

19.9.1 Following the decision of Cabinet of about 3 October 1988, the Government released a media statement on 6 October 1988 and Mr Dowding and Mr Parker participated in a news conference. The transcript of the news conference is incomplete, but it was not suggested that the omissions affected the answers to which we will refer. As we have pointed out, a number of important issues had not been resolved and, according to Mr Judge, Bond Corporation was not committed to undertake the project. Notwithstanding that lack of commitment, the Government proceeded with its announcement which could only exacerbate its already difficult bargaining position with Bond Corporation.

19.9.2 The media reports concerning the Government involvement in the project began in July 1988. We have already canvassed the media statements released by the Government following the decision of Cabinet on 28 July 1988. In addition our attention has been drawn to numerous media reports spanning July to October 1988 which include considerable speculation. We have read those reports, but it is appropriate to mention only those more pertinent to an assessment of how the issue was presented and the reaction of the media.

19.9.3 On 29 July 1988 a report appeared in *The Sydney Morning Herald* quoting the WA Government through a spokesman as having "... confirmed that the deal was in part a `ploy' by it to `bail out' Mr Connell from financial difficulties arising from his proposed purchase of a \$350 million parcel of loans ... from Rothwells". It was said that the purchase effectively underwrote Mr Connell's personal financial position by providing him with \$350 million in cash with which to pay Rothwells for the purchase of the loans. In addition there was a report in *The Australian* of 2 August that the Government agreed to participate only after an ultimatum by the NCSC threatened the collapse of the latest rescue of Rothwells. On 3 August, however, Mr Dowding was quoted in *The Australian* as denying a report that the Government's decision was linked to moves by the NCSC. The article also said that Mr Dowding indicated he did not agree with statements attributed to sources allegedly within the Government that the investment was triggered by concern about the viability of the Perth-based financier.

19.9.4 An article appeared in *The West Australian* on 29 July 1988 suggesting that the Government had stepped in because ownership problems which arose from a restructuring of PICL threatened to stop the project getting off the ground. *The Age*

reported on 29 July that Bond Corporation had earlier in the month advanced \$150 million to Dallegles secured against Mr Connell's share in the planned petrochemical plant. It went on to say that Mr Connell's purchase of the debts would allow Rothwells to negotiate the release of the indemnity and repay \$150 million to NAB. On 29 July 1988 *The Australian* reported that the change in ownership would enable the Government to retire the guarantee early and this was repeated in *The Weekend Australian* of 30-31 July 1988.

19.9.5 On 3 August 1988, Mr Parker was said to have admitted the previous day that the NCSC wanted a guarantee that Mr Connell had the funds to buy the Rothwells loan portfolio before it would allow the deal to proceed and such guarantee was given when Cabinet decided to buy into the project. It was said Mr Parker left little doubt he was philosophically opposed to the Government participating in such deals, but it was the price the Government had to pay to get the project up and running at the right time and to utilise the State's surplus gas supplies. Mr Parker was reported as saying the initiative for the Government to become involved had come from Mr Bond, that Mr Bond had done his private dealing with Mr Connell and the Government did not want to know what the nature of that was. It went on to say that, according to Mr Parker, Mr Bond indicated the dealing with Mr Connell would be such that two fundamental things would happen, namely, the Government would get out of the Rothwells guarantee and would go into the petrochemical project on the basis of the real value that the Government was able to assess. Mr Parker apparently said that if Mr Bond had invited the Government to get involved in the project without the opportunity of discharging the guarantee it would have declined.

19.9.6 On 4 August 1988, Mr Parker was reported in *The Financial Review* as confirming the reason for the Government wanting to withdraw its guarantee was concern that it could not have safely retired half of it in September 1988, as was proposed when it was put in place in October 1987. He was quoted as saying that he did not think there was any imminent danger of a collapse "... but certainly we would have been hard pressed to retire half of the guarantee without endangering Rothwells."

19.9.7 On 6 August 1988 an article in *The West Australian* stated that the key to the decision to become involved was the \$150 million guarantee and, the same day, Mr Parker was reported in another article as saying there was no suggestion that Rothwells was about to fall over. On 26 August 1988 an article appeared with the heading, "Parker rules out petro link", and it began with a statement that the State

Government had the previous day denied there was any link between its decision to buy into the Kwinana petrochemical project and its release from the Rothwells bank guarantee. Mr Parker was reported as having told Parliament that the Opposition's premise that they were linked was false. It is not for us to determine whether that statement was made to Parliament and, if so, whether it was a lie. The Commission has been prevented by the Parliament's claim to privilege from investigating that or any other statements that may have been made to Parliament.

19.9.8 Impressions would also have been conveyed when Mr Parker was interviewed on radio on 5 October, immediately following an interview with the acting Leader of the Opposition, Mr Richard Court. During that interview he made the point that the Government had never actually put \$150 million or any amount into Rothwells and said it was not likely to do so. He said:

"Now we expect that within the next weeks based on, not on this decision on the petrochemical project, but based on a decision that was actually taken at an extraordinary shareholders meeting of Rothwells, I think in July from memory, that one of the major shareholders of Rothwells, Mr Connell, will buy out of Rothwells some of their more difficult to recover debts to the tune of about \$350 million, that was the figure that was approved at the shareholders meeting, *nothing to do with the Government* [our emphasis] and that in turn will improve the liquidity position of Rothwells to such a degree that the repayment of the National Bank, which has in fact provided the funds based on our guarantee will enable the National Bank to retire our guarantee to Rothwells."

Mr Parker said he thought the words were accurate, but accepted that the impression given avoided the true link. It was misleading and improper to say the purchase of the debts had nothing to do with the Government.

19.9.9 Mr Judge said that on the morning of 6 October 1988, the day of the news conference, Mr Parker advised him there was to be a news conference at which the Government would announce its intention to proceed having received the valuation from First Boston. He said Mr Parker specifically asked whether it would be permissible to say that the Government was buying its interest from Bond Corporation because he did not wish to disclose that it was dealing with Mr Connell. Mr Judge replied that such a

statement was untrue and Mr Parker could not make it as he knew of the acquisition structure of which he had approved in relation to certain stamp duties issues. He pointed out there was paperwork which would contradict such a statement and advised Mr Parker that he felt it most unwise of him to make the statement. He claimed, however, that Mr Parker responded by indicating it did not really matter. Mr Judge was positive that Mr Parker was aware that Bond Corporation was not committed to proceed and he reminded Mr Parker there were outstanding issues yet to be resolved. He said he conveyed to Mr Parker that he should be cautious about the way he expressed Bond Corporation's position in relation to the project because there were outstanding issues yet to be resolved.

19.9.10 According to Mr Judge, after the news conference Mr Parker advised him it had been a success, and that the Government had indicated it was buying its interest from Bond Corporation and providing no profit to Bond Corporation. Mr Judge replied that Mr Parker knew the statement was untrue and they had spoken about this issue in the morning. As to his own reaction, Mr Judge said he was absolutely flabbergasted, but it was important that the Government had committed itself publicly, whereas Bond Corporation had not done so, and Bond Corporation would not proceed until certain conditions were met. In Mr Judge's view, commercially, the Government had put itself squarely in a hole.

19.9.11 Mr Parker said he tried as hard as he could to avoid dealing with Mr Judge and denied any conversation as described by Mr Judge. A conversation about a lie simply did not take place and he was absolutely certain that he did not speak to him on 6 October. He discussed the purpose of the news conference with Mr Beckwith and canvassed the basis on which the Government would be making the announcement but, as to whether it included saying it was buying the interest from Bond Corporation, Mr Parker said he did not have a clear recollection. He did not recall a subsequent discussion with Mr Beckwith, but remembered one in advance of the conference because, apart from anything else, it was a courtesy to advise Mr Beckwith that they were proceeding with the announcement of a project in which Bond Corporation was intimately involved. As to whether Mr Beckwith made any comment about the wisdom or otherwise of what they were proposing to say, Mr Parker said he did not have any specific recollection along the lines suggested by Mr Judge, but he did not rule out the possibility that Mr Beckwith might have suggested some modifications. Mr Parker said he did not get the impression at the time that Bond Corporation felt the Government

commitment had given Bond Corporation the upper hand, although he could see how it could be argued.

19.9.12 Extracts from Mr Beckwith's diary indicated that Mr Beckwith was overseas from 29 September to 9 October 1988, travelling extensively. It appears that on 4 October he travelled to New York and then on to London on 5 October. His diary suggests he was in London on Thursday 6 October. Records disclose that a telephone call was made from Mr Parker's home to the London number of an associate of Bond Corporation during the evening of 6 October, Western Australian time, that is, after the news conference. This evidence does not exclude the possibility that Mr Parker spoke with Mr Beckwith that morning but he did not do so from his home. A call from his office that morning would have been received in London in the very early hours.

19.9.13 The evidence does not enable the Commission to resolve the conflict between Mr Parker and Mr Judge.

19.9.14 Mr Dowding and others in Government had put themselves in a difficult position. They reasonably believed they could not afford to allow the message to get abroad that Rothwells had experienced continuing problems to the point where a large deficiency existed that required the Government and Bond Corporation to enter into the PICL transaction in order to generate sufficient funds to rectify that deficiency. Any hint of that position, it was believed, even if tempered with the knowledge that the Government had engaged in a second rescue of Rothwells, was likely to destroy what little remained of public confidence and result in a run that Rothwells could not have survived. It is also understandable that Mr Dowding and Mr Parker wanted to concentrate on the benefits to the State that they believed would flow from the petrochemical project.

19.9.15 It was incumbent, however, on those representing the Government not to mislead the public either directly or by implication. We find that the total impression conveyed by Mr Dowding and Mr Parker over the period July to October 1988 was misleading. The impression was conveyed that Rothwells, by its own efforts and restructuring, had managed to put itself into a position in which it could ensure the discharge of the indemnity provided by the Government to NAB. That impression was, of course, totally contrary to the true position.

19.9.16 The news conference of 6 October 1988 exacerbated the situation. While Mr Dowding made it clear that it was necessary to have the indemnity discharged before the Government would take on the liability associated with PICL, he did so on the basis that the Government did not want to have two exposures and failed to explain that, of the \$175 million capital paid for the interest in PICL, \$150 million was effectively earmarked for payment by Rothwells to NAB to repay the debt and enable the indemnity to be discharged. In response to a direct question as to where the \$175 million was going, namely, "who gets the money?", Mr Dowding responded that it would be paid to the Bond Corporation "... that have come to us with this project." Later in the interview this passage occurred:

"Reporter: Does the Government's decision to invest in PICL have any bearing at all on its Rothwells guarantee? Any bearing at all on its Rothwells guarantee?

Dowding: No. The simple answer to that question is that we're investing in the PICL project because the project is an important and a good project. We would not be interested in this if we had other exposures. We will not have other exposures and therefore we will not be worried about other matters. As far as we're concerned, this project stands on its own it's worth 175 million, we're paying 175 million and the benefits to the State will be, for example, even during construction, \$10 million a year.

Reporter: Premier, Government advisers were on the phone to senior reporters around town the night before the Government announced that it was going into the Kwinana project, saying that the Rothwells guarantee was about to be retired, now, it seems there is some coincidence of circumstance.

Dowding: There's no coincidence. We simply make it clear that we are not prepared to invest 175 million while we have other exposures, and it is essential from our point of view that no exposures exist.

Now you know that we have had an exposure at no cost to the community, an exposure which has not cost us one cent which is going to be retired.

Reporter: Is what you're saying mean then that you wouldn't be investing in the project if the Rothwells guarantee would not be retired?

Dowding: I am saying that it wouldn't matter what other exposures we had of that sort, we would not invest in this project."

19.9.17 Mr Dowding's negative answer when asked whether the decision had any bearing on the Rothwells guarantee was misleading and improper, as was his statement that there had been an exposure at no cost to the community.

19.9.18 Mr Dowding was asked whether it was appropriate to use the expression that the exposure had not cost one cent and was going to be retired. He responded that he did not know that it was correct to say anything other than that. He said he was not aware as at 6 October 1988 that the Government had lost any money and it was not his expectation at that time that it would. Asked whether it would not have been more accurate to acknowledge that \$150 million was earmarked for payment to the National Australia Bank so that the exposure could be retired, Mr Dowding said it would have been precise to have laid out in detail all the elements referred to, but he thought it would have been highly damaging for the interests of the community to do so. When it was suggested that he could have effectively indicated that \$150 million was earmarked in that manner without making reference to the hole in receivables or any other crisis in relation to Rothwells, Mr Dowding gave a lengthy answer in which he referred to the need to make a judgment in the course of a long news conference when the media were pressing for a new angle. He said he had to make a judgment as to what was consistent with his obligations of frankness and honesty while recognising these other pressures. He said he did not think he was particularly trying to avoid saying that in essence \$150 million had been earmarked in that fashion.

19.9.19 While there were good reasons not to refer to the crisis in Rothwells, we find Mr Dowding's explanation unconvincing. There would have been no difficulty in identifying that \$150 million was intended for the bank in order to repay the debt and retire the indemnity. That much could have been explained without making any

reference to a crisis within Rothwells. If that much was not to be explained, it was incumbent on Mr Dowding and Mr Parker not to mislead the public into believing that somehow Rothwells, by its own efforts, had managed to put itself in a position where it could discharge the debt and retire the indemnity.

19.9.20 Mr Dowding asserted that the link to Rothwells was clearly established in the sense that the circumstances of Rothwells gave rise to the Government's involvement in the project. In our view the link in that fashion had never been acknowledged and a contrary impression had been given. In the material brought to our attention, the truth was never disclosed, namely, that the Government had taken a decision to be involved in the PICL project because of the circumstances in Rothwells and that it might not have done so but for those circumstances.

19.9.21 Following the news conference of 6 October 1988, the *Daily News* reported that the Government's proposal would effectively provide a way for the State to extricate itself from a \$150 million guarantee to Rothwells. On 7 October, *The Australian* reported that previously the Premier had virtually admitted the link with the retirement of the guarantee by stating that the change in ownership of the project had been a factor in the restructuring of Rothwells which would result in the early retirement of the guarantee. *The West Australian* of 7 October carried a number of articles including one under the heading: "\$175 million the price of ending Rothwells guarantee". In that article it was said that the \$175 million investment was the culmination of a year long effort by the Government to extricate itself from the guarantee and that the net effect of the deal was to enable the State Government to convert the \$150 million contingent liability into "... an apparently healthy bricks and mortar investment". Another article described it as a second rescue for Mr Connell, observing exactly how much Mr Connell would receive for his 50% stake was uncertain but, adding, that it was understood the payment could be as much as \$350 million. It was said that whatever amount was paid, Mr Connell would use the proceeds to purchase the \$350 million portfolio of debts from Rothwells.

19.9.22 Returning to the news conference of 6 October 1988, a statement was made by Mr Parker, in the presence of Mr Dowding and by implication adopted by him, that was incomplete and thereby quite misleading. A reporter asked "What was the basis of the valuation?", to which Mr Dowding responded: "Well, all of the aspects of the project that are in place". Mr Parker went on to expand and mentioned buying a project "which has been brought to a certain stage and which has certain inherent strengths in it", referring to matters such as contracts and approvals. He then discussed

the method of taking the figures, working out future profitability from the figures and arriving at a "current net present value". He then said "Now that's the basis of the valuation".

19.9.23 Mr Parker said he felt unable to mention the Government support mechanism as a factor in the basis of the valuation and, while not accepting that the answer was inaccurate, he acknowledged it was incomplete. Mr Dowding, however, would not accept that the answer was incomplete. He felt difficulty in mentioning the support arrangements because he understood they should not be discussed until banking arrangements were in place. If any mention of them had occurred, he said to then respond by declining to discuss them would have resulted in those matters being the major focus of attention which was, in his view, undesirable on that occasion.

19.9.24 We are satisfied it was well known to both Mr Dowding and Mr Parker that the special support mechanisms put in place by the Government linking the cost of supply to commodity prices affected cash flows and was a crucial factor in First Boston's valuation. They also knew that, without such support, the project could not obtain finance. To omit reference to that support in an answer which purported to set forth the basis of the valuation was misleading. Further, we find that the omission of any reference to the support mechanisms was quite deliberate and done, not as suggested by Mr Dowding for reasons associated with sensitivities of bankers and obtaining finance, but because they were aware that the issue of Government support was likely to occasion political embarrassment.

19.9.25 As to the fact that the proceeds from the sale of PICL enabled Rothwells to pay NAB and therefore to have the indemnity released, Mr Dowding said he thought that was already publicly known. He drew a distinction between July and October as to whether such a statement should be made. He said that, between July and October, there was publicity about the issue and no secret of it. If he had been asked directly in July he would have responded in the affirmative, but not so in October because he would not want to give the media "... a 20 second grab" in a way in which they could overlay the whole announcement by reference to that issue. He took this position on advice, presumably from his media advisers, and said it was his responsibility to give the project the best chance to get up and running and shed off the association with Rothwells.

19.9.26 During the course of his evidence on this topic, Mr Dowding said he had invited the editor-in-chief of *The West Australian*, Mr Bob Cronin, to his office where he used the whiteboard "... to show what had happened to the money and how it had moved at about that time". Initially he placed the meeting at about 28 July 1988, but then indicated it was some time after the release in July. Later in his answers he thought it was after October because they discussed the level of internal support mechanisms. Mr Dowding said he had a distinct recollection of a discussion about the cost and a whole range of issues. He claimed he had told Mr Cronin there had been a large problem in Rothwells and this first step had to be taken to cure that problem. He did not remember precise figures, but, in general terms, he said they had a frank discussion about the matter during which he explained that part of the proceeds went to Rothwells enabling it to repay NAB and hence release the indemnity. Without being able to remember the detail, he said he thought they talked about the concept of internal support mechanisms.

19.9.27 Mr Cronin was provided with a copy of Mr Dowding's evidence. With the assistance of his files, he was able to place the meeting as probably in August 1989. He said there was a front page story in *The West Australian* that Mr Dowding had misled the public over whether there was a guarantee and he was aware that the reporter had faxed the story to the Government before it appeared and asked if it wanted to comment. He understood the reporter spent more than an hour on the phone arguing with the Premier about whether the story was right or wrong and they printed the story with a side reference reporting that the Premier had said the story was wrong. He recalled that a day or two after the article appeared, the Premier asked for the meeting and he attended with a couple of other senior people from *The West Australian*. During the meeting, Mr Dowding said that the reporter seemed incapable of understanding the complexity of the matter and that he wanted to explain it. Mr Dowding used the whiteboard, without the assistance of notes, to illustrate that there had not been a guarantee. Mr Cronin distinctly recalled saying to Mr Dowding, at the end of the presentation, "... well it looks like a guarantee to me". He said Mr Dowding responded that they were simply incapable of understanding anything and regarded them as a lost cause. During the discussion Mr Dowding used a number of graphs. Mr Cronin was unsure whether figures were discussed, but he recalled the information that if production reached certain levels, and if world prices were at certain levels, then a particular outcome would ensue. Mr Dowding argued that even in the worst case scenario there would be no requirement for the Government to top up any losses. It was explained that if there was a loss in any particular year it would be recovered from profits in other

years and hence there was really no risk. It was put rather as a matter of giving comfort to potential backers of the project than a guarantee. As to the nature of the comfort or support given, Mr Dowding said the Government would be required to top up any shortfall in the cash flow but that was most unlikely to happen on all of the projections. Mr Cronin described the discussion as a semantic argument about what amounted to a guarantee and the paper was saying that the Government had guaranteed the project and the Premier was saying it was not really a guarantee because it would not come into force.

19.9.28 Mr Cronin had also spoken with Mr Dowding on previous occasions dating back to about April 1988. He said they developed quite a friendly relationship to the point where Mr Dowding would occasionally invite him to lunch in the Capita Centre, generally with other people. Mr Norm Taylor would invariably be present. Without being able to pinpoint actual dates, he believed PICL was discussed on a number of occasions about late 1988, after the October 6 news conference. Mr Dowding generally took the line that it was a good project and was not assisted by *The West Australian* "bagging" it. Mr Cronin said he pointed out that the paper did not have any problems with the project, but was very sceptical about the way the whole thing had been arranged and the amount of money that had been paid for it, "... which we always believed was largely money for blue sky". Mr Dowding had responded that the Government was in a situation where it could either invest the money in PICL and obtain for the State something of value or it would lose the \$150 million cold. While Mr Dowding had not mentioned a major problem within Rothwells that had required the PICL project and the finances to cure it, Mr Cronin said it was always his understanding from the beginning when the Government first announced its involvement in July 1988 that the project was Rothwells linked. He said he thought the Premier had said the deal would enable the Government to retire the guarantee, although it was not quite clear at that stage exactly how that end would be achieved. Mr Cronin observed that the project was linked with Rothwells from the beginning, but it seemed to him that later there were occasions when the Government tried to say it was not linked with Rothwells. Mr Dowding always appeared confident in what he was asserting and it did not ever cross his mind that Mr Dowding did not know what he was talking about.

19.9.29 Mr Cronin made a further observation that, although Mr Dowding had said in July that one of the advantages of the deal was that it would enable the Government to retire the guarantee, when *The West Australian* pursued the method of retirement and any further involvement or detail, "... it took a long time to get it out".

As to what he meant, he said it was reported soon after July that the NCSC was holding up the purchase of the loan book by Mr Connell. It was speculated that the PICL deal enabled the money to go around, but he did not think it was ever conceded at that stage by the Government. Mr Cronin recalled that the actual details of how the guarantee was to be retired and where all the money was going continued to be a matter of discussion for some time. He was unable to assist as to when it seemed to be finally resolved.

19.9.30 Counsel for Mr Dowding cross-examined Mr Cronin, but did not suggest that his evidence was incorrect. Mr Cronin was an impressive witness and we have no hesitation in accepting his evidence as reliable. Mr Dowding did not, as he claimed, set out to demonstrate what happened to the money, rather, he attempted unsuccessfully to convince Mr Cronin and his colleagues that there was no guarantee by the Government. We are satisfied the meeting took place in about August 1989, some nine or ten months after the October 1988 news conference on 6 October 1988.

19.9.31 The issue of how to present this matter to the public was the subject of dissension among Government ranks. According to Mr Parker, he and Mr Dowding had different views. Mr Parker said he wanted to present it as a debt for equity conversion, but Mr Dowding disagreed. He said Mr Dowding was responsible for the presentation and made it clear that it was not to be done on the basis of a debt for equity conversion. Mr Dowding's view prevailed. Mr Parker said that in October he was under constraint, namely, the very strongly held view of Mr Dowding that the whole thing had to be presented as a project in its own right, unrelated to Rothwells except by Rothwells being a catalyst with minimal revelations about the circumstances surrounding it. He said that approach included playing down or minimising both the fact of the Government support and the extent of it. Although Mr Parker thought they should not reveal detailed terms, it was his view that they should reveal the existence of some Government support in terms of credit enhancement mechanisms, but Mr Dowding did not agree. It was Mr Dowding's view it would be very difficult for people to understand and, if given general terms, they would seek details which would be difficult to resist and disadvantageous to the project. Mr Parker said that, because of these differences and the fact that Mr Dowding's view prevailed, he felt difficulty in answering some of the questions on 6 October 1988. Subsequently he was advised of criticism by the Premier's media advisers for being too frank when he came very close to using words like debt for equity conversion and he understood Mr Dowding agreed with the criticism. Mr Grill recalled being aware that some of Mr Dowding's staff thought Mr Parker had gone too far.

19.9.32 Mr Dowding accepted that Mr Parker made known his view about the manner of presentation. He said there were a number of discussions and a number of different views presented at different times, but he did not think it was correct to say that there was a difference between them to the point where at some time Mr Parker was overruled. Mr Dowding believed that eventually they were in agreement as to the presentation. Subsequently, he became aware of differences between them about how to describe the support mechanism prior to settlement.

19.9.33 Mr Edwards later became aware of differences between Mr Parker and Mr Dowding. Mr Taylor did not recall any nor did he have any recollection of criticising the Deputy Premier over his comments. In addition, he observed that it was not his practice to criticise the Deputy Premier. He recalled some discussion on one occasion, not about the substance but about Mr Parker's style and the view that he was a "pretty competent media operator" and "a very persuasive advocate for the Government in these matters". He was not aware of any criticism by members of the Premier's media staff.

19.9.34 Generally we found Mr Dowding's evidence in this respect unconvincing. We accept the evidence of Mr Parker about the difference and the fact that he was working under the constraint of Mr Dowding's very strongly held view.

19.10 Mr Grill's view

19.10.1 Mr Grill readily admitted the Government presentation was less than ideal and said he did not agree with the obfuscation engaged in by the Premier. He referred to the need to justify the debt for equity swap as based on the "camouflage" of the fact that the Government was losing \$150 million in Rothwells. If the Government was not to be seen as simply writing off its \$150 million, the only alternative was for Bond Corporation and the Government to put together a deal using PICL and he said:

"... I think that there was a reluctance by the Government to admit, especially to the Opposition, that they had actually lost the money in Rothwells."

He suggested, however, that although political considerations were always present for politicians in this particular instance they were not the most important factor.

19.10.2 Mr Grill's view was obviously influenced by his perception that the Government paid, at the most, \$25 million for PICL. He held that view because the

balance of \$150 million ultimately went to discharge the indemnity. Initially, Mr Grill emphatically suggested that the Commission or counsel assisting the Commission was responsible for a very large part of a misconception that the Government paid \$175 million for its interests in PICL. He said: "... you have been presenting the impression ad nauseam to this Commission that the Government paid \$175 million and that is quite incorrect". That attack was totally unjustified and contrived. From the outset it was the Premier and Ministers of Government who said the Government was paying \$175 million and, as eventually accepted by Mr Grill, legally the Government had paid that amount. Until Mr Grill made the statement in evidence to the Commission that in reality the Government only paid \$25 million, no one had ever made that suggestion.

19.10.3 In referring to the fact that the Government portrayed the purchase price as \$175 million, Mr Grill said that presentation was unfortunate. In his view it was a mistake that should never have happened. He described it as "totally misleading". He said it was misleading in the sense that the public gained the impression that the Government had been party to a transaction whereby \$400 million had been paid for the PICL project whereas, in truth, the Government had paid \$25 million for its share and Bond Corporation had probably paid \$35 million or \$40 million. He went on to say he thought that it was unintentionally misleading.

19.10.4 Mr Grill's view of the reality of the matter carried with it the implication that the Government effectively wrote off \$150 million because, in the way in which the transaction was documented, the funds were paid in consideration of the transfer of a share in PICL. The Government did not have any recourse against Rothwells in respect of the \$150 million that had made its way to Rothwells and then to NAB. In acknowledging that such a consequence flowed from his view of the matter, Mr Grill said that, in any event, that sum of \$150 million was probably lost. As to the suggestion that the Government had hoped originally that Rothwells would remain viable, carry on and eventually pay off its debt to the bank which would enable the Government to be released from its indemnity, Mr Grill acknowledged that position but said in the short and medium term he thought the Government had accepted the fact that the money had been lost. He went on to say that in the long-term the money would be recovered, but not quickly.

19.10.5 In his view of the matter, Mr Grill acknowledged the accuracy of the following proposition:

"So what the Government did not do in its presentation to the public was put up its hands and say 'Look, this 150 million was effectively lost so we've decided to clear the book. We've paid Rothwells who've paid out the National Australia Bank. We're released from our indemnity. We've written off the 150 and to get on with our business we have paid 25 million for an interest in the PICL project.' That's what the Government didn't do and you say perhaps it should have?"

19.10.6 As indicated earlier, Mr Grill had not presented this view to anybody prior to giving evidence before the Commission. At best he expressed the view to Mr Dowding that the transaction should be presented as openly as the Government possibly could. However, he said that after the public announcement he had lunch with Mr Don Smith, the editor of the *Sunday Times*, and laid out the deal in the same direct manner in which he had presented it to the Commission. As to why he had not expressed a similar view to Mr Dowding, Mr Grill said Mr Dowding or the Premier's staff had obviously decided the manner in which it was to be presented.

19.10.7 Mr Grill also said that he spoke to journalists John McGlue and Stephen Loxley of *The West Australian* and made clear that, in reality, the Government had only paid \$25 million for PICL because it had paid off the Rothwells' debt to the National Australia Bank. If Mr Grill made this clear to Mr Smith and the journalists from *The West Australian*, it is remarkable that none of the press reports to which we have had our attention drawn have expressed the transaction in those plain terms. Mr Grill acknowledged that no one had ever written in the media that the true purchase price was \$25 million.

19.10.8 Clearly Mr Grill did not, as he initially claimed, express the matter to those persons in the manner in which he presented it before this Commission. When confronted with the suggestion that Mr Smith had told the Commission he did not recall any reference to the true cost of the transaction being only \$25 million, Mr Grill retracted from his original position and said he spelt out the price that was being paid and the fact that the indemnity was being discharged. He claimed that whether he mentioned the \$25 million or not, a clear conclusion must have been that the true price was \$25 million. He ultimately said that he might not have mentioned the \$25 million.

19.10.9 Mr Grill was then faced with the proposition that Mr McGlue had given information to the Commission that Mr Grill did not express the price for PICL as \$25 million and, again, he retracted, saying he might not have put it in those words but Mr McGlue was well aware of the discharge of the indemnity and thus it was really a situation "when night follows day". Finally, when confronted with the suggestion that Mr Loxley also said the deal was never made clear in those terms, Mr Grill again acknowledged that perhaps he did not present it exactly in such terms, but believed some of Mr Loxley's articles indicated Mr Loxley understood the direct connection.

19.10.10 We should also refer to evidence given by Mr Grill during the inquiry by Mr McCusker. He acknowledged that the questions and answers were predicated on the basis that the total price was \$400 million and the Government's share was \$175 million. As to why he did not take the opportunity to explode what he viewed as a myth that had been propagated for so long, Mr Grill said in answering the questions that were being put to him by Mr McCusker his mind was not focused on it as such an opportunity. As to the suggestion that the effect of his evidence was to perpetuate the myth, he said:

"I suppose it could be said that for quite some time I have been guilty of that particular misdemeanour if that's the way you are putting it. I have never publicly put out a statement indicating those matters."

19.10.11 Far from not having publicly put out a statement indicating those matters, however, Mr Grill presented a contrary perspective in a letter to the editor of the *Kalgoorlie Miner* which appeared in the edition of 23 November 1988. In response to a previous letter, from a Miss Wilkinson, claiming that the potential loss was \$400 million, Mr Grill wrote that such a claim was nonsense because it included "... a total loss of all the Government's \$150 million guarantee, a claim that has not even been made by Miss Wilkinson's Leader, Mr MacKinnon [then the leader of the State Opposition]". This letter had not been brought to Mr Grill's attention when he gave evidence that in reality the Government had lost its \$150 million and was paying only \$25 million for PICL. Mr Grill had little option but to agree that, if his evidence before the Commission was correct, his public denial of losing \$150 million was misleading. When asked why he was prepared publicly to make a misleading statement, Mr Grill said he could only presume that the letter was put together by the Premier's Department and he went along with it. Pressed as to whether it was a responsible action to "go along with it", he said it was very hard to break with the line set by the Premier and, for that reason he did not take the opportunity in the *Kalgoorlie Miner* to set the record straight. We find his explanation in this regard unsatisfactory and unconvincing.

19.10.12 If, in 1988, Mr Grill genuinely held the views he now expresses and believed that the Government should publicly state the position as he perceived it, we have no doubt that he would have expressed those views to Mr Dowding or others well before appearing as a witness in this Commission. He had an ideal opportunity to correct the position before Mr McCusker and, if he genuinely believed the views he now puts forward, we do not accept he would have overlooked doing so. In addition we find Mr Grill's rapid change of position with respect to his conversations with the journalists revealing. His current version is contradicted by his own letter to the *Kalgoorlie Miner*.

19.10.13 As previously stated, in our view the figure of \$400 million was arrived at because \$350 million was needed to inject into Rothwells via Mr Connell and \$50 million was required to purchase Mr Dempster's interest. We do not believe that it was an accident or a coincidence that the split between Bond Corporation and the Government resulted in the Government paying \$25 million and Bond Corporation about \$50 million more than their then current exposures to Rothwells. The calculation was obviously related to their respective direct exposures and was designed to ensure that Bond Corporation paid a larger net figure than the Government. In that context, the underlying rationale of the arrangement was obviously that \$150 million of the Government's contribution of \$175 million was earmarked for payment to NAB in order to discharge the indemnity. The rationale for arriving at the respective contributions of Bond Corporation and the Government was no doubt apparent to Mr Dowding, Mr Parker and Mr Grill who were all closely involved with the matter. Notwithstanding

the absence of a specific explanation to this effect, it is difficult to see how others in Cabinet could not have appreciated that situation. In pursuing the objectives, we have no doubt that Mr Dowding was prepared to mislead the public and did so in the manner previously described. To admit a loss of \$150 million would have been politically disastrous. By complying with the line taken by the Premier, Mr Parker and Mr Grill were party to that improper conduct. It is a striking demonstration of what Mr Edwards called "illusion" and Mr Parker meant when he spoke of Government being built on "concealment". It was a major exercise in deception and was improper.

19.10.14 On 6 October 1988, Mr Edwards resigned as a Director of WAGH and SGIC released its own media statement confirming it had taken up a \$175 million debenture issue by WAGH in what was described as a rearrangement of the Government fixed interest securities investment portfolio.

19.11 October 1988 - advance of \$4.5 million by R & I Bank to Rothwells

19.11.1 On 6 October 1988 Mr Lloyd, as Rothwells' Managing Director, wrote to NAB indicating that, as discussed, it was expected that settlement of the sale of a portfolio of loans would occur shortly and that on settlement Rothwells wanted to retire the current \$150 million Bill Acceptance facility. Despite that optimistic forecast, Rothwells continued to experience difficulties. On about 10 October 1988, Mr Lloyd requested an advance of \$4.5 million from the R & I Bank. Mr Bill Phillips, Deputy Group General Manager of the Bank, asked Mr Colin Lynn to speak with Mr Lloyd. He did so and his notes recorded the conversation. Mr Lloyd was seeking an advance of \$4.5 million for approximately one week pending the PICL settlement which he advised was due to occur any day. Security was offered by way of Paragon shares and commercial bills and, when speaking to Mr Lynn on 10 October, Mr Lloyd said he would like to issue a cheque to NAB that day in order to avoid their account being overdrawn. Mr Lynn noted that he did not particularly like the prospect, but commented that "... I guess we need to do [it] to get Rothwells through [the] current series of transactions". Mr Prokojes prepared the formal submission to the Lending Committee on 11 October 1988 and referred to the history concerning the existing temporary facility for \$3 million granted in September 1988 which we have already discussed in paragraph 19.5.15 of this chapter. He commented, "... in view of the source of the request (Government - Mr Parker) and urgency of the matter additional temporary overdraft of \$4.5 million was approved by the Board and this submission is for confirmation of the approval". Mr Prokojes was unable to recall who gave him that information, but said it had to have come from someone close to him in the bank working either in the corporate lending area or from executive level.

19.11.2 Mr Parker said he was advised that the R & I Bank had been asked to provide some sort of facility to Rothwells and confirmation was sought from him of the veracity of what was put to the bank in terms of the Dalleagles transaction. The bank wanted to know how quickly the transaction would be settled and he advised it would

be going ahead very soon. He was quite confident that it was not put in terms that the request emanated from him.

19.11.3 Mr Phillips was unable to recall speaking with Mr Lloyd prior to asking Mr Lynn to work on the matter, but accepted that he might have done so. He said during a meeting to consider the request, a female person from Mr Parker's office telephoned "... and gave some indication that they'd like to see the loan approved". He did not know the identity of that person. He went on to say that it probably would have been said that Mr Parker was interested in the outcome and inquiry was made as to how the matter was progressing and whether the loan had been approved. He said he certainly had the feeling that Mr Parker would like to see it approved. Mr Phillips admitted that his recollection was very, very vague and said it was really based on the fact that the meeting moved to a further approval stage that probably would not have occurred without the telephone call. He said they were not particularly keen to approve the loan and, until the telephone call, he thought it would have been declined. He accepted it was possible he was informed only that the Minister was interested in the outcome of the application and wanted to know how it was going. This might have led him to infer that the Minister wanted the loan approved.

19.11.4 Mr Andrew Gordon, a director and Group General Manager of the bank who was at the meeting, said Mr Phillips left the meeting to take the call and returned saying, in substance, that Mr Parker had asked the bank to see if it could approve the loan. Prior to the call, a decision had not been made but he thought the tendency was that they did not want to approve it, but, on the other hand, they had to look after the bank's interests. After Mr Phillips returned, the matter was discussed and it was decided to grant the loan. The call was enough to tip the scales, which until then had been finely balanced.

19.11.5 After the meeting had approved the request, Mr Gordon was in the office of the Chairman, Mr David Fischer, who was absent overseas. Mr Gordon received a telephone call from Mr Parker. He said Mr Parker had called to find out what had been decided and he indicated the bank had approved the request. He then said to Mr Parker that it was a fairly unsatisfactory way to deal with the bank for him or somebody to ring up and make the request at such a late hour. Mr Gordon said he conveyed that he was fairly unhappy about the way the request had been made. He did not believe he was aggressive but accepted that he was forthright and Mr Parker just listened. He could not recall any rebuttal or any explanation from Mr Parker. Mr Phillips was able to hear Mr Gordon's end of the conversation and he recalled Mr Gordon advising Mr Parker of the approval and being forthright to the point of aggression in conveying his displeasure that Mr Parker had sought approval from the bank with so little information and so little time. He said Mr Gordon was unhappy that Mr Parker's office had telephoned and put pressure on the bank to approve the request.

19.11.6 The approval was quickly followed by a withdrawal of facilities. On 12 October 1988 Mr Prokojes wrote to the directors of Rothwells, for the attention of Mr Lloyd, referring to the temporary overdraft facilities of \$3 million and \$4.5 million

which were due for clearance by 14 October 1988 from the proceeds of the settlement of the \$350 million sale to Dalleagles. The letter formally advised Rothwells that the existing facilities were no longer operative and were withdrawn immediately, and that the bank required clearance of all facilities from the settlement of the Dalleagles transaction on 14 October. The total involved was \$7,524,397. The letter also advised that, as the Commercial Bills issued would not mature until 2 December 1988, cash cover of \$10 million was to be lodged to meet the payment when it fell due.

19.11.7 Mr Lloyd met with Mr Alan Renton of the R & I Bank on 13 October 1988. He advised Mr Renton that Rothwells could not provide cover for the \$10 million bill facility and it was not in a position to settle the temporary exposures. Mr Renton recorded, in a file note of the discussion, that it had become quite apparent the margin previously available within the PICL settlement had been eroded. He noted that, in essence, in order to provide each party with its agreed payment, there was no money left to repay the R & I. He recommended the bank, through the highest officer available, contact the Government through Mr Parker and advise of the bank's position in the matter.

19.11.8 Mr Fischer returned within a day or so of the approval and said he was advised by Mr Gordon that the bank had received an approach from Mr Parker's office seeking the bank's approval to the request for the temporary advance. He further understood, from speaking with Mr Gordon, that the bank's unhappiness at being pressured into making such a decision was conveyed to Mr Parker in a subsequent telephone conversation. Mr Fischer was advised by another officer of the bank that it appeared the facility would not be repaid from the proceeds of the PICL settlement. It appears likely that this advice came from Mr Renton's file note of 13 October 1988. Mr Fischer said he telephoned Mr Parker. He told Mr Parker he understood Mr Parker had contacted the bank and influenced the bank into making a loan which was to be repaid from the proceeds of the PICL settlement and they were now told this was not going to happen. He said to Mr Parker that he was extremely angry and asked what Mr Parker was going to do about it. Mr Parker responded that he thought it was up to the bank to resolve the problem to which Mr Fischer retorted "well I don't think so". It was then that Mr Parker said that he was thinking about seeking a prepayment by SECWA for coal from Western Collieries and Mr Fischer drew the conclusion that at least part of the proceeds would come to the bank in repayment of the \$4.5 million loan.

19.11.9 In our view, if the original contact between Mr Parker and the R & I had been limited in the manner described by Mr Parker, it is most unlikely that Mr Parker would have telephoned a second time to inquire of the result of the application. We see no reason to doubt the reliability of the evidence given by Mr Phillips, Mr Gordon and Mr Fischer, and we are satisfied that Mr Parker had someone from his office ring the bank to convey not only his interest, but his wish that the application be approved and that he subsequently telephoned for confirmation of that approval. In our view it was inappropriate for Mr Parker to interfere in this fashion and it further serves to demonstrate the importance that the Government placed on the survival of Rothwells.

19.11.10 On 17 October 1988 the bank relented and new arrangements were approved. In the meantime, on 11 October 1988 NAB wrote to the Premier agreeing to the request that, in consideration of the payment of \$150 million, the indemnity be discharged. This was specified to be on the basis that the entire amount was retained by the bank and not avoided by any statutory provision or otherwise and that, should any part of the payment be avoided, it would, to that extent, be deemed not to have been made. On the same day Mr Heron, as Chairman of WAGH, wrote to Mr Dowding indicating that it was the opinion of Mr Brian Saunders, from the Crown Law Department, and Mr Wiese, that the letter from NAB should not be accepted. The letter suggested the Government should adopt the attitude that as the debt which was the subject of the indemnity had been paid, the indemnity was no longer required. Mr Dowding noted his agreement with that advice on 11 October 1988.

19.12 The Arthur Young report and preference problems

19.12.1 As discussed in paragraph 19.7.1 of this chapter, according to the evidence of Mr Judge it was his concern about preference payments that led to the decision to retain Arthur Young to review the position in Rothwells as it was estimated to be after the PICL settlement. The draft report from Arthur Young was dated 7 October 1988, but it appears likely it was not provided to Bond Corporation until 11 or 12 October 1988. The letter accompanying the report indicated that a review had been conducted of the pro-forma unaudited balance sheet of Rothwells as at 9 September 1988. The letter advised that specific inquiries had been made into receivables and investments, both short and long-term, and the carrying value of those items and off-balance sheet items which could affect Bond Corporation's consideration of the financial position of the company. The letter noted that, during the course of the review, Arthur Young was requested, and found it necessary, to increase the scope of the terms of the engagement to review specific balance sheet items and the projected cash flow forecast prepared by Rothwells. In its disclaimer Arthur Young said the report was based on a review of the balance sheet as at 9 September and additional financial data supplied by officers of Rothwells, and that no audit had been carried out of the accounting records of Rothwells, the balance sheet or information supplied. Accordingly, Arthur Young expressed no opinion on whether a true and fair view of the state of affairs was presented.

19.12.2 The report did not provide the comfort hoped. The calculation of the estimated net tangible asset backing resulted in an estimated net worth of \$77.3 million, but assumed that the sale of Western Collieries shares would achieve a book value of \$105 million. In addition no allowance was made for the claim of \$100 million instituted against Tryart and the counterclaim against Rothwells by Tryart for \$160 million. It was noted that it was very difficult to make an accurate independent assessment of the bad and doubtful receivables due to limited data on file and the lack of continuous detailed transaction knowledge. Arthur Young had reviewed 64% of the outstanding loans and believed an additional allowance should be made in that regard. It was pointed out that a review of loans and advances for the period 31 July to 30 September 1988 indicated there had been almost no reduction in the balance outstanding

during that period and, in particular, the large loans listed on the schedule had not been reduced. Further, a review of the individual files of the debtors indicated that recovery and subsequent cash collections could be a long drawn-out process as it involved the realisation of assets in accordance with the security held. In view of this, the report said that, while Rothwells had prepared its budgeted collection programme in a logical and orderly manner, Arthur Young was of the opinion that the collections and timing of those collections were not capable of being reasonably confirmed at that time.

19.12.3 In a memorandum of 12 October 1988 to Mr Oates, Mr Judge described the results of the review by Arthur Young as "... not terribly attractive". He said it appeared that the net worth of Rothwells was in the order of \$70 million, provided that full recovery was made of the Tryart debt, and the biggest problem appeared to be the ongoing liquidity as evidenced over the previous few days. Mr Judge said in evidence that he had a "gut feeling" that an additional \$75-\$100 million would be needed fairly soon and over the ensuing six months to meet ongoing liquidity problems. He expressed the same view in the memorandum. In evidence he said he was not at all confident in the assumptions made by Rothwells' staff as to likely future income. In the memorandum he indicated that he had been unable to obtain any assurance from anybody as to where the money would be found and that, unfortunately, he was somewhat cynical about sources that Rothwells management believed they possessed. In this context we note the evidence of Mr Judge that on about 7 October, or during that week, while he and Mr Edwards were discussing preference issues and Rothwells' financial position, Mr Edwards conveyed in emphatic language that the Government would not let Rothwells fall over, having done this particular deal.

19.12.4 Mr Judge said that on 12 October 1988 he provided a copy of the Arthur Young report to Mr Parker at the request of Mr Beckwith while Mr Parker was in Mr Beckwith's office. He said Mr Beckwith indicated in the presence of Mr Parker that, as a result of his discussions with Mr Parker, he was satisfied the Government would continue to support Rothwells. Mr Parker agreed he was shown a copy of the report in Mr Beckwith's office, but said he was not able to keep it or make a copy. He said he was told by Mr Edwards and Mr Beckwith of the Arthur Young view that, after the transactions, Rothwells would have a net worth in the short term of somewhere between \$40 million and \$70 million or \$40 million and \$80 million, depending on various matters, and in the long term trading environment potentially well in excess of \$100 million. He understood recovery of the Tryart fee would have resulted in a figure in excess of that amount and he disagreed with the suggestion that Rothwells was worth about \$40 million assuming recovery of at least a percentage of the Tryart fee and it might come back to \$10 million if none of the fee was paid. Mr Parker said Mr Beckwith made clear his views that he felt there was a net worth but also continuing liquidity problems in the order of \$75 million. Mr Anderson's \$50 million was included in that figure of \$75 million. Mr Beckwith was insistent that the Anderson deposit be tied down and indicated Bond Corporation recognised that any short term liquidity assistance required was the responsibility of Bond Corporation provided the Government continued to assist with the realisation of assets in Rothwells. While

Mr Parker had possession of the Arthur Young report, Mr Beckwith ran through it with him.

19.12.5 Mr Edwards said he met representatives from Arthur Young in the Rothwells offices, together with Mr Lloyd and possibly Mr Judge, about two or two and a half weeks before the 17 October settlement. He said they were given a verbal outline of where Arthur Young thought it was finishing up. The outline indicated that, discounting the Tryart fee and allowing for carrying forward of tax credits, it could be said that after settlement Rothwells would have a positive net worth which Mr Edwards understood was "pretty line ball" of \$10 million or so. He said there was not much to spare even allowing for recovery of about \$30 million or \$40 million of the Tryart fee. He thought this meeting was early in the week. The matter was finalised by the weekend with the final advice being qualified in various ways. Mr Edwards said he, Mr Lloyd and Mr Judge were very concerned about the matter. It seemed pointless to finalise PICL without ensuring that Rothwells continued because all payments would be regarded as preferences if Rothwells failed. Mr Edwards had a diary entry for 5 October which referred to Mr Parker, Mr Dowding, Mr David Gladwell (a media officer assisting Mr Parker) and Mr Heron. He thought this was an occasion when there would have been a briefing on the whole situation and the views of Arthur Young.

19.12.6 Mr Lloyd prepared some notes in about November or December 1988 following legal advice that the directors should prepare notes of recent events for their own purposes because they were likely to be called on to give evidence. He noted that Bond Corporation executives Mr Judge, Mr Mitchell and Mr Beckwith, had sought to satisfy themselves as to Rothwells position in relation to net worth and cash flow and hence Arthur Young was retained. He recorded that Arthur Young worked on the position over a period of some ten days to a fortnight and prepared a written report to Bond Corporation which was not available to Rothwells. It was his understanding that it did not reach firm conclusions but collated and digested information provided by Rothwells through full access to Rothwells' records and interviews conducted with him, Mr Hilton and Mr Hare. Mr Lloyd then wrote that Bond Corporation staff had discussed with him, Mr Hilton and Mr Hare their conclusions on the basis of the Arthur Young report which were:

- "(i) the net asset position of Rwl's on a liquidation basis was \$40 million after deducting FITB, assuming 100% recover of the Tryart fee and of making extra arrangements in respect to the \$50 million subordinated loan.
- (ii) the cash flow position had weakness in it and up to \$75 million additional cash may be required.

The initial reason given for the Arthur Young investigation was that BCH wanted to know that RWLS was 'fixed' by the PICL/Dalleagles transactions. It subsequently transpired that the concern was specifically directed to the question of 'preference' ".

19.12.7 The issue of a possible Rothwells' liquidation following the PICL settlement was also the subject of written advice given on 13 October 1988 by Mr Wiese to Mr Heron. He wrote that this was an issue to which Bond Corporation representatives had been addressing themselves, "... given the manner in which Rothwells Ltd proposes to apply the 350 million it will receive from Dalleagles Pty Ltd ...", and he indicated an understanding that \$150 million would be applied in repayment of NAB and that some other substantial proportion would be applied in repayment of amounts owing to the Bond group of companies. He then proceeded to give advice concerning the provisions of section 122(1) of the Bankruptcy Act.

19.12.8 Having identified five conditions to be satisfied before a transaction could be avoided as a preference pursuant to section 122(1), Mr Wiese addressed those conditions as follows:-

- "(a) Clearly, in the absence of a payment being made with intent to defraud creditors, the period of exposure for both the Bond Corporation group and the National Australia Bank is the period of 6 months after settlement. It is obviously extremely important that Rothwells Ltd. not go into liquidation during the period.
- (b) The proposed repayments do satisfy the description of one of the types of transactions required for the purposes of section 122(1) of the Bankruptcy Act. That they comprise payments is sufficient.
- (c) It is a condition for voidability as a preference that the transaction should have occurred at a time when Rothwells Ltd. was unable to pay its debts as they fell due from its own money. For the purposes of this provision, a debtor is not able to pay debts from its own moneys if he can do so only by means of moneys borrowed for that purpose - and neither is it sufficient that, given time, the debtor would be able to pay its debts. The question is whether the debtor would be able to do so at the time of the transaction. Clearly, this issue relates to the value of Rothwells Ltd.'s receivables, and their collectability, immediately post settlement, and as you know, we have no particular information as to that. However, our understanding is that were all Rothwells' debts called for payment immediately post settlement, it may well have severe difficulty in meeting its obligations.

- (d) So far as we are aware, there is no doubt that both the Bond Corporation group of companies and National Australia Bank stand in the position of creditors to Rothwells Ltd., so that the payments on settlement will constitute the satisfaction of past indebtedness, and will not have been made in respect of any contemporaneous transaction.
- (e) Finally, before a transaction can be characterised as a preference, it must have the effect of giving the creditor in question a preference, priority or advantage over other creditors of the company. In other words, if, as a consequence of the payments, the Bond Corporation group and National Australia Bank obtain 100 cents in the dollar when the other creditors of equivalent rank obtain something less, they will be deemed to have obtained an advantage.

Given that satisfaction of the tests imposed by section 122(1) of the Bankruptcy Act, the creditor who has received the payment will be required to disgorge it as an undue preference, and take his place with the other creditors who rank equally with him in distributions available on the winding up.

From these observations it can be seen that if Rothwells is currently insolvent (a matter on which we have no particular knowledge), and National Australia Bank receives payment of the amount due to it by Rothwells Ltd., and Rothwells Ltd. goes into liquidation as a consequence of a petition presented within 6 months of settlement, then National Australia Bank will have received an undue preference and will be required to disgorge the amount paid to it. In those circumstances, our view is that the Treasurer's indemnity may be called on by the National Australia Bank to meet any deficiency remaining after the bank has received a final distribution in a liquidation of Rothwells Ltd.

In summary, therefore, the Treasurer will remain at risk under the indemnity for six months after settlement (and more, if the payment to the National Australia Bank is found to have been made with an intention to defraud creditors of Rothwells Ltd); and the Treasurer has a real interest in ensuring that Rothwells Ltd. does not go into liquidation in that period of 6 months. In that respect, the Treasurer shares a common interest with the Bond Corporation group of companies."

19.12.9 The risks faced by the Government were clearly spelt out by Mr Wiese. We note his understanding that if all Rothwells' debts were called for payment immediately post settlement, "it may well have severe difficulty in meeting its

obligations". Mr Heron said that if there was a forced liquidation he understood there would be a difficulty, but he also understood that Rothwells would receive a net \$50 million which would avoid the forced liquidation situation, thus achieving an orderly retirement of Rothwells from the commercial scene.

19.13 Pre-settlement anxiety

19.13.1 Mr Lloyd was so concerned about the position that he got Mr Edwards out of his sick bed on 12 or 13 October 1988 in order to see Mr Parker. He did not think there was any specific event that prompted this action and explained that there had been a number of factors which caused real problems for Rothwells in the preceding month or so. Originally, the PICL settlement was planned for 31 August 1988 and the delay had an interest cost penalty which was not budgeted for. Rothwells management time was diverted from other things that had to be done to alleviate cash flow difficulties, including the sale of some of the loans and financing of various matters. In addition, Mr Lloyd said there was a very substantial miscalculation by all of them at Rothwells that, at the very least, the retirement of the Government indemnity would be neutral to Rothwells cash flows and perhaps even positive in that it would indicate that Rothwells problems had been fixed. He said, however, that as a consequence of institutions and individuals believing they were at greater risk because the Government guarantee was to be withdrawn or the Government paid out, serious problems were caused by attempts to withdraw facilities and deposits. Hence, by the middle of October, Mr Lloyd said he thought it important that the Government and Bond Corporation understand that Rothwells would not be able to survive after the PICL settlement without continuing cash flow support. In his mind, the position for Bond Corporation was less critical because it had sought and been provided with cash flow predictions which really indicated both the fragility of Rothwells position after settlement and the large number of things that had to be done quite quickly to meet obligations in succeeding weeks. In evidence given at his trial in the District Court in January 1990, evidence which he confirmed as accurate, Mr Lloyd said he was concerned that the Government should understand that the settlement would not solve all Rothwells' liquidity problems, contrary to the impression the Government might have had when the transaction was originally conceived some three or four months earlier.

19.13.2 Notwithstanding an entry in Miss Kent's diary for 12 October which accorded with the memory of Mr Edwards, Mr Lloyd said he thought the meeting occurred on Thursday, 13 October 1988. They met Mr Parker at Parliament House.

Mr Lloyd recalled advising Mr Parker that, following settlement, Rothwells would need liquidity assistance to survive and the Government should not proceed with settlement if it did not acknowledge this need and were not prepared to provide assistance. He thought he might also have alluded to preference difficulties as a means of alerting Mr Parker to the penalties which would flow from proceeding with settlement and not providing Rothwells with the support necessary for it to continue. As Mr Lloyd recalled the conversation, Mr Edwards proffered the advice that they should not proceed with settlement, but he was unable to recall whether Mr Edwards said why he held that view. Mr Parker responded that he had anticipated that Rothwells would require liquidity assistance after the PICL settlement, but said it was not a decision that he would be making on his own. He said he needed to talk to the Premier before giving an answer. Mr Parker left the room and after about 10 minutes or so, returned and indicated that Mr Dowding had said that settlement should proceed.

19.13.3 Mr Lloyd's notes of the meeting set out that he conveyed to Mr Parker concerns related to the cash position and Mr Connell's position with Standard Chartered and NZI. The notes recorded advice by Mr Parker that his discussions with Mr Judge were to the effect that Bond Corporation would be responsible for Rothwells day-to-day cash flows and the Government would assist by way of other arrangements including moral suasion in respect of obtaining bank loans, arrangements for the sale of Western Collieries Ltd and pre-purchase of coal. Mr Lloyd said he believed his notes were accurate at the time that he made them. In his trial evidence, he said that Mr Parker treated what he was told quite seriously and had said he understood the situation and had discussed it with Bond Corporation. In particular, Mr Parker told Mr Lloyd the Arthur Young report, which confirmed that liquidity was going to be a problem after settlement, had been transmitted to him. He had discussed it with Mr Beckwith.

19.13.4 Mr Edwards said by this time he believed only \$12 million net would flow to Rothwells. He said he and Mr Lloyd went right through the matter with Mr Parker. Mr Edwards said he strenuously took the position that, unless it was "watertight" that the liquidity existed they should not proceed, and Mr Lloyd expressed views along similar lines although not quite as strenuously. He confirmed that Mr Parker indicated that he had received the Arthur Young report and discussed it with Mr Beckwith. Mr Edwards said they discussed the potential preference problem and Mr Lloyd indicated there was not going to be much left after settlement. Mr Edwards said it was his view it was not watertight and he was quite specific in his advice to

Mr Parker that the Government should not proceed. In later evidence given by Mr Edwards during cross examination, the following passage occurred:

Q: And indeed at no stage did you advise Mr Parker that PICL should be abandoned, did you?

A: No. I ... my recollection is I made it clear that unless we had in place a mechanism to maintain liquidity, we shouldn't proceed because we'd immediately fall in a preference situation.

19.13.5 According to Mr Edwards, Mr Parker left to speak with Mr Dowding and returned after about half an hour or so saying it was all too difficult and they had to proceed. Mr Parker indicated there was a general understanding that Bond Corporation and the Government would make sure Rothwells was kept liquid, with Bond Corporation handling the matter day to day and the Government generating "... some big sums, in particular the coal matter". Mr Edwards understood it was the Premier's view that it was all too difficult not to proceed.

19.13.6 During the meeting Mr Lloyd's position was touched on briefly. According to Mr Edwards it was self evident that, without the PICL settlement, Rothwells would have to close its doors and he observed that a closure would result in Mr Lloyd being in "some strife". He did not identify the "strife".

19.13.7 Mr Parker denied that Mr Edwards advised against proceeding. He said Mr Edwards told him that the information to date about Rothwells following settlement was accurate in that it would become very healthy in balance sheet terms, but added that unless certain things were tied down there would continue to be a liquidity problem. He said Mr Edwards mentioned the \$50 million deposit by Mr Anderson and the Standard Chartered facility in the order of \$8 million to \$10 million and Mr Lloyd wanted to make the Government aware of the problem because, if it came to a situation of closing the doors through ongoing liquidity difficulties, there would be preference issues involved. They conveyed to him that the likely net proceeds to Rothwells from PICL after repayment of certain amounts would be \$20 million or \$30 million. He could not recall any suggestion that Rothwells would not receive as much as was first anticipated. He recalled that while discussing the pros and cons of not proceeding with the settlement, they pointed out in terms of potential prosecutions that Mr Lloyd's legal position could be in some jeopardy.

19.13.8 Mr Parker said he saw Mr Dowding and suggested he speak with Mr Lloyd and Mr Edwards, but he declined. It was the Premier's view the Government had to proceed and Mr Parker should make sure that the Government's position concerning ongoing funding of Rothwells should be reiterated to Bond Corporation. Mr Parker agreed the Premier made it clear that, at this stage, it would be virtually impossible not to proceed. It was Mr Parker's view that it would have been an extraordinary mess if they had not proceeded.

19.13.9 Mr Dowding could not recall an occasion when Mr Parker asked him to see Mr Edwards and Mr Lloyd but, given the level of his other commitments, he accepted that it might well have occurred. He thought it possible that he would have declined. Mr Dowding had a recollection of an occasion when Mr Parker spoke to him at Parliament House indicating that he had received assurances from Bond Corporation that if there were any problems following settlement they would cover them and they were only likely to be small problems. Neither in this conversation, nor from any other source, did he receive a suggestion that Rothwells was not going to get as much from the settlement as anticipated.

19.13.10 Mr Parker said he had previously discussed the matter with Mr Beckwith and had advised that cash flows were to be the responsibility of Bond Corporation after the settlement. Mr Beckwith indicated he was not confident there would be no ongoing problems. Mr Parker made it clear the project should not go ahead unless there were to be no real problems, or, if there were, that Bond Corporation would be responsible for such problems. He said he told Mr Beckwith the Government was not prepared to put further liquidity into Rothwells but would try to assist generally. After the meeting with Mr Edwards and Mr Lloyd, Mr Parker again saw Mr Beckwith who indicated that, in their assessment, allowing for the repayment of Mr Anderson's \$50 million, there might be a need over the next few months for about \$75 million. He said Mr Beckwith accepted that it was Bond Corporation's responsibility to provide the ongoing liquidity, but it meant that Mr Anderson's commitment to a long term on his deposit in Rothwells was a precondition of settlement. Mr Parker said he reported that situation to Mr Edwards. The undertaking by Mr Beckwith was later denied by Bond Corporation. The Commission would be surprised if such an undertaking was given by Mr Beckwith.

19.13.11 There were unmistakable and alarming warning signs. The Government was about to embark on another rescue of Rothwells against a background of continual problems which, although described as short-term liquidity difficulties, had persisted

virtually unabated notwithstanding the injections of hundreds of millions of dollars since October 1987. Mr Parker was told by Mr Beckwith that, even after settlement, \$75 million might be needed over the next few months. The difficulties were obviously not short-term and commonsense dictated that a serious permanent problem must have existed. In addition, since at least early July 1988, those involved for the Government believed they had been misled. They had learned of a very large and fundamental deficiency within Rothwells. We find that Mr Edwards advised Mr Parker against proceeding because the arrangements were not "watertight". We have no doubt that Mr Parker would have accurately repeated the position to Mr Dowding. It is a measure of the desperation felt by Mr Dowding and Mr Parker about the possibility of Rothwells going into liquidation that they were prepared to proceed with the transaction within a few days and without first arranging for an independent and in depth analysis of Rothwells. If they intended to rely on further financial assistance from Bond Corporation, assurances to that effect should have been obtained from Bond Corporation in writing. It follows from what we have said that we have rejected the evidence of Mr Parker and Mr Dowding that they were not advised in advance of settlement that Rothwells would not receive as much as anticipated. Indeed, we find extraordinary the attitude of Mr Dowding in declining to meet with Mr Edwards and Mr Lloyd, washing his hands of the problem on the basis that it was all too difficult. In our view it was improper to proceed to settlement in these circumstances and the failure to consider the public interest is apparent.

19.13.12 Mr Parker also received, indirectly, a warning signal from another source. As discussed in paragraph 19.11.8 of this chapter, Mr Fischer told Mr Parker on 13 or 14 October 1988 he understood the R & I Bank would not be paid from the proceeds of the PICL settlement. Mr Parker was on notice, therefore, that Rothwells did not anticipate being able to meet an amount of \$4.5 million after settlement. He did not reassure Mr Fischer that arrangements were in place to meet any liquidity shortage but told him he was thinking about seeking a prepayment for coal.

19.13.13 Mr Lloyd's notes recorded that at the close of business on Friday 14 October 1988, Rothwells was \$4 million over its overdraft limit and that this was conveyed to Mr Beckwith on the 16 October to reinforce with him that it would be impossible for Rothwells to continue to trade unless the PICL settlement took place on or before Monday 17 October. Mr Lloyd noted that taking into account the need to correct the overdraft and, as discussed in section 19.17 of this chapter, the \$9.5 million to be drawn from Rothwells to fund the purchase by Katanning of the Rothwells shares

held by Bond Corporation, there was to be approximately \$1 million net cash to Rothwells after the settlement. He noted it was clear to Bond Corporation that Rothwells would need additional funding support "... pending realisation of cash generating transactions foreshadowed in the cash flow projection". Mr Lloyd said he would have been aware on Friday 14 October 1988 that Rothwells would only receive \$1 million net, but he did not recall speaking with Mr Parker or any other Minister after the occasion at Parliament House and before settlement. He believed, however, that Mr Parker and Mr Edwards well understood that liquidity would only be increased by about \$1 million. Mr Edwards acknowledged he probably knew before settlement that only \$1 million net would be produced. He said he did not tell anyone because he had "... done all that the week before and the difference between \$12 million and \$1 million ... did not amount to anything". By that we understand him to mean that the difference between the \$10 million or \$12 million net, anticipated the previous week, and the revised figure of \$1 million, would not have caused Mr Dowding or Mr Parker to alter their decision to proceed.

19.13.14 We are satisfied that neither Mr Lloyd nor Mr Edwards told Mr Dowding or Mr Parker that only \$1 million net would flow to Rothwells. They should have been advised but, as suggested by Mr Edwards, such advice would have been unlikely to have caused either of them to decide that the project should be cancelled or settlement delayed. They had already decided to proceed in the knowledge that many millions would be required after settlement to maintain liquidity.

19.13.15 Mr Hilton spoke with Mr Musca on 14 October 1988. Mr Musca made a brief note of the topics discussed. After referring to a number of outstanding issues in connection with the PICL settlement, Mr Hilton discussed a proposed variation agreement between Rothwells and a company connected with Mr Anderson, Tipperary Developments Pty Ltd ("Tipperary"), and the requirement by Mr Anderson that the directors of Rothwells sign a solvency declaration. Mr Hilton advised Mr Musca that the solvency declaration could not be signed and they could not hold a directors solvency meeting because Rothwells could not balance. We have no doubt that Mr Lloyd would have similarly been aware of that situation.

19.14 Mr Anderson visits Derby

19.14.1 During October, Rothwells was under pressure from Mr Anderson who was seeking repayment of the \$50 million provided in March 1988 pursuant to a bill

endorsement facility. Rothwells did not have the financial capacity to make that payment. Mr Edwards confirmed that it became a condition of the PICL settlement that an assurance be obtained from Mr Anderson that the facility would remain in place.

19.14.2 Mr Anderson said that by September 1988, Tipperary Developments had not been receiving interest due pursuant to the bill endorsement facility agreement made between Tipperary Developments and Rothwells in respect of the \$50 million. As a result of that default, through Mr Bert Gianotti, a partner of Mallesons Stephens Jacques who was acting for Mr Anderson, negotiations were entered into with Mr Lloyd. The result of those negotiations was a letter dated 8 October 1988 from Rothwells, signed by Mr Lloyd, to Tipperary proposing that the facility agreement be varied by being reduced from \$50 million to \$30.5 million with effect no later than 28 October 1988. Mr Lloyd confirmed that Rothwells would be in a position to meet in full its obligations to Tipperary Developments in March 1989. The proposal contained in that letter was accepted by Tipperary Developments. Shortly thereafter, according to Mr Anderson, Mr Lloyd expressed to Mr Anderson his concern about Rothwells' ability to meet a payment on 28 October 1988 of \$19.5 million unless it had Government support. The discussion went on to mention PICL and Mr Lloyd said there would be some money coming to Rothwells from the Government by reason of PICL. Mr Anderson was not interested in the particulars of PICL, but became concerned when he appreciated that the deal, if it went through, would relieve the Government of its "guarantee". This information rang bells of danger to him and resulted in him deciding to fly to Derby to see Mr Dowding. He was accompanied by Mr D Newby of Armstrong Jones who wished to discuss something concerning that organisation with the Premier.

19.14.3 Mr Anderson said he met Mr Dowding and Mr Parker at Derby during the evening of Sunday, 16 October 1988. He said he told them that he wanted his \$50 million back and, if not, "I'll put Rothwells into liquidation and I'll also go for your throat". He said Mr Dowding responded to that threat by telling him not to do anything because of the PICL deal whereby \$400 million would solve all the problems. He claims Mr Dowding then said, "I will guarantee you that we will pay you \$19 million at that [PICL] settlement and the balance will come in March 1989". He said Mr Dowding then told him to ring his, Mr Anderson's, solicitors who were with Mr Dowding's solicitor in the latter's office and tell them to allow the PICL deal to proceed. He further said that Mr Dowding instructed his solicitor over the telephone to proceed to draw up documents to the effect that Mr Anderson would get his \$19 million at the settlement. Mr Anderson said he rang his solicitor, Mr E L Bolto, also a partner

of Mallesons Stephens Jacques, and told him that the PICL deal should proceed because "Dowding and Parker have guaranteed me that we will get \$19 million at this settlement. You make sure we get it". That conversation was said to have taken place in the presence of Mr Dowding and Mr Parker. The conversation with Mr Dowding appears to have satisfied Mr Anderson because, as he said, he had the word of the Premier and the Deputy Premier. As to Mr Parker, Mr Anderson said he could not remember the details of what Mr Parker said, but he was supportive of the PICL deal.

19.14.4 The deed of variation to the facility agreement dated 17 October 1988 appears to have been drawn up by Mr Bolto. It provided for the variation of the facility agreement by an undertaking on the part of Rothwells to pay \$19.5 million, being the face value of certain expired bills, on 28 October 1988 and the balance of the facility, \$30.5 million, on 31 March 1989. In short, the deed of variation which was executed by both Tipperary Developments and Rothwells, in effect carried out what Mr Lloyd confirmed in his letter of 8 October 1988 as having been accepted.

19.14.5 Mr Gianotti gave evidence that, on receiving the letter of 8 October, a deed was prepared but, prior to signing the deed, Mr Lloyd stated to him that he wanted confirmation from the Premier and the Government before he would allow Rothwells to execute the deed. Though he did not remember Mr Lloyd's exact words, in general terms Mr Lloyd said he was not prepared to make a commitment that Tipperary Developments would be repaid \$19.5 million without assurances from the Government and Mr Dowding. As Mr Gianotti understood it, Mr Anderson had an assurance from Mr Dowding that the \$19.5 million would be repaid and that Rothwells, after the PICL settlement, would be in a position to honour the terms of the deed. He said he understood that the deed had to be executed before the PICL settlement could proceed and that is what happened.

19.14.6 Mr Bolto said he and Mr Gianotti were at the offices of Robinson Cox awaiting the outcome of the discussions in Derby. Mr Anderson rang from Derby about midnight on the Sunday instructing him not to call up the \$50 million debt then due to Tipperary Developments from Rothwells, but he was to continue with the preparation and execution of the deed of variation. He was told Mr Anderson had received the appropriate assurances, but Mr Anderson did not say from whom. It was Mr Bolto's understanding that Mr Anderson had been in Derby for the purpose of speaking to Mr Dowding and Mr Parker and, particularly, was seeking assurances from

Mr Dowding. Mr Gianotti confirmed receipt of the telephone call at the office of Mr Wiese very late that Sunday evening.

19.14.7 Mr Dowding recalled Mr Anderson's visit while he was in Derby. As far as he was concerned, the discussion with Mr Anderson focussed on the SGIC's leasing commitment over a city property. He did not recall anything of a discussion concerning \$50 million except one remark he remembered, "if you pull it out and Rothwells goes down, everyone will suffer including yourself". He denied giving Mr Anderson any guarantee concerning \$19.5 million. He said he did not suggest that Mr Anderson ring his solicitors to give approval to allow the PICL deal to proceed, nor did he instruct Mr Wiese to draw up any documents. He made no telephone call to any solicitor during the evening. Mr Dowding suggested that, in his evidence, Mr Anderson was, for good commercial reasons, endeavouring to improve his position. Mr Wiese, while confirming Mr Bolto and Mr Gianotti were in his office on Sunday night, 16 October 1988, could not recall any telephone calls from Derby to him that night and said he did not speak to Mr Dowding during that night or the weekend. He accepted that it was possible Mr Gianotti or Mr Bolto might have received a call from Derby.

19.14.8 Mr Parker recalled Mr Anderson being told that the PICL settlement would not proceed unless Mr Anderson allowed his \$50 million to remain in Rothwells and, if the PICL settlement did not proceed, then Mr Anderson's money would be lost. He recalled Mr Anderson ringing Mr Gianotti. Specifically, no guarantee as described by Mr Anderson was given. He recalled, however, discussion about \$50 million remaining in Rothwells until March 1989. He had no recollection of Mr Dowding speaking to any lawyers during the meeting, though Mr Anderson did.

19.14.9 Mr Lloyd agreed that when he wrote the letter of 8 October 1988, he could not be sure that Rothwells would have the funds to meet the obligations set out in the letter. He appreciated at the time that Rothwells would not be able to carry on after the PICL settlement without further Government support. We accept Mr Gianotti's evidence that Mr Lloyd would not agree to the execution of the deed without Mr Dowding's express approval.

19.14.10 We have no doubt that Mr Dowding gave an assurance to Mr Anderson to the effect that Rothwells would be put in sufficient funds by reason of the PICL settlement to enable it to meet the commitments in the proposed deed of variation. We are satisfied that, on the basis of the assurance from Mr Dowding, Mr Anderson

instructed Mr Bolto that the deed should be executed to enable the PICL settlement to proceed. We do not believe, however, that the assurance given by Mr Dowding was to the effect that \$19.5 million would be paid at the time of the PICL settlement which was to be the following day, 17 October. Indeed, the deed itself supports that conclusion since it expressly stated payment was to be made on 28 October. There is no reference in any part of the deed to the forthcoming PICL settlement.

19.14.11 No amount was paid to Mr Anderson on 28 October 1988 or subsequently. He said an arrangement was reached between Mr Lloyd and Mr Gianotti for payment in lots of \$2 million per day for nine days. The first cheque bounced and, in Mr Anderson's words, "that was the end of it". Eventually \$12 million was recovered from Paragon and litigation is pending concerning the balance.

19.15 Gofair

19.15.1 Another issue that arose in the course of negotiations concerned certain expenses that had been paid by PICL to a entity called Gofair Investments Limited ("Gofair"). According to Mr Judge, this issue arose in July when he was given the task by Mr Mitchell of reviewing what was to be bought, whether it be the company PICL or the project itself. Mr Mitchell made it very clear that the deal was being put together quickly and it was intended, in the period immediately after the signing of the memorandum of understanding, that Bond Corporation attempt to flesh-out what PICL entailed in order to arrive at a decision whether to buy the company or the project separately from the company. Mr Judge pointed out that obviously the decision to buy the company was different from buying the project because of the contractual obligations that would be inherited with the company. In the course of this task, which included a due diligence evaluation, Mr Judge obtained the balance sheets of PICL and extensive discussions followed about its liabilities including an attempt to substantiate how the liabilities had been incurred. He said requests were made for the balance sheets at the beginning of July 1988, but the vendors were slow in responding and were maintaining that the acquisition would take effect from the end of July, as it were, "warts and all".

19.15.2 At a meeting on 27 July 1988, there was a consensus between Government and Bond Corporation representatives that the company should be acquired, a decision that Mr Judge described as basically tax-driven. It was explained that this required an examination of the history of the company and access to the

paperwork which had hitherto been resisted by Mr Dempster. Mr Edwards was given the task of gaining access to that information and it was subsequently provided. Bond Corporation had originally taken the position that it would not purchase the company but, if it did, there should be no liabilities. Any liabilities were, therefore, contentious. Payments to Dempster Nominees and Gofair were particularly in issue as well as a payment to a salt company.

19.15.3 The timing of the negotiations concerning these payments is not totally clear, but Mr Dempster indicated the issue was not finally resolved until shortly before the 17 October PICL settlement. Mr Musca made a note dated 7 October 1988 indicating the issue had not been then settled. In this context it is necessary to canvass briefly the evidence concerning Gofair, the true position of which both Mr Connell and Mr Dempster were clearly anxious to avoid disclosing.

19.15.4 According to both Mr Connell and Mr Dempster, Gofair was set up overseas by Mr Dempster and Mr Connell to be legally at arm's length and controlled by trustees in what is commonly known as a "blind trust". According to Mr Dempster, however, in reality he and Mr Connell could direct the trustees as to the manner in which funds controlled by Gofair should be applied and he would expect those directions to be obeyed. Mr Connell conceded he would anticipate that the trustees would react favourably to any request concerning disposition of funds. We have no doubt the position was accurately described by Mr Dempster.

19.15.5 It was originally envisaged that after Dempster Nominees, as the project manager, had brought the project to a point where it was ready to proceed with construction, Gofair would replace Dempster Nominees as the project manager and receive fees accordingly. In addition it would be used as a conduit company to make payments overseas to those persons or entities supplying services to PICL who wanted payment made overseas. The net income to Gofair was to be split 50/50 between Mr Dempster and Mr Connell and applied by the trustees in accordance with the directions of Mr Dempster and Mr Connell. However, that scheme was not implemented because of the sale of PICL to Bond Corporation and the Government.

19.15.6 During 1987 and 1988 Gofair rendered accounts to PICL for consulting services totalling in excess of \$1.5 million. According to Mr Dempster, those accounts were paid but only about \$150,000 worth of consulting work had been carried out for PICL in connection with the Western Australian petrochemical project. The remainder of the consulting work related to other developments overseas.

19.15.7 It was these payments, and a company called WA Salt, that were the subject of discussion. Mr Connell described WA Salt as a company acquired by interests associated with him and Mr Dempster to supply salt to the project. He said it had a contract of supply which gave it value because the project required a large supply of salt. According to Mr Judge, he was told at the beginning of July 1988 by Mr Edwards of the position taken by Mr Dempster that WA Salt was not part of the petrochemical deal. Subsequently Mr Edwards told him of an agreement that WA Salt be retained by Mr Dempster. Mr Edwards said that initially he held the view that it was part of the project, but a discussion had taken place between Mr Grill and Mr Dempster at which it had been agreed that Mr Dempster would keep the company and the salt contract would be released.

19.15.8 Mr Judge recalled that these matters were the subject of discussion at a meeting in Mr Parker's conference room on 2 or 3 September 1988 attended by him, Mr Beckwith, Mr Mitchell, Mr Grill, Mr Parker and Mr Edwards. He thought Mr le Roux and Mr Heron were present. Mr Judge questioned the payments and expressed the view they were unjustified. Mr Grill seemed to have a different opinion and indicated that he considered them to be justified, while Mr Parker said the Government would not be involved with PICL if it had anything to do with Gofair. He recalled Mr Edwards seemed to suggest that some of the payments were justified. Subsequently, in late September, a proposal was put by Mr Heron and Mr Edwards that the amount of liabilities properly to be included in the balance sheet should be reduced to \$12 million. A resolution was reached early in October when Mr Judge was informed by Mr Beckwith that he and Mr Parker had resolved the issue and there would be about \$13.5 million in liabilities assumed. Mr Judge said Mr Beckwith also explained that as part of the deal between Bond Corporation and the Government, Bond Corporation would get a preferential dividend of \$5 million out of PICL in priority to the Government. To Mr Judge's response that he did not understand how this had been worked out, Mr Beckwith said they had come up with about \$3.5 million of expenditure which they considered was justified. This left about \$10 million of unjustified liabilities, and he had reasoned that Bond Corporation had about half of the project and would therefore be covered by the priority distribution of \$5 million.

19.15.9 Mr Edwards said he was told by Mr Wiese that Gofair was a device put in by the owners of PICL to take a sales commission directly from Mitsubishi offshore in a manner that would avoid the bankers and generate some cashflow for the owners. Mr Edwards thought it was also set up with tax advantages in mind. While he viewed

the arrangement as "normal" and "sensible" for the private sector, it was his view, and the Government's position, that it was inappropriate for it to be continued because of the taxation avoidance implications. Hence they insisted on approaching Mitsubishi with a view to readjusting the sales contract to delete the arrangement of a side commission going to Gofair. He agreed the question of whether PICL was being acquired including or excluding liabilities became an issue, he thought probably sometime in September, but did not agree that the Government was happy to have the liability as high as possible. The Government was, however, concerned about the liquidity of Rothwells and, to the extent that some of the liabilities owed by PICL to Rothwells might have diminished that problem, the Government would be prepared to accept them. Mindful that liquidity was a real problem in Rothwells, Mr Edwards said the Government took a medium position in the interest of getting the whole issue resolved. Bond Corporation insisted they would not meet any liabilities at all, but the Government wanted to get rid of the disagreement so it took the middle course of picking up those liabilities that could clearly be demonstrated as attributable solely to the development of the petrochemical project. Mr Edwards did not think any of the Gofair payments were included. As to the formula concerning the distribution of dividends mentioned by Mr Judge, he said that was a face-saving mechanism for Mr Beckwith that applied 14 years hence. He understood the cash value of that mechanism on a discount basis was negligible and hence the Government representatives agreed to it.

19.15.10 Mr Parker said he was vehement in his view that these unusual payments by PICL had to be removed and there was discussion about the extent to which the Government would accept any liabilities in the PICL balance sheet. Any that clearly had nothing to do with legitimate PICL expenditure had to come out and a negotiation had taken place as to what was legitimate or otherwise. Finally a figure in the order of \$13 million had been agreed, but Mr Parker was unaware of any agreement that Bond Corporation had the right to the first \$5 million in dividends paid after the project loan was repaid. When shown a memorandum from Mr Mitchell and Mr Judge to Mr Bond of 17 October 1988, he said he did not understand the statement made in the context of the \$13 million debt being assumed in PICL that "we have the right to the first \$5 million in dividends". He understood that, after repayment of the loan, dividends would be distributed according to the equity holding.

19.15.11 Mr Dowding said that through July to October he was unaware of any involvement of a company called Gofair.

19.15.12 Mr Dempster eventually agreed to a reversal of approximately \$13 million in fees paid by PICL to Gofair. Although he regarded the Government and Bond Corporation as having originally agreed in principle to accept this liability, he did not regard the deal as thrown open when they insisted that he agree to the reversal. He believed he was not in a position to negotiate because SECWA had the sole supply of gas and electricity and there existed the threat to withdraw the mandate.

19.15.13 Finally in respect of Gofair, we note the evidence of Mr Judge that, during the negotiation about the payments, Mr Grill said words to the effect: "I shouldn't worry about Gofair. It's just Dallas and Laurie". This statement or any knowledge of this nature was denied by Mr Grill. The danger of misinterpreting statements made during negotiations is considerable. We cannot be certain the statement was made, but, if it was, we would not regard it as significant.

19.15.14 Once the issue of liabilities had been agreed and repayment made by Dempster Nominees to PICL, Gofair ceased to have any relevance to the settlement. We should not leave the issue of Gofair, however, without expressing our concern about the manner in which Gofair was presented and used in connection with PICL while Mr Dempster and Mr Connell were in charge.

19.15.15 In January 1988, Wardleys prepared an information memorandum on PICL. According to Mr Connell, although it did so at his request, he did not provide it with any information about Gofair. He said Wardleys personnel met with Mr Dempster, who had the day to day carriage of the matter, and the letter of Wardleys to Mr Connell of 29 January 1988 confirmed that a meeting had taken place with Mr Dempster that day. The executive summary of the memorandum indicated that the shareholders were seeking an equity participant and under the heading "Project Description", a subparagraph was headed "Plant Construction and Funding". In that subparagraph it was stated that Gofair had been engaged as project manager and Gofair was described as "... a Hong Kong based company with extensive petrochemical plant construction experience". Mr Connell acknowledged that it was not correct to say that Gofair possessed extensive petrochemical plant construction experience. He understood that the company would use consultants and it may have been that it was envisaged the company would bring persons into Gofair with that expertise. Mr Dempster agreed that, read literally as meaning the company over a period had gained experience in the industry, the statement was incorrect, but he said it would be correct if it was read as

meaning Gofair had available to it, and was intending to employ, companies or people who were expert in the field and possessed such experience.

19.15.16 The statement in the information memorandum was plainly misleading. In addition there is a distinct lack of legitimacy in the manner in which funds flowed from PICL to Gofair while PICL was under the control of Mr Dempster and Mr Connell. Mr Dempster was obliged to acknowledge a lack of legitimacy in respect of the invoices. His attempts to explain away that obvious situation were unconvincing. PICL was set up and promoted as the vehicle for the establishment of the petrochemical project and there was never any hint of a suggestion that it was being used for other purposes. It was operating on borrowed funds and, from the evidence of Mr Dempster, it seems unlikely that the lending institutions were told that PICL was branching out into other activities. Mr Dempster said it did not occur to him that payment of the invoices was in anyway improper or illegal because he and Mr Connell were the only shareholders in PICL and the funds borrowed from the bank were guaranteed by him personally.

19.15.17 Mr Dempster frequently prevaricated concerning Gofair and the position as it ultimately emerged was quite different from the impression that Mr Dempster conveyed in the totality of his answers during Mr McCusker's inquiry. When asked by Mr McCusker why the fees were paid to Gofair, Mr Dempster referred to purposes associated with the petrochemical project but failed, at any time, to refer to the work in Sri Lanka which accounted, on Mr Dempster's evidence to the Commission, for almost all the fees paid. He said that issue escaped his memory at the time that he was giving evidence. He made that claim notwithstanding the fact that in 1988, during negotiations concerning the repayment of those fees before the PICL settlement could proceed, he had addressed his mind to the fact that only about \$150,000 of the total was a legitimate expense of the petrochemical project.

19.15.18 We do not believe Mr Dempster's assertion that he had forgotten that aspect when answering Mr McCusker's question. We are satisfied he deliberately lied to Mr McCusker to avoid disclosure of what he now says is the true position. He similarly attempted to avoid disclosure in his evidence before this Commission.

19.16 October negotiations with SECWA

19.16.1 As mentioned previously, the SECWA contract was far from finalised by 6 October 1988. We set out, in some detail, the evidence concerning the negotiations during October because it demonstrated some of the difficulties created by the premature announcement on 6 October 1988.

19.16.2 Mr Crisafulli made a file note of developments occurring on 27 and 28 September 1988. The note included reference to a conversation with Mr Heron on 27 September to the effect that the PICL agreement needed to be finalised urgently and the project could not stand a CPI escalation. Mr Heron expressed the view to Mr Crisafulli that he considered an escalation of CPI less 1% would be appropriate. In evidence Mr Parker said that he did not think Mr Heron specifically expressed that view to him, although it was being suggested that a suitable compromise between the Government position and that of Bond Corporation might be CPI less 1%. Mr Crisafulli noted the point he made to Mr Heron that, because there were so many players involved in the exercise, it was not always clear who was on the other side of the table and it was necessary for Bond Corporation, PICL and WAGH to establish their collective position on all outstanding issues and speak with one voice. Mr Heron said he was having a meeting the following day and would ensure all the matters were clarified.

19.16.3 Mr Crisafulli recorded that Mr Stephen Doyle, a solicitor of Jackson McDonald who was representing SECWA in the PICL contract negotiations, subsequently advised him that he had attended a meeting with Mr Heron, Mr Edwards, Mr Wiese and a person he believed was the WAGH company secretary. He had been instructed to redraft the supply agreement to incorporate a number of changes, including alterations to the pricing structure. In the interests of not being seen as obstructing efforts to resolve the differences, Mr Crisafulli instructed Mr Doyle to redraft the agreement to incorporate part of the alterations but not the pricing changes. He did this pending instructions from SECWA management.

19.16.4 On 3 October 1988 a special meeting of SECWA was called at which Mr Heron briefed the Commissioners on the current status of the project and the role of WAGH, together with the effect of the cross guarantees. Although handwritten minutes of the meeting did not record a resolution, a type written extract noted a resolution in which the Commission approved the incorporation of the following matters within the energy supply contract:

"(A) In the event that Petrochemical Industrial Company Limited defaults on energy payments to the State Energy Commission of Western Australia, because WA Government Holdings itself is in default, then the State Energy Commission of Western Australia will look to WA Government Holdings for recourse and will continue to supply energy to the project. The Treasurer will provide the State Energy Commission of Western Australia with a formal guarantee in respect of the WA Government Holdings' obligations.

(B) The energy pricing escalator is to be reviewed after 1992 to take account of the financial position of both Petrochemical Industrial Company Limited and the State Energy Commission of Western Australia. The State Energy Commission of Western Australia's position would be protected by a floor of 1% below Consumer Price Index."

19.16.5 The negotiations during October 1988 with respect to the arrangements between PICL and SECWA were extensive and at times intense. Mr Crisafulli was closely involved throughout and, in October 1989, he prepared an outline of the events from 1987 to 1989. His evidence was of considerable assistance and we are satisfied it is reliable.

19.16.6 Mr Crisafulli met with representatives of Bond Corporation on 6 October 1988 to discuss the latest draft of the utilities supply contract and several issues that remained outstanding. Bond Corporation wanted the product pricing linkage mechanism incorporated in the supply contract to which Mr Crisafulli objected. When Mr Dick Selfe, of Bond Corporation, indicated that in recent meetings it had been made clear to Bond Corporation that WAGH would not agree to the linkage mechanism through a separate deed of undertaking, Mr Crisafulli contacted Mr Heron. He was told by Mr Heron that it was out of the question for the Government to be providing that sort of support mechanism and it would have to be incorporated in the supply agreement. Mr Crisafulli found himself in a difficult position because of the triangular nature of the negotiations and a meeting was arranged at which both Bond Corporation and WAGH would be represented together with SECWA.

19.16.7 Mr Crisafulli did not have authority from the board to commit SECWA to an alternative contract involving product price linkage. Following a discussion involving Mr Blackman and Mr Heron, however, he was prepared to explore the concept of product pricing provided the agreement enabled a complete renegotiation

of pricings without restriction at an appropriate time. On 8 October 1988, in a sometimes heated meeting with Bond Corporation representatives, Mr Crisafulli advanced that concept together with a limitation or "collar". Although Bond Corporation was not happy with the concept of a collar, there appeared to be broad agreement on the general concept. Mr Crisafulli believed that Bond Corporation would have been well aware that he could not commit SECWA to a contract involving product price linkage without the authority of the Commission. In subsequent discussions with Mr Heron, Dr McKee and Mr Edwards, they took the view that a collar of plus or minus 15% should be applied. This meant the price of energy, when linked to product prices, had to lie within a range of plus or minus 15% of what it would have been if calculated as agreed in the original heads of agreement. It was a limiting factor. Bond Corporation, however, rejected the collar and sought a more specific set of principles within which to incorporate the product price linkage mechanism. The rejection was contrary to Mr Crisafulli's understanding, obtained from Dr McKee, that Mr Parker had secured the agreement of Bond Corporation that the contract should include a collar.

19.16.8 The matter was not resolved by Friday, 14 October 1988 and Mr Crisafulli perceived a need to revert to the original heads of agreement. He therefore prepared a contract on the basis of those heads which was updated on all other issues that had since been negotiated. At the same time Mr Rory Argyle, a solicitor representing Bond Corporation, produced an alternative wording based on product price linkage but allowing for a hardship clause rather than a collar. Mr Doyle took yet another approach by drafting a clause with a price based on CPI pursuant to the heads of agreement, but providing a hardship clause under which Bond Corporation could seek renegotiation if staying with CPI caused it hardship. In this state of affairs, on Friday 14 October Mr Blackman, Mr White and Mr Crisafulli were joined by an agitated Dr McKee who was obviously very concerned to have a resolution of the matter that day. According to Mr Crisafulli, Dr McKee said he had to walk away that afternoon to go to a meeting with something that was satisfactory and would enable agreement to be reached.

19.16.9 Mr Crisafulli said that, during the meeting on 14 October, Dr McKee rang Mr Judge and put the proposition of reverting to the heads of agreement but providing for a hardship clause. This was rejected and efforts by Mr Blackman to persuade Mr Judge were also unsuccessful. There was discussion about the possibility of getting a quorum together for a SECWA meeting. This arose because Dr McKee

stated that resolution had to be reached that night and, if Bond Corporation would not agree to SECWA's propositions, SECWA would have to put forward something to which Bond Corporation would agree. To do so required a change to the heads of agreement which in turn necessitated a resolution. A quorum could not be achieved.

19.16.10 While Mr Crisafulli was moving in and out of the room, he was aware of Dr McKee and Mr White having a telephone conversation with Mr Parker. Mr White maintained that SECWA would not agree to a product price linkage. After the call, Mr Blackman advised Mr Crisafulli that the Minister had directed Dr McKee that SECWA should comply with Bond Corporation's requirements and they set about drafting a letter intended to advise Bond Corporation that SECWA would agree to a product price linkage. In a final effort to retrieve the situation partially, a draft letter in more general terms was prepared indicating SECWA's agreement in principle to product price linkage, but it contained a rider that the clause had to be negotiated in terms satisfactory to both parties. Mr Crisafulli recalled drafting two letters, one in the general terms just described and the other presenting the stricter SECWA view. The letter dated 14 October 1988 is in the terms of Bond Corporation's request, but generalised. Mr Crisafulli pointed out that the current annexure to that letter is not the annexure referred to in the letter, but is the clause that represented reversion to the heads of agreement plus a hardship clause prepared by SECWA but rejected by Mr Judge on the afternoon of 14 October.

19.16.11 On Sunday 16 October 1988, Mr Doyle advised Mr Crisafulli that the letter had been rejected by Bond Corporation. He told Mr Crisafulli that Mr Judge, Dr McKee and Mr Edwards had continued to examine the question of a product price linkage and worked out a three-year product price "moving average" which Mr Judge believed would be acceptable to Bond Corporation. A lengthy meeting at the offices of Jackson McDonald followed during which the SECWA group prepared Draft No. 9 incorporating this proposal. Mr Crisafulli went home at about 5.30 pm understanding it was imperative that settlement occur the following day and was told at about 10.30 pm that Bond Corporation was still considering the matter.

19.16.12 Mr Doyle telephoned Mr Crisafulli at about 4.00 am on Monday 17 October and requested his presence at the offices of solicitors Robinson Cox. On arrival Mr Crisafulli was told by Dr McKee and Mr Edwards that he was not there to negotiate but simply to incorporate what had been agreed in the contract. The principles that Mr Crisafulli was required to follow were a departure from previous negotiations.

What was now put to him was a ratio to be established in advance involving prices for utilities as a percentage of the return for product sales. This new concept effectively removed dollars per gigajoule or cents per kilowatt hours from the price for utilities and the price became just a proportion of the total revenue. In addition, the original concept of a renegotiation when SECWA's gas contract expired in the year 2005, but to occur only if SECWA was able to secure alternative supplies of gas, was replaced by a simple clause to indicate a complete price renegotiation across the board at that time. Mr Crisafulli was also told to incorporate a clause to the effect that, at the end of a 15 year period, there would be no price renegotiation but it would remain the same for a further five years. When contact was later made with Mr Argyle, however, there was disagreement about the establishment of the ratio. He said Mr Argyle maintained there were to be no renegotiations in the year 2005 but, rather, SECWA would simply indicate what new price was to apply which Bond Corporation would accept.

19.16.13 Mr Crisafulli's position was really summed up in the following question and answer:

Q: Well the position had become at this stage, had it, that really whatever Bond wanted you were amending the agreement to incorporate. Is that right?

A: That was what I understood my instruction to be at that time.

19.16.14 As far as Mr Crisafulli was concerned he was simply following the instructions of Dr McKee but there was no authority from SECWA to enter into such a contract. Dr McKee told him the Government would pick up any amount beyond plus or minus 15%.

19.16.15 After settlement, an analysis by Mr Crisafulli of the new pricing arrangements demonstrated that it could work to the disadvantage of all parties and he understood the Minister gave approval for renegotiation. In those renegotiations, although Mr Crisafulli was looking for an alternative product price linkage mechanism and was not pushing to go back to CPI, Bond Corporation ultimately indicated it was prepared to go back to CPI and a final agreement was reached based on CPI with a considerably refined hardship clause. The supply agreement was executed by SECWA on 1 February 1989 and was explained in a submission dated 15 February 1989 from Mr White to SECWA.

19.16.16 Mr Blackman recalled that by Friday 14 October 1988, SECWA had agreed to the escalator being reduced to CPI minus 1% but Bond Corporation was still seeking the product price linkage that SECWA was not prepared to accept. As to why SECWA was concerned to hold out against Bond Corporation on this issue of the produce price linkage, Mr Blackman pointed out that the negotiations in the latter months were quite extraordinary because of the triangular situation. Bond Corporation was asking for something to which Bond Corporation said it was entitled, but SECWA was being told by WAGH, which was meant to bear the risk of any concession, that it would not pick up the costs of such a concession.

19.16.17 As to the meeting of 14 October 1988, Mr Blackman described Dr McKee as "... clearly agitated and very anxious that we amend SECWA's position to some extent to allow the agreement to be reached with Bond". A proposal was put by Dr McKee to Mr Judge that SECWA would "agree to agree" in the future, a proposal described by Mr Blackman as a "token". Not surprisingly this proposition was rejected by Mr Judge. Mr Blackman was present during telephone conversations between Dr McKee, Mr White and Mr Parker during which Mr White indicated that the Bond Corporation position was not a commercial proposition for SECWA because of the risks involved in accepting the product price linkage. Mr Blackman understood there was a further telephone conversation between Dr McKee and Mr Parker, following which Dr McKee asked for a letter to be prepared indicating that it was prepared under ministerial directive. Mr Blackman was unable to recall any attempt to obtain a quorum.

19.16.18 On 17 October 1988 Mr Blackman was advised by Mr Crisafulli that he had been up all night working under Dr McKee's guidance or direction redrafting the contract in a form reflecting some sort of product price linkage acceptable to Bond Corporation and to Dr McKee. Mr Blackman said such an arrangement was not authorised by the board and Dr McKee did not have authority to renegotiate and commit SECWA in that respect. He confirmed that the subsequent analysis by Mr Crisafulli demonstrated that the new formula could work to the disadvantage of both SECWA and Bond Corporation. When this was explained to Mr Parker he gave the instruction to sort it out with Bond Corporation.

19.16.19 Mr Heron was part of the last minute negotiations leading to settlement. He said he attended in his capacity as a representative of WAGH and had an interest in PICL as a prospective director. Originally there was talk about trying to complete the matter by the end of September but, when that was not achieved, there was a great deal

of urgency in getting it finished by 17 October 1988. The urgency was demonstrated by what Mr Heron described as "... the extraordinary measures that we had to go through to resolve the problem on that date". He said he worked for nearly three days straight and 17 October was regarded as immovable for some Rothwells related reason, but he did not know the full details. There were issues to be resolved with SECWA and it appeared that agreement would not be reached in time for settlement. He understood from comments made by Dr McKee that the Minister had either given a direction or intended to give one. Mr Heron said that during the negotiations he and Mr Edwards were providing the major instructions, but, if he felt that there was need to go further he, Mr Heron, would have contacted Mr Parker

19.16.20 Mr Edwards said he worked straight through for about 48 hours leading to settlement on 17 October 1988 and he was aware of the difficulty concerning the execution of the contract by SECWA. He said Bond Corporation was essentially wanting to renegotiate the whole SECWA contract whereas SECWA was not keen to deviate from the basic position in the November 1987 heads of agreement. Although he could not remember specifically when they occurred, there were telephone conversations with Mr Parker during the 48 hour period and Dr McKee sought direction from Mr Parker. Mr Edwards understood that, essentially, Mr Parker was prepared to go along with the final resolution which was not what Bond Corporation wanted but it might have involved "a bit more pain" for SECWA. Dr McKee wanted to be assured that if there was any variation from the heads of agreement Mr Parker was prepared to give a formal direction, but he did not know whether such a direction was actually sought. He did not think Mr Crisafulli was correct in saying that by the 17 October the SECWA/Government side was doing whatever Bond Corporation wanted. Mr Edwards pointed out it was a very complex process and the Government had a view as to the position of SECWA which would not necessarily accord with the SECWA view.

19.16.21 Mr Judge said that Bond Corporation was concerned that the Treasurer's guarantee would not be in place by the 17 October 1988 and Mr Bond was angry about that issue. It was made clear that Bond Corporation was not going ahead without the execution of a SECWA contract that supported the transaction. The proposition by SECWA that it wanted a plain, standard SECWA contract was unacceptable. He said Mr Parker indicated to him that he did not want to put too much pressure on SECWA to sign the contract and wanted it to come to the signing of its own volition. If necessary, Mr Parker would be prepared to direct SECWA to sign but he did not want

to do it right there and then. When Mr Judge left work on the Friday, 14 October he thought that the deal was off.

19.16.22 Mr Judge said he spoke with both Mr Beckwith and Mr Edwards on the morning of Sunday, 16 October 1988. Mr Beckwith had spoken to Mr Parker. Mr Beckwith had said it was important for settlement to occur on 17 October and Mr Parker had assured him he would have SECWA agree to the terms of the utilities agreement sought by Bond Corporation. A meeting was to be arranged on the Sunday with representatives from SECWA to finalise the agreement. Mr Beckwith was also comfortable that the Treasurer's guarantee would be forthcoming in connection with overall credit enhancement, but there was some embarrassment about it being provided immediately. He wanted Mr Mitchell and Mr Judge to attend the meeting with SECWA. The same message of urgency was conveyed in conversation with Mr Edwards and there was mention of the delay in the execution of the guarantee which had been the topic of a prior conversation between them. Earlier in the week, in the context of the delay and the delivery of the executed guarantee, Mr Edwards had indicated that there was a possibility of a five to six week delay until the end of the parliamentary session because it was politically preferable that it be executed after Parliament rose.

19.16.23 On Sunday 16 October 1988, Mr Judge attended a meeting at the offices of Robinson Cox, together with a number of other persons representing all parties including SECWA. He said Mr Heron and Dr McKee clearly conveyed an awareness of their position that they had to negotiate and finalise the contract that day. He thought Mr Crisafulli might have given a similar indication. He understood Mr Parker had directed them to get together and finalise the contracts so that the deal could be completed the following day.

19.16.24 At 4.49 am on Monday 17 October 1988, Mr Mitchell and Mr Judge sent a memorandum to Mr Bond who was overseas. Mr Bond did not recall receiving it. The memorandum indicated it had been made clear to Mr Mitchell and Mr Judge that, if Rothwells was to continue in business, settlement of the PICL transaction had to occur that day. The memorandum canvassed the proposal they recommended be accepted in respect of the arrangements with SECWA at the expiration of the debt repayment period and observed they were a long way from where they had been seven hours previously. They commented that a number of compromises had been struck. The memorandum confirmed their view that the Arthur Young report appeared to

indicate "the downside in liquidity requirements at around \$75 million". A number of other issues were mentioned in the memorandum including one paragraph which read:

"In terms of the credit enhancement mechanism we only have legal certainty in the SECWA contract down to zero. After that (where we rely on the WAGH guarantee) the position is far from clear. However as a matter of practicality it would seem that the guarantee will work. The supporting guarantees as Ken [Mr Judge] has already explained to you will be issued post settlement."

That "down to zero" concept was explained by Mr Judge. In line with the credit enhancement arrangements, utility prices could vary downwards quite materially according to the revenues generated by the products of the project. This could occur even to the point that, if the revenues were insufficient to meet operating expenses, excluding utilities and/or debt service, then SECWA would have to continue to provide utilities without being paid, that is, down to zero. Mr Judge was told there was a constitutional problem for SECWA in that it could not contribute back to the project as well as provide free utilities, hence SECWA's participation was kept at down to zero. It was, therefore, necessary for the Government to contemplate the introduction of a third party to provide the additional credit support. Mr Judge understood that in mid July 1988 SGIC was intended to deal with the below zero situation but, later in July, he was told by Mr Edwards that the Government was going to use WAGH as its participant and provider of credit support in substitution for SGIC.

19.16.25 According to Mr Judge, although agreement had been reached between Bond Corporation and SECWA, at settlement on 17 October 1988 it became apparent that the SECWA contract had not been executed and Dr McKee provided a letter dated 17 October 1988 as follows:

"This is to confirm that in accordance with section 10 of the State Energy Commission Act 1979 (as amended), I as Chairman, because of the absence of the necessary quorum of the Board of Commissioners of the State Energy Commission (SECWA), have been directed by the Minister for Economic Development and Trade to undertake that a contract for the supply of electricity, ethane and gas will be executed within one month of the date of this letter in terms of the attached Draft No. 10."

19.16.26 Mr Judge understood the Minister had power to give a particular direction in the absence of a quorum, as opposed to what he described as "the capital D" direction to the board. Mr Beckwith instructed Mr Judge to proceed and informed Mr Judge of an assurance from Mr Parker that there would be no problems in respect of the SECWA contract or the Treasurer's guarantee. Mr Beckwith told him of a letter received from Mr Parker. Mr Judge said Dr McKee told him there were a few noses out of joint or feathers ruffled at the SECWA board and a little time was needed. He said that Mr Edwards "... was considerably more coarse than that and indicated that arms and legs would be broken if it wasn't executed".

19.16.27 After settlement, when execution of the contract was subsequently delayed, Mr Judge said he spoke with both Dr McKee and Mr Heron and was advised it was a matter of concern at SECWA and SECWA was being difficult. In addition he was told by Mr Edwards, and later confirmation came from Dr McKee, that Mr Parker would not give a direction because such a direction would appear throughout the life of the outstanding contracts in the accounts of SECWA and this was politically unacceptable. Because of the delays, Mr Judge wrote a letter of 14 November 1988 requesting confirmation that the supply agreement would be executed in accordance with the terms of the letter of 17 October 1988.

19.16.28 Mr Judge said the terms were later modified because it was made clear to Bond Corporation that Mr Parker was refusing to give the direction and modification was required if any progress was to be made with SECWA. Mr Beckwith was particularly concerned by the prospect of the forthcoming February 1989 election occurring without the contract having been signed. On 26 January 1989 Mr Beckwith advised Mr Judge of a meeting with Mr Parker and gave instructions that Bond Corporation should sign the SECWA contract. Mr Beckwith told him Mr Parker had given assurances that the Government accepted that the contract was not in the terms agreed and, provided the Government was returned in the election, a direction would be issued after the election to cause a modification or a variation to be made to the SECWA contract to bring it back to the terms of product price linkage that Bond Corporation had demanded. As a consequence the contract was executed.

19.16.29 It is clear that, during the final negotiations leading to settlement on 17 October 1988, the Government representatives believed they had no option but to reach an agreement because settlement had to be achieved on that day. The letters of 14 and 17 October from Dr McKee to Bond Corporation and PICL respectively, and a

letter from Dr McKee to Mr Parker dated 17 October 1988, all suggest that Dr McKee was given a direction by the Minister to undertake that a contract would be executed.

19.16.30 Mr Parker said he received ongoing reports from Dr McKee throughout the negotiating process and was aware in the week beginning 10 October 1988 of outstanding matters to be negotiated with Bond Corporation in respect of the SECWA contract. According to Mr Parker, on Friday 14 October Dr McKee indicated that agreement had been reached but it had not been put to SECWA which he thought should be given an opportunity to approve it. Because Bond Corporation wanted certainty, Dr McKee suggested, as a compromise, that it be advised that should SECWA fail to ratify the agreement the Minister would use his powers to direct it to enter into the contract. Mr Parker said he agreed with that suggestion. He indicated he would allow a month for SECWA to approve the contract and would be prepared to give a direction at the end of the month if the board failed to give its approval. Mr Parker maintained that he did not give a direction to Dr McKee and denied giving an assurance to Mr Beckwith that he would give a direction if the Government was returned in the election.

19.16.31 Mr Parker agreed there was a lot of pressure that week and it would not surprise him if there was a fair bit of tension. He said Dr McKee made it clear that, if SECWA was being asked to enter into an arrangement which did not meet its commercial objectives, then SECWA would not willingly enter into such an arrangement without some form of support. Mr Parker effectively acknowledged that Dr McKee said something along the lines that, in the absence of a guarantee, the Minister was going to have to direct him to enter into the arrangement because the guarantee was not in place.

19.16.32 On Saturday 15 October 1988, while in Wyndham, Mr Parker received a telephone call from Mr Judge who wanted to talk to him about the PICL matter. Mr Parker was not prepared to discuss it with Mr Judge and said he would talk to Mr Beckwith. He said he spoke with Mr Beckwith who said his personnel wanted the Treasurer's guarantee to WAGH in place prior to settlement, but the Government representatives had said it would not be in place, and he wanted some comfort that there was no issue between them. Mr Parker indicated it was not an issue and Mr Beckwith asked him to confirm that in writing. As a result, Mr Parker hand wrote a letter dated 17 October 1988 which was delivered to Mr Beckwith after settlement on the Tuesday 18 October or Wednesday 19 October 1988. In the letter Mr Parker referred to the

Treasurer's guarantee to WAGH to back up the funding for PICL in the "credit enhancement". He wrote:-

"The Government has not in any sense backed away from its willingness to put this - [the guarantee] in place and will do so at the first opportunity ...".

19.16.33 In the letter Mr Parker also used the expression "cross guarantees" when referring to arrangements between WAGH and SECWA . He had difficulty explaining the use of that expression in view of both his earlier evidence that semantics were important and his belief that the arrangement between WAGH and SECWA was an undertaking which could not appropriately be described as a guarantee. He denied the Government was guaranteeing the project. In the view of Mr Wiese, although technically the Government was not guaranteeing the project, the economic effect of what it was doing was the same.

19.16.34 Mr Parker confirmed that following settlement SECWA personnel made it clear that they were not happy with the contract and sought his permission to renegotiate it with Bond Corporation.

19.16.35 According to Mr White, during the afternoon of Friday 14 October 1988, Dr McKee indicated there were deadlines hence the matter had to be resolved that afternoon. Dr McKee was under considerable pressure to get SECWA to accept the position that Bond Corporation was putting forward, but Mr White refused to do so because he regarded the conditions as very onerous on SECWA. Those conditions required that after the period of debt repayment SECWA should adjust its energy prices to reflect the commodity prices and he regarded this as a particularly risky proposition. He said Dr McKee was quite agitated and clearly under a lot of pressure, repeatedly stating that he had been placed in an impossible position.

19.16.36 Mr White correctly regarded Dr McKee, being a non-executive chairman, as a person without authority other than as chairing SECWA. For the purposes of the negotiations he regarded him as head of DRD. A quorum for a SECWA meeting could not be obtained as Mr White managed to contact only one other member, but no serious attempt was made to convene a meeting that evening.

19.16.37 Mr White said that following his suggestion Dr McKee telephoned Mr Parker and reported to the Minister that he was having no success in reaching agreement with SECWA. Mr White then spoke with the Minister and indicated his view

that he could not agree to the Bond Corporation position, to which Mr Parker responded that he believed SECWA was being too conservative and that Mr White was being greedy by wanting too much out of the deal. He accused SECWA of standing in the way of State development and indicated that SECWA should proceed with the deal. It was a fairly heated discussion in which Mr White stood his ground. Following that call Dr McKee went to another office and apparently made a further call to Mr Parker because, on his return, he said he had been directed by the Minister to advise Bond Corporation that SECWA would do the deal and accept the conditions. Mr White said this was the first mention of a direction.

19.16.38 The letter of 14 October 1988 was then prepared. Mr White said he had an input in respect of a clause stating that, if prices of energy were linked to product prices, then it was a matter to be sorted out to the satisfaction of both parties. He did this in an attempt to keep his options open. He understood Dr McKee was meeting with Bond Corporation that evening and he next became involved on Sunday 16 October 1988 when he was advised by Mr Crisafulli that Bond Corporation had rejected the letters and a further meeting was to take place. Further work was done that Sunday on another proposal to be put to Bond Corporation on Monday morning 17 October. Mr White said at about 8.00 am on Monday 17 October he was contacted by Mr Crisafulli who indicated that he had been called to a meeting in the early hours to prepare a final draft incorporating what had been agreed by others.

19.16.39 Mr White said he sought a meeting with Mr Parker in November 1988 to demonstrate that the draft contract was unworkable for SECWA and would probably be unfair to both parties if certain events occurred. He met with Mr Parker and others and Mr Parker accepted the explanation. He instructed them to negotiate with Bond Corporation to change the contract accordingly. Mr Heron and Mr Johnson undertook the negotiations.

19.16.40 According to Dr McKee, during the week preceding 17 October 1988, Mr Parker had made it clear that the deadline of Monday 17 October for resolution of the difference could not be shifted. The Minister had been advised by Bond Corporation that they were not going to sign unless there was a supply agreement in place. He said Mr Parker was very forceful in transmitting his desire that Dr McKee do whatever he could over the weekend to ensure that Bond Corporation was satisfied and the documents were signed on the Monday.

19.16.41 Dr McKee said when he met with SECWA officers during the afternoon of 14 October 1988 it was clear to him that the instructions to the negotiating team for SECWA prevented them from accepting the conditions sought by Bond Corporation. There was concern about the product price linkage and the absence of any guarantee from the Treasurer or anybody in Government that WAGH would meet its responsibilities. According to Dr McKee, he and the others at the meeting reaffirmed their desire that SECWA should adhere to its long held position. He and Mr White spoke with the Minister explaining the situation and indicating that they were not in a position to resolve the pricing arrangement with Bond Corporation prior to the Monday morning deadline given by the Minister. Mr Parker responded by saying, "... give it a shot, but bear in mind that the whole thing has to be buttoned up by Monday" or words to that effect. He said Mr Parker was very angry to the point of saying they were failing in not getting the matter settled and if he, Mr Parker, had taken personal charge of the negotiation the matter would have been dealt with by this time. Dr McKee confirmed Mr White also spoke with Mr Parker, after which they proceeded to draft the letter dated 14 October.

19.16.42 Dr McKee's attention was drawn to the reference in the letter to a direction in view of the lack of a quorum. As to whether he received a direction from the Minister, Dr McKee said he was directed orally to proceed with the arrangement. He said it was put to Mr Parker that there were two points to be covered otherwise they were not in a position to finalise the supply agreement and they were unable to get a quorum. Mr Parker responded: "Well, you go ahead and tell Bond Corporation that you will do that and I'm instructing you to go ahead and do that". Dr McKee went on to say, however, that he could not swear that Mr Parker used the word "instruct" or "direct". In quite lengthy evidence on the topic, Dr McKee said that while he could not recall the precise words he and SECWA were clearly given a direction or an instruction to proceed.

19.16.43 Dr McKee said Bond Corporation rejected SECWA's correspondence and the impasse continued. Further meetings were held during Saturday and Sunday, 15 and 16 October 1988, and eventually a formula was agreed. Those negotiations were conducted by Dr McKee, Mr Heron, Mr Edwards, Mr Crisafulli and solicitors from Jackson McDonald representing SECWA with representatives from the Bond Group and their solicitors. Dr McKee said Mr Parker was kept apprised of progress at regular intervals and he said the important call occurred at about 5.00 am on Monday, 17 October. He outlined to the Minister that a basis acceptable to Bond Corporation had

been reached, but SECWA needed to be protected. The basis concerned a trend line for the product price with a collar around the product price at 15% above and below the trend line. SECWA also needed a Government undertaking that it would be protected. According to Dr McKee, he then told Mr Parker "precisely" that "I will need to be directed on this point and directed to undertake to have the matter approved by the Board in due course, but we will need to be protected on this point". He said the Minister formally, and with the correct words, directed him to undertake to have the contract put in place and used the words "I direct you". Dr McKee was prepared to accept that situation because, arithmetically, the position had finally been reached that SECWA sought to achieve when it had approved that the negotiating team could accept 1% below CPI.

19.16.44 Dr McKee said he recognised the need for a direction because he had no authority to commit SECWA, but he believed that SECWA would approve the arrangement because it was what it wanted. He could not, however, give the undertaking required by Bond Corporation that the agreement would be passed by SECWA, hence he put it in front of the Minister and the direction was given by Mr Parker. He said Mr Parker understood that he, Dr McKee, was unable to provide the undertaking and it was Dr McKee's belief that, effectively, the Minister had directed that the contract be executed. The letter of 17 October 1988 is the document that Dr McKee said he was directed by the Minister to sign. Dr McKee maintained it was not possible that he received but one direction, namely, the direction on the evening of 14 October and he maintained "... there was a clear and direct and formal direction verbally on the telephone of the morning of the 17th". Dr McKee said he sent the letter of 17 October 1988 to Mr Parker in confirmation of the discussions that had occurred.

19.16.45 Mr Parker did not have any power to direct Dr McKee. The power of direction is contained in section 10(2) of the *State Energy Commission Act* which provides that the Minister may give a written direction, but it must be to the Commission which is defined as "the body corporate". Dr McKee and the group with which he was working did not have any authority to bind SECWA and SECWA adopted that view in subsequent meetings when it declined to proceed with execution of the contract.

19.16.46 We have no doubt Mr Parker made it very plain to Dr McKee it was imperative that settlement take place on 17 October 1988 and Dr McKee should do whatever was necessary to ensure that differences with Bond Corporation were resolved

in order to achieve settlement on that day. Mr Parker admitted he told Dr McKee that he would give a direction if necessary, but maintained that he did so after that procedure had been suggested by Dr McKee. On the other hand, Dr McKee presented quite a different version of the conversations of 14 and 17 October 1988. While in urgent and tense situations there is always room for misinterpretation and, in respect of the conversation of Friday 14 October 1988 Dr McKee was unable to recall the precise words, we are unable to accept that Dr McKee could be mistaken in his memory that Mr Parker gave a specific instruction in the early hours of Monday 17 October 1988. The correspondence supports Dr McKee.

19.16.47 We are satisfied that Mr Parker instructed Dr McKee to agree to the terms of the contract between SECWA and Bond Corporation and, if necessary, to do so in accordance with the wishes of Bond Corporation. In arriving at our finding we have taken into account not only the evidence of Dr McKee, Mr Parker and others concerning this particular issue, but also the evidence and our findings in respect of the events since the idea of using PICL was first suggested. The scheme to use PICL had been devised and put in motion some months earlier, and we have found that various improper actions occurred at each step along the way to bring the scheme to a conclusion by settlement of the sale of PICL to Bond Corporation and the Government. Mr Parker's actions in this instance are yet another example in that chain of inexcusable events. He purported to rely on his power of direction in order to ensure that the PICL settlement was achieved on 17 October 1988. His dominating concern was to ensure that Rothwells did not collapse thereby embarrassing the Government. He did not pause to consider the wider interests of the public.

19.16.48 On 17 October 1988 Mr Dowding wrote to SECWA confirming his intention to execute, in due course, a Treasurer's guarantee of WAGH's obligation to SECWA. It was eventually executed on 23 January 1989.

19.17 The purchase of Bond's shares in Rothwells by Katanning Holdings Limited and the management fee

19.17.1 As a consequence of the 1987 rescue, Bond Corporation had acquired shares in Rothwells for approximately \$17.5 million. As a condition of being involved in the PICL project, Bond Corporation insisted that those shares be purchased from it. On 21 July 1988, Mr Connell signed an agreement that in consideration of Bond Corporation executing the memorandum of understanding and on

Bond Corporation acquiring its proportion of shares in PICL and settling in respect of that acquisition, Mr Connell would, simultaneously with that settlement, and as a condition of the settlement, purchase from Bond Corporation and pay for 3,323,539 ordinary and 6,647,078 preference shares in Rothwells for \$17,448,579.75.

19.17.2 That agreement posed a financing problem for Mr Connell. He said a number of ideas were floated, including payment to Bond Corporation of a \$17.5 million management fee for the PICL project. According to Mr Connell, he had been told by various people involved in the negotiations that there was an agreement between Bond Corporation and the Government for payment of the management fee. He said he discussed it at various times with Mr Lloyd, Mr Edwards, Mr Parker and Mr Grill. Mr Connell regarded this, not as a management fee, but an amount designed to pick up other costs. He said he did not appreciate being asked to meet the cost of the purchase of the shares. Mr Connell said he discussed the matter with Mr Beckwith who was amenable to picking up the cost of this purchase with a management fee, that is, by increasing the management fee as then agreed by an amount that reflected the cost of the shares. Mr Connell maintained it was not part of the original deal and he should not bear the cost. He said while Mr Beckwith had no problem with the proposal, it was obviously a matter that he would have to take up with the Government. Mr Connell understood from Mr Beckwith that he did so and the management fee was going to be increased with the consequence that the financing of the purchase of the shares would not then be his concern. Ultimately, Katanning Holdings Limited ("Katanning") purchased the shares, but Mr Connell was unable to recall how much was paid.

19.17.3 According to Mr Connell, at about the time of the PICL negotiations, he attended Mr Parker's office at the request of Mr Parker and a conversation took place about Mr Parker's future plans. We canvass this matter in detail later in section 19.18 of this chapter. For present purposes, we note Mr Connell's evidence that in the course of that discussion Mr Parker said he understood Mr Connell's position had improved as a result of the change in the arrangement with respect to the management fee and that, in effect, Mr Connell would be \$17.5 million better off.

19.17.4 According to Mr Connell it was ultimately decided not to proceed with the management fee proposition and, in that context, he spoke to Mr Grill because he understood Mr Grill effectively "scuttled it". Mr Connell indicated to Mr Grill he wanted the arrangement to proceed and attempted to enlist Mr Grill's support for it, but Mr Grill responded that the decision had been taken not to proceed and it would not.

From discussions with Mr Edwards and Mr Grill, it was Mr Connell's understanding that the decision was taken by Mr Grill on the recommendation of Mr Edwards.

19.17.5 Mr Edwards said that during the negotiations it was agreed that Bond Corporation would be managers of the construction project and obviously a management fee would be part of the final documentation. There were discussions toward the end of the negotiations concerning the level of management fee and both Mr Edwards and Mr Grill were adamant that the fee had to be consistent with normal commercial practice. He was told by Mr Parker that Mr Connell had approached him with a proposal that the management fee be used to offset a condition of the settlement by payment of the fee, or part of it, as a "lump sum up front". Mr Edwards could not remember the numbers involved, but said it was larger than one would have thought, around \$30 million, with a substantial proportion up front. He advised Mr Parker he did not believe it was tenable and, in his discussion with Mr Grill, they agreed it was not an approach that could be adopted.

19.17.6 Mr Grill said he could remember the matter of the management fee being mentioned by Mr Connell on an occasion when he advised Mr Connell that Cabinet had approved the settlement. Mr Connell asked him whether the management fee had been approved and was disappointed when Mr Grill indicated it had not. He said Mr Connell was talking about "... an up front capitalised management fee" of about \$16 or \$17 million and claimed the rejection could jeopardise the whole transaction. The matter had been brought to Mr Grill by Mr Edwards on the basis that such a fee had been requested by Bond Corporation in the negotiations. He did not think it was appropriate and advised Mr Edwards accordingly. Mr Grill did not think the matter went to Cabinet and did not recall discussing it with Mr Parker.

19.17.7 Mr Parker said he first became aware that Mr Connell was to purchase Bond Corporation's shares in Rothwells as part of the deal when Mr Connell sought his help in negotiating a loan to Katanning. This occurred after Mr Parker's return from overseas, which was about 1 August 1988, and it was during the negotiations leading to settlement. Mr Parker took the view that any side arrangement reached between Mr Connell and Bond Corporation was of no significance. There were two discussions between him and Mr Connell within a week to three weeks of settlement. One concerned the management fee and the other related to the \$17.5 million purchase. As to the management fee, there had been a negotiation conducted by Mr Edwards that was well advanced, but not concluded, about the level of that fee. Mr Parker was

approached by Mr Beckwith on the basis that Bond Corporation was finding it difficult to finance the \$225 million. Mr Beckwith suggested that the net present value of the management fee could be calculated from the payment over the construction period less a discount, and the Government could pay that net present value up front to Bond Corporation rather than the fee over the period of construction. Mr Parker said Mr Beckwith presented it as financially advantageous to the Government, but Mr Parker responded that he would think about it. He spoke with Mr Edwards and Mr Grill and, although the presentation by Mr Beckwith was reasonably plausible in terms of cost, it ignored the fundamental reason for the existence of the management fee, namely, payment in response to actual management of the project. A payment up front would diminish the incentive to manage properly. In discussion with Mr Grill and Mr Edwards, they decided not to proceed with such a proposition.

19.17.8 As to the \$17.5 million required by Mr Connell, Mr Parker said that issue was raised with Mr Parker less than a fortnight before the PICL settlement. Mr Connell telephoned and said Bond Corporation was insisting that Mr Connell purchase the shares and hence there was a need to find \$17.5 million. Mr Connell told Mr Parker he had negotiated a loan with BCCI Australia ("BCCI"), but it needed to go to the credit committee of BCCI in London. Although he was confident that it would be approved, there was a time delay and Mr Connell asked if it would be possible for SGIC or some other Government entity to provide bridging finance on the basis of a take out by BCCI when the credit committee approved it. Again Mr Parker said he would think about the matter. He spoke with Mr Edwards who in turn spoke with Mr Rees and came back with a negative response. Mr Connell telephoned Mr Parker again and said the arrangement would be altered in that BCCI was prepared to fund the loan but it wanted SGIC to take them out or guarantee to do so. Mr Parker advised him that he did not think that would be approved. Mr Parker again spoke with Mr Edwards and they agreed that the second proposition was not acceptable. Mr Parker said he did not discuss pushing these matters through Cabinet with Mr Connell, nor did he undertake to do so, and neither was it a matter that he would ordinarily have expected to go to Cabinet. In view of the decision taken by him in conjunction with Mr Grill and Mr Edwards there was nothing to put to Cabinet.

19.17.9 Mr Edwards confirmed that Mr Parker spoke with him about Mr Connell's request as to whether SGIC would take a put option in respect of a property on which BCCI would advance money via Katanning. Mr Edwards was not keen on being involved and discussed the matter with Mr Rees, following which he

reported negatively back to Mr Parker. Mr Parker was not keen on the proposition and, as far as Mr Edwards was concerned, Mr Parker was just going through the motions.

19.17.10 Mr Frederick Holman was and remains a director of Katanning. He said the purchase of the shares from Bond Corporation evolved from a meeting when Mr Connell suggested that Katanning purchase the shares. Mr Connell was not a member of the Katanning Board, but Rothwells was a major shareholder to the extent of about 30% in Katanning. In Mr Holman's view the suggestion did not appear to be out of line. Although Mr Holman was not intimately concerned with the progress of the matter at the outset, he became involved with the completion of the transaction during the week preceding 17 October 1988.

19.17.11 Mr Holman described the suggestion by Mr Connell as more of a comment made during a general meeting at which Mr Lucas, Mr Connell, Mr Lloyd, Mr Selwood and Mr Holman were present. Mr Lloyd did not hold a position with Katanning, but he appeared to pick up the idea and was going to check it. Mr Holman understood the idea must have been developed by the Rothwells decision makers. The next contact with Katanning was a memorandum from Mr Hare early in October 1988 indicating the procedure to be followed and the detailed documentation required. It also referred to financing. Mr Holman, together with Mr Dorsey and Mr Rakich as the Board of Katanning, discussed the matter, including the benefits and ramifications. He accepted the purchase was being promoted by Rothwells and not by Katanning, but Katanning was totally reliant on Rothwells for its day to day funding because Rothwells was its main financier. Other funding had dried up and it was very much a hand to mouth situation. Katanning was, therefore, totally dependent on Rothwells for its survival.

19.17.12 In his evidence Mr Holman acknowledged that on the open market the shares were then worth between \$9.5 and \$10 million. Katanning was to pay the purchase price of \$17.5 million and, not surprisingly, Mr Holman was unable to justify the purchase from an economic point of view other than by reference to the need to appease Rothwells and the possibility that Katanning would find itself in difficulties if Rothwells withdrew its financial support. He said there was one conversation with Mr Hare who stated the obvious, that Katanning was very much dependent on continued funding from Rothwells. Mr Holman said the situation was a little different from sitting down in front of the bank manager and having the manager lay out the facts of life about repaying the overdraft. As to the justification for paying a price far greater than

the price at which the shares were currently trading, Mr Holman responded that there was a full indemnity by Dallegles against any losses incurred on the future resale of the shares. Mr Holman said the directors understood the current price was very much deflated. He said there was every reason to believe that with a reconstruction of Rothwells and the Government involvement the price of the shares would recover, not to pre-October 1987 prices, but to a figure around what Katanning was paying. Mr Holman was then specifically directed to the question as to what explanation was given, if any, as to why Rothwells wanted Katanning to pay \$17.5 million for the Bond Corporation shares rather than market price. He responded: "I haven't an answer for that". He said he could not remember asking and assumed he did not. He was not told why the price had been set at \$17.5 million.

19.17.13 Mr Holman denied that Katanning was directed to make the purchase and did not think it was correct to say that it was unable to refuse. He said it was in a position where it was prudent to proceed and would disagree with the suggestion that the directors did not exercise due diligence from Katanning's point of view.

19.17.14 From the evidence of Mr Ted Davies of SGIC, and by reference to a letter to him of 17 October 1988 from the R & I Bank, it appears that on 14 October 1988 SGIC purchased a Bill from Bond Corporation for \$8 million and on-sold it to the R & I Bank. By this means \$8 million was provided to Bond Corporation which enabled it to provide an \$8 million facility to Katanning. According to a memorandum from Mr Judge to Mr Oates of 12 October 1988, the \$8 million facility was repayable in 12 months. Mr Judge told the Commission that the financial position of Bond Corporation was such that payment in full of the \$17.5 million was required in order for Bond Corporation to have sufficient funds to settle on the purchase of the interest in PICL.

19.17.15 It has been necessary for us to consider the facts of the transaction concerning Katanning because it is an integral part of the convoluted arrangements that preceded the PICL settlement and also because it involved further indirect funding of Rothwells by SGIC. In addition, it explains why some of the settlement proceeds were paid by Rothwells to Katanning. A full scale investigation, however, falls outside the Commission's terms of reference because the officers of Katanning did not deal with Government. The evidence serves to demonstrate, however, that Bond Corporation was very much in control during these negotiations and was ensuring, as Mr Bond told us he insisted, that its exposure to Rothwells was eliminated.

19.18 Mr Parker and the management fee

19.18.1 As mentioned previously, during his evidence concerning discussions with Mr Parker about the management fee, Mr Connell said Mr Parker referred to Mr Connell's position being improved as a result of the change in the arrangements. According to Mr Connell, this conversation took place after Mr Parker had telephoned him and asked him to attend at Mr Parker's office.

19.18.2 Mr Connell said Mr Parker referred to the amount of work done. He indicated that he appreciated that Mr Connell had put in a lot of time and effort and expressed the hope that Mr Connell appreciated that he, Mr Parker, had similarly put in a lot of time and effort over the preceding year to reach a resolution. Mr Parker suggested that life would improve considerably for Mr Connell in the future because he could move himself out of Rothwells and carry on with his own affairs. Mr Connell said Mr Parker indicated a wish to retire from politics in the following January because he had difficulty with Mr Dowding and could not see any future for him in the Government with Mr Dowding. Mr Parker said he had developed a lot of experience in dealing with the matters of the previous year and was aware that Mr Holmes a Court would be spending a lot of time in London. He expressed a desire to live in London and put deals together and suggested there would be deals in which Mr Connell could be involved. However, he did not have the required financial means because, notwithstanding his hard work, he had nothing to show for it. He thought it would require something like \$5 or \$10 million and suggested to Mr Connell that Mr Connell might like to consider assisting him in putting the money together. Mr Connell said he responded that he did not have that sort of money and, in that context, the subject of the management fee arose. He asked Mr Connell to consider, when his position was improved as a result of the PICL settlement and the management fee, whether he would contribute 10% or \$1.75 million as a start in putting together the \$5 or \$10 million that was required. Mr Parker spent quite a bit of time talking about his plans. In evidence Mr Connell said he was stunned and really left the matter hanging in the air because he did not know how to handle it. The Commission finds Mr Connell's stated reaction surprising having regard to the breadth of his own experience. He said in evidence he did not really know what Mr Parker was wanting him to do, whether it was to subscribe capital or something else. He said Mr Parker was talking about how he could set up as a non-resident and work in London without being subject to UK tax, for which it would be necessary to set up a non-resident entity for tax purposes in the UK. A range of options was canvassed, including the use of tax havens such as the Channel Islands and

British Virgin Islands. There was discussion about the possibility of their meeting in London to further his intentions.

19.18.3 Mr Connell said in evidence he did not take the approach as a suggestion that he should make a gift of \$1.75 million to Mr Parker. He did not know what Mr Parker wanted and he was not keen to establish what he wanted. Mr Connell said he really did not want to be involved. The meeting lasted 15 or 20 minutes. It came to an end only when Mr Parker suggested that Mr Connell was to be the source of funds. Mr Connell was adamant that he did not provide any funds to Mr Parker, or any entities associated with Mr Parker or his family. He said he did not assist him directly or indirectly in establishing any kind of structure.

19.18.4 Mr Connell said that he reported the essence of the meeting to both Mr Lloyd and Mr Hilton and he thought that he had done so individually and collectively. He said Mr Lloyd's reaction was one of amazement and disbelief. Mr Connell recalled telling Mr Hilton that he could not believe what had been put to him and he was really getting a bit sick of demands from Bond Corporation and Rothwells. He effectively told Mr Hilton that Mr Parker wanted financial support to set himself up in London to the extent of 10% of what Mr Connell was going to be saving as a result of the management fee position. He might have told Mr Hilton of a proposal to meet in London, but he could not recall doing so. He did not recall mention of setting up a Channel Islands company for Mr Parker, but he did remember telling Mr Hilton that Mr Parker wanted to go to London to set up an offshore entity. Mr Connell denied telling Mr Hilton that in order to induce Mr Parker to support the management fee proposal, he had agreed to pay him the fee of \$1.75 million. He maintained that there was no suggestion by him that he would induce Mr Parker to do anything, rather, Mr Parker was asking for some support to do what he wanted to do. Mr Connell said he had a very good reason for not telling Mr Grill at that time and was not sure whether he might have spoken to Mr Grill about Mr Parker's request in more recent times. He did not think he had ever advised Mr Musca of the conversation and could not recall any discussion with Mr Hilton and Mr Musca in a coffee lounge somewhere near Allendale Square shortly after Rothwells went into provisional liquidation. He could recall being in a coffee lounge on one or two occasions with Mr Musca, but not of advising him in such a circumstance about the discussion with Mr Parker.

19.18.5 Mr Lloyd remembered being aware of the proposal promoted by Mr Connell that the PICL management fee be set artificially high, thus compensating

Bond Corporation for the \$17.5 million worth of shares. He thought it was to be achieved by a management fee inflated by \$35 million. He and Mr Edwards were of the same view that there was no reason for the Government to agree to it. At about this time Mr Connell described to him a conversation with Mr Parker, but not in the context of the management fee or the Rothwells shares, but in relation to the arrangements for the energy trust. Mr Connell told him Mr Parker sought a payment of \$1.75 million on the successful completion of an energy trust which involved Western Collieries. Mr Lloyd said he was amazed. He could not believe the allegation and said so. Mr Connell responded to the effect, "[w]ell, let's leave it like that". Mr Lloyd said he did not discuss that subject with anyone until Mr Connell gave his evidence to the Commission. He then rang Mr Parker and advised him of the particular conversation with Mr Connell. Mr Parker was distressed and denied the allegation.

19.18.6 Mr Hilton described a conversation with Mr Connell in the Captain Stirling Hotel after work soon after Mr Connell had returned from a visit to Mr Bond's yacht in the south of France in the following terms:

"He told me that I shouldn't be concerned about settling that matter, that he had made arrangements with Mr Parker and that Mr Parker was to receive a fee of \$1.75 million for assisting him in making sure that the management fee proposal was approved and that was part of a package he had agreed with Mr Parker and he was planning to go to London with Mr Parker to set up some vehicles in the Channel Islands for him to transfer funds through."

Mr Hilton said there was a subsequent mention in Mr Connell's office when, following a telephone conversation, Mr Connell told him that it was Mr Parker ringing to say he could not go with Mr Connell to London as previously arranged.

19.18.7 Mr Musca described an occasion in late November or early December 1988 when, over coffee, Mr Connell, Mr Hilton, Mr Musca and a fourth person, who was possibly Mr Hare or Mr Lucas, engaged in a general discussion about Rothwells and what went wrong. He said it was like a post mortem and someone other than Mr Connell asked about the \$1.75 million that Mr Parker was to get. Mr Connell responded, "[a]nd the rest. He was in there for \$10 million." According to Mr Musca, there was no acknowledgment that anyone knew about the \$10 million and that was the end of the conversation on that issue.

19.18.8 Just as Mr Lloyd said he found the suggestion amazing and did not believe it, Mr Edwards said that he also found the suggestion that Mr Parker should personally take part of the management fee as incredible. He was not aware of anything which was consistent with such a proposition or suggested it in any way.

19.18.9 As canvassed previously, Mr Parker agreed he discussed with Mr Connell financial aspects associated with purchase of the shares, but he emphatically denied that he ever asked Mr Connell for \$1.75 million or any sum. Mr Parker was adamant he did not discuss leaving politics or his future with Mr Connell.

19.18.10 It is obviously a serious allegation and, because of the possibility of hidden motives, the evidence of Mr Connell in this regard must be approached with extreme care. While it is correct that Mr Connell spoke of the topic toward the end of 1988, he said in evidence and told Mr Hilton that it arose in the context of the management fee. However, according to Mr Lloyd, Mr Connell did not relate it to the management fee but said it was to be paid on successful completion of the energy trust. Mr Connell has told us that he did not make any agreement on the matter; but, according to Mr Hilton, Mr Connell said he had agreed a package with Mr Parker. Finally, there is the evidence of Mr Musca that Mr Connell said that Mr Parker was "... in there for \$10 million", which does not accord with the evidence of Mr Connell. There is thus significant inconsistency in the versions given by Mr Connell and a total absence of any form of corroboration. In these circumstances, the Commission declines to give any credence to the allegation made by Mr Connell.

19.19 SGIC financing of debenture purchase

19.19.1 As previously discussed in section 19.6 of this chapter, in order to finance the purchase of the Government's share, WAGH issued debentures which it invited SGIC to purchase. That invitation was accepted by letter of 30 September 1988. The method by which SGIC financed the purchase of the debentures is the subject of an accountant's report for the Commission prepared by Mr Stephen Mann and dated 21 July 1992. In summary it appears that on 21 July 1988 SGIC sold SECWA and WA Treasury stock and repurchased Treasury stock which it eventually sold on 3 October 1988 for \$173,331,670. Those funds enabled SGIC to purchase, on 3 October 1988, the WAGH debentures at a total cost of \$175 million. The debentures were to mature on 3 October 1997.

19.19.2 On 28 July 1991 WAGH redeemed the seven debentures of \$25 million each held by SGIC at face value. To do so, WAGH borrowed \$175 million from the ANZ Banking Group Ltd. That facility was reduced to \$150 million by repayment of \$25 million by the WA Government on 28 June 1992.

19.20 The obligations of WAGH

19.20.1 On 14 October 1988 a meeting of the Board of Directors of WAGH was held. Present were the Chairman, Mr Heron, and Directors Mr Bowe and Dr McKee together with Mr Lewi and Mr Rosario, the company secretary. By invitation, Mr Edwards, Mr Wiese and Mr Doyle were also present. The minutes recorded that Mr Wiese explained the obligations of WAGH arising under the Deed of Undertaking. The board resolved to accept the terms of that deed and approved its execution. In essence it was explained that during the project loan period WAGH was required to fund, by way of subordinated loans to PICL, deficits indicated by PICL's forward cash flow forecasts which could not be covered by project finance or net revenue. The obligation terminated on the repayment of the project loan, but subordinated loans remaining unpaid at the date of the repayment of the project loan would be assumed by a holding company of PICL so that PICL was left free of debt. WAGH would be obliged to forgive that debt after it was assumed by the holding company. The directors were advised and accepted that the Deed of Undertaking was in the nature of an underwriting for project finance and was tantamount to a guarantee. Mr Heron informed the directors that, in the most adverse case, WAGH was exposed to a \$200 million risk and Mr Wiese advised that the deed required the Treasurer to issue a guarantee in respect of the financial obligations of WAGH.

19.20.2 There was also a shareholders' agreement. Mr Wiese advised that it regulated the relationship between the owners of PICL, being WAGH and the Bond Group of companies. It provided that WAGH appoint three nominees to the boards of PICL and two other companies which would control PICL. It was resolved that Mr Bowe, Mr Heron and Dr McKee be the nominees and, further, that those nominees act diligently and prudently to protect the interests of WAGH. It was explained that six directors would constitute the board, with equal representation by nominees from WAGH and Bond Corporation and that Bond Corporation had the right to nominate the chairman who had a casting vote in the event of a deadlock after a cooling off period of three days. The board unanimously resolved to accept the terms of the agreement and approved its execution.

19.20.3 Mr Wiese also explained the management agreement which provided that Bond Corporation was responsible for the management of the construction phase. The board resolved to approve the terms of that agreement.

19.20.4 The contents of the proposed supply agreement between SECWA and PICL were noted together with the obligation of WAGH to ensure that SECWA was duly and properly paid on commercially agreed terms for its services and supplies to PICL. Dr McKee advised the directors that the agreement would not be agreed to and executed by SECWA in time for settlement and, to avoid delays, it was proposed that the parties endorse a letter of intent to which a copy of the proposed agreement would be attached. Mr Wiese confirmed that all the risks taken by WAGH in relation to the supply agreement were in line with the Deed of Undertaking and memoranda of understanding relating to the State's interest in the project. The board resolved to accept the terms of the agreement and approved execution of it.

19.20.5 As to the share sale agreement, the directors authorised the payment of \$175 million and WAGH's share of the stamp duties. They required that WAGH officers attending settlement to ensure that the settlement process resulted in a receipt for \$150 million being issued by NAB to Rothwells and a receipt for \$50 million being issued by Dempster Nominees Pty Ltd. Other technicalities relating to the agreement were explained and the board resolved to enter into the share sale agreement.

19.20.6 Finally, the minutes recorded that, at the request of the directors, the solicitors present orally confirmed that WAGH had the legal capacity to enter into the various agreements and related documents. The solicitors also confirmed that the directors were acting legally and within their powers to approve execution of the agreements and to make disbursements including the payment of \$175 million.

19.20.7 While consideration was properly given to the capacity of WAGH to enter into the arrangements, there does not appear to have been any specific consideration given to the duties of the directors to pursue matters that were in the commercial interests of WAGH nor to the significance of the fact that an excessive price was being paid.

19.21 Settlement 17 October 1988

19.21.1 In October 1988, Mrs Sue Wilson was a senior associate of Parker & Parker and acting for Bond Corporation. She provided a statement to the Commission in which she explained the mechanics of the PICL settlement. There was a "dummy run" at the offices of Dallhold on the evening of 14 October. Settlement was scheduled for 7.30 am on Monday 17 October, at the offices of Robinson Cox. She was present throughout settlement and her role was to co-ordinate it. There were basically nine stages to the settlement structure which Mrs Wilson described as follows:

"Stage 1

A company associated with Laurie Connell, Dalleagles Pty Ltd, purchased a new subsidiary (Newco 1) which subsequently became known as Petrochemical Investments Pty Ltd ("PIPL").

Stage 2

PIPL then purchased from each of Dalleagles and Dempster Nominees Pty Ltd ("Dempster Nominees") and other entities associated with Dempster, their respective 50% shareholdings in PICL, for \$50m each. Consideration for the transfer of shares to PIPL was a \$50m debt owing from PIPL to Dempster Nominees and a \$50m promissory note from PIPL in favour of Dalleagles. By the end of Stage 2, all of the shares in PICL are held by PIPL which is, in turn, a wholly owned subsidiary of Dalleagles.

Stage 3

Dalleagles then purchased 100% of another new \$2.00 company (Newco 2) which subsequently became known as Petrochemical Holdings Limited ("PHL").

Stage 4

Dalleagles sold its two shares in PIPL (which by then owned all the shares in PICL) to PHL for \$300m. Consideration for the transfer of shares to PHL was a \$300m promissory note from PHL in favour of Dalleagles. By the end of Stage 4, Dalleagles owned both shares in PHL which in turn owned both shares in PIPL which in turn owned all the shares in PICL. See Diagrams A and B attached which illustrate Stages 1 to 4.

Stage 5

The two promissory notes - the \$50m note from PIPL to Dalleagles and the \$300m note from PHL to Dalleagles - were both endorsed to Rothwells Limited ("Rothwells"). Rothwells then acknowledged that the endorsement of the promissory notes

satisfied Dalleagles' obligations to Rothwells under the Purchase of Loans Agreement (whereby in July 1988, Dalleagles agreed to buy certain Rothwells debts for \$350m). See Diagram C in relation to Stage 5.

Stage 6

WAGH and a Bond company, Bond Petrochemicals No 1 Pty Ltd ("BP1"), each purchased from Dalleagles one share in PHL. The total consideration for the purchase was \$2.00. This amount was said to be the then net worth of PHL since PHL and its subsidiary, PIPL, together owed \$350m to Rothwells, and \$50m to Dempster Nominees. Arguably then, since the value of the petrochemical project was \$400m, PHL's assets equalled its liabilities, and therefore its net value was nil. See Diagram D in relation to Stage 6.

Stage 7

Pursuant to the Shareholders Agreement, WAGH, BP1 and Bond Petrochemicals No 2 Pty Ltd ("BP2") (another Bond company) subscribed for further shares in PHL and also each agreed to lend funds to PHL in the following amounts:-

BP1:	\$50m subscription and \$150m loan
BP2:	\$6.25m subscription and \$18.75m loan
WAGH:	\$43.75m subscription and \$131.25m loan

On the settlement date, the above arrangements were slightly changed in that an agreement was reached for the \$150m BP1 loaned to be apportioned among Bond companies as follows:

BP1	\$75m
Bond Media Limited ("Bond Media")	\$25m
Bell Resources Limited ("Bell")	\$50m

By the end of Stage 7, PHL has \$400m. See Diagram E in relation to Stage 7.

Stage 8

PHL then loaned \$100m to PIPL.

Stage 9

PIPL and PHL then satisfied their obligations:-

- (i) PIPL paid Dempster Nominees \$50m due under Stage 2 and also paid Rothwells

\$50m in satisfaction of the promissory note endorsed under Stage 5. (Rothwells then endorsed this \$50m to Bell).

- (ii) PHL paid Rothwells \$300m in satisfaction of the promissory note it issued to Dalleagles in Stage 4 and which Dalleagles endorsed under Stage 5. (Rothwells then paid out its creditors, namely, NAB \$150m, Bell \$50,883,561.56, BCF (Bond Corporation Finance) Limited ("BCF") \$107,446,366.54 and Bond Media \$26,346,301.37.)

By the end of Stage 9, Rothwells had received \$15,323,770.45."

The diagrams referred to are set out in the schedule to this chapter.

19.21.2 In the context of the total settlement, the figures set out above generally reflect those set out in the briefing notes for the Cabinet meeting on about 3 October 1988. While Cabinet was told that Rothwells would receive a net \$25 million, the lesser figure of \$15,323,770.45 provided by Mrs Wilson appears to have resulted, in the main, from interest that was due. However, Mr Edwards said that Rothwells' liquidity was advanced only by \$1 million or thereabouts because there were not only increased payments due to Bond Corporation, but the rest "... was really gobbled up in this Katanning Holding's machinations".

19.21.3 Mr Grill produced a single page document with a diagrammatic representation of \$25 million remaining after payment of the fundamental amounts to NAB (\$150 million), Bell (\$50 million), Bond Corporation (\$100 million) and Bond Media (\$25 million). That balance of \$25 million was, however, linked to other entries which demonstrate that, after various items were expended, a balance of \$1 million remained. Those items were as follows:

"9.5	RWLS shares ex Bond
8.0	Repayment Bond deposits
2.5	Interest (Bond/Bell)
4.0	NAB O/d
—	

1.0M "

19.21.4 Mr Grill said it looked as though the document represented on the one hand what should have happened, leaving a balance of \$25 million and, on the other, what actually occurred. He thought it might have come from Mr Edwards after Mr Edwards rang him and informed him that settlement had not provided sufficient liquidity. Although he was not sure, he thought the call came after settlement.

19.21.5 Mr Mann, in a statement of 29 May 1992, confirmed the figures set out in stage 9 of Mrs Wilson's statement and was able to explain the allocation of the balance of \$15,323,770.45 as follows:

"Cheque in favour of Katanning Holdings\$9,500,000
Cheques in favour of Spedleys\$4,900,000
Cheque in favour of Paragon Resources\$700,000
Other sundry disbursements\$228,094

\$15,328,094 "

19.22 Settlement with Mr Dempster

19.22.1 In section 16.7 of chapter 16 we have already referred to the agreement of 25 October 1987 whereby Dempster Holdings agreed to sub-underwrite part of the issue of shares in Rothwells to a maximum subscription of \$5 million. We also canvassed in that section the arrangements in January 1988 whereby Dempster Nominees borrowed \$7.5 million from Rothwells which it lent to Dempster Holdings and Dempster Holdings subscribed for Rothwells shares totalling \$7.5 million. During 1988, the debt owed by Dempster Nominees to Rothwells fluctuated. On 17 October 1988 further transactions were entered into between Dempster Holdings and

Rothwells and Dalleagles and Dempster Holdings that are reflected in the agreements of that date. According to the solicitors for Mr Dempster the following occurred:

"(i) On 17 October 1988

(a) As it was a condition of the sale of PICL that its debt with Rothwells be cleared :

PICL loan balance	17,441,700
Less deposit proceeds and interest	4,491,620
	<hr/>
	\$12,950,080

(b) Dempster Nominees agreed to reverse its claim for management fees to the extent of \$12,950,080, that is the amount owing to Rothwells, thereby effectively taking over the PICL debt to Rothwells.

(c) The PICL debt to Rothwells was satisfied.

(d) Dempster Nominees owed Rothwells \$12,950,080.

(ii) The Dempster Nominees debt to Rothwells was cleared on 17 October 1988 by offsetting the \$3.5m on deposit in the name of Dempster Nominees :

Loan balance	12,950,080
Less deposit	3,500,000
	<hr/>
	\$9,450,080

(iii) On 17 October 1988 :

(a) Dempster Holdings borrowed \$10m from Rothwells under a non-recourse loan facility secured by a put option to Dalleagles Pty Ltd ("Dalleagles") over the shares held by Dempster Holdings in Rothwells which was mortgaged to Rothwells. The documents evidencing these transactions are:

(i) Loan agreement between Rothwells and Dempster Holdings;

- (ii) Put Option Agreement between Dalleagles and Dempster Holdings; and
 - (iii) Mortgage of Contractual Rights between Dempster Holdings and Rothwells.
- (b) In the books of Dempster Holdings it is recorded that Dempster Holdings received \$10m from Rothwells to:

Repay Dempster Nominees	7,500,000
Loan Dempster Nominees	<u>2,500,000</u>
	\$10,000,000

- (iv) By direction from Dempster Holdings to Rothwells, Dempster Nominees' loan of \$9.45m was cleared.
- (v) It was agreed between Dempster Holdings and Rothwells that the \$10m facility from Rothwells be paid direct to PICL so that PICL discharged the \$10m debt that Dempster Nominees owed Rothwells.
- (vi) The above transactions were evidenced by settlement on 17 October 1988 when Dempster Nominees and PICL received discharges for their debts.
- (vii) In November 1988, Dempster Holdings made the call under the put option to Rothwells, thereby repaying in full its obligation to Rothwells."

The events set out above were canvassed by Mr Musca in a memorandum to Mr Lloyd and Mr Connell of 7 October 1988. Ultimately, however, there were no entries in the Rothwells' accounting system to reflect these events but it is unnecessary to resolve that issue. Charges have been brought against Mr Dempster in respect of the original transaction and, for our purposes, it is sufficient to note the net result of the transactions.

19.22.2 Mr Lloyd understood that, as part of the settlement, Mr Dempster required that he be released from his obligations for the existing loan from Rothwells. He understood that by October 1988 it was agreed that Mr Connell would in effect take responsibility for the loan. This was to be achieved through a put option that could be exercised by Dempster Holdings placing the Rothwells shares with Mr Connell for the amount of the loan. Mr Lloyd did not think it was a cash transaction, rather, it was his

understanding of the arrangements that they just simply dealt with the existing exposure. He could not say whether there were journal entries or an exchange of cheques.

19.22.3 The documents establish that on 17 October 1988 Dalleagles granted Dempster Holdings a put option in respect of the shares for \$10 million. On the same day Dempster Holdings mortgaged its rights in the put option to Rothwells. In essence Dempster Holdings had assigned its rights pursuant to the put option to Rothwells. When Dempster Holdings exercised its rights pursuant to the put option, the debt of \$10 million then owed by Dalleagles to Dempster Holdings became a debt of \$10 million by Dalleagles to Rothwells. In essence Dalleagles had taken over the debt of Dempster Holdings which accounts for Mr Lloyd's understanding that, in effect, Mr Connell had taken responsibility for the loan. We could be excused for doubting that it was ever intended that Dalleagles should repay the debt to Rothwells.

19.23 The effect of settlement for Mr Connell

19.23.1 On the basis that Mr Connell's half interest in PICL could have been purchased for about \$50 million, Mr McCusker concluded that, effectively, a gift of about \$300 million was made to Mr Connell thereby enabling him to pay off the Connell-related debts. He observed that whatever recovery action may have been open to the liquidator against Mr Connell and Oakhill had been diminished to the extent of \$350 million, that is, that the payment to Mr Connell enabled him to clear his direct and indirect liabilities to Rothwells to that extent.

19.23.2 Mr Edwards thought that such a view was a "bit simplistic" and said no one had ever thought of it that way. He said no one was about to give Mr Connell anything. He conceded, however, that although it had not occurred to anyone it was open to such an interpretation. Mr Parker said any suggestion that Mr Connell should receive a benefit would have been given very short shrift and he found it hard to completely understand Mr McCusker's comments. Mr Dowding said this issue was never raised with him and he was surprised by the concept when it was raised by Mr McCusker. Mr Grill did not agree with Mr McCusker's view in the circumstances that he was aware of in 1988. He added that if Mr Connell had assets which could be attacked or if the loans were found to have value then he would have agreed with Mr McCusker. He said his entire approach was predicated on the basis that Mr Connell

did not have any assets apart from PICL. Later in his evidence Mr Grill added his view as follows:

"I think there's absolutely no credibility at all in the notion that Mr Connell received \$350 million. The \$350 million paid to Mr Connell was a book entry. It went to him and then went straight into Rothwells so any notion that it was a gift of \$350 million I think we can put to one side and say, "that is totally fallacious". Then there comes the question as to whether by doing the transaction the way it was done as to whether any benefit went to Mr Connell and that's the area where there could be some argument."

Mr Grill said the argument would centre on the question as to whether Mr Connell gave any personal guarantees in respect of the loans which were purchased by Dalleagles.

19.23.3 There is no evidence as to whether Mr Connell guaranteed any of the loans in question. The criteria governing the selection was that they should be debts having no prospect of yielding any value. Investigations by accountants assisting the Commission were not conclusive but suggested that recovery by Dalleagles of any amount of significance is extremely unlikely.

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