



CORRUPTION AND CRIME COMMISSION

SPEECH BY COMMISSIONER LEN ROBERTS-SMITH QC

TO

WALGA AGM

TOPIC: ***THE MATTER OF ETHICS***

DATE: **Thursday, 31 July 2008**

PLACE: **Perth Convention Centre**

ACKNOWLEDGEMENTS

Councillor Bill Mitchell, President of WALGA

Mayors, Councillors, CEOs

Ladies and Gentlemen

SPEECH

Thank you for the opportunity to address the leaders of local government in Western Australia.

The title of my address is *The Matter of Ethics*. I'm afraid to adequately address this topic in terms of the relationship between the Commission and Local Government, I'll have to take a slight deviation and explain the Commission's broad function and experience in terms of your sector.

The title of my address and the prominent presence of the word ethics could imply that the main emphasis is on the choices and individual makes when going about their duties as a public officer.

Of course this is important and we all have codes of ethics and codes of conduct to indicate what is and what is not acceptable behaviour but the implication is that misconduct is only an ethical issue and due to a few so-called "bad apples" who need to be dealt with.

However, from a Commission point of view, the critical long term aspect of corruption prevention is dealing with the structures, policies and procedures that organisations have in place to assess and manage the risk of misconduct.

Our corruption prevention people - which is an important part of the Commission's operations – say: "The organisation has the potential to make an ethical person act unethically or an unethical person behave ethically".

To this end we recently launched a comprehensive package called *Misconduct Resistance. An integrated governance approach to protecting agency integrity*. This

package aims to help agencies such as local government to identify their particular misconduct risks, indicates what needs to be put in place to manage them and how to measure the success of such initiatives.

I'll refer to that package again later.

The emphasis on this aspect of the Commission's activities may not be familiar to many of you here today.

The nature of the Commission's work means much of our contact with the public is done through the media's reporting of public hearings and the tabling of reports in Parliament and the resulting public comment that results from those activities.

Unfortunately, that does not give an accurate picture of the main, long term work of the Commission.

This was well summed up by former New South Wales Premier, Nick Greiner, in describing the work of our equivalent body in that State, the Independent Commission Against Corruption or ICAC. Some of you may remember that ICAC cost Mr Greiner his premiership.

POWERPOINT 2

Mr Greiner (22 seconds)

In some ways I think ICAC is now doing exactly what it was created to do which is to try and change behaviours, change cultures, change approaches. It's not essentially about criminality even though there might be some. It's really about what's acceptable behaviour in public life.

The starting point to the long term work of the CCC is our Act. Section 7A says that the main purposes of the Act are to combat and reduce the incidence of organised crime and "...to improve continuously the integrity of, and to reduce the incidence of misconduct in, the public sector."

We are not concerned this afternoon with the organised crime function of the CCC, and so I shall say no more about it here.

But how is the Act's purpose in respect of integrity and misconduct in the public sector to be achieved?

Section 7B of the Act says that the Act's purposes are to be achieved primarily by establishing the CCC as a permanent commission, able to help public authorities to deal effectively and appropriately with misconduct by increasing the capacity of public authorities to do so, whilst retaining power to itself investigate cases of misconduct, particularly serious misconduct.

The CCC Act is the primary law under which the Commission exists and operates.

You will note that in defining the legal mandate for the Commission in respect of misconduct in the public sector, section 7B says that the Commission is -

- to help public authorities to deal effectively and appropriately with misconduct;
- while retaining power to itself investigate cases of misconduct, especially serious misconduct.

There are several points to be made at this stage. The first is that the Commission has statutory jurisdiction only over public officers.

The definition of "public officer" is very wide, but it is important to remember that the Commission has no authority nor jurisdiction to investigate (subject to some very limited exceptions) nor to express any opinion about, the conduct of persons (such as developers, lobbyists or private citizens) who are not "public officers".

The second point is that you may assume that local government officers and councillors are "public officers" for the purposes of the following discussion.

The third point is, the Commission's primary concern is to help public authorities themselves to deal effectively and appropriately with misconduct.

The fourth point is that "misconduct" has a very particular definition in the CCC Act. For present purposes, "misconduct" under the CCC Act may broadly be taken to mean the abuse by a public officer of their authority for personal gain or to cause benefit or detriment to another person or that they have engaged in official conduct contrary to the public

interest. That of course includes what would ordinarily be regarded as criminal corruption, but also extends to misconduct which would not be criminal.

It is important to bear in mind is that the CCC is still a very young organisation by comparison with others of its kind. There are only four bodies in Australia which have similar responsibilities and powers to a greater or lesser extent. They are the Crime & Misconduct Commission (CMC) in Queensland, the Independent Commission Against Corruption (ICAC) in New South Wales, the Police Integrity Commission (PIC) in New South Wales, and the Office of Police Integrity (OPI) in Victoria.

The Queensland and New South Wales Commissions are the most similar to the CCC, but either in their present form or earlier manifestations, they have been around much longer. The NSW Commission was established in 1988; the original Queensland Commission started the following year, so both of them have around 20 years experience. By contrast, the CCC has been in existence for only four-and-a-half years, having commenced on 1 January 2004, following recommendations from the Kennedy Royal Commission into the West Australian Police.

Each of these other public sector misconduct and anti-corruption bodies experienced teething problems in their earlier years. Whilst there were perfectly legitimate concerns by people who were worried about the exceptional powers given to these bodies, each was also subjected to hostile opposition and campaigning by those who had vested interests to protect and who saw these bodies as a threat to their corrupt or criminal activities or to their commercial self interests.

However, they survived those attacks, and the successes they have achieved over the subsequent years have proved beyond doubt the need for such bodies with exceptional powers, monitored and checked by independent scrutiny to ensure those powers are not abused and are ultimately subjected to parliamentary control.

Anti-corruption agencies are an acknowledgement by Government that there is a need for agencies with special powers to not only expose criminal conduct beyond the reach of ordinary law enforcement powers, but also behaviour by public officers that while not criminal, strikes fundamentally at good governance and the public interest and is unacceptable to the broader community.

While the police deal with criminal behaviour they are not set up to deal with misconduct in public office, the investigation of which can be very resource intensive, take a long time, does not necessarily result in criminal charges and often is only effectively countered in conjunction with education campaigns to help increase the awareness of the issues in government and the general public.

Examples of this type of behaviour can include improperly handling conflicts of interest, abuse of a position (commonly to benefit personal or private interests to the detriment of the public interest), the unauthorised access to and disclosure of confidential information, biased or preferential employment practices, allegations around contracts and tendering, and the misappropriation of public funds or public property.

Public officers are expected to be held to a higher level of behaviour than the general community because of the power and influence they hold. They are entrusted with considerable discretion to carry out their everyday duties honestly, with impartiality and in the public interest.

Of course, the activities described might well result in criminal charges but there is more often a level of behaviour beneath that level of culpability that is unacceptable in terms of laws such as the *Public Sector Management Act*, the *Local Government Act* as well as Codes of Conduct and so on.

Investigating this type of activity can require sophisticated and powerful techniques. That is one reason anti-corruption agencies in Australia have been given the powers of a standing Royal Commission.

It may reasonably be suggested that the lobbyists' activity disclosed in the public hearings in relation to the Commission's Smith Beach investigation would not have been discovered, much less revealed, by ordinary police investigative powers.

Before I get into specifics, I'd like to give you a bird's eye view of the Commission:

- It started in January 2004 taking over from the Anti-Corruption Commission
- There are over 150 staff and an annual budget of \$28 million

In the last financial year the Commission:

POWERPOINT 4

STATISTICS 2007 - 08

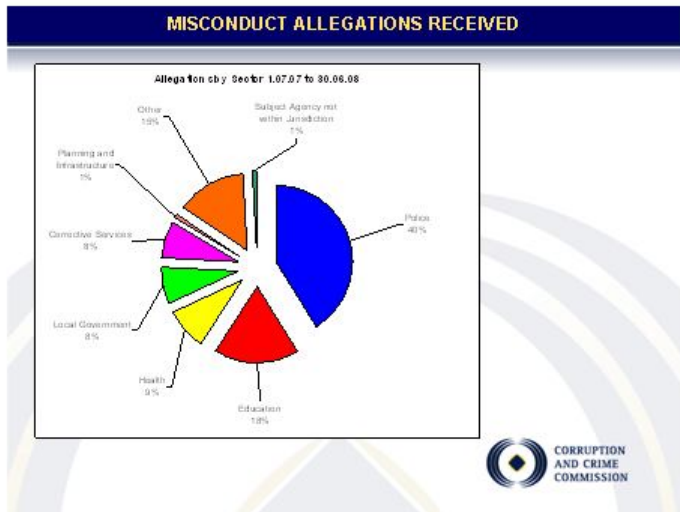
Annually the Commission:

- Assessed 2,354 allegations
- Monitored 2,109 public sector investigations
- Reviewed 2,352 completed public sector investigations
- Charged 18 people with a total of 62 charges
- 5 convictions
- Held 1 public hearings over 45 days, 20 private hearings
- Delivered 70 corruption prevention education seminars
- Tabled 6 reports on investigations in the Parliament

 CORRUPTION AND CRIME COMMISSION

- Received and assessed 2,354 complaints and notifications of misconduct – 23 per cent of which were substantiated. The resolution of each of these matters can vary from a short letter to a substantial document laying out the evidence considered and the Commission’s final assessment.
- Monitored 2,109 investigations into alleged misconduct conducted by public organisations
- Reviewed 2,352 completed investigations into alleged misconduct by public organisations
- Charged 18 people with a total of 62 criminal offences
- In addition, 5 people were convicted of Commission-related charges
- Held one public hearing over 45 days
- Held 20 private hearings over 27 days.
- Delivered 70 corruption prevention and education seminars to more than 2,500 attendees which included a number of councillors and council staff in both the metropolitan area and regions
- Tabled six reports on investigations in the Parliament

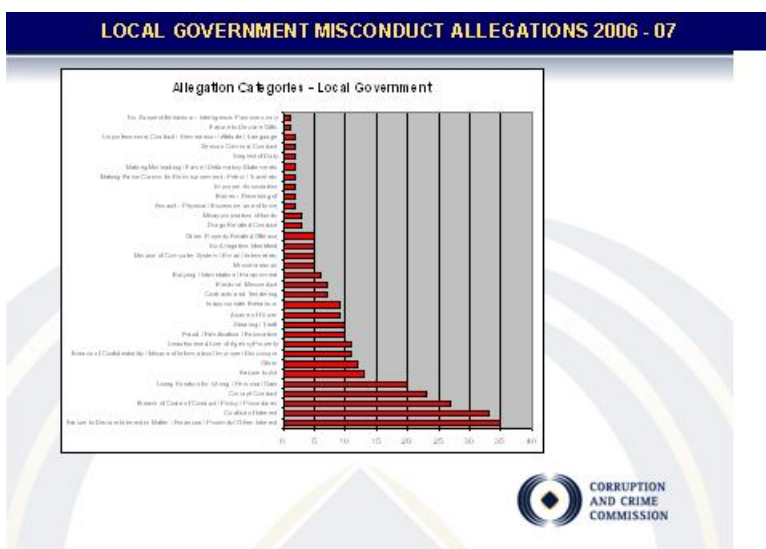
POWERPOINT 5



About eight per cent of all allegations received in 2007-8 were in relation to local government matters. These come from local government authorities, the department and the public.

As the Commission is relatively new and still working with departments, agencies and public authorities, it's not possible to say if this represents under reporting or not, though the percentage of notifications from local government has increased slightly from 2004-5. It would be wrong to conclude from the figures that police have more notifications of misconduct than any other agency as the threshold for which police are required to notify the Commission is much lower, resulting in them generating many more notifications.

POWERPOINT 6



The Commission received a variety of allegations against councillors or officers of local government authorities in 2007-8. The good news is that there were no prosecutions against any public officer from local government last financial year.

The most common allegations - conflicts of interest and a failure to declare an interest in a matter - came up strongly in the Commission's Smiths Beach report and are unfortunately not well understood.

Suburbs and towns are small places where many people know each other. Having a conflict of interest is not the problem. The critical issue is how the conflict is handled. In particular, councillors who have many complex relationships both public and private, need to put their public duties first and private interests second and to be seen to be above suspicion.

Our corruption prevention people have been giving seminars around the state on this topic and it's an area in which more work needs to be done. The presentation of the conflict of interest seminars has now been handed over to the Department of Local Government and Regional Development.

Next is a breach of a code of conduct/policy or procedures. An example of this would be to use council resources for a private business.

Then comes corruption, an example of which would be surreptitiously receiving money from a developer and not declaring the gift when voting on a matter affecting the developer.

The Commission has a standard procedure for handling allegations of misconduct.

The CCC Act states that the Commission may make assessments and form opinions as to whether misconduct has occurred or is occurring, or is likely to occur. It may make recommendations as to whether consideration should (or should not) be given to the criminal prosecution of, or the taking of disciplinary action against, particular persons. It may also make recommendations for the taking of other action that the Commission considers should be taken in relation to the subject of its investigations.

The Act stipulates that an opinion that misconduct has occurred is not to be taken as a finding or opinion that a person has committed a criminal offence or a disciplinary offence. That is because the Commission does not exercise judicial power and so cannot make legal determinations of guilt or innocence.

After the Smiths Beach report was tabled one of the people adversely mentioned downplayed their mention by saying it was only an opinion of the Commission. That is, the Commission hadn't ruled on the guilt of the individual - implying the matter was relatively trivial. That response, of course, missed the point.

As I have said, legally the Commission cannot rule on guilt and can only express opinions on whether misconduct has or may have occurred. That's as far as it goes. It's then up to other agencies – be it the Department of Premier and Cabinet, the Department of Local Government and Regional Development, some other department or even individual local councils - to decide on the appropriate action according to their jurisdiction.

It is implicit in the Act that a recommendation that consideration be given to charging a person with a criminal offence or taking disciplinary proceedings against them –

- may not be accepted by the person or body to whom it is made;
- may be accepted, and consideration be given to prosecution for a criminal offence or disciplinary proceeding, but they decide not to prosecute or institute such proceedings; or
- is accepted, and a criminal prosecution is, or disciplinary proceedings are, taken – in which case they may either fail or succeed.

Whatever the outcome of action taken subsequent to a Commission opinion of misconduct and a consequent recommendation, that outcome does not affect the validity of the Commission's reported assessment, opinion or recommendation.

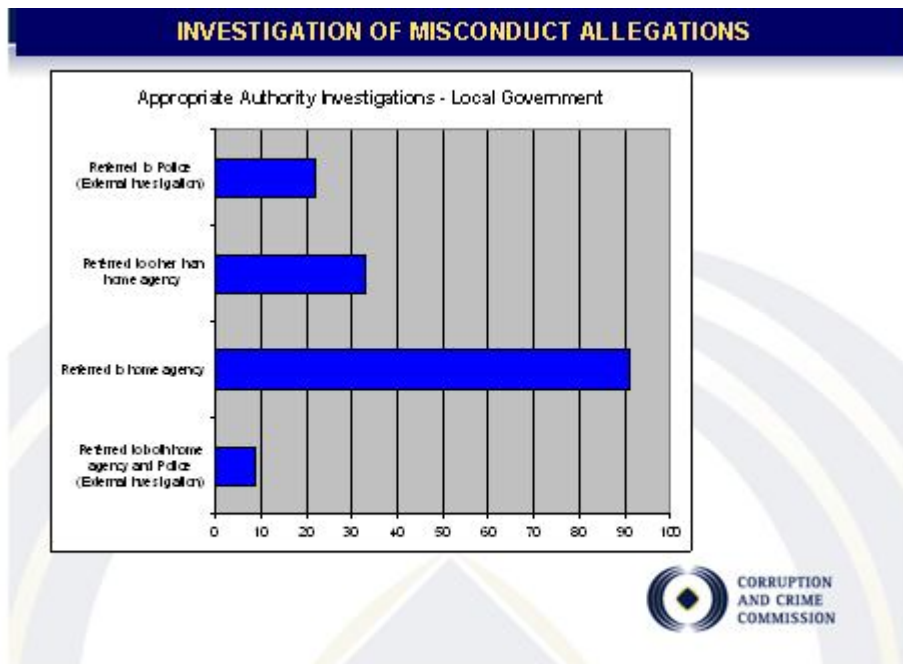
That is not to say that a Commission opinion that misconduct has occurred is a minor matter.

Forming and publishing these opinions in a report may affect individuals personally and professionally. It may affect relations between those adversely mentioned and their families, friends and acquaintances. Recommendations may lead to the laying of criminal

or disciplinary charges. For these reasons the Commission takes great care in forming opinions as to the occurrence of misconduct.

The story so far covers public officers. However, if non public officers are involved in the allegations of misconduct, under the Act the Commission has only two choices – recommend they be charged with a criminal offence or do nothing about them at all. As a substantial level of proof is required for a criminal charge (proof beyond reasonable doubt), non public officers may escape comment as the Commission cannot form opinions of behaviour even if it considered that to be highly undesirable, unless what they have done has caused, or been likely to cause, misconduct by public officers.

POWERPOINT 8



The vast majority of investigations are referred by the Commission to the agency against whom the allegation has been made. That is so with local government.

In this case it would be referred back to the particular local government with the Commission monitoring the progress of the investigation and reviewing its adequacy and outcome.

The sheer volume of allegations means the Commission cannot investigate everything itself.

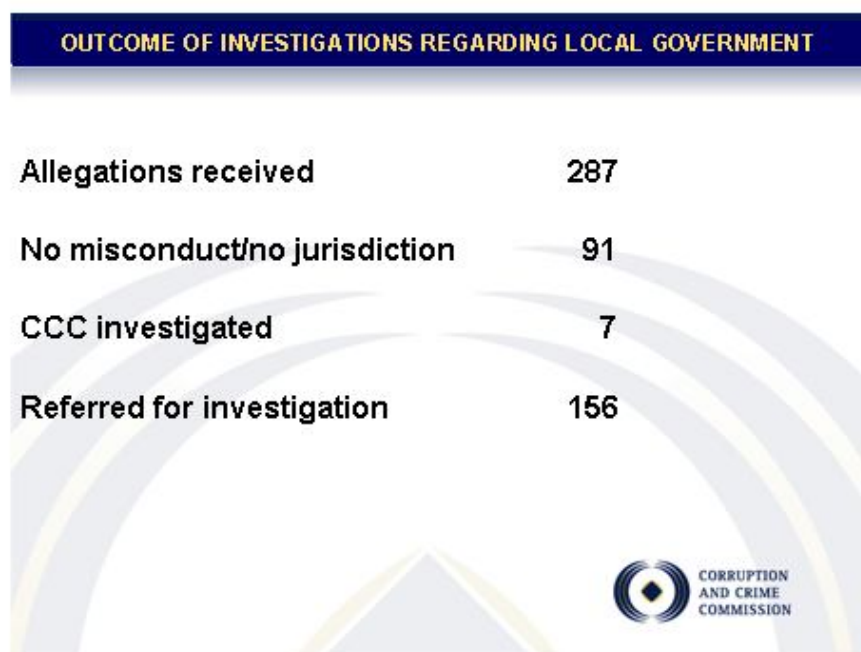
Under the statutory option “Other than home agency to investigate,” instead of referring an allegation back to a particular Council to investigate, it may refer the allegation to the Department of Local Government and Regional Development for investigation. The Commission has a protocol with the department to ensure an exchange of information on allegations received by both agencies.

These may include allegations of misconduct or contraventions of the *Local Government Act*, such as the failure to disclose a financial or proximity interest and breaches of council procedure. Again, the Commission monitors and reviews the outcome of these investigations.

Allegations of misconduct by councillors or council staff of a criminal nature (such as bribery or other forms of corruption, stealing or dealing with illicit drugs) may be referred to the police for criminal investigation.

The Commission can also conduct joint investigations with other agencies, such as the Department of Local Government and Regional Development or the West Australian Police.

POWERPOINT 9



Last financial year the Commission received 287 allegations relating to local government of which 91 were assessed at the outset as not constituting misconduct or not falling within the jurisdiction of the Commission.

An example of such a complaint may be a member of the public being dissatisfied with a Council decision which is inferred to be corrupt, but where the Commission finds no evidence to suggest there is corruption or misconduct by councillors or council staff, and so takes no further action.

The Commission investigates less than one per cent of the allegations received. Seven of 287 local government allegations received last financial year were the subject of further investigation by the Commission itself.

These would be the more serious allegations or those requiring the powers granted to the Commission to conduct the investigation.

An example from local government could be an allegation of a councillor receiving a payment from a developer for supporting a development application.

156 allegations involving local government last financial year were referred back to local government or the department for investigation.

Generally, if the Commission refers an allegation to local government for investigation it is important to maintain confidentiality as:

- Breaching confidentiality could compromise subsequent inquiries
- It could place informants at risk of reprisal, and
- It is an offence under the *Corruption and Crime Commission Act* to disclose information provided to the Commission except in certain circumstances (s151)

The media often ring the Commission asking if a particular matter is being investigated. The Commission's general response is to neither confirm nor deny a particular matter or individual is under investigation.

One reason for this is that there have been situations where the complainant sends an allegation to the media at the same time as the Commission so as to damage an opponent, before an election, for example.

To confirm that the allegation had been received and is being looked at would give the impression that the matter is serious and being investigated by the Commission. However, a subsequent assessment of the allegation may reveal it has no substance but the damage to the individual against whom the allegation had been made is already done.

I should add there are heavy penalties under the CCC Act for making false allegations to the Commission.

I would now like to look at specific issues faced by local government through research conducted by our equivalent in New South Wales – the Independent Commission Against Corruption or ICAC.

As I have said, ICAC has been operating for about 20 years and has built up a valuable source of research on corruption risks in local government.

In 2001 ICAC started a research project on Local Government to identify corruption risks, prevention strategies and develop sector-specific advice to deal with corruption.

ICAC said it chose to research Local Government because:

- It consistently received more complaints about this area than any other in the New South Wales public sector. (That, however, does not appear to be the case in Western Australia.)
- Local councils have a lot of discretionary powers within their decision making processes. These discretionary decision making powers have been shown to be a corruption risk.
- Local councils, as a group of organisations, have similar problems and functions so are likely to share similar problems.

ICAC found 15 functions that had a high risk of corruption. Of that 15, 10 were functions regularly performed by local government.

POWERPOINT 11



- Handling cash payments.
- Having regular dealings with the private sector.
- Inspecting, regulating or monitoring standards of premises, businesses, equipment or products.
- Undertaking construction.
- Allocating grants of public funds.
- Issuing or reviewing the issue of fines or other sanctions.
- Providing a service to the community where demand exceeds supply.
- Providing subsidies, financial assistance or care to the vulnerable or disabled.
- Having discretion concerning land rezoning or development applications.
- Making determinations or handing down judgements about individuals or disputes.

The experience of the CCC shows handling of confidential information and employment practices could be added to the list.

As I mentioned earlier, the Commission has developed a package to help public sector organisations, including local government, prevent, treat, detect and respond to misconduct.

The approach taken in the Commission's package is that managing misconduct is a key aspect of an organisation's business that needs to be integrated with the delivery of its core business.

Critically, the CEO of each public sector organisation has responsibility for and is required to address integrity and misconduct issues within their own agency. That brings us back to s.7B of the CCC Act, which makes it a Commission priority not to step in from outside and take responsibility for dealing with misconduct in a department or agency, but in the first instance to support and assist the department or agency to do so itself.

Addressing integrity issues can seem like an additional, unwelcome task that is outside a council's core business of delivering key services to rate payers. However, in terms of today's climate of accountability, public expectation and media scrutiny, integrity is a core business of any organisation.

There is real practical reason for the emphasis being on each organisation having in place its own processes for preventing or dealing with misconduct. There can be a huge cost in terms of time, people, money and efficient government if issues of misconduct are not addressed and eventually are revealed publicly. Maintaining the best possible level of integrity is therefore a critical component of any risk management.

You only have to consider the recent hearings on Wollongong Council conducted by ICAC in Sydney. The effect on the Council's normal business operations would have been devastating and it will no doubt take a long time to overcome the effects. Then there's the damage to the reputation of the members of the Council and staff. It's a large price to pay.

The corruption resistance building package has three broad headings:

- The right agency culture which means a culture that values integrity and is intolerant of misconduct. This looks at the values, leadership and workplace behaviour of agencies;
- The right agency operational strategies that considers how agency policies and systems support the effective treatment of misconduct risks. This looks at policies, risks, treatment and understanding: and

- The right agency management environment where misconduct resistance is an integrated and established component of agency life. This looks priorities, business practices, mindset, review and communication.

Each of the these sub-areas has a detailed list of questions to help each agency identify their misconduct risks, indications of when the issue is being well handled and a short misconduct resistance health check that can be run across an agency.

Copies of the package are here today and you are welcome to take one with you.

Based on this package, Commission staff will conduct a program to work with agencies to deal with managing the risk of misconduct.

Generally, the attitude of CEOs is critical in dealing with misconduct.

Research shows that what influences staff most to act ethically or unethically is how they perceive:

- The behaviour of leaders in an organisation; and
- The features of the organisation, particularly the punishment of wrongdoing and the existence of organisational values, rules and rewards.

On a broader front the Commission welcomes the recently introduced changes to the *Local Government Act* and believes they will do much to improve the handling of integrity issues in the sector.

The changes include regulations containing *Rules of Conduct* with each local government area also required to have *Codes of Conduct* covering the behaviour of elected members outside meetings and staff in general.

Codes of conduct are a good guide as to acceptable behaviour and a benchmark against which behaviour can be measured. However, they need considerable follow-up by senior leadership if they are to be effective.

During the HIH Royal Commission the CEO of FAI Insurance, Rodney Adler, confessed that though he signed off on a Code of Conduct in 1995, he only read it when the Royal Commission started.

Finally, unfortunately the Commission has not had a lot to do with the detailed issues faced by local government in managing misconduct. We have dealt with issues affecting local government in public hearings such as Smiths Beach, tendering and voting practices, and handle the allegations received throughout the year relating to the sector.

However, we have not undertaken the detailed work we have done in cooperation with several State Government agencies, including the Department of Local Government and Regional Development, where Commission officers have assessed misconduct handling policies and procedures in some depth.

This will have to be done at some time in the future with recognition that local government consists of a large number of independent and diverse agencies that operate within their own unique environment and face their own particular misconduct risks.

I look forward to undertaking that challenge with your cooperation.

For those who would like further information, there are Misconduct Resistant Integration Guides available at the Delegation Registration Desk.

Thank you very much.