

**Investigation into the public service
recruitment and employment of
Ms Madeleine Setchell**

TO: The State Services Commissioner

**D K Hunn
Crown Law Office
Wellington
12 November 2007**

Index

PART A. INTRODUCTION	1
A. Terms of reference	1
B. Methodology	2
C. Relevant Facts	3
PART B. MINISTRY FOR THE ENVIRONMENT	3
A. Recruitment	3
B. Organisational Change.....	9
C. Appointment.....	10
D. Disclosure	12
E. Meeting between the Minister and the Chief Executive.....	14
F. Further Consultation with the State Services Commission.....	16
G. The CE's Decision	20
H. Failure To Reach A Mutually Satisfactory Agreement.....	23
PART C. MINISTRY OF AGRICULTURE AND FORESTRY.....	32
A. Discussions on the Possibility of Short-Term Appointment.....	32
B. The CE's View	35
C. The Minister's View	37
D. The View Down The Line	40
PART D. MINISTRY OF EDUCATION	41
PART E. STATE SERVICES COMMISSION	43
A. Scope of Investigation	43
B. Nature of Involvement.....	44
C. Factors Impinging on SSC Role.....	46
D. Critical Issues	48
E. Managing in the Commissioner's Absence.....	51
F. Memory Loss.....	54
PART F. Findings.....	56

PART A. INTRODUCTION

A. Terms of reference

- 1.1 The terms of reference for an investigation into the public service recruitment and employment of Madeleine Setchell were set out in the attachment to a letter of 6 August from the State Services Commissioner (see Annexe A). The letter itself outlined the task to be undertaken by me within these terms of reference. It was made clear the task was limited to investigating “the relevant facts of the public service’s recent handling of their recruitment and employment processes relating to (Ms) Madeleine Setchell” and was seen to be a contribution to a wider review to be undertaken by the State Services Commissioner himself, assisted by his legal advisor.
- 1.2 The investigator was appointed under s 25(2) of the State Sector Act 1988 as a result of which all the powers and authority conferred on the Commissioner by s 25(1) of the Act could be exercised in undertaking the investigation.
- 1.3 Having completed the investigation a report was to be provided to the State Services Commissioner on the following:
 - “ The relevant facts including the involvement of me or of any State Services Commission staff.
 - Any assessment or comment you consider should be made in relation to the involvement of me or of any State Services Commission staff.
 - Where any conflict of evidence arises your assessment of what the truth of the matter is.”
- 1.4 The Commissioner also made clear that on the completion of his own assessment he proposed to publish this report alongside his own. If there were any matters that the investigator needed to report to the Commissioner for which there were compelling reasons not to be made public, these reasons were to be included in the report and the confidential matters placed in a separate annexe. The Commissioner noted his intention that any assessment the investigator had of his own involvement in the matter would not be withheld from publication. It should be noted here that it has not been found necessary to place any confidential matters in a separate annexe.

B. Methodology

- 2.1 This investigation commenced on 6 August and to ensure its independence it has been carried out with the support and participation of, and from within the premises of, the Crown Law Office. On the advice of the Solicitor-General it was agreed that the principal part of the investigation would comprise interviews of all those directly involved in the case. Over a period of two weeks, 29 persons were interviewed. They are listed, by designation, at Annexe B. The investigator conducted all of these interviews. The Solicitor-General was present at 10 of them and a representative of the Crown Law Office at the remainder.
- 2.2 All interviewees were sent, in advance, an information sheet drafted by the Solicitor-General which set out the procedures for the interview. All interviewees were advised they were welcome to be accompanied by either a legal advisor (three did so) or a support person (five exercised that right). All the interviews were conducted under oath or affirmation and were taped. The transcripts are not to be made public but have been drawn on as the principal source of evidence in this report.
- 2.3 To assist the investigator reach informed judgments about the recruitment and employment processes adopted in this case, standard procedures together with departmental codes of conduct were sought from six departments together with those of the three Departments involved. A summary table of this material is provided at Annexe C.
- 2.4 Likewise, to provide a basis for judging the role played by the State Services Commissioner and his staff, material was gathered from a number of sources. The investigator invited contributions, particularly in respect of the issues of conflict of interest and political neutrality, from the Victoria University of Wellington School of Government, the New Zealand Institute of Public Administration and the Public Service Association. A list of this material, all of which is available publicly, is described in Annexe D. The texts of articles which were suggested to the investigator as being relevant in any wider judgments of the case are listed, together with a bibliography of studies which would also be helpful in this respect, (Annexe F).

C. Relevant Facts

- 3.1 The terms of reference require the investigator to report on the relevant facts of this case and to make an assessment of the involvement in it of the State Services Commissioner and his staff. As the scope of the task has been limited to an investigation into the public service recruitment and employment of Ms Madeleine Setchell, the period of review can be defined as being from November 2006, when the position of External Relations Manager in the Ministry for the Environment was advertised, until 22 June 2007, the day of Ms Setchell's departure from the Ministry. However, the events which took place thereafter and which are relevant to the involvement of the State Services Commission, have been included.
- 3.2 In accordance with the terms of reference I have reviewed all the material brought together by this investigation, and particularly the interviews and associated documents, and have summarised below what I consider to be the most important matters of fact, including those areas where there are significant differences of opinion or recall.
- 3.3 In the following paragraphs I have used the designations of those involved rather than their names both to reduce personal references and focus on the facts, as well as to emphasize the roles and relationships of all the parties. This could be seen to be somewhat unfair to Ms Setchell since for reasons of clarity I refer to her variously by name or as "the applicant" or the "Communications Manager" but as no fault can be ascribed to her I hope it will be understood there is no intention to direct particular attention to her part in this investigation. I also apologise in advance for the use of the term "case" to describe the events over the period of the investigation. It is a necessary shorthand to avoid repetition but it tends to depersonalise the events and I am fully conscious of the strain and distress they have occasioned for Ms Setchell, her partner and others involved in this case. I would also like to record here my appreciation of the support I have received from the Crown Law Office.

PART B. MINISTRY FOR THE ENVIRONMENT

A. Recruitment

- 4.1 The position of External Relations Manager was advertised nationally at the end of November 2006 following agreement within the Ministry on a

detailed job description. Some time after the advertisement had appeared Ms Setchell telephoned the Acting Communications Manager who was conducting the appointment process under her Group Manager's overall supervision (and, as it happened, she had been Ms Setchell's manager in 1999/2000 when both were working for another government agency) and expressed her interest in applying. In the event Ms Setchell did not do so at that time. Applications closed on 15 December. The 12 applications were assessed on the papers and one person interviewed, in the week before the Christmas break. No appointment was made.

- 4.2 As it had proved difficult to find a suitable person to meet the Ministry's requirements – evidenced both by the responses to the advertisement and by the fact there had been an external consultant acting as Communications Manager since June 2006 – it was decided early in 2007 to widen the search. Coincidentally, Ms Setchell telephoned the Acting Communications Manager and said she regretted she had not applied in December. She was informed that an appointment had not been made and it was not too late to apply. It was suggested to Ms Setchell that she email her CV to the Ministry, which she did. Two prospective candidates, one of them being Ms Setchell, were interviewed on 7 February by the three member panel - comprising the Group Manager (Corporate and Community); the Information Manager; and the Acting Communications Manager – which had also conducted the earlier interviews. Following a brief post-interview assessment Ms Setchell was recommended for appointment on the same day. For reasons which are not now apparent, the recommendation was signed only by the Group Manager and the Information Manager.
- 4.3 In terms of subsequent events, the most important aspect of the interview of Ms Setchell was how the question of her potential conflict of interest was handled. In answer to the invitation to apply, as already noted above, she had done so by email and not on the standard application form, but even if she had used the form there was no provision in it for the declaration of potential conflicts of interest – nor is there any reference to it in the Ministry's "Guide to Recruitment and Selection Process". Consequently, because of the manner in which the case unfolded, the interview was the sole occasion, prior to her appointment, when this could have been identified formally in her presence and discussed adequately from the perspective of all the parties. This aspect of the case is of particular concern to Ms Setchell herself since it reflects directly on her integrity which, naturally, she is determined to protect. (It could be

noted here that only one of the departments who provided their appointment procedures do have provision for conflict of interest declarations in their application forms, while none of the six has guidance to their employees as to how to handle conflicts of interest issues at employment interviews).

- 4.4 There were three different accounts of what happened at the interview. All those present agreed that the matter of a potential conflict was raised, although the recollections vary as to how the matter arose and at what point in the interview. All agreed that in answer to a question - “is that likely to be a problem?” - the applicant was forthcoming and related previous experiences where she had handled the conflict to the satisfaction of her employers (including when she had worked for government agencies and her partner had been a political reporter for the “New Zealand Herald”). The elements which are common to all of the recollections are that the question related to the applicant’s partner and that he had some role with a political connection in a media-related position.
- 4.5 The differences arose as to what precisely was the partner’s role and thus the extent of the conflict. The applicant herself and the Acting Communications Manager both recollect that the disclosure was complete and explicit - namely that “ her partner works at Parliament as the Chief Press Secretary for the National Party, working for John Key ” - that the issue was traversed fully, and that the panel appeared satisfied with the answers and with the applicant’s ability to manage any potential conflict situations in a professional manner as she had done previously.
- 4.6 The Information Manager’s recollection was that the applicant had disclosed her partner worked “as a media adviser to the National Party”. As she had answered the questions on the matter with such honesty and confidence, he was assured that both the applicant and her partner would handle any potential conflict professionally and “work around it”. The recollection of the Panel Chair, the Group Manager (Corporate and Community), was that the applicant had said in respect of her partner’s role that he “worked in Parliament” in some form of journalism. Since the Chair signed off the appointment recommendation it can be assumed she accepted the assurance she had been given, albeit in retrospect she was clearly unaware of the full significance of the issue.
- 4.7 My terms of reference require me to make an assessment of where the truth lies when there is a conflict of evidence. In my view it is sufficiently

clear from both the interviews undertaken by this investigation and the associated documents, that a potential conflict of interest had been identified by the appointment panel; that they had discussed it in some detail; that the applicant had answered forthrightly all the questions put to her; and that her straightforwardness together with her previous experience convinced the panel this was not a major issue and that it could be managed. In fact it was an issue which had been settled so completely that even though it had taken up at least 10% of the 50 minute interview, it was not recorded in the formal write-up and was not discussed with anyone else in the Ministry, including the Chief Executive. All the write-up says in the area of political sensitivity is under the heading "Change management/political nous" where it is noted - "Haven't had to make any big calls but understands all the processes and frameworks from the political point of view. Well versed in processes through quals. Have had to deal with political climate daily".

- 4.8 One can only speculate why the panel failed to discern the potential conflict of interest as a major issue which should be recorded and discussed with the Chief Executive. It is a fact that the two persons who most clearly recall full disclosure knew all about the situation relating to the partner's role prior to the interview. The recall of the other two present was partial and differed one from the other. There is absolutely no doubt the matter was raised since the Information Manager's notes of interview have the words "conflict with partner?" in the margin. As there is no evidence of deliberate suppression, the lack of clarity of two of the panel members can only mean that the questions and answers triggered different responses in their minds and because there was no mention of it in the formal write-up (and this formal report was not checked by the Chairperson with the other two persons on the panel) there was no subsequent opportunity to resolve any apparent lack of understanding. Moreover the confidence and assuredness of the applicant in being able to deal with any problem, convinced them that this was not a matter that needed to be taken further. Both the Group Manager and the Information Manager now acknowledge the applicant had said enough to alert them to an issue which should have been followed up and that they should have been more assiduous in their questions. At the same time it has to be taken into account that at the time of the interview in February 2007 the position of External Relations Manager was a middle management one (as defined by the job description and the salary range of \$90,000 to \$112,000) which was not regarded as being particularly sensitive and not expected to involve direct contact with the Minister.

- 4.9 Prior to appointment one final possible source of information on the matter of potential conflict of interest, were the two referees' checks. These were undertaken in the week following the interview. The person designated to complete the checks (not a member of the panel) was instructed by the Chair of the panel to concentrate on the applicant's management experience, the lack of which had been seen by the panel (and acknowledged by the applicant herself) as posing the greatest risk for the Ministry if she were appointed to the position of External Relations Manager.
- 4.10 The report on the referees' checks does not mention conflict of interest at all. However, one of the referees recalls that the matter arose in a discussion on the applicant's professionalism and he had used as an example the fact that when she had worked for him her partner had been "in a press secretary-type role for the National Party". The referee had been certain that the applicant could be trusted since she had been very careful in avoiding discussion about the National Party in respect of issues affecting his organisation. He recalled this exchange lasting for about five of the 20 minutes of the telephone conversation, and he thought the caller could be in no doubt that the applicant's partner worked for the National Party.
- 4.11 The officer concerned does not recollect this part of the conversation taking up 25% of the call time, but she does agree that this referee did allude to the matter of potential conflict of interest in the manner he had described in his evidence, but she thought he had "volunteered that comment solely as an illustration of the applicant's good character and professionalism". She did not consider the comment to be made "in a context that indicated or implied that potential conflict of interest was a significant matter that would need to be addressed on account of the position the applicant was seeking".
- 4.12 Clearly there are differing impressions of this telephone conversation just as there are of the same issue when it was raised at interview. Required as I am to provide my own assessment where there is a conflict of evidence, it is my conclusion that while the officer making the referee checks was not asked to follow up on the conflict of interest issue, and while the conversation took place in the context of the External Relations, and not the Communications role, sufficient was said – even if it was only by way of "illustration" - to alert the caller to something which should have been mentioned in the report on the referees' checks. It was not up to the

referee to assess the significance of the information from the Ministry's standpoint.

- 4.13 It has been suggested that Ms Setchell had other opportunities to clarify her position before she took up her employment. The record does not support that contention. She has told this inquiry that as far as she was concerned she had made full disclosure, the matter had been thoroughly discussed and the appointment panel had given every indication that it had accepted her assurances that she had handled the "problem" before, to the satisfaction of her previous employers, and she was positive she and her partner could do so again. Assuming the matter was likely to come up, she had prepared herself in advance of the interview and if the Information Manager had not raised it, she would have done so. Certain that the question had been dealt with she did not raise it again herself, in the half dozen or so contacts she had with the Ministry before joining it (including a half hour meeting with the CE). She does not recollect anyone raising it with her apart from one conversation she had with the Group Manager (Corporate and Communications) on 5 April, the day she was given a copy of her employment agreement, during which reference was made to it in passing - and she remembers the incident because the Group Manager referred several times, erroneously, to "John Keys". She was fully aware, as were many of her colleagues, of other instances where similar potential conflict of interest situations had arisen in the Public Service and where they had been managed appropriately: she had been given no reason to believe that things would be any different in the Ministry for the Environment.
- 4.14 In light of its importance, the above reference to the meeting on 5 April was checked with the Group Manager. She has replied that she did attend a meeting with Ms Setchell on that day, in order to confirm the appointment and arrange the documentation, but has no recollection of the references to the Leader of the Opposition.

B. Organisational Change

- 5.1 At about the time the recommendation for the appointment to the position of External Relations Manager was made, the CE and his senior managers embarked on a process of organisational change for which they coined the term “realignment”. The process had its genesis in the substantially increased emphasis by the Government on environmental matters, especially climate change and sustainability. These matters became, in the words of one witness, virtually a fourth plank in the Government’s three point strategic agenda of economic transformation, “Families Young and Old”, and national identity. The move to accord environmental policy a much higher priority had been heralded by the Prime Minister at the Labour Party Conference in Rotorua in October 2006 and then reinforced in her key-note speech in Parliament in February 2007.
- 5.2 The effect of this was, in turn, to place greater emphasis on the role of the Ministry for the Environment and put pressure on it to perform at a higher, and more public, level. The Ministry’s top management responded by considering how it should “realign” its staff and other resources to meet the new challenge. Among other things it precipitated a discussion of the place communications should assume in the Ministry’s future operations.
- 5.3 One suggestion was that the new role for communications should be signalled by creating a new second-level position of Group Manager (Communications). This was not accepted by top management but a decision was promulgated around mid-May (i.e. after Ms Setchell’s appointment – see below) to rename part of the External Relations Manager position “Communications Manager” and the other part of the job retained the title of “External Relations” – later, in June, changed to “Stakeholder Engagement”. The supervision of both jobs was to be transferred from the Group Manager (Corporate and Community) to the also renamed Group Manager (Reporting and Communications). One immediate reflection of this greater status and importance of communications was the attendance of the Acting Communications Manager at the regular weekly meetings of the CE and his senior managers, with the two Ministers to whom the Ministry was responsible. This occurred for the first time in May 2007. The Acting Communications Manager attended two meetings with the Minister for the Environment and the intention at the time was that the new appointee

would attend thereafter (in the event the new Communications Manager did not attend any meetings with either Minister in the three and a half weeks she held the position).

C. Appointment

- 6.1 Because of the “realignment” Ms Setchell’s appointment was delayed. She was informed of the reasons for this and in the weeks following she underwent the standard psychological assessment the Ministry asks all successful applicants to undergo, and had meetings with both the CE and the Group Manager (Reporting and Communications) to “top off” the job interview. Both were impressed with Ms Setchell’s capability and expressed their keenness for her to commence. By chance, before confirming the appointment, the CE had had the opportunity of a brief discussion with Ms Setchell’s former employer which had added to his comfort that the right choice had been made. (Ms Setchell also had further meetings with both her current and future Group Managers during May.) The CE signed off the approval to make the appointment without being advised of any potential conflict of interest. He has made the point that if he had been aware of this he would have asked in detail about the appointee’s partner’s role and might not have agreed to the appointment.
- 6.2 On 5 April the Group Manager (Corporate and Community) who still retained oversight of the position – it was to have shifted over to the Reporting and Communications Group at 1 July – made a formal offer of employment to Ms Setchell . The offer was a provisional one for the position of Communications Manager and noted the intention to shift it in due course to another group (as described above). The start date was set for 28 May and the salary agreed at \$126,887 which met Ms Setchell’s expectation as expressed at the interview. Both the designation and the salary indicated the shift in the status and seniority of the position.
- 6.3 Ms Setchell signed acceptance of the position of Communications Manager on 12 April and also signed a declaration that she had read the Public Service Code of Conduct and the Ministry’s “Our Responsibilities” document. On the same day – 12 April – Ms Setchell signed her Individual Employment Agreement for the position of External Relations Manager and attached to the agreement was the job description for that position i.e. the one that had been advertised five months previously.

- 6.4 It would appear that Ms Setchell signed up for two jobs on the same day for the same salary. In fact she was appointed to the formal position of External Relations Manager as advertised and in accordance with the job description that had been drafted in November 2006. The use of the term “Communications Manager” in the letter of offer was a mistaken throw back to the former title of the position. Both documents should have referred to “External Relations Manager”.
- 6.5 At the point the offer of employment was made, the appointment was a provisional one but only insofar as the normal departmental procedure required there to be a period of nine working days following the notification of the appointment to give any Ministry employee the right of review, should they wish to exercise it. There is no evidence on file that the appointment was notified in accordance with this provision. Nor is there any formal note to indicate when the nine day clock started ticking. The appointment offer included the undertaking the applicant would be advised of the status of her appointment on 20 April so that it can be inferred the review period began on the date of the offer (5 April) and not the date of acceptance (12 April). There was no subsequent formal letter confirming the appointment but it can be assumed that it was legalised by the signature of the two parties to the employment agreement on 12 April, despite the fact that the review period had not expired. In my view the appointment could not be regarded in any way as being provisional once the employment agreement had been signed.
- 6.6 As mentioned above, a further complication arose from the fact that in accordance with the “realignment” process, the job of External Relations Manager was split and two new jobs were officially promulgated within the Ministry on 16 May. One of these revived the former designation “Communications Manager” and it was this position Ms Setchell was deemed to have filled when she joined the Ministry twelve days later. The other position which was subsequently designated “Stakeholder Engagement Manager”, was the one offered to Ms Setchell on 30 May, after the CE had decided she could not remain in the job to which she had been “appointed”. While the Ministry has confirmed that both of these positions were new ones there is nothing on file to suggest that it was thought necessary to readvertise the Communications Manager position. It seems the Ministry felt the procedures under which it was managing the changes and the reassurances it had given staff about job retention, justified their not doing so. There is no record on file to regularise the transformation of Ms Setchell from “External Relations

Manager” to “Communications Manager” but it can be assumed the Ministry was satisfied she was the legal incumbent. The formal job descriptions for both of the new positions were not settled until mid-June. The CE has explained this apparent anomaly by saying that in the normal course of events Ms Setchell would likely have been confirmed in the new Communications Manager role. However, in light of the organisational changes and the promulgation of the two new positions, the Ministry considered it was open to it to appoint her to the Stakeholder Engagement Manager role. In the circumstances following 28 May, the CE sought legal advice on whether he could direct her into the other role as a means of resolving the conflict of interest issue. His legal adviser told him he could. Ms Setchell’s legal adviser takes the opposite view.

D. Disclosure

- 7.1 The appointment of their new Manager was announced to the Communications Team in the first week of May. Two weeks later a Ministry employee temporarily seconded to the Beehive was approached on two occasions by other communications staff in the building who commented on the fact that the Ministry’s new Communications Manager was the partner of the Chief Press Secretary to the Leader of the Opposition. In the light of what he took to be a potentially damaging rumour circulating around the Beehive, which was likely to end up in the media, he thought it was his duty to warn whom he considered to be the appropriate persons so that he informed first, on 25 May, a senior manager in the Ministry and second, on 28 May, an adviser to the Minister for the Environment – the same day Ms Setchell had commenced working at the Ministry.
- 7.2 On 28 May the Minister for the Environment himself was in Auckland. His adviser considered it was his responsibility to follow up the information he had received (he considered it would have been “unusual” if he had not tried to verify it before alerting his Minister) and at around 7pm he telephoned the CE to inform him of the rumour that had been passed to the Minister’s Office. The CE replied that he was totally unaware of his Manager’s relationship and would check it out immediately. Several telephone calls were exchanged, on the CE’s part to report that he had been unable to clarify the situation and on the adviser’s part to inform the CE that he had finally managed to speak to the

Minister to let him know that the CE was investigating a potential conflict of interest matter. The adviser, who had some knowledge of employment matters, was careful to emphasize that he was aware that departmental employment decisions were the sole responsibility of the head of the department and that neither he nor the Minister could or should influence those decisions. The CE has confirmed the Minister's adviser took care to distance himself from the employment aspects of the case.

- 7.3 There is one variation in the recollections of these phone calls. At his joint press conference with the Acting State Services Commissioner on 27 July, the CE said “in the phone call with (the Minister's adviser, the adviser had) said that the Minister's office needed to perhaps have confidence in the staff who were visiting the office and there always needed to be an atmosphere where free and frank discussion could take place. But I will come back and make the point that I made at the start. The issue was he was simply asking for information and I will say this repeatedly again and again he was very clear with me that employment issues were my issues to manage”. The CE is also certain that the adviser said at some stage in the telephone exchanges on 28 May that he had told the Minister about the “rumour”: he gained the impression that the Minister was “exceptionally annoyed”. The adviser disputes this interpretation of his conversations with the CE.
- 7.4 It took the CE until mid-morning of Tuesday, 29 May, to confirm that the Communications Manager's partner was the Chief Press Secretary to the Leader of the Opposition, the delay being largely due – as it has now become clear - to the fact that the Group Manager (Corporate and Community) who was his logical first contact point on his staff, was the least aware among the appointment panel members of the details of the disclosure. He immediately informed the Minister's adviser and also told him that in the light of the sensitivity of the situation he had decided to confer with the State Services Commissioner. (The senior manager who had been approached the previous Friday did not get around to passing on the information to his CE until some days later when it was too late as a warning, but it at least confirmed for the CE that the “rumour” was likely to have been circulating widely among Beehive communications staff.)
- 7.5 The CE then telephoned the State Services Commissioner to advise him of the situation and to let him know that he would be seeing the Minister later that day and planned to raise the matter with him. From the brief

explanation of the circumstances, the State Services Commissioner gained the impression that the CE thought he had made a mistake with an appointment and needed to change things “rather drastically”. Having himself been in a similar situation as the Communications Manager appeared to be, the Commissioner said the CE shouldn’t rush into things simply because of family connections. The first aim should be to see if the potential conflict could be managed. The Commissioner commented that if he were the CE he would not himself talk to the Minister in the circumstances as he understood them.

- 7.6 The CE was insistent that in terms of his “no surprises” undertakings, he felt bound to speak to the Minister particularly since the inquiry had come from his office. He explained that he would be with the Minister that day in circumstances in which the issue could well come up. He knew that the Minister was already involved because of the phone calls from his adviser. The Commissioner replied that he could not stop the CE from doing so, but he was taking a risk involving the Minister in something that was not his business. The Commissioner stressed the CE should be very careful as to how he handled the discussion with the Minister since the employment matter was the CE’s alone to deal with. The telephone exchange was left on the basis that the two would talk again the following day.

E. Meeting between the Minister and the Chief Executive

- 8.1 On the afternoon of Tuesday, 29 May, the Minister and the CE were together on an official visit to the Waikato. About mid-afternoon, during a gap in the proceedings, the CE notified the Minister he would like a few minutes later in the day to discuss the personnel matter his adviser had mentioned to him the previous evening. Around 6.00pm, as they were waiting at the Hamilton airport for their plane to Wellington, there was an opportunity for a private conversation which the CE took to inform the Minister that he had confirmed the newly appointed Communications Manager, who had just started working in the Ministry, had a potential conflict of interest. He had been unaware of this until the Minister’s adviser had asked him about it the day before, and he was now going to manage the matter appropriately. It was his responsibility under the State Sector Act to handle the situation independently and he intended to do so. He wanted the Minister to know he was going to do his best to work towards a solution which would deal with the potential conflict but also fulfil his obligations as a good employer. He had been and would be,

conferring with the State Services Commissioner in resolving the situation.

- 8.2 The CE recalls the Minister responding that staff decisions were the CE's to make, but that he would find it difficult to speak as freely as he would with other senior managers, in front of an employee who was in a close family relationship with someone working for the Leader of the Opposition. He reminded the CE that the Government had recently announced its intention to give environmental issues a much higher profile in the Government's priorities and it would thus be open to much greater pressure from the Opposition on these issues. It was only to be expected that he would be more cautious in discussing matters of policy and tactics in front of such a person, so that meetings with the senior managers might not be as productive as, desirably they should be.
- 8.3 For his part the Minister does not recall the detail of the conversation among the host of other things which preoccupied him at the time, nor even where and when it took place. However, as he told the House on 26 July, he "had one conversation with the chief executive relating to this matter before it was resolved. The conversation happened when he drew me aside in the context of a meeting about other issues and advised me there was an issue he was dealing with involving the partner of a National Party staff member, and that he had formed a preliminary view that there was a conflict of interest and that he was working with the State Services Commission to manage that issue. I noted two things: first, that this was clearly an employment issue and therefore his responsibility alone to manage, and, secondly, that from the point of view of my office I would be less free and frank in meetings with such a person. That was a statement of the obvious". The Minister assures me that his explanation to the House was based on what he had been advised the CE could recall of their conversation at Hamilton Airport. The Minister himself has no independent recollection of the meeting.
- 8.4 The CE remembers the conversation as a "robust" one on the Minister's part but not out of the ordinary. The Minister customarily expressed his views firmly and this was no exception. The CE, in his years as departmental head, has had much firmer discussions with Ministers. (This is important to note, since later, as the story filtered down the chain of command, some staff formed the view the Minister had been "ballistic".) While the exchange was a rational one, the Minister seemed irritated that he had heard about the potential conflict of interest through a third party.

The CE emphasized that he had been unaware of the problem until he had been contacted by the Minister's adviser. In the CE's opinion there was no room for any doubt that both parties knew the matter was his to deal with and he felt no pressure on him from the Minister towards any particular option. The Minister had left no impression that he expected the Communications Manager to be terminated in her job although the CE was clear that that the Minister would not feel able to speak as freely as he would with other senior managers, in front of an employee who was the partner of the Chief Press Secretary to the Leader of the Opposition. For his part the CE thought the Minister was indicating that he would find difficulty in the Communications Manager's role being performed "to the full" as it had been envisaged in the "realignment" process.

- 8.5 In his evidence to this investigation, the Minister commented that if the CE had come back to him and said "this is a conflict we can manage, well I wouldn't have had an issue with it". In retrospect the Minister also questions the necessity of the CE raising the employment matter at all. Certainly from a "no surprises" aspect the CE already knew that he, the Minister, was aware of the problem since he had been informed by his adviser. Clearly the CE does not agree with the Minister on the second point: on the first one he has commented this was not the impression he had at the time.

F. Further Consultation with the State Services Commission

- 9.1 The next morning, Wednesday, 30 May, the CE telephoned the State Services Commissioner and told him briefly what had transpired at the meeting he had had with his Minister. They arranged to meet in the Commissioner's office later in the morning, each of them accompanied by a staff member. It was probably during this conversation that the CE conveyed to the State Services Commissioner the flavour of the Minister's concerns about his ability to speak freely on sensitive issues in the presence of the Communications Manager. Whether the comment was made in the phone call or at the subsequent meeting, the Commissioner remembers observing that it was not a significant factor in how the issue should be managed.
- 9.2 Prior to the meeting with the SSC, the CE spoke to the Group Manager (Corporate and Community) - who later went with him to the SSC - about how the problem of conflict could be managed if the Communications Manager remained in her job. There was some

discussion about the formulae that had been used to overcome other cases of conflict within the Ministry. Also discussed was what alternative employment the Ministry might be able to offer the Communications Manager should it be decided she could not remain in the position to which she had been appointed. The Group Manager reminded the CE that at the time of creating the position of Communications Manager, the Ministry had established a parallel position of Stakeholder Engagement Manager. (As already described, both of these were the successors to the original External Relations Manager.)

9.3 At the meeting at the SSC, the Commissioner commenced with a repetition of the points he had made the previous day and added a forceful exposition of the principles which should determine the conduct of CEs in their dealings with their Ministers. He continued to stress the importance of CEs making sure that in the case of individual employment decisions, they should act completely independently. The CE responded by describing, at some length, the organisational changes that were taking place in the Ministry as a result of the heightened emphasis on the Government's environmental policies. Within this context he explained the key role of communications in getting across messages which would change people's behaviour and contribute to environmental sustainability. The Ministry was under great pressure to perform. The Commissioner realised he had not understood, the day before, the full impact of these organisational changes in relation to the Communications position, nevertheless he still argued that was no reason to over-react to what was essentially an employment issue.

9.4 The Commissioner made the following points:

- the increased emphasis on environmental policy was not the same as close political management of the Minister's position;
- if the Government was planning a politically oriented environmental communications programme, the Ministry shouldn't be doing it: if it wasn't, it should be possible to find a way to manage the appointment;
- because the Minister might have expressed certain views the previous evening, was not sufficient reason "to do anything dramatic";

- the CE had a role as a good employer and his primary obligation was to concern himself with his employee;
- it would be most unwise for the CE to manage his subsequent discussions with the Communications Manager so that she felt the need to leave;
- while Ministers could not interfere with individual employment matters nor tell the CE how he was to manage individual staff members, nevertheless they could say who they were not prepared to work with or to have present at meetings in their offices.

9.5 On this latter point the Commissioner elaborated that though the Minister could say who was to be present in his office, the Minister could not require the CE to prevent particular individuals in the Ministry from having certain roles or even accessing certain information. It was the CE's responsibility to run the department and provide assurances as to confidentiality. If the CE had confidence in the behaviour of individual staff members it was beyond the power of a Minister to control who had what role or how they worked. The Commissioner also advised the CE that it was open to him to confine the Communications role to work which reduced the potential for rumours or accusations of conflict of interest, but at the same time emphasized that had to be within the law and with the agreement of the incumbent.

9.6 The Commissioner explained to me that his approach to this meeting was to try to draw the CE back from the direction in which he appeared to be heading – although what that direction might be was not fully explicit. However the Commissioner was surprised at one point that the conversation turned to whether the CE had grounds to terminate the appointment. Having established from the Group Manager who was present and had chaired the appointment panel, that the applicant had made some form of disclosure (as indicated elsewhere Ms Setchell is adamant she made full disclosure but at this point the Commissioner could only comment on what had been relayed to him by the CE and his Group Manager), the Commissioner told her she had let her CE down in not informing him and made it clear that, unless there were other factors, the Ministry didn't have a leg to stand on if it came to an argument over bad faith. Neither the CE nor the Group Manager can recall this being said. The SSC Performance Specialist remembers only that the Commissioner observed to the CE that he had not been well served by

his appointment panel: her principal recollection was that the CE was “worried” about his relationship with his Minister.

- 9.7 The CE was sure he had left the impression, as he had intended, that while there was some tension as the result of the Minister’s reaction to the appointment of the Communications Manager, the situation was under careful management on his part. He had gone to the SSC because the Commissioner has a statutory role and in these circumstances CEs need to seek the perspective of that role. The CE had no expectation that the Commissioner need do anything more than tender his advice. The rest was up to him, albeit the way was open for further discussion if he felt he needed it.
- 9.8 Both the Commissioner and the CE left the meeting in the clear knowledge that the case was one for the CE alone to manage and that it was up to the CE to reach an understanding with his employee in keeping with employment law and good practice. No detailed instructions were given to the SSC employee present but she was told to liaise closely with the Ministry and arrange any appropriate assistance. (It was well understood that she would be working to the Deputy Commissioner responsible for managing the relationship between the two organisations.) The Commissioner offered to accompany the CE to see the Minister if he eventually decided that would be helpful in resolving the matter. No note was taken by any of the participants in this meeting (nor was one taken of the previous day’s telephone conversation between the Commissioner and the CE). The Commissioner has explained to me that it is not his habit to make notes of confidential discussions with Public Service CEs.
- 9.9 One of the puzzling features of these three exchanges between the Commissioner and the CE - two brief telephone calls and a half to three quarters of an hour meeting – is exactly when what later transpired to be the most sensitive part of the meeting between the Minister and the CE on 29 May, was disclosed to others. None of the participants can recall all the details. In the light of subsequent events it is important to know when that part of the Minister’s response to the CE (namely that the Minister would be constrained by the Communication Manager’s presence in any sensitive discussions on environmental policy because of her relationship with someone working for the Opposition) was conveyed to the Commissioner and why only he and the CE appeared to have known about it until 25 July. The State Services Commissioner’s explanation is that he did not regard the comments attributed to the Minister as being

unusual or controversial and thus did not see the need to discuss them, at the time, with anyone else in his office.

- 9.10 It is also possible that this most sensitive piece of information was regarded as confidential and was passed to the Commissioner in the second telephone call with the CE when only the two of them would have been privy to it. However, the CE is clear in his mind, and this is certainly inferred from part of the Commissioner's evidence, that the Minister's concerns were fully aired at the meeting at the SSC when two others were present. In the CE's view, given the nature of the conversation and the issues that were covered, there could have been no doubt that the seriousness of the case derived from the difficulty the potential conflict of interest had presented for the Ministry's relationship with the Minister and thus the conduct of the Ministry's business. This does not explain why the Commissioner afterwards forgot this aspect of the case nor why the CE omitted to advise the Deputy State Services Commissioner two months later, but it indicates the issue was present in the mix from the outset. Certainly it helps to explain why the CE considered the basis of the line he ultimately took, would be understood by the SSC even if they did not agree with it - and the SSC had been clear, as had the Minister and his adviser, that any decision concerning a Ministry employee was his alone.

G. The CE's Decision

- 10.1 Since the conflict of interest problem had been first presented to him, the CE had been turning over the options in his mind. As indicated above he had already discussed some of the possibilities with the Group Manager. She was instructed not to speak with the Communications Manager at this stage.
- 10.2 After his interview with the Commissioner he had a long talk with his Deputy. They canvassed all the possibilities, their pros and cons, and finally came to the conclusion that while the CE should do all he could to retain Ms Setchell as an employee, she could not remain in the position of Communications Manager. The risks both to the Ministry and to Ms Setchell herself were too great to permit her to continue in a role which would expose them to possible misunderstanding and lack of trust at a point when the Ministry was expected to be a key component in one of the Government's principal policy drives. This was not any reflection on Ms Setchell herself, but the result of an unfortunate set of circumstances

which had come to light too late but now had to be faced up to. It was not something which could be swept under the carpet and managing the situation with the Communications Manager remaining in the position (which in practical terms would mean she would not be able to develop a good working relationship with the Minister) would obviate the purpose of having the new appointment in the first place.

10.3 The points the CE took into account in reaching his decision were:

- the role that the Communications Manager's partner played. He was not just any media adviser, he was the Chief Press Secretary to the Leader of the Opposition, in almost direct, constant, competition with the government of the day;
- the new expectations of the Communications Manager's role;
- the relationship between the employee and her partner was a live-in one;
- the risk to the Ministry and especially a "what-if scenario" if the Opposition appeared to be anticipating Government policy announcements;
- the risks to the employee in those circumstances;
- the extent to which he could change her role or direct her into another one;
- the possibility that other major participants in the policy field might be less open with the Ministry because of their perceptions of the partner's role;
- there was a parallel manager's position available.

10.4 What conclusions can be drawn from the facts as they relate to the CE's decision to remove the Communications Manager from the position to which she had been legally appointed, the reason for her removal not having arisen from anything she herself had, or had not, done? On the face of it the CE did not act in accordance with the intent of the advice he had received from the State Services Commissioner. For his part the CE claims that the advice was not so explicit as to lead him to understand the Commissioner was counselling him against doing what he did. According to the evidence they gave to this investigation, the CE's decision was not

expected by the Minister's adviser who first asked the question about the Communications Manager's potential conflict of interest; the Minister who had reservations about the appointment when it was put to him by his CE; and the State Services Commissioner who was asked for his advice on how to deal with the problem. The implication of their common reaction is that to the extent they thought about it, all three inclined to the expectation that the Communications Manager would remain in her job and the potential conflict would be managed by excluding her from meetings with the Minister which dealt with matters of particular political sensitivity. (It could be observed here that it is normal departmental practice to limit strictly, the number of persons who are privy to the most sensitive matters which are discussed between Ministers and their CEs.) Again, the CE is positive that the views of all three in this respect were not as clear to him at the time as is now represented. He has also recalled that he informed the adviser around 10 June that he was intending to change Ms Setchell's role: the adviser gave him to believe this would be a good way to manage the issue and did not suggest that he felt she should remain in the role. In my view, the CE's comment to the adviser is capable of being interpreted as meaning that Ms Setchell's role was being changed in the sense that while she would retain her position, she would not be attending meetings with the Minister – which is consistent with what the adviser said to this investigation. However, the CE stands by his view that the Minister and his adviser would have had difficulties working with Ms Setchell in the specific role of Communications Manager while her partner was working as the Chief Press Secretary to the Leader of the Opposition.

- 10.5 In directing the change of role, the CE relied on the advice of his experienced employment legal adviser who assured him he could direct such a change if the new role was broadly similar in nature, in terms and conditions, and suited the person's skills and experience. In his view all of these conditions had been fulfilled in the offer he made Ms Setchell. He also called on the advice of the Group Manager (Corporate and Community) who has drawn the attention of this inquiry to the Ministry's Individual Employment Agreement document which is signed by all Ministry employees at appointment (and was signed by Ms Setchell). She has pointed to the passage in the document under "Restructuring and Redundancy" which stipulates – "In the event that your position becomes superfluous to the needs of the Ministry as a consequence of reorganisation, and the Ministry wishes to retain your services, the Ministry may transfer you to an alternative position that is in keeping with

your skills and experience, or within your capability with such retraining as may be provided by the Ministry.” The problem I see with relying on this clause is that Ms Setchell’s position had not become superfluous, quite the opposite – it had been raised in status and seniority and was seen to be an important part of the new directions following “realignment”.

H. Failure To Reach A Mutually Satisfactory Agreement

- 11.1 On Wednesday afternoon, 30 May, without any prior hint of difficulty, Ms Setchell was informed by the Group Manager (Corporate and Community) that the CE had “found out” that her partner worked for the National Party and that she could not remain in her position. Ms Setchell reminded her that she had specifically disclosed this at her job interview in February and it had been mentioned again in conversation with the Group Manager on the day she had been given the text of her employment agreement. (Note: what was said at that meeting, on 5 April, is now subject to dispute) No objection had ever been raised with her. The response she received from the Group Manager was based on the latter’s partial understanding of what had been said at the original job interview in February and coloured the rest of the employment proceedings from then to Ms Setchell’s departure on 22 June.
- 11.2 On Thursday, 31 May, the CE met with Ms Setchell. He told her what had happened and explained the reasons he had come to the decision that she could not remain in her position. However he was very keen to retain her on the staff and could offer her what he considered to be an equivalent alternative. Ms Setchell was profoundly shocked. She pointed out not only that she had declared her interest before she was appointed, but there were many such instances involving partners, around Wellington, where the relationship was being managed professionally just like hers was. The CE declined to discuss this and repeated that he would want her to consider the alternative role. She asked the CE to go back to the Minister and tell him that he (the CE) had confidence in her. However, the CE said that was not an option. Ms Setchell told the investigation that at this point the CE said the Minister was free to choose who he will, or will not, work with. “I asked (the CE) if he was saying the Minister would not work with me. He said, yes.” From the outset she had doubts about the alternative she was offered, since it was not as aligned to her skills and experience as

the position she was in and it did not offer the same prospects for personal development. Nevertheless she was prepared to examine it before making a final decision as to her next step.

11.3 The situation appears to have developed from there as follows:

31 May. The same day, Ms Setchell received a formal letter from the CE, headed “Regarding confirmation of your role at the Ministry”. Ms Setchell found the letter “made little sense” and certainly did not address her principal concerns which she had made clear to the CE. It did not say categorically that she would no longer be the Communications Manager, but was sufficiently clear that because of the potential conflict of interest she could not be “confirmed” in that role and would be transferred to head another team dealing with stakeholder relations (the title of the position had not yet been determined). She would remain on the same terms and conditions. Ms Setchell interpreted this letter to mean the CE was saying her appointment had somehow been a provisional one, which was not the case. During the following weeks, despite the question mark over her employment, she continued to manage the Communications Team as best she could (they were not told what was going on until two weeks later).

1 June. The CE called the Deputy Commissioner, SSC, to inform her he had decided the perceived conflict of interest was such that he must offer the Communications Manager another position where that issue would be more manageable. The Deputy Commissioner noted that this was a decision for the CE to make and advised him to seek legal advice: he confirmed he was doing so. The CE mentioned that one of the reasons for his decision had been the Minister’s reaction to the Communications Manager’s relationship with her partner. The Deputy Commissioner responded along the lines - “Well if the Minister does display concern, just tell him to get over it”. (The CE did not find this particularly helpful: the remark may have been a little colourful but the CE could not have had a more succinct encapsulation of the SSC view of where the Minister’s and the CE’s responsibilities began and ended).

8 June. Ms Setchell attended a meeting with the CE where she was again advised to accept the Stakeholder Engagement Manager’s role – by now it had a name and a job description. She said she would consider it but she repeated her wish to have the conflict of interest

matter cleared up, since her integrity had been impugned. She wanted her team told what was happening and that would be the opportunity to clarify that she had declared her interest before she joined the Ministry. She undertook to provide some words for this purpose (which she subsequently did but they were not conveyed to the CE by the person to whom they had been given). From her perspective, the CE's reaction to this request was not a positive one. He said he was in a difficult position as there were conflicting stories as to what had been said in the original job interview. The CE's impression of this meeting was that it was mostly about the role of stakeholder engagement and how Ms Setchell could be developed in it: he thought Ms Setchell and the former Acting Communications Manager (who was also present) were more concerned about what was happening regarding Ms Setchell and her role in the Ministry rather than what was said at the original job interview.

8 June. On the same day Ms Setchell received a second formal letter from the CE which repeated the offer made on 31 May but enclosed the new job description. Significantly, in the light of the reasons for the job transfer, one of the relationships listed in the job description, was "Minister(s) offices".

11 June. Over the weekend Ms Setchell considered the job offer and on the Monday replied to the CE by email asking a number of questions about the proposed role. At this stage there appeared to be an even chance she would accept the role, even if only for an interim period, if her questions were answered positively – and the notes on the file indicate there was room for the parties to negotiate satisfactorily.

11 June. The Deputy Commissioner, SSC, met the CE for a "hand-over" meeting (she was leaving SSC on a long-planned secondment on 13 July) and was told he and the Communications Manager had reached the point in their discussions where she was likely to accept an alternative position that did not involve a direct relationship with the Minister's office (strictly speaking this was not correct since the job description for the "Stakeholder Engagement Manager" does envisage a relationship with the Minister's office). The Deputy Commissioner also reminded the CE of previous errors of judgment and made the point, with which the CE did not disagree, that there was a basic lack of risk awareness on the part of his senior managers,

to balance their youthful drive and enthusiasm. (A further example of this lack of awareness occurred in the timeframe of this case when the Ministry placed in the newspapers what has been described as “ad for an ad”, advising that it would shortly be seeking applications for communications positions in the Ministry, an organisation which dealt with issues “at the top of the political agenda” - this ad had been placed without the CE’s knowledge.)

12 June. The CE met the Communications Team. His explanation of the situation was brief and according to both the former Acting Communications Manager and Ms Setchell herself, confusing and misleading. He would not answer any questions and left the Team in considerable uncertainty. Because they had not been passed to him, the CE did not use the form of words drafted for him by Ms Setchell to clarify the conflict matter – nor any other variation which would have set out the true position for the staff. In the event, the former Acting Communications Manager who had remained at the meeting, had to explain what had happened.

12 June. Following the meeting with the Team Ms Setchell, in distress at the outcome, sought a further personal discussion with the CE. The CE apologised for not having talked with Ms Setchell beforehand but he maintained his position on the conflict of interest issue and said “I can’t deal with that now”. Ms Setchell said that while he remained unwilling to accept she had made matters clear at the interview, she could not remain an employee of the Ministry and that in her view, by apparently trying to avoid risk, he was instead opening up himself, the Ministry, the Minister and the Government, to risk. There was some discussion of the alternative role she had been offered but on Ms Setchell’s part emphasizing the difficulties with it and her lack of trust in the Ministry to deal with them. The CE asked what further he could do. Ms Setchell replied that he should go back to the Communications Team and tell them the truth. He said he would sleep on it. The CE does not recall this undertaking but does clearly recall saying to Ms Setchell that he accepted she had made a declaration at the interview but there was a difference among the parties about what was said and he had not been able to get a definitive answer. Ms Setchell informed the CE that she was making inquiries about other positions in other agencies. He repeated his desire for her to stay with the Ministry but did offer her support

including supporting her in seeking jobs elsewhere in the public sector (the possible MAF role was discussed – see Part C below).

18 June. As nothing came from the 12 June meeting which would meet her principal concerns Ms Setchell concluded that she could not remain in an organisation which did not support her on an issue of such importance to her personal integrity. By now the Communications Team was in some disarray. Ms Setchell had signalled several days earlier to a colleague who was acting in a liaison role between her and the CE, that she was likely to be leaving and had been told a settlement offer would be prepared. On this day she received a letter from the Group Manager (Corporate and Community) which said she had been instructed by the CE to finalise matters, and restated the Ministry's preference for Ms Setchell to remain in the Ministry as the Stakeholder Engagement Manager. As an alternative however, she outlined a settlement the Ministry was prepared to consider, on a without prejudice and confidential basis. This included Ms Setchell's reengagement as a contractor for two months to progress the stakeholder engagement strategy.

18 June. Ms Setchell met with the Group Manager and said she did not want a contract, preferring a clean break. However she would like some support in searching for a new job.

18 June. "A Ministry for the Environment officer" telephoned the SSC Performance Specialist to advise that the employment matter had been settled with the Communications Manager. The detail of the settlement was not communicated.

20 June. In the days following, while the settlement document itself went through three drafts, the Group Manager handed Ms Setchell the draft of a letter which was supposed to accept Ms Setchell's resignation on a mutually satisfactory basis and to set out the reasons for Ms Setchell's departure from the Ministry in terms which protected her personal integrity in any discussion with a prospective employer. It was, however, based on the Group Manager's partial recollection of the disclosure discussion at the original job interview and was therefore totally unacceptable to Ms Setchell. As a result there was no formal letter accepting Ms Setchell's resignation

22 June. The settlement agreement was signed by both parties and Ms Setchell left the Ministry. The terms of the agreement are

confidential but I have seen them and based on comparisons with other settlements in such circumstances, look not unreasonable. While the agreement itself remains subject to the confidentiality clause, one of the conditions was discussed at interview and therefore can be mentioned in this report. To meet Ms Setchell's concerns over the damage to her integrity, it was formally agreed the Ministry would provide her with an agreed personal letter and would release an agreed statement to staff setting out the background to her resignation. Neither of these documents could be agreed - and thus the settlement condition has not been met - because of the Ministry's persistent inability to come to grips with what happened at the original job interview in respect of the declaration of a potential conflict of interest.

22 June. The Group Manager (Corporate and Communications) called the SSC to advise that the employment matter with Ms Setchell had been concluded and she had left the Ministry. (Since the settlement document contained a confidentiality clause, the details were not disclosed to the SSC at that time. Later, in July, when the Deputy State Services Commissioner was trying to put together a comprehensive picture of the case, he became aware of the full details of the settlement. However, because of the continuing application of the confidentiality clause, the SSC is not able to draw on this information.)

25 June. His Executive Assistant informed the Commissioner that Ms Setchell had left the employment of the Ministry for the Environment. The Commissioner noted he could not form an opinion on this until he knew what the CE's view of the matter was, and asked that that view be obtained and assessed. (This assessment had not been prepared by the time the Commissioner went overseas four days later and on 2 July it was overtaken by the "dam burst" of events which the SSC faced.)

29 June. By this time media inquiries had commenced so it was becoming clear the matter would soon be in the public domain. By chance, the Commissioner ran into the CE in the forecourt of Parliament Buildings. There was a brief conversation during which the CE informed the Commissioner that Ms Setchell had left the Ministry following the conclusion of an agreed settlement. . The CE thanked the Commissioner for his advice and also expressed his

appreciation for the help he had received from the SSC Performance Specialist.

- 11.4 It is necessary at this point to interpolate a paragraph on the settlement agreement. As I have noted already, the document continues to be subject to a confidentiality clause which Ms Setchell, on legal advice, prefers to maintain. When the CE told the Commissioner there had been “an agreed settlement”, the latter had understood this had been acceptable to both parties which provoked the question “Has there been any payment?” The CE replied there had been a modest payment in lieu of notice. For my own part, I would rather describe it as not unreasonable, based on comparisons with other settlements in circumstances of involuntary departure. The terms went somewhat beyond payment in lieu of notice and constituted what both parties regarded as an equitable interpretation of the employment agreement. The CE considered that the settlement terms should reflect the fact that it was not Ms Setchell who had created the situation and the Ministry should be fair to her. In agreeing to the confidentiality clause, the Ministry acted on legal advice and would appear to have accorded a higher priority to Ms Setchell’s right to privacy than to the guidance of the Auditor General on this subject, that the public interest generally requires transparency for such settlements.
- 11.5 At the heart of the problem of trying to agree on a formula which would result in Ms Setchell’s remaining an employee of the Ministry for the Environment, was the virtually unbridgeable gap between Ms Setchell on the one hand and her employer on the other, as to what had been disclosed at the original job interview, concerning her potential conflict of interest. I have reached a conclusion above as to where I think the balance lies but that is not a view that appears to be accepted by the Ministry. Throughout the period from 28 May to 22 June there does not seem to have been any proposal from either the CE or those responsible for HR management, to attempt to settle the question by some initiative which was seen by both Ms Setchell and the panel members to be a reasonable attempt to clear the air and give all the parties an opportunity to express their views in an open manner.
- 11.6 The Ministry has asserted strongly that it was making every effort to achieve an acceptable balance between the need to deal with the conflict issue and the obligation to be a good employer. The CE has produced notes of the meetings of 31 May and 8 June to show that he

was at all times “genuinely seeking to resolve the situation and act as a good employer, but was also clear that I wanted to resolve the issue, and that the degree of conflict was such that there needed to be a role change.” It is clear from these notes that the CE, from his perspective, was going to considerable lengths to find a way through the problem and offer Ms Setchell an acceptable alternative to enable her to remain in the Ministry. But the notes also confirm Ms Setchell’s point that there was no discussion of how the conflict could be managed in her existing role (since the CE had already made up his mind that was not a viable option) and there was no mention of Ms Setchell’s chief concern which was to protect her personal integrity over the disclosure issue. Ms Setchell’s overriding impression that the CE was simply not prepared to face up to resolving the matter was taken a stage further when the CE declined, over the final period of employment, to see the two things (of settling the difference of opinion over disclosure and a successful conclusion of the negotiation on the new job offer) as being inseparable if the matter was to be settled in a way which would engender confidence and persuade Ms Setchell to stay.

- 11.7 It has been suggested that the reason for the CE’s stance during this final period was his concern that, although his main objective was to try and persuade Ms Setchell to remain in the Ministry, he could see the possibility of her eventually deciding to leave, and he was anxious to avoid anything which might later lead to legal proceedings (and his legal adviser on employment matters was consulted throughout this period). This has been confirmed by the CE’s observation that (the same HR staff member who did not pass on Ms Setchell’s suggested words of explanation to the Communications Team), told him that the Ministry’s legal adviser had said the CE should not tell staff that “Ms Setchell had made a full declaration of her interest, at the interview.
- 11.8 The fact is that the approach adopted led to Ms Setchell’s conclusion that her integrity was being questioned and that therefore she could not remain in an organisation which appeared reluctant to support her, when through its own omissions and faulty procedures, it had placed her in this unacceptable position. She has commented that at no time did the CE discuss the full reasons for his decision as set out in paragraph 10.3 above nor was any attempt made to explore how any perception of conflict of interest could be managed to the satisfaction of all the affected parties, as it had been in several other positions she had been in and where both she and her employers had reached a

mutually acceptable *modus vivendi*. In this case even despite the elevation of the status of the position of Communications Manager it remained a third level management role, reporting to a Group Manager who could have dealt with any conflict issues if and when they arose. From her perspective the most politically sensitive part of the Ministry's work – sustainability including the related communications responsibility – was already allocated on a temporary basis to a separate short term task force and that separation could have continued (the CE does not accept this as a workable solution from his point of view).

Post script - Identifying conflicts of interest

- 11.9 As mentioned above, the Ministry for the Environment has had experience in working with staff who have actual or perceived conflicts of interest. These are managed in different, but formal, ways depending on the nature of the conflict. An interim audit by Audit New Zealand in early 2007 and the draft Management Report on the audit of the Ministry for the Environment for the year ended 30 June 2007 indicated that the Ministry should do more to identify potential conflicts of interest. Because of this, on 2 July 2007, the senior management team considered a preliminary scoping paper on identifying conflicts of interest. This paper suggested some ways of providing greater assurance that potential conflicts of interest have been identified. Among the suggestions were a written declaration of real and perceived sources of conflict as part of contract management, a declaration of outside interests during the recruitment process, a declaration of outside interests by employees, and a confidential conflict of interest register. Work recommended in the paper has not been, and will not be, undertaken until further advice resulting from the State Services Commission inquiry has been received. The only change made by the Ministry has been to ensure that recruitment interviews include a standard question related to conflict of interest and other matters that an employer should be made aware of. Advice on the wording of this question was sought from the State Services Commission.

PART C. MINISTRY OF AGRICULTURE AND FORESTRY

A. Discussions on the Possibility of Short-Term Appointment

- 12.1 On 5 June Ms Setchell met a friend over coffee and they were joined by a former colleague in MAF, the Acting Communications Director. As he had previously asked her, before she joined Environment, whether she would like to return to MAF, and she had enjoyed working there, she asked if there were any current employment opportunities in his department. By coincidence he had a vacancy in his team and the department was considering a six month contracting position as an interim replacement.
- 12.2 She spoke to him again a couple of days later to say she had been offered an alternative position at Environment but before making a final decision would like to consider other options. At the same time she stressed that she had no wish to repeat the Environment experience and asked the Acting Communications Director if he could speak to his CE and find out whether he had the same difficulty as her current CE, with her partner's position in the Office of the Leader of the Opposition (of which the Acting Communications Director was already aware). She would not want to apply if the way was not clear. For his part the Acting Communications Director understood she also wanted the Minister to be appraised of the situation "so as not to put MAF in a difficult situation". (this particular comment was not passed on to the CE, so he was unaware of it). On the basis of her understanding that her concerns would be respected, she sent MAF her CV.
- 12.3 A day or so after that the Acting Communications Director met the CE and strongly recommended Ms Setchell's appointment as a short term contractor. In his view Ms Setchell's previous experience both as a senior MAF communications adviser and as Communications Manager at Dairy Insight (a key agricultural stakeholder and partner of MAF), uniquely qualified her for the position he was proposing. He also explained Ms Setchell's concerns and her wish to avoid facing a protracted employment process which might subject her to the same unacceptable stresses as she was currently experiencing. Consequently she wanted an assurance before she applied for any position that her personal relationship was not going to disqualify her. The CE had the same high opinion of Ms Setchell's capabilities as his Acting Director but was much more conscious of the difficulties such an appointment

would pose for both the department and Ms Setchell herself and thought it prudent, in the light of the situation which had developed in the other department, to seek the Minister's view first.

- 12.4 On 11 June, in order to confirm his wish to appoint Ms Setchell, commencing on 2 July, and to progress the matter while he was away in Australia, the Acting Communications Director emailed the CE. The email continued:

“The role would start as a contracted position until the end of the year, with a view to the ongoing nature of the role being considered as part of the upcoming corporate review.”

After referring to Ms Setchell's previous relevant appointments and her partner's position in the Office of the Leader of the Opposition, the email said:

“ Madeleine has been “up front” about her relationship which, in my view, should pose no obstacle to her being able to take up the contract position I am offering. However, I am aware of some of the political sensitivities that may be present around this appointment and would ask, should you think it appropriate, to raise this possible appointment with the Minister..... We are looking to have a job description confirmed by (22 June)”.

- 12.5 On 12 June the CE telephoned the Minister's Chief of Staff on another question and, in passing, mentioned the matter to him. The CE told the Chief of Staff he thought he should speak with the Minister but before doing so would be interested in the view of the Chief of Staff. The Chief of Staff replied that he would want to “cogitate” on the matter and that the CE should raise it at his next weekly meeting with the Minister. The CE then emailed his Acting Communications Director (by now in Australia) to advise him that the Chief of Staff would be thinking about it overnight and it would be raised with the Minister the next day. The Acting Communications Director replied:

“Of course I will accept any decision the Minister makes but I am extremely worried about the potential precedent here. We have a number of employees with potential “perceived” conflicts that may come in to play with a change of government. I look forward to hearing the Minister's office's response.”

12.6 The Chief of Staff telephoned the CE prior to the meeting with the Minister and gave him a first reaction. The CE again emailed his Director, saying:

“I have discussed with (the Chief of Staff) and he has discussed with the Minister. The answer is a clear “no”. I can discuss further once you are back.”

(Further information and explanation relating to this sentence is set out in paragraph 15.2 below).

12.7 The CE met the Minister, with his senior managers, on 13 June, and following the normal round-table briefing, stayed behind with the Chief of Staff to talk about the employment issue in the context of MAF’s interim plan for the communications function. The Minister said the personnel decision was not his to make but since his opinion was being sought, he repeated in greater detail the views that had already been conveyed to the CE (see below). Since that confirmed the direction in which he was heading, the CE made up his mind, but did nothing further until his Acting Director returned to New Zealand a week later.

12.8 On 20 June the CE met the Acting Communications Director and informed him what had taken place at the meeting with the Minister, conveying (in the Director’s mind) the message that the Minister was not comfortable with the appointment and giving his reasons. The CE made it clear that MAF would not be proceeding with any further discussions with Ms Setchell in respect of positions which might involve her in sensitive political issues. While he did not agree with his CE, the Director said he would not pursue the matter. With the CE’s permission he then passed on this message to Ms Setchell. She expressed her disappointment but commented he had “done his best”.

12.9 Over the next few weeks the Acting Communications Director went ahead with an external consultancy to advertise three, six-month, contractual positions in the Communications Team as senior communications advisers. In the course of doing so he asked Ms Setchell whether she would want to be considered for one of these (at least one of them would have been working in the area of climate change which had given such difficulty in the Ministry for the

Environment but it had been his intention, had she applied, to appoint her to one of the other positions). He advised her that if she were interested she should apply to the consultants.

- 12.10 On 23 July the matter was discussed again with the Minister, in his office, the Chief of Staff, the CE and the Acting Communications Director all being present.
- 12.11 The latter has told this investigation the CE recounted the events according to his recollection and said that he had made the employment decision, not the Minister. The Acting Communications Director informed the Minister that he had asked a consultant to recruit three short-term contractors for the communications area and that Ms Setchell might be interested in one of them. He asked the Minister if that would be a problem. He said the Minister suggested to the CE that he seek advice from the SSC. As it happened, Ms Setchell advised the Acting Communications Director a few days later that she would not be pursuing this option as she had been successful in obtaining a permanent position elsewhere.

B. The CE's View

- 13.1 The CE's perspective was contained in a written statement on which he elaborated at interview. His conversations with the Minister and the Minister's Chief of Staff were not recorded. He pointed out that while Ms Setchell had indicated an interest in a role with MAF, that had not progressed to the point of an offer of employment. "The particular role considered for her was not formally defined, and no job description ever created." He had not met with Ms Setchell nor had any discussion with her. His reaction, when the proposal to employ her was first put to him by his Director, was that while he held Ms Setchell in high regard, and would ordinarily have been pleased to have her back in MAF, in his view "the association with her partner's role was problematic". This was "particularly the case with respect to proposed engagement in the agriculture and forestry component of the climate change programme given the likelihood of an intense and highly politicised public debate with some stakeholders and the Opposition parties around emerging policies in these areas." He emphasized also that while his Acting Director of Communications may have wanted to move quickly to make an appointment, they had not got to the point of

deciding on the modalities of the appointment process and it would have been his intention to ensure it was a formal, competitive, one.

- 13.2 From past experience the CE had a great deal of trust in Ms Setchell's integrity but "the role proposed would require her to assist in shaping communications strategies with respect to highly contentious political issues whilst her partner was engaged on the same issues on behalf of the Leader of the Opposition. That was likely to be awkward for her, for her partner, for our Minister, for other Ministers working in this policy area, and potentially for the Leader of the Opposition. There was also the real possibility of her integrity, and MAF's, being impugned by accusations of inappropriate information flows even when she was conducting herself with high integrity. To place Madeleine into such a position did not seem to me consistent with my obligations to protect the real and perceived integrity and political neutrality of MAF and the wider public service."
- 13.3 At interview the CE essentially repeated what he had outlined in his statement. While he continued to have a high opinion of Ms Setchell's capabilities, his concern had been over the question of the potential conflict of interest in respect of the same politically sensitive matters which had caused the difficulty for her in the Ministry for the Environment. While MAF would have been happy to consider Ms Setchell for various roles for which she would have been suitable, he did not think he could put her in a position that was going "to have her in the front end of those highly contentious issues and working with the Minister".
- 13.4 The CE said, prior to this he had not spoken to his current Minister, nor to his predecessor, about public service employment issues but he thought this was an exceptional case, and Ms Setchell herself had asked that it be clarified so that she would not be exposed to embarrassment a second time. He was "pretty sure" what the Minister's view would be, nevertheless he thought it best to take the precautionary step of clearing the air with the Minister so that there was no doubt, both as to the temporary positions that were being considered as well as Ms Setchell's possible interest in applying for one of them.
- 13.5 It is clear the CE did not agree with his Acting Director either about the significance of the potential conflict or as to the manageability of any difficult situations which might arise from it.

- 13.6 While, unlike his colleague in Environment, he did not seek the advice of the SSC, he had several contacts with the Deputy State Services Commissioner (the Commissioner himself had gone overseas by then) after the matter had become a cause celebre and following the SSC's first becoming aware that there had been discussions between MAF and Ms Setchell. On 23 July during one of these conversations, the Deputy Commissioner expressed the opinion that it would have been preferable for the CE to have spoken to the SSC before taking the matter up with the Minister. The CE did not agree and replied that he continued to think his action had been appropriate. The MAF situation had occurred "where there was not yet a formal job defined and where I was responding to an indication of Madeleine's interest and availability i.e. she had not applied for a role, had not been appointed to a position, nor had she been given any undertakings". As far as he was concerned, " I was taking steps to establish the nature of any issues that might emerge were we to progress to that stage and to clarify the basis on which I might make judgments about the proposal before me." The remainder of the conversation dealt with whether there might be similar impediments to Ms Setchell's being employed in a MAF role that did not have the same sensitivities. Both agreed there were not.
- 13.7 Finally, the CE has observed to this inquiry that "until the post-mortems began, I had devoted no more than a few minutes to the management of the issues, including discussions with Minister Anderton. Moreover, those few minutes came in the midst of an exceptionally busy period of work in MAF. If some of the communications, including emails, appear a bit curt, the context within which those communications occurred is highly relevant to (any) judgment formed".

C. The Minister's View

- 14.1 The issue was first raised with the Minister on 12 June, through his Chief of Staff, following a telephone call from the CE. He was told that a person called Madeleine Setchell, whom he had never heard of before, could be a possible candidate for a position in MAF's Communications Division. The key issue that had been brought to the attention of his Chief of Staff, was that the candidate was the partner of the Chief Press Secretary to the Leader of the Opposition. The Minister's immediate response was that this was an operational matter

for the CE to determine, but since his view was being sought, he was prepared to give it. In his opinion Ministers and their CEs must be able to talk about relevant and important things, otherwise they could not operate effectively. The issue for him was its relevance to MAF. Whatever had happened at Environment had happened and was not for him to judge. He said to his Chief of Staff that if Ms Setchell were to be engaged with sensitive information on a continuous basis, she might be constantly vulnerable to suspicion and difficulties in her work while “living with a partner who was also engaged in the communications business but in the highly political activity advising the Leader of the Opposition on his ongoing strategies.” He again made it clear that any appointment was for the CE to decide, but suggested the CE might like to talk to him personally the next day.

14.2 When he saw him the next day the CE said he himself had concerns about a possible appointment in this case, which he outlined to the Minister, but he said nevertheless he would be interested in having the Minister’s opinion. The Minister felt that the CE had indicated the matter seemed relatively clear to him but he did not specify at that point exactly what his next step would be. “He didn’t say to me, “Well, I’ve made my decision.” ” The Minister then repeated what he had said the previous day to his Chief of Staff about his concern for Ms Setchell’s welfare and the possibility of what she would experience. The Minister’s summary of the meeting was there was an exchange of views on the matter raised by the CE about which they were both clear – it was the CE’s decision to make - and they left it there.

14.3 At interview the Minister made the following additional points:

- he didn’t see any difficulty with the matter being raised either through his Chief of Staff or directly by the CE;
- the CE is an experienced public servant and acted entirely professionally. They had a very good relationship marked by trust, confidence and respect for their relative roles;
- they both understood and reaffirmed in conversation on this matter, that employment decisions were the responsibility of the CE rather than Ministers; on this basis, he had interpreted the approach from the CE as “somewhere between notification of an impending issue, in other words of the “no surprises” kind, and a sensitive inquiry about whether there would be issues that

should be considered by him as CE as a result of his discussion with me.”;

- in 8 years as Minister he had had only one such previous case of a politically sensitive employment matter being raised with him by a CE, which demonstrated how rare they were, and on that occasion the matter had been dealt with by the CE and he was still unaware of the outcome – he didn’t ask, wasn’t told and had no interest in it;
- in all the portfolios he had held, there had probably been dozens of people working in government departments for which he was Minister, who had relationships or family connections with former or current politicians or advisers across the political spectrum. From all these there had never been any conflict of interest matters reported to him, other than the sole exception to which he had referred (which had involved an existing senior official considering standing as a candidate for Parliament, and hence was concerned with notification about a possible issue that might emerge in the public arena). The rarity of such matters meant that in the case of Ms Setchell, the Minister had understood that the CE had raised the matter precisely because it was different in degree and significance from the many others and hence was being brought to his attention.

14.4 In answers to questions the Minister said:

- he could not see a great deal of difference between the circumstances in Environment where the matter had arisen after the appointment and in Agriculture when it had arisen beforehand. Essentially the issues were the same. All the factors should be weighed in either case and that was the job of the CE and his department;
- in terms of the sensitivity of the portfolio (could it be said that Agriculture was as politically sensitive as Environment?) the Minister said that in terms of the issues they dealt with in common, they were equally so. But his concern had not been so much about the political sensitivity of the issues themselves but about the problem for the public servants who had to deal with them, often under tense and difficult conditions. It was hard

enough to cope with these situations without running the risk of “having the bone pointed at you”, whether that was fair or not;

- 14.5 As I thought it would be both relevant and instructive to have the view of a senior and experienced Minister on the nature of the communications function itself, I asked the Minister if he thought it had changed over the years. He replied that in his view the role of “communications advisers” and “press secretaries” had developed to be very different from what it might have been in the past because it increasingly involved communications strategy (and sometimes highly political strategy) rather than mere reporting.

D. The View Down The Line

- 15.1 I have referred already to the differences in perspective between the Acting Director and his CE. That in itself is not remarkable but it has led to one of the more contentious comments in this case, which needs to be clarified. When I interviewed Ms Setchell she told me, more than a little reluctantly since she was very appreciative of the efforts her former colleagues had made on her behalf, that when the Acting Director had conveyed the result of the CE’s meeting with the Minister, he had commented “the decision was the Minister’s not the Ministry’s”. When this was put to him, he said he couldn’t recall his exact words, but that would be a fair interpretation of them. At the time (on 20 June) his impression had been that the way the matter was being handled, the Minister’s “intervention” was indeed crucial to the decision. When I suggested to him that “intervention” by a Minister in a personal employment matter would, if it happened, be illegal (under the State Sector Act) he replied that that had not occurred to him - “in a practical world why go to the Minister if it was to have no effect on the outcome?”
- 15.2 What might have contributed to his remark was not only the Acting Director’s absence from New Zealand when the discussions with the Minister took place (and the wording of the cryptic emails he received as a result) but also his view that any conflict could have been managed. He had thought the Ministry for the Environment had “got it wrong” and that in MAF the reporting line for Ms Setchell could have been through him, which would have removed any potential conflicts since she would not have been required to appear before the Minister. On 20 July, after seeing a television report, he had begun to

raise with his CE the need for MAF to be prepared for questions on their part in the case. On 23 July when he attended the pre-Cabinet meeting with the Minister, his CE had made clear that the decision had been his alone and definitely not the Minister's. Subsequently the Acting Communications Director advised his CE that he had misinterpreted the exchange with the Minister, particularly in light of the second email he had received in Australia. The CE has conceded that on reflection the email could be seen to be ambiguous and that it would have been preferable if he had corrected that misunderstanding earlier, but nevertheless there was no doubt in his mind (or his Minister's), then or subsequently, that he had made the decision, not the Minister.

PART D. MINISTRY OF EDUCATION

- 16.1 During her final weeks in the Ministry for the Environment Ms Setchell experienced a good deal of sympathy and concern from her Communications Team some of whom were upset by the treatment she had received. The mother of one of these staff members was a temporary manager in the Ministry of Education where the Communications Team was going through a period of transition. By means of this contact Ms Setchell was asked if she would like to submit her CV to be considered for some contract positions that were being advertised. As suggested, Ms Setchell sent in her CV to the Acting Communications Manager whom she understood to be responsible at that time for overseeing the process of appointments to the Ministry's communications staff.
- 16.2 Three Communications management roles had been advertised on 31 March and 4 April by the Ministry's consultants (the same ones as those used by MAF). The closing date for these positions was 11 April and the interviews were held before mid-June. It is not clear whether these positions had been filled at the time Ms Setchell was invited to submit her CV. On 18 and 21 July (a month after Ms Setchell had left the Ministry of the Environment) the Ministry of Education advertised again, this time under its own logo, for five advisory roles. At the time in June when Ms Setchell was considering her options, these roles had been defined but not yet advertised. Since the matter did not proceed beyond the submission of the CV it can only be assumed that if she had decided to go ahead with a more formal expression of interest, she

would have been asked to apply in the normal way for whatever position remained vacant, albeit with some indication as to the fit between her CV and any vacant position – otherwise what would have been the point of her submitting the CV in the first place?

- 16.3 Shortly after she had sent her CV to the Ministry, her contact departed and was replaced by a permanent employee. The new Group Manager Communications, was immediately presented with major staffing problems in the Division. He has described the situation as one of “extreme volatility” and although he was able “to provide a continuity of service at a basic level”, he was under constant pressure. He recalls having a week’s overlap with his temporary predecessor and that she mentioned she had a friend (whom she named and whose circumstances she explained) “looking for work”. In the light of the difficulties with which he was faced, he took no action and left the recruitment process to the consultants (who would be expected to assess all the papers). He also recalls that “towards the end of the week beginning 25 June”, he received a message from Ms Setchell on his answer phone. Ms Setchell was clear in her evidence that she had called the Communications Manager to follow up her original contact with his predecessor to inquire as to what had happened to her CV: he merely remembers “a casual phone call” being a general inquiry about possible work. Whatever the nature of the inquiry (and the further information provided below confirms Ms Setchell’s version of the events), because of his immediate problems he did not get around to answering it. For this omission he has apologised, but in retrospect, apart from failing to respond to Ms Setchell’s call, he does not think he would have acted differently. At interview he said he did not know what had happened to the CV, having never seen it himself.
- 16.4 On 1 August the Group Manager was asked by his Deputy Secretary whether he had received a job application from Ms Setchell. He explained the situation as described above. In his view the correct answer was “No”. He understood the context for this inquiry was a telephone call his CE had received from the State Services Commissioner, saying it had come to his attention that Ms Setchell had applied for a job at the Ministry of Education and had not received any response.
- 16.5 As a footnote to the Communications Manager’s evidence it is relevant to record that in responding to the first draft of this report, he

informed me that on 24 September, while looking through a folder of emails received from the Ministry's employment consultants since mid-June, he found that they had in fact emailed him Ms Setchell's CV on 6 July. She was proposed by the consultants as a short term contractor. He had no recollection of receiving or responding to this message. He did not say when the consultants themselves received the CV, but he explained that when he had been asked on 1 August by the Deputy Secretary to report whether he had received a job application from Ms Setchell, he had checked with the consultants whether they had forwarded her CV to him at any stage. They apparently assured him they had not and he had relied on that assurance. It now transpires that the CV had indeed been forwarded but by a consultant other than the one who had supplied the earlier information

- 16.6 At the time I conducted the interviews for this inquiry I did not think the circumstances warranted my talking to either the CE or the Deputy Secretary in the Ministry of Education, since they had had nothing to do with the case and could not have added to the essential facts nor explained why their senior officer had ignored Ms Setchell's call. However in reviewing the first draft of this report which was made available to him by his Communications Manager, the Deputy Secretary has written to me. It does not throw any further light on the mystery of the temporarily missing CV but it does confirm that there was contact between Ms Setchell and the Ministry's Acting Communications Manager in June.

PART E. STATE SERVICES COMMISSION

A. Scope of Investigation

- 17.1 For this part of the investigation I have varied the detailed chronological approach adopted in the previous parts. The reasons for this are first, that the principal involvement of the SSC in the employment and recruitment process, which is the subject of this investigation, has been recorded above (the SSC was much more involved in the period following 22 June when Ms Setchell left the Ministry for the Environment); second, that I am required to reach conclusions about the Commissioner and his staff which I am not required to do in respect of the other organisations and this argues for a different treatment; and, third, as many of the events which occurred

from 6 July onwards have been recorded either in Parliament or the media there is not the same need for a narrative account. Accordingly I have concentrated on the roles undertaken by the SSC and attempted to arrive at an informed judgment as to how those roles were performed. In order to enable a better understanding of the context in which the SSC was working during July, I attach at Annexe F a chronology of events provided by the SSC. While this has been compiled from the SSC viewpoint, it helps to explain the basis on which they were operating during a very public period in this case.

B. Nature of Involvement

- 18.1 I have interviewed all eight SSC employees, including the Commissioner himself, who were involved in some way in this case. They were (in date order):
- a) The State Services Commissioner who became involved on 29 May when he was telephoned by the CE, Ministry for the Environment, to inform him the CE had learned on the previous day, after Ms Setchell had first assumed her appointment, that she had a potential conflict of interest. The CE indicated that he wanted to raise the matter with his Minister later that day and wanted to seek the Commissioner's advice before doing so. He met with the CE in his office the next day, for a second consultation on the way forward. He had one brief encounter with the CE during June, prior to going overseas from 30 June to 29 July. While he was absent the Commissioner remained in touch with his deputy by telephone and drafted an op-ed piece for the "Dominion Post" on 20 July. He had a number of telephone calls, including one with the Minister of State Services and another with the CE, over the weekend of his return, spoke to the media on 2 August and issued two press releases on 2 and 3 August. (See Annexe H).
 - b) The SSC Performance Specialist who was responsible to the Deputy Commissioner and assigned to liaise with the lower levels of management in the Ministry for the Environment. She attended the Commissioner's meeting with the CE on 30 May and remained in contact with the Ministry thereafter although the nature and extent of the contact varied.

c) The Deputy Commissioner (one of five in the SSC who are each assigned to a group of departments and work directly with their CEs) whose task it was to oversee the SSC's relationship with the Ministry for the Environment. She was not able to be present at the 30 May meeting but was briefed immediately afterwards by the SSC Performance Specialist and established contact with the CE on 1 June. She had several telephone calls and one meeting with the CE from then until 13 July, her last day before commencing a planned secondment to the Ministry of Social Development. However, her direct involvement with the case finished at a point when it appeared likely there would be a positive outcome from the SSC perspective - because of her impending departure and the fact she had had her "sign-off" meeting with the CE on 11 June, she was not part of the proceedings from mid-June onwards. She was contacted once, by the SSC, after moving to the new organisation, for assistance with an OIA request.

d) The Commissioner's Executive Assistant who received an email from the SSC Performance Specialist on 31 May informing him of her first liaison meeting with the CE (Environment). He acted thereafter in various liaison and information roles between other members of the office and the CE, on the one hand, and the Commissioner, on the other.

e) The Communications Manager who fielded the first media inquiry on the case to come to the SSC, on 25 June. Thereafter he was involved in the preparation of all public documents emanating from the SSC and in liaising with members of the media. He maintained contact on media issues with the office of the Minister of State Services.

f) The Chief Legal Advisor who was first drawn into the case on 28 June to assist with the preparation of an answer to a media inquiry. He was closely involved with the preparation of all the major documents thereafter.

g) The (statutorily appointed) Deputy State Services Commissioner who acted for the Commissioner in his absence overseas and was initiated abruptly into the case when he received a telephone call on 2 July from the Chief of Staff of the Leader of the Opposition. From then until the Commissioner's return on 29 July he took the lead role

within the SSC on all aspects of the case, principally in meeting with and reporting to, the Minister of State Services and in discussing matters, as they arose, with the CEs of the Ministries for the Environment and of Agriculture and Forestry as well as with the Prime Minister's Office. He gave a joint press conference with the CE (Environment) on 27 July. He was absent in Australia on prior commitments twice during the month of July.

h) The Deputy Commissioner who took over the role of her colleague in (c) above when the latter departed on secondment. Her few days' involvement which included working on the op-ed piece, a report to the Minister and telephone calls to the CE (Environment), was interrupted by her taking bereavement leave following an unexpected death in her family.

C. Factors Impinging on SSC Role

- 19.1 While the SSC itself would not claim that its accountability for its part in the case was attenuated by the circumstances over which it had no control, it is instructive from an organisational management point of view to note how many factors impinged on its ability to take a coherent, consistent and authoritative approach. The Commissioner himself was overseas during the period when public disclosure required the clearest direction – this is no reflection either on the Commissioner who had no idea when he departed that a crisis was at hand nor on those who had to cope, but I recall from my own experience that it is very difficult when one is away from the scene for those who have to explain one's actions when they were not present at the event which has to be explained. Moreover the barrier of distance between the Commissioner and Wellington was raised even higher by the frequently poor cell phone reception. The Deputy State Services Commissioner was placed in the invidious position of being responsible for managing the SSC's response to events as they unfolded, often unexpectedly, and trying to catch up with information which was not being made clear to him – he was also interrupted in his control of the situation by two prior commitments in Australia. A pre-planned hand-over from one Deputy Commissioner responsible for relationship management with the Ministry for the Environment, to another, proceeded in the middle of the most difficult period for the SSC (and the choice of the successor Deputy Commissioner had to be made at the last moment). The participation of the second Deputy was then affected by a family

bereavement. Finally, the detail of the important Ministerial submission of 20 July had to be checked with the CE of the Ministry for the Environment while the latter was on a shaky mobile phone connection at the back of a conference room in Palmerston North thus missing a crucial opportunity to pin down more precisely what had transpired between the CE and his Minister. Murphy's Law was truly in the ascendant.

- 19.2 At the same time there were factors which were within the SSC's control. Since my terms of reference do not allow me to balance these with comments on the performance of others, they need to be considered in a broader context. The crucial meeting from the SSC's perspective was that of 30 May between the Commissioner and the CE (Environment). No record was kept of the meeting so that all the elements of the case which were either discussed at that meeting or would have been made explicit by a written record, were not available to others who were not there but had to deal with the fall-out. The follow-up action to that meeting was not precise and the SSC appears to have had little influence on subsequent events.
- 19.3 The impression one is left with is that the liaison arrangements between the SSC and the Ministry of the Environment did not work as they were intended so that the SSC involvement was not imprinted as strongly on the situation as it could have been. The CE claims he specifically said to the SSC Performance Specialist – but apparently not to the Deputy Commissioner who was the officer responsible for the interdepartmental relationship on the SSC side - that if she had any concerns about the way he was handling the case, she should tell him: for her part the Performance Specialist felt inhibited in telling a CE what he should, or shouldn't, do especially on an appointment matter which, by law, was his sole responsibility.
- 19.4 After the initial consultation with the Commissioner, not only did the CE not follow the tenor of his advice, but the SSC's internal processes did not keep the Commissioner informed. This does not seem to have been picked up and rectified through the liaison arrangements so that the outcome (i.e. Ms Setchell's departure from the Ministry) came as a surprise to the Commissioner when he thought that the negotiations between the CE and his employee were proceeding towards a mutually satisfactory endpoint, namely her continuation in the Ministry. (The Deputy Commissioner and the SSC Performance Specialist were also

unaware of the final outcome of the negotiations between the Ministry and Ms Setchell until after the event.) Under the law any decision concerning Ms Setchell's employment undoubtedly rested with the CE, but a stronger SSC presence could have enabled the CE to realise that the path he had chosen was not only not the sole viable option but the one likely to create the greatest risk from an employment perspective (which the Commissioner had already pointed out but it obviously needed reinforcement). Essentially the SSC does not appear to have operated on the basis that once the CE brought his problem to them, it was theirs as well as his - in the sense that while the legal employment authority was the CE's, the SSC had a responsibility to provide appropriate leadership and guidance. The Commissioner acknowledges the outcome of this case shows that the steps taken were not as effective in providing guidance, and support, as was his intention at the time.

D. Critical Issues

- 20.1 In assessing the SSC's role in the cases of the Ministries of Education and of Agriculture and Forestry, there is nothing to be said as the SSC had no involvement in either case – indeed as the CE of Agriculture has made clear, he did not consider it necessary to consult the SSC. In the case of Education the CE was entirely unaware of what was happening at a lower level in the organisation – nor was it necessary that she should be since the appointment authority in this case had been delegated.
- 20.2 In the case of the Ministry for the Environment there were three critical issues for the SSC stemming from its traditional responsibilities - first, to oversee the rights of public service employees (including the guardianship of the merit principle); second, to provide guidance on defining and handling conflicts of interest (within the context of codes of conduct); and, third, to protect the political neutrality of the Public Service. All of these were central to the former control role of the SSC and exercised by the forerunner to the current Commission which was first set up as a key component of our governance system almost 100 years ago. These matters remain as integral to the SSC's purpose as they have always been, but apart from some limited instances, the SSC no longer has the legal authority to direct departments. For the past 20 years CEs have been solely responsible for all employment matters in their departments, so that only they can hire and fire and in doing so

must manage conflicts of interest in respect of their employees (as the employer of the CEs the Commissioner is responsible for ensuring they have no conflicts). Under the State Sector Act it is illegal for anyone – including Ministers and the Commissioner himself – to attempt to influence the CEs in carrying out these employment functions in relation to individuals (this does not prevent Governments from making decisions on employment policies and practices which have wider application) but it is accepted that consultation with the Commissioner does not infringe the law. On the contrary in difficult cases it is in the interest of CEs to do so and they would normally expect (and want), if they approach the Commissioner, to receive a clear indication as to what is best practice

- 20.3 Consequently while the Commissioner's view carries considerable weight, it is not mandatory for the CE to accept his advice. At the same time the Commissioner's monitoring and evaluatory functions, combined with his role as the CE's employer, mean that the performance of CEs will be assessed by the Commissioner. And while Ministers cannot direct their CEs on individual employment matters, the CEs are responsible to them for the administration of their departments. The interactions between these various overlapping responsibilities have to be handled deftly and sensitively so that each of the parties respects the roles of the other and avoids actions which might cause embarrassment to them – or worse, might create a situation which leads to a breakdown in relationships or to administrative failure. The fact that there are so few such cases as the present one, shows that for the most part all three parties understand the conventions and work within them. It is when the understanding of the conventions differs (perhaps as a result of changes in public attitudes) or there is insufficient care taken in the handling of particular cases, that difficulties can arise.
- 20.4 It can be seen then, that the action of the CE of the Ministry for the Environment in seeking the advice of the Commissioner on 29 May, was completely in accord with accepted practice. For his part the Commissioner, with his wider experience in dealing with the relationships between Ministers and CEs and since he saw the dangers in unnecessarily escalating it, was right to suggest to the CE, first, to think carefully whether he should raise this particular employment matter at all, with the Minister. The CE having decided that he had no option but to do so, the Commissioner's next duty was to do precisely

what he did, namely, to urge the CE to take his time, not to be rushed by any reaction he may have received from the Minister, to apply the relevant Public Service principles and to seek an accommodation with his Communications Manager, given that she was legally employed and was clearly of the opinion that she had acted correctly. It was at this point that the misunderstanding could have begun, in that the CE appears in retrospect to have already moved on in his thinking to offering Ms Setchell an alternative position (directing her if necessary) while the Commissioner was inclined to the option of exploring how any potential conflict of interest could be managed in Ms Setchell's existing position.

20.5 There can be no doubt the Commissioner made his views clear on the standards the CE should apply and that he had fulfilled his part in drawing attention to the necessity of having regard to the three critical issues and of giving them equal weight. He was urging the CE to consider all the factors and reach a balanced judgment ensuring that the rights of the employee were fully respected. He also offered to help the CE in any subsequent discussion with the Minister and to accompany him if that would be useful. (It should be noted that later the CE asked the SSC Performance Specialist to pass on to the Commissioner that he might need his support if there were any difficulties with the Minister over Ms Setchell's working in the Stakeholder Engagement role: she did so, but as Ms Setchell did not accept the role, the offer was not followed up). In terms of responding to the CE's approach for advice and assistance the Commissioner could do no more than he did. It is also important to note that while others in the Commission and the Ministry were not aware of the most sensitive part of the exchange on the previous day between the CE and his Minister, the CE and the Commissioner were aware of it and would have been fully conscious that this lay behind the CE's question at their meeting on 30 May whether Ministers were entitled to bar individual staff from their offices – to which the Commissioner had replied, they were.

20.6 While two senior Commission staff had contacts with the CE and his people in the three weeks after the crucial 30 May meeting, the influence of the SSC over the proceedings which ended in a result completely at odds with that recommended by the Commissioner, appears to have been minimal. The officer who had been tasked at the meeting with the duty of maintaining regular liaison did so but at stages

when she had doubts about the way the matter was proceeding, she did not think she was in a position to question the CE's decisions so she did not raise them with him. Their own chronology shows that as far as the SSC was concerned, the affair fell off the radar at the critical point when apparently positive discussions between the Ministry and Ms Setchell shifted to an agreement between the parties that she would leave the organisation altogether – as explained above, the conclusion least favoured by the SSC. One explanation for this is that at no time were the SSC officers made aware how strongly Ms Setchell felt on the matter of disclosure and that the CE had refused to deal with it until he had settled the employment issue – if they had, their greater objectivity might have enabled them to persuade him that the two issues were inseparable. At the same time, it would not have altered the fact that, legally, only the CE had the authority to make the final decision.

E. Managing in the Commissioner's Absence

- 21.1 Almost immediately after the Commissioner had gone overseas, the dam burst and the case became a daily exercise in trying to cope with constant demands for information and comment. OIA requests, reports to and meetings with the Minister of State Services, answering Parliamentary questions – all required quality information. The Deputy State Services Commissioner who was then acting for the Commissioner, found himself in the unenviable position of not only not having been at the key meeting on 30 May, but not having access to any record of it - apart from the incomplete account by the one other SSC official who had been there (incomplete, because she was not aware of the precise and critical detail that the Minister had said he would not be prepared to be as “free and frank” as he was with other senior managers, in meetings at which the partner of the Chief Press Secretary to the Leader of the Opposition ,was present) . For one reason or another, he experienced considerable difficulty in obtaining all the information he sought from the CE, to the extent that despite the several conversations he had had with the CE and two days of preparation on 25 and 26 July for the joint press conference, it was not until 27 July that two further significant pieces of information emerged – one at a meeting of Public Service CEs and one later in the day, at the joint press conference itself. In respect of Ms Setchell's difficulties, the Deputy State Services Commissioner had no appreciation that the

final settlement had been anything other than “amicable”, until he met her personally on 24 July.

- 21.2 Although one must take these difficulties into account, and even given that it was not until as late as 25 July that senior SSC staff were aware of the “free and frank” element of the CE’s 29 May meeting with his Minister (what they regarded as the material point), it seems to me that enough was known by all those involved in both the SSC and the Ministry for the Environment (and all but the Commissioner were available in Wellington to contribute to an understanding of what had happened) to have given the Minister of State Services a more comprehensive written briefing than the ones she received on 20 and 24 July. Certainly the Deputy State Services Commissioner gave the Minister a detailed briefing of what he knew on 3 July, the day after he became involved in the case. But the account given to the Minister in the written submissions, both about the CE’s meeting with the Minister for the Environment (even lacking the vital element discovered on 25 July – and in that respect it was known that the CE had asked the Commissioner whether Ministers are able to ban departmental staff from their offices) and also the process which the CE had gone through with Ms Setchell and which ended in failure from the SSC’s standpoint, could have been much fuller than it was and thus more helpful to her in dealing with the turmoil she had encountered.
- 21.3 Part of the problem was that the paper of 20 July was rushed to meet a deadline and its checking with the CE was done under unfavourable circumstances (he was out of Wellington). It is relevant also, as mentioned above, that the SSC found it extremely difficult to obtain the information they needed - for example, SSC officials only became aware of the “free and frank” dimension after hours of discussion with the CE when it was mentioned almost casually. During this period the SSC had the distinct impression that the CE had narrowed his focus solely to his employment problem to the exclusion of the wider Public Service considerations which were the responsibility of the SSC. They also felt that the SSC had not been kept in the picture during June, in as detailed a manner as the CE appeared to think.
- 21.4 I should note that the Minister of State Services herself has not complained about the service she received.

- 21.5 In my view it is also debatable whether the Commissioner half way around the world and unable to appreciate fully the situation in Wellington, should have put out any press release on 20 July. But if it was thought advisable to do so, it would have been better to have discussed it with the Minister first and then a statement drawn up for general release rather than placed as an “op-ed” with one newspaper. I can understand the Commissioner’s wish to correct the grossly misleading editorials which had begun to appear, to meet the public’s demand for information and to appear to be accepting accountability for the SSC’s part in what had become a very messy situation, but the vehicle chosen personalised the matter when that tended to obscure the issue and was, in any case, only a partial explanation of what had happened.
- 21.6 There were a number of opportunities in July for the CE to provide SSC with a more complete account of his contact with the Minister than he did. However many of these communications were centred on discussion of draft documents (such as the op-ed item and the draft report to the Minister of State Services on 20 July), where there was considerable time pressure, and the CE was under the impression that his ability to make changes was limited. In the context of those documents, the CE considered the comments touching on the interaction with the Minister to be accurate. It was also not evident to the CE that the SSC was operating under a partial understanding of the contact between the CE and his Minister. The CE knew that he had passed on the details of this contact to the Commissioner, and he believed (mistakenly as it has turned out) that both the SSC Performance Specialist and the original Deputy Commissioner for the Ministry were fully in the picture. When media reporting on the issue began to focus increasingly on the role of the Minister, the CE considered contacting his Minister to discuss the issue, but he decided against it. He made this decision on the assumption that the Minister would have recalled the discussion and comments made, and that it was the Minister’s business to respond to the queries about his involvement. The CE also felt that to discuss the matter with the Minister created a risk of accusations of collusion between him and the Minister – this possibility was in fact alluded to in the joint press conference of 27 July.

F. Memory Loss

- 22.1 Regrettably all the work done by the Commissioner and his staff has been overshadowed in the public's mind by the Commissioner's statement on 2 August, after his return from overseas and when he was able to realise how significant the issues had become, that he had forgotten one vital element in the briefings he had received from the CE (Environment) – namely that at their meeting in Hamilton on 29 May the Minister had said to the CE that he could not be as “free and frank” as he would want to be in his discussions with his officials, if Ms Setchell were in the room. By then the Minister for the Environment had made his own admission in the House that he had indeed said this, and had resigned.
- 22.2 More than most I can understand the pressures under which a Commissioner works, and the myriad of sensitive matters one handles on a daily basis. It is simply not possible to remember all of them.. The Minister of State Services has said to me that it is only human to forget and that is right - we are all forgetful at times, some of us increasingly so with the passing years. And in this case there were extenuating circumstances. At the time of his conversation with the CE the Commissioner had taken on board all that had been said to him, he had responded fully to the CE's request for advice, he was left with the impression that his part in the matter was dealt with (unless the CE came back to him for some further help and he had not) and so he had moved on. He had been in the country for a month after that conversation with the CE and while he didn't agree with the outcome, the question of Ms Setchell's employment had been settled before he went overseas.
- 22.3 So if the “free and frank” comment had been a material point in the discussions of Ms Setchell's appointment it could have been raised with him at any time in that period. In any case he had not thought at the time (and still doesn't) that the comment in itself was especially remarkable. It wasn't the first time and certainly won't be the last that a Minister had expressed his reluctance to have a particular individual in his office – they are entitled to do so. He had not thought the comment was such that in itself he needed to do anything other than what he had done – which was to advise the CE how he might handle the case.

- 22.4 He had then gone overseas and while he had kept in touch with the office, communications had often been bad and it had not been easy to get a feel for how the case had been developing back home. Finally, and probably most importantly, he had in the course of his trip been told about the issue of Ms Setchell's attempts to seek employment in MAF and what he had learned had worried him much more at the time than what he knew had happened in the Ministry for the Environment, and he thought one had crowded out the other in his mind.
- 22.5 The scope of this investigation has been defined as covering the period of Ms Setchell's appointment to the Ministry for the Environment. As I have recorded above, that period finished on 22 June. I have no hesitation in accepting that in respect of Ms Setchell's employment, the Commissioner's loss of memory had no effect on the outcome whatsoever. As this investigation has shown, after 30 May, while the SSC continued to be involved on the fringes, the action shifted back to the Ministry for the Environment and the key decisions were all made by the CE as the law prescribes, without any further reference to the Commissioner.
- 22.6 After his departure overseas the Commissioner's Deputy and staff were faced with the very difficult task of trying to reconstruct from the SSC's perspective what had happened in his office at the key meeting between himself and the CE. Everything else flowed from that. While the delicacy of the situation was apparent, it came as a bolt from the blue when on 25 July they finally realised that the position was more sensitive than they had understood and it gave the case a new dimension. If this important piece of information had been known by others in the SSC at the beginning of July when the case first became public, subsequent events might have unfolded differently. If it is not acceptable to record the Commissioner's confidential discussions with CEs then some other way must be found to convey sensitive matters to others who may have subsequent responsibility for follow up. The point is that the SSC plays an essential role in maintaining the health of our system of government, a vital part of which is a politically neutral Public Service. It is certainly forgivable to forget on occasion and no system can eliminate human error entirely, but on questions that bear directly on the core responsibility of the SSC this case demonstrates the need to take every precaution to minimise the risk. With the benefit of hindsight, the Commissioner made an error when he failed to ensure that the appropriate members of his senior staff were aware

of all the information that had been conveyed to him by the CE following the CE's discussion with his Minister. The Commissioner appreciates he made an error. The public can be confident that the Commissioner is unlikely to repeat it.

PART F. FINDINGS

23.1 It is important to reiterate, at this point, that the purpose of this inquiry is to record the facts relating to “the public service recruitment and employment of Ms Madeleine Setchell” - that is, apart from the State Services Commissioner and the SSC itself, whose involvement I am required, in addition to compiling a summary of the facts, to assess and comment on. Individual judgments about the wisdom of, and the justification for, actions and decisions taken by those other than the SSC are for others who have the appropriate authority, to make. Nor have I been asked to recommend any follow-up actions that might be taken on this report. On the basis of the evidence assembled by this investigation I have arrived at the following conclusions:

(a) Ministry for the Environment:

- (i) In the light of its own procedures, and those followed by other government departments, there were significant errors in the manner in which Ms Setchell was recruited and employed by the Ministry and subsequently in managing the circumstances which led to her departure;
- (ii) In particular, despite Ms Setchell's openness about her potential conflict of interest, the issue was not identified by those with the responsibility to do so and was not dealt with adequately after the Chief Executive had belatedly been made aware of it: some account must be taken of the fact that at the time the job interview was held in February the position was not as senior in the departmental hierarchy, nor was it designed to interact with the Minister, as was the intention by 28 May when Ms Setchell joined the Ministry;
- (iii) The position of Communications Manager was a sensitive one both because of the issues with which it would be dealing and because it would require the incumbent to be present when the Minister was discussing matters which

the Government might regard as being highly confidential;

- (iv) The Chief Executive took the initiative to discuss the question of Ms Setchell's appointment with the Minister for the Environment, after the matter had been first raised with him by the Minister's adviser. For his part the Minister did not contravene either the State Sector Act nor any currently accepted practice or convention, in responding to the Chief Executive's initiative. As the State Services Commissioner has pointed out, Ministers are not prevented from barring from their offices and from their discussions, officials in whom they do not have confidence (and in the past this has included at least one Chief Executive);
- (v) All the parties involved – the Minister, his adviser, the Chief Executive – were absolutely clear that any decision as to Ms Setchell's appointment was for the Chief Executive alone to take;
- (vi) In hindsight the State Services Commissioner and the Chief Executive emerged from their key meeting of 30 May with differing impressions which influenced their subsequent thinking;
- (vii) In respect of how the negotiations with Ms Setchell were handled after 30 May, there is a significant difference of opinion between Ms Setchell and the State Services Commission on the one hand and the Chief Executive and his Ministry on the other, as to whether enough weight was given to dealing with the conflict issue while retaining Ms Setchell in the position of Communications Manager.
- (viii) There are indications, but not conclusive evidence, that if the Chief Executive had been more forthcoming in resolving Ms Setchell's strong and obvious concerns over the matter of disclosure, he may well have achieved the objective he and the State Services Commissioner had intended, namely to retain Ms Setchell as a Ministry employee;

- (ix) The settlement agreement itself was not unreasonable in the circumstances and by comparison with other settlements in cases of involuntary departure, but it is not clear what weight was given by the Ministry to the Auditor-General's guidelines, which generally require transparency for such settlements.

- (x) The question has been asked why, in July, the SSC did not have a fuller account from the CE of his contact with the Minister. The contacts between the SSC and the SSC over this period often involved discussion of documents under time pressure (such as the draft op-ed article and the draft Ministerial report of 20 July). The CE considered the relevant comments in those documents to be accurate given their context. In his view he had provided the Commissioner with a full account of the contact with the Minister at the outset when he had first sought his advice, and he believed others in the SSC were similarly aware since he had never sought to obscure it. Accordingly it was not evident to the CE that he needed to repeat his account. When the media began to focus increasingly on his Minister's role, the CE decided against contacting the Minister, both because he assumed that the Minister would have recalled their conversation of 29 May and would make his own decision as to how the matter should be handled and because discussion on the issue between them might have risked an accusation of collusion.

(b) Ministry of Agriculture and Forestry

- (i) After she had been told she would not be able to continue in the role to which she had been appointed, Ms Setchell expressed an interest in exploring alternative employment options with her former department. This was conditional, on her part, upon clarification that neither the Chief Executive nor the Minister (of Agriculture) would have the same objections as she had encountered in the Ministry for the Environment. She also wanted to avoid giving embarrassment to her former colleagues.
- (ii) The Ministry was interested in re-employing her, but the Chief Executive had reservations which he wanted to clarify in order to give Ms Setchell the assurances she had sought. While he was “pretty sure” of the Minister’s view, he took the initiative to seek that view before making a final decision;
- (iii) The Minister, his Chief of Staff and the Chief Executive – all of whom were present at a meeting in the Minister’s office, at which the matter was discussed - were clear in their own minds that the decision was the Chief Executive’s alone to take. No attempt whatsoever was made to interfere in that decision;
- (iv) The Chief Executive subsequently decided that he could not proceed with an appointment process which might lead to Ms Setchell being in a position that would create the same problems for MAF as had arisen in the Ministry for the Environment.
- (v) In relaying the decision to Ms Setchell, MAF’s Acting Communications Director conveyed the impression to her that the decision had been the Minister’s and not the Ministry’s. Not only does the evidence show beyond doubt that this was not the case, the Acting Director himself has now accepted that his interpretation had been occasioned by an understandable, but mistaken, reading of a cryptic email he had received from his Chief

Executive. He is now clear that the decision was the CE's;

- (vi) Later, in June, when a range of further communications contract positions were advertised (some of which would have avoided the earlier problem), MAF approached Ms Setchell to gauge her interest. By that time she had already accepted another permanent position, but the approach demonstrated MAF's view that Ms Setchell's difficulties had not disqualified her from consideration for appropriate communications positions in the public service.

(c) Ministry of Education

- (i) During the period in June when she was exploring alternative employment options, Ms Setchell submitted her CV to the Ministry at their invitation. Some time later, having had no response, she followed up with a telephone inquiry to the recently appointed Communications Manager. The message was left on his answerphone and he did not respond to it. Apart from this failure of courtesy, for which the Manager has now apologised, there are no findings required. If she had wished to pursue her employment opportunities in the Ministry Ms Setchell could have applied in the normal way for any of the communications positions which were then on offer through public advertisement.

(d) State Services Commission

- (i) Over the period 29 May to the day this enquiry began in early August, there were 8 SSC personnel involved in this case. Following the initial contact on 29 May between the Commissioner and the Chief Executive for the Ministry for the Environment, and their longer meeting the following day, the normal liaison arrangements between the two organisations were in place. This intensified after the matter came into the public arena towards the end of June.

- (ii) The Commissioner's advice to the Chief Executive when it was sought on 29 and 30 May was comprehensive, cogent and correct. For his part, the Chief Executive felt he had explained his position clearly and that the SSC understood the imperatives which drove his decisions and actions. Both parties were clear that under the law any decisions as to individual employees could only be made by the Chief Executive and that the SSC could not be seen to be directing him.
- (iii) In retrospect it has become clearer that the different frames of reference of the Commissioner and the Chief Executive led to misunderstanding from the beginning - the Chief Executive deciding very early that he had only one option and the Commissioner being under the impression that alternatives would be actively assessed and that Ms Setchell would remain an employee of the Ministry. Although both parties thought there was a plan in place to manage their separate roles, the failure in the information flows to the SSC led to a less assertive stance on its part than might have been expected, which in turn led to the Commissioner being taken by surprise when he learned well after the event that the negotiations between the Ministry and Ms Setchell had failed and she had left the Ministry.
- (iv) While there were a number of unforeseen factors which complicated the situation for the SSC (a not abnormal occurrence), there were also areas where, in retrospect, a more assertive approach might have produced a more positive result;
 - (a) a clearer exposition of how the interactive relationship between Chief Executives and Deputy Commissioners complements the statutory relationship between the Chief Executives and the Commissioner;
 - (b) guidance to staff as to the role, purpose and modalities of the SSC's interactions with other organisations, especially in areas where the SSC is

expected to be influential but has no statutory power to direct;

- (c) a more definite response to the CE's approach. There was a plan for follow-up action in the minds of the Commissioner and the Chief Executive at their 30 May meeting, but it does not appear to have been sufficiently explicit to others.;
- (d) the absence of formal records and poor information flows. As this case demonstrates, where there are no formal records, reliance on memory and on emails (which are often cryptic and hurriedly drafted), can produce distortionary results.
- (v) Overall the SSC did not provide sufficient in the way of leadership and guidance in order to influence events more positively (conceding that ultimately Chief Executives are solely responsible for employment matters and that the Commissioner cannot direct them nor subject them to pressure). In this case, also, the SSC could have given the Minister of State Services better information than she received and published a more formal statement for the media generally, rather than drafting an op-ed piece for one newspaper which was only a partial explanation;
- (vi) In respect of the Commissioner's failure to remember a significant detail arising from his first discussions with the Chief Executive of the Ministry for the Environment, there is no doubt that this had no effect whatsoever on the outcome of Ms Setchell's employment case. Equally, there is no doubt it has produced, in the public mind, a question as to whether events might have unfolded differently in the aftermath if the detail had been known to his colleagues in the SSC a month earlier than it was. It is certainly forgivable to forget on occasion and no system can eliminate human error entirely, but on questions that bear directly on the core responsibility of the SSC, this case demonstrates the need to take every precaution to minimise the risk. With the benefit of hindsight the Commissioner made an error when he failed to ensure that the appropriate members of his

senior staff were aware of all the information that had been conveyed to him by the CE following the CE's discussion with his Minister. The Commissioner appreciates he made an error. The public can be confident he is unlikely to repeat it.