



CORRUPTION AND CRIME COMMISSION

**SPECIAL REPORT BY THE
CORRUPTION AND CRIME COMMISSION
ON ITS REPORTING FUNCTION WITH RESPECT TO
MISCONDUCT UNDER PART 5 OF THE
*CORRUPTION AND CRIME COMMISSION ACT 2003 (WA)***

21 October 2010

ISBN: 978-0-9805052-7-6

© 2010 Copyright in this work is held by the Corruption and Crime Commission (“the Commission”). Division 3 of the *Copyright Act 1968* (Commonwealth) recognises that limited further use of this material can occur for the purposes of “fair dealing”, for example, study, research or criticism. Should you wish to make use of this material other than as permitted by the *Copyright Act 1968* please write to the Commission at the postal address below.

This report and further information about the Commission can be found on the Commission Website at www.ccc.wa.gov.au.

Corruption and Crime Commission

Postal Address	PO Box 7667 Cloisters Square PERTH WA 6850
Telephone	(08) 9215 4888 1800 809 000 (Toll Free for callers outside the Perth metropolitan area.)
Facsimile	(08) 9215 4884
Email	info@ccc.wa.gov.au
Office Hours	8.30 a.m. to 5.00 p.m., Monday to Friday.

Special Needs Services

If you have a speech or hearing difficulty, contact the Commission via the National Relay Service (NRS) on 133 677 for assistance or visit the NRS Website, www.relayservice.com.au. NRS is an Australia-wide telephone service available at no additional charge. The Commission Toll Free number is 1800 809 000.

If your preferred language is a language other than English, contact the Translating and Interpreting Service (TIS) for assistance. TIS provides a free, national 24 hours a day, seven days a week telephone interpreting service on 13 14 50. TIS also provides on-site interpreters for face-to-face interviews on 1300 655 082.



CORRUPTION AND CRIME COMMISSION

Hon. Barry House MLC
President of the Legislative Council
Parliament House
Harvest Terrace
PERTH WA 6000

Hon. Grant Woodhams MLA
Speaker of the Legislative Assembly
Parliament House
Harvest Terrace
PERTH WA 6000

Dear Mr President
Dear Mr Speaker

In accordance with section 88 of the *Corruption and Crime Commission Act 2003* (WA), the Commission presents the *Special Report by the Corruption and Crime Commission on its Reporting Function with Respect to Misconduct Under Part 5 of the "Corruption and Crime Commission Act 2003"* (WA).

Yours faithfully

A handwritten signature in black ink that reads "Len Roberts-Smith".

The Hon. LW Roberts-Smith, RFD, QC
COMMISSIONER

21 October 2010

ABBREVIATIONS AND ACRONYMS

“the CCC Act”	<i>Corruption and Crime Commission Act 2003 (WA)</i>
“the Commission”	Corruption and Crime Commission
“the PSM Act”	<i>Public Sector Management Act 1994</i>

TABLE OF CONTENTS

ABBREVIATIONS AND ACRONYMS	v
CHAPTER ONE	
INTRODUCTION	1
1.1 Background	1
1.2 Purpose of Report	2
CHAPTER TWO	
GENERIC OR COMMON MATTERS	3
2.1 Jurisdiction of the Commission	3
2.2 Definitions	4
2.2.1 Misconduct	4
2.2.2 Public Officer	8
2.3 Reporting by the Commission	8
2.4 Disclosure	8
2.5 Telecommunications Interception Material	9
2.6 Opinions of Misconduct	10
2.6.1 Publication of an Opinion	10
2.6.2 Balance of Probabilities	10
2.6.3 Meaning of Corruption	12
2.6.4 Section 23(1) of the <i>Corruption and Crime Commission Act 2003 (WA)</i>	14
ENDNOTES	17

CHAPTER ONE

INTRODUCTION

1.1 Background

- [1] The main purposes of the *Corruption and Crime Commission Act 2003* (WA) (“the CCC Act”) are –
 - (a) *to combat and reduce the incidence of organised crime; and*
 - (b) *to improve continuously the integrity of, and to reduce the incidence of misconduct in, the public sector.*¹
- [2] The purposes of the CCC Act are to be achieved primarily by establishing the Corruption and Crime Commission (“the Commission”) as a permanent commission.²
- [3] Section 7B(3) of the CCC Act states that the purpose of the CCC Act in relation to improving integrity and reducing the incidence of misconduct in the public sector is to be achieved by the Commission helping “public authorities to deal effectively and appropriately with misconduct³ by increasing their capacity to do so while retaining power to itself investigate cases of misconduct, particularly serious misconduct”.⁴
- [4] The Commission has a function of helping to prevent misconduct. The CCC Act calls this the prevention and education function.⁵
- [5] One way in which the Commission performs its prevention and education function is by conducting reviews to assess the capacity of public authorities to deal effectively and appropriately with misconduct, that is, to assess their capacity to prevent, identify and manage misconduct, and by “generally increasing the capacity of public authorities to prevent misconduct by providing advice and training to those authorities”.⁶
- [6] It is also a function of the Commission “to ensure that an allegation about, or information or matter involving, misconduct is dealt with in an appropriate way”. The CCC Act calls this the misconduct function.⁷
- [7] One way in which the Commission performs its misconduct function is by making recommendations and furnishing reports on the outcome of investigations.⁸
- [8] Section 84 of the CCC Act provides that the Commission “may at any time prepare a report on any matter that has been the subject of an investigation or other action in respect of misconduct”.
- [9] The Commission may include in such a report, statements as to any of its assessments, opinions and recommendations and its reasons for them.⁹
- [10] A Commission report, prepared under section 84 of the CCC Act, may be laid before each House of Parliament¹⁰ or, if Parliament is not sitting, the Commission may transmit its report to the Clerk of each House and the

report is thereupon deemed to have been laid before each House – that is to say, tabled in the Parliament.¹¹

- [11] By section 88 of the CCC Act the “Commission may, at any time prepare a special report on any administrative or general policy matter relating to the functions of the Commission”.
- [12] This report is presented pursuant to section 88 of the CCC Act.

1.2 Purpose of Report

- [13] There are some matters which are generic or common to all Commission investigations and organisational reviews, and reports on those investigations and reviews.
- [14] They are important matters of law or approach which underlie the investigative, assessment and reasoning processes involved in the Commission identifying relevant facts, evaluating evidence, forming opinions and making recommendations.
- [15] Because each Commission report must be supportable on its own content, it has been necessary to include the generic or common matters in each report. That has meant sometimes lengthy repetition of the same generic matters from one report to another.
- [16] The Commission has accordingly decided to set out those matters in a single section 88 report from which they can in the future then be incorporated by reference as appropriate in reports upon specific misconduct matters. These matters are as set out in Chapter Two of this report.

CHAPTER TWO

GENERIC OR COMMON MATTERS

2.1 Jurisdiction of the Commission

[17] The Commission is an executive instrument of the Parliament (albeit an independent one). It is not an instrument of the government of the day, nor of any political or departmental interest. It must perform its functions under the CCC Act faithfully and impartially. The Commission cannot, and does not, have any agenda, political or otherwise, other than to comply with the requirements of the CCC Act.

[18] It is a function of the Commission, pursuant to section 18 of the CCC Act, to ensure that an allegation about, or information or matter involving, misconduct by public officers is dealt with in an appropriate way. An allegation can be made to the Commission, or made on its own proposition. The Commission must deal with any allegation of, or information about, misconduct in accordance with the procedures set out in the CCC Act.

[19] It is also a function of the Commission, pursuant to section 17 of the CCC Act, to help prevent misconduct (the **prevention and education function**). It performs this function by –

- (a) *analysing the intelligence it gathers in support of its investigations into organised crime and misconduct; and*
- (ab) *analysing the results of its investigations and the information it gathers in performing its functions; and*
- (ac) *analysing systems used within public authorities to prevent misconduct; and*
- (ad) *using information it gathers from any source in support of its prevention and education function; and*
- (b) *providing information to, consulting with, and making recommendations to public authorities; and*
- (c) *providing information relevant to its prevention and education function to the general community; and*
- (ca) *ensuring that in performing all of its functions it has regard to its prevention and education function; and*
- (cb) *generally increasing the capacity of public authorities to prevent misconduct by providing advice and training to those authorities, if asked, to other entities; and*
- (d) *reporting on ways to prevent misconduct.*

2.2 Definitions

2.2.1 Misconduct

[20] The term “misconduct” has a particular and specific meaning in the CCC Act and it is that meaning which the Commission must apply. Section 4 of the CCC Act states that:

Misconduct occurs if —

- (a) *a public officer corruptly acts or corruptly fails to act in the performance of the functions of the public officer’s office or employment;*
- (b) *a public officer corruptly takes advantage of the public officer’s office or employment as a public officer to obtain a benefit for himself or herself or for another person or to cause a detriment to any person;*
- (c) *a public officer whilst acting or purporting to act in his or her official capacity, commits an offence punishable by 2 or more years’ imprisonment; or*
- (d) *a public officer engages in conduct that —*
 - (i) *adversely affects, or could adversely affect, directly or indirectly, the honest or impartial performance of the functions of a public authority or public officer whether or not the public officer was acting in their public officer capacity at the time of engaging in the conduct;*
 - (ii) *constitutes or involves the performance of his or her functions in a manner that is not honest or impartial;*
 - (iii) *constitutes or involves a breach of the trust placed in the public officer by reason of his or her office or employment as a public officer; or*
 - (iv) *involves the misuse of information or material that the public officer has acquired in connection with his or her functions as a public officer, whether the misuse is for the benefit of the public officer or the benefit or detriment of another person,*

and constitutes or could constitute —

- (v) *an offence against the “Statutory Corporations (Liability of Directors) Act 1996” or any other written law; or*
- (vi) *a disciplinary offence providing reasonable grounds for the termination of a person’s office or employment as a public service officer under the*

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

- [21] Misconduct, as defined in section 4 of the CCC Act applies only to the conduct of public officers.
- [22] In section 3 of the CCC Act “**serious misconduct**” is defined as “misconduct of a kind described in section 4(a), (b) or (c)”.
- [23] Misconduct of a kind described in section 4(d)(i) – (iv) must not only involve the type of conduct described there, but must also be serious enough to meet the criteria set out in section 4(d)(v) or (vi).
- [24] Section 4(d)(v) says that the conduct must be serious enough so that it constitutes, or could constitute, an offence against a written law.
- [25] Section 4(d)(vi) is more complex. It says that the conduct must be serious enough so that it constitutes or could constitute “a disciplinary offence providing reasonable grounds for the termination of a person’s office or employment as a public service officer under the *Public Sector Management Act 1994* (whether or not the public officer to whom the allegation relates is a public service officer or is a person whose office or employment could be terminated on the grounds of such conduct)”.
- [26] The words in brackets are important. They make it clear that where the public officer concerned is not an officer of the public service, and subject to the *Public Sector Management Act 1994* (“the PSM Act”), the test is notional – that is, although it cannot then apply directly, the Commission must assess the public officer’s conduct against the objective criteria set out in the PSM Act, as if that person were a member of the public service.
- [27] In Cox v Corruption and Crime Commission [2008] WASCA 199, Martin CJ at [63] stated that:

... [s]ection 4(d)(vi) [of the CCC Act] expressly provides that the definition of “misconduct” applies whether or not the public officer is a public service officer whose employment could be terminated on the grounds of a disciplinary offence under the PSMA [the PSM Act]. It is therefore clear that the conduct defined as “misconduct” by s 4(d) of the [CCC] Act is that which would provide reasonable grounds for termination if the public officer was liable to termination under the PSMA, irrespective of whether or not the public officer is so liable. In the case of a public officer who is not a public service officer covered by the PSMA, the definition imposes a hypothetical standard of conduct – the hypothesis being that the officer could in fact be liable to dismissal under the terms of the PSMA.

Steytler P at [116] stated that:

... there is nothing in s 4(d)(vi) of the CCC Act that requires the public officer in question to have been a public service officer under the PSM Act. That is made plain by the words “(whether or not the public officer to whom

the allegation relates is a public service officer or is a person whose office or employment could be terminated on the grounds of such conduct)". It is consequently irrelevant whether Dr Cox was, or was not, a public service officer for the purpose of the PSM Act.

[28] General principles of official conduct are set out in section 9 of the PSM Act, which states that:

The principles of conduct that are to be observed by all public sector bodies and employees are that they –

- (a) *are to comply with the provisions of –*
 - (i) *this Act and any other Act governing their conduct;*
 - (ii) *public sector standards and codes of ethics; and*
 - (iii) *any code of conduct applicable to the public sector body or employee concerned;*
- (b) *are to act with integrity in the performance of official duties and are to be scrupulous in the use of official information, equipment and facilities; and*
- (c) *are to exercise proper courtesy, consideration and sensitivity in their dealings with members of the public and employees.*

[29] Breaches of discipline are set out in section 80 of the PSM Act, which states that:

An employee who –

- (a) *disobeys or disregards a lawful order;*
- (b) *contravenes –*
 - (i) *any provision of this Act applicable to that employee; or*
 - (ii) *any public sector standard or code of ethics;*
- (c) *commits an act of misconduct;*
- (d) *is negligent or careless in the performance of his or her functions; or*
- (e) *commits an act of victimisation within the meaning of section 15 of the "Public Interest Disclosure Act 2003",*

commits a breach of discipline.

[30] Section 80(e) was added on 1 July 2003 but otherwise the section has remained unchanged.

[31] A breach of discipline may be a minor breach or a serious breach. In order to be dismissed under section 86(3)(b)(vi) of the PSM Act a person

must have committed a serious breach. The PSM Act does not provide criteria for determining whether a breach is minor or serious. The *Disciplinary Procedures Guide* produced by the Department of the Premier and Cabinet, Government of Western Australia, states (at paragraph 2.3) that: “Agencies must use their own judgement when determining if a breach is serious or minor in nature. Consideration should be given to the impact the breach of discipline has on the relationship of trust between the respondent and the employing authority, other employees and the general public”.¹²

- [32] The *Disciplinary Procedures Guide* also states (at paragraph 4.9) that: “Serious breaches of discipline are difficult to define and in most cases a question of degree will be involved. An employing authority’s view is also likely to vary with the nature of the public sector body’s business and the position held by the respondent”.¹³
- [33] A minor breach may be punished by a reprimand or a fine not exceeding 1 days pay or both, pursuant to section 83(1)(a)(i), (ii) or (iii) of the PSM Act.
- [34] If a departmental investigating authority is of the opinion that a serious breach of discipline appears to have been committed, that authority shall cause the public officer to be charged with that alleged breach pursuant to section 83(1)(b) of the PSM Act.
- [35] The procedure for dealing with a charge of a serious breach of discipline is set out in section 86 of the PSM Act.
- [36] The punishments which may be imposed where a charge of a serious breach of discipline is admitted and proved are set out in section 86(3)(b) of the PSM Act. Section 86(3)(b) states that:

... if a respondent admits a charge under subsection (2) and the employing authority finds the charge to be proved, the employing authority –

 - (b) *may –*

...

(vi) *dismiss the respondent, ...*

[37] Where the public officer concerned is a Chief Executive Officer and the recommendation is for dismissal, the Minister shall so recommend to the Governor (section 89 of the PSM Act).

[38] It follows from the above, that not only must there be an identifiable (actual or possible) breach of discipline under the PSM Act for section 4(d)(vi) of the CCC Act to be brought into play, but it must be characterisable as a serious breach for the punishment of dismissal to be an option under section 86(3)(b)(vi) of the PSM Act.

2.2.2 Public Officer

[39] The term “public officer” is defined in section 3 of the CCC Act by reference to the definition in section 1 of *The Criminal Code* (WA). The term “public officer” includes any of the following: Ministers of the Crown; members of either House of Parliament; members, officers or employees of any authority, board, local government or council of a local government; police officers; persons holding office under, or employed by, the State of Western Australia, whether for remuneration or not; and public service officers and employees within the meaning of the PSM Act.

2.3 Reporting by the Commission

[40] Under section 84(1) of the CCC Act the Commission may at any time prepare a report on any matter that has been the subject of an investigation or other action in respect of misconduct. By section 84(3) the Commission may include in a report:

- (a) *statements as to any of the Commission’s assessments, opinions and recommendations; and*
- (b) *statements as to any of the Commission’s reasons for the assessments, opinions and recommendations.*

[41] The Commission may cause a report prepared under this section to be laid before each House of Parliament, as stipulated in section 84(4) of the CCC Act, or dealt with under section 93 of the CCC Act.

[42] Section 86 of the CCC Act requires that before reporting any matters adverse to a person or body in a report under section 84 the Commission must give the person or body a reasonable opportunity to make representations to the Commission concerning those matters.

2.4 Disclosure

[43] The Commission has powers that include the capacity to apply for warrants to lawfully intercept telecommunications, utilise surveillance devices, conduct searches, compel the production of documents and other things, compel attendance at hearings and to compel responses to questions on oath in hearings conducted by the Commission.

[44] Section 151 of the CCC Act controls the disclosure of a “restricted matter”. A “restricted matter” means any of the following:

- (a) *any evidence given before the Commission;*
- (b) *the contents of any statement of information or document, or a description of any thing, produced to the Commission;*
- (c) *the contents of any document, or a description of any thing, seized under this Act*

- (d) *any information that might enable a person who has been, or is about to be, examined before the Commission to be identified or located; or*
- (e) *the fact that any person has been or may be about to be examined before the Commission.*

[45] Restricted matters cannot be disclosed unless particular criteria are met. Section 151(4)(a) of the CCC Act states that: a “restricted matter may be disclosed in accordance with a direction of the Commission”. Further, pursuant to section 152(4), “official information” (that is, “in relation to a relevant person, means information acquired by the person by reason of, or in the course of, the performance of the person’s functions under this Act”¹⁴) may be disclosed by a relevant person (that is, “a person who is or was ... an officer of the Commission ... or a Commission lawyer”¹⁵) if it is disclosed:

- (a) *under or for the purposes of this Act;*
- (b) *for the purposes of a prosecution or disciplinary action instituted as a result of an investigation conducted by the Commission or the Parliamentary Inspector under this Act or any other prosecutions or disciplinary action in relation to misconduct;*
- (c) *when the Commission has certified that disclosure is necessary in the public interest;*
- (d) *to either House of Parliament or to the Standing Committee;*
- (e) *to any prescribed authority or person; or*
- (f) *otherwise in connection with the performance of the person’s functions under this Act.*

[46] The Commission takes decisions about releasing information to the public very seriously. Consistently with the considerations to which it is required to have regard in deciding whether or not an examination (hearing) should be conducted in public, when considering the disclosure of information in a report the Commission takes into account the benefits of public exposure and public awareness against privacy considerations and the potential for prejudice.

2.5 Telecommunications Interception Material

[47] The Commonwealth *Telecommunications (Interception and Access) Act 1979* (Cwlth) (“the TI Act”) contains stringent controls and safeguards in relation to telecommunications interception and handling, and communicating information gathered from lawfully intercepted telecommunications. Section 63 of the TI Act prohibits the communication of lawfully intercepted information unless given particular restricted circumstances.

[48] Section 67(1) of the TI Act allows certain intercepting agencies, including the Commission,¹⁶ to make use of lawfully intercepted information and interception warrant information for a “permitted purpose”. “Permitted purpose”, as defined in section 5(1) of the TI Act, in the case of the Commission “means a purpose connected with ...: (i) an investigation under the Corruption and Crime Commission Act into whether misconduct (within the meaning of the Act) has or may have occurred, is or may be occurring, is or may be about to occur, or is likely to occur; or (ii) a report on such an investigation”.¹⁷

2.6 Opinions of Misconduct

2.6.1 Publication of an Opinion

[49] The Commission fully appreciates that any expression of opinion by it in a published report that a public officer has engaged in misconduct is serious. The publication of such an opinion or any adverse matter against a public officer, or any other person, may have serious consequences for the public officer, or person, and their reputation.

[50] The Commission is careful to bear these matters in mind, when forming opinions, when conducting investigations and reviews, and when publishing the results of investigations and reviews.

[51] It should be noted, however, that as a standing Commission of inquiry, section 7B(1) of the CCC Act, which, *inter alia*, conducts administrative investigations, the Commission does not determine whether any person has committed a criminal or disciplinary offence. The opinions of the Commission are confined to whether or not a public officer has engaged in misconduct according to the particular definition contained in section 4 of the CCC Act.

2.6.2 Balance of Probabilities

[52] The Commission may form an opinion as to misconduct on the evidence before it only if satisfied of misconduct on the balance of probabilities. The seriousness of the particular allegation and the potential consequences of the publication of such an opinion by the Commission, also go to how readily or otherwise it may be so satisfied on the balance of probabilities.

[53] The balance of probabilities is defined as:

The weighing up and comparison of the likelihood of the existence of competing facts or conclusions. A fact is proved to be true on the balance of probabilities if its existence is more probable than not, or if it is established by a preponderance of probability ...¹⁸

[54] The balance of probabilities is a standard used by courts when considering civil matters. It is a standard which is less than the criminal standard of beyond reasonable doubt. This was confirmed by the High Court in a unanimous judgement in Rejzek v McElroy (1965) 112 CLR 517:

... The difference between the criminal standard of proof and the civil standard of proof is no mere matter of words: it is a matter of critical substance. No matter how grave the fact which is to be found in a civil case, the mind has only to be reasonably satisfied and has not with respect to any matter in issue in such a proceeding to attain that degree of certainty which is indispensable to the support of a conviction upon a criminal charge ...

[55] The balance of probabilities can be applied to circumstantial evidence, as explained by the High Court in Luxton v Vines (1952) 85 CLR 352:

... The difference between the criminal standard of proof in its application to circumstantial evidence and the civil is that in the former the facts must be such as to exclude reasonable hypotheses consistent with innocence, while in the latter you need only circumstances raising a more probable inference in favour of what is alleged. In questions of this sort, where direct proof is not available, it is enough if the circumstances appearing in evidence give rise to a reasonable and definite inference: they must do more than give rise to conflicting inferences of equal degrees of probability so that the choice between them is mere matter of conjecture ... But if circumstances are proved in which it is reasonable to find a balance of probabilities in favour of the conclusions sought then, though the conclusion may fall short of certainty, it is not to be regarded as a mere conjecture or surmise ...

[56] The degree of evidence necessary to reach a conclusion on the balance of probabilities varies according to the seriousness of the issues involved. This was explained by Sir Owen Dixon in Briginshaw v Briginshaw (1938) 60 CLR 336:

... Except upon criminal issues to be proved by the prosecution, it is enough that the affirmative of an allegation is made out to the reasonable satisfaction of the tribunal. But reasonable satisfaction is not a state of mind that is attained or established independently of the nature and consequence of the fact or facts to be proved.

The seriousness of an allegation made, the inherent unlikelihood of an occurrence of a given description, or the gravity of the consequences flowing from a particular finding are considerations which must affect the answer to the question whether the issue has been proved to the reasonable satisfaction of the tribunal. In such matters "reasonable satisfaction" should not be produced by inexact proofs, indefinite testimony, or indirect inferences ...

or, as Lord Denning said in Hornal v Neuberger Products Ltd (1956) 3 All ER 970: "The more serious the allegation the higher the degree of probability that is required ...".

[57] Furthermore, the Commission could not reach an opinion of misconduct on the basis of a "mere mechanical comparison of probabilities", without any actual belief in its reality. That is to say, for the Commission to be satisfied of a fact on the balance of probabilities, it would have to have an actual belief of the existence of that fact to at least that degree.¹⁹

2.6.3 Meaning of Corruption

[58] Misconduct is defined by section 4 of the CCC Act, and misconduct of a kind described in section 4(a), (b) and (c) is defined as “**serious misconduct**” by section 3 of the CCC Act. Section 4(a) deals with public officers who act corruptly, or corruptly fail to act, in the performance of the functions of their office or employment and section 4(b) deals with public officers who corruptly take advantage of their office or employment to obtain a benefit or cause a detriment to any person.

[59] Corruption is a notoriously difficult concept to define. The word is not defined in the CCC Act. Although there are many cases which discuss the meaning of corruption, each is a product of the statutory provision (or common law concept) being considered and the circumstances then at hand.

[60] The leading authority in Western Australia on the meaning of corruption is Willers v R (1995) 81 A Crim R 219. In that case Malcolm CJ said that section 83 of *The Criminal Code* (WA), “is concerned with the use of power or authority for improper purposes”. Malcolm CJ noted that in the context of the corporations law the term improper “has been held not to be a term of art, but simply to refer to conduct by an officer of a company which was inconsistent with the proper discharge of the duties, obligations and responsibilities of the officer concerned ...”. Malcolm CJ went on to cite various definitions from the dictionary. Malcolm CJ said, for example, that the Oxford English Dictionary definition of “corrupt” included “perverted from uprightness and fidelity in the discharge of duty; influenced by bribery or the like”. In the same dictionary the verb “corrupt” meant “to destroy or pervert the integrity or fidelity of (a person) in his discharge of duty”. Ultimately Malcolm CJ concluded that an exercise of lawful authority for an improper purpose can amount to corruption under section 83 of *The Criminal Code* (WA). Malcolm CJ’s *ratio decidendi* should not be taken as an exhaustive definition of the meaning of corruption. The facts in that case involved the abuse of an otherwise lawful power for an improper purpose. The charges were laid under section 83(c) of *The Criminal Code* (WA) of acting “corruptly in the performance or discharge of the functions of ... [the officer’s] office or employment, so as to gain a benefit ... or ... cause a detriment”. On such a charge, proof of an intent to obtain a benefit or cause a detriment was itself an element of the offence. Malcolm CJ’s reasons must be understood in that context. The case does, however, provide a guide to what may amount to corruption in the circumstances of that case.

[61] Re Lane (unreported, Supreme Court, Qld, Ryan J, 9 October 1992) concerned legislation pursuant to which a public officer could lose their superannuation entitlements if they committed an act of corruption. As to the meaning of corruption Ryan J said:

In my opinion, in this context it means conduct which is done deliberately and contrary to the duties incumbent upon the person by virtue of his public office, as a result of which the person has sought to gain an advantage for himself or another.

I consider that the word “corruptly” is not to be equated with “dishonestly”, and that dishonesty does not necessarily connote corruption, but if a person who holds a public office dishonestly applies public moneys to his own use, then his conduct is properly describable as corruptly using a public office held by him.

I accept as correct the submission made on behalf of the respondent that it is necessary to find a conflict between duty and interest before one can find a corrupt performance or non-performance of public duties. But if a person uses a public office which he holds so as to dishonestly apply for his own benefit public funds, he has allowed his own private interest to override his public duty to apply the funds only for public purposes, and his conduct is corrupt.

(emphasis added)

- [62] Thus for Ryan J the essence of corruption was the dereliction of public duty. The judgment of Ryan J in Re Lane was cited with approval by Higgins J in DPP (Cth) v Hogarth (1995) 93 A Crim R 452. It is of course important to appreciate that the interpretation of particular words (such as “corruptly”) can be very case-specific, and turn on the particular legislative context and the facts of the case.
- [63] Nonetheless, another decision that provides a useful insight into the meaning of the phrase “acts corruptly” is that of the Federal Court of Australia in Williams v R (1979) 23 ALR 369. That case involved an appeal from the ACT Supreme Court. At trial the appellant was convicted of conspiring to cause a police officer to act corruptly. His defence was that he had paid the police officer the money so as to encourage him to investigate the complaint (against the appellant) properly because he had been “framed”. In deciding the case it was important to assess the meaning of the phrase “acts corruptly”. Blackburn J (with whom St John J agreed) expressed this opinion about the meaning of the phrase, at 373:

The word has, in my opinion, a strong connotation of misconduct, i.e., dereliction of duty, whether by act or omission. To that extent, the scope of the section resembles that of the common law offence of bribery, which implied the intention to procure a breach of duty on the part of the official bribed.

(emphasis added)

- [64] The trial judge’s direction to the jury in that case left open the possibility that the jury might think that they could convict the appellant even if they concluded that he had bribed the police officer to conduct a thorough investigation. Blackburn J took the view that the appellant could not be convicted of conspiring to cause a police officer to act corruptly in circumstances where he was paid to do his duty. For that reason the conviction was quashed with an order for a retrial. The decision in this case is authority for the proposition that the phrase “acts corruptly” means to act contrary to one’s public duty.
- [65] In the criminal law, the notion that a person may act corruptly does not of itself necessarily involve the gaining of a benefit or the causing of a

detriment. As Willers demonstrates, section 83 of *The Criminal Code* (WA) makes it an offence for a public officer, without lawful authority or a reasonable excuse, to act “corruptly” in the performance or discharge of the functions of his office or employment, so as to gain a benefit for, or cause a detriment to, any person. The meaning of “corruptly” therefore cannot necessarily involve an intent (or purpose) to obtain a benefit or cause a detriment.

- [66] More importantly, the same distinction is made clear in section 4 of the CCC Act itself. The word “corruptly” appears in both section 4(a) and 4(b). The former contains no reference to the gaining of a benefit or the causing of a detriment. That subsection makes it misconduct for a public officer to “corruptly” act or fail to act in the performance of his or her office or employment. The latter does expressly refer to gaining an advantage or causing a detriment, by the public officer “corruptly” taking advantage of his or her office or employment. If the notion of “corruptly” already included an intent to gain an advantage or cause a detriment, those words would be otiose.
- [67] It is axiomatic that the proper construction of a statutory provision turns upon the words used in the particular provision, read in the context of the Act of which the provision is part, and having regard to the general purpose and policy of the legislation.²⁰
- [68] Ordinary dictionary definitions support the conclusion that in section 4 of the CCC Act, “corruptly” connotes dereliction or breach of duty, or acting contrary to one’s duty; being perverted from fidelity or integrity. “Corruption” is the perversion of a person’s integrity in the performance of official or public duty or work.²¹ It involves the concept of a prohibited act undertaken with a wrongful intention.²² The Commission accepts that the notion of “corruptly” in section 4(a) and (b) of the CCC Act requires that the conduct contrary to the duties incumbent upon the public officer by virtue of their office (to adopt the language of Ryan J in *Re Lane*) also be attended by moral turpitude of a kind implied by the expression “perverted from fidelity or integrity”. Without attempting to be exhaustive, that may be found in dishonesty;²³ an improper purpose;²⁴ in circumstances in which there is some conflict between the public officer’s interests and their duty; or in some other relevant factor.²⁵
- [69] Thus, “corruptly”, in section 4(a) and (b) is not to be equated with “dishonestly” nor “for an improper purpose”, nor (merely), “contrary to [their] duty”. For present purposes it is sufficient to state that the Commission takes the law to be that “corruptly” in section 4(a) and (b) of the CCC Act connotes conduct done deliberately, which is contrary to the duties incumbent upon the public officer by virtue of their office and attended by moral turpitude in the sense explained above.

2.6.4 Section 23(1) of the *Corruption and Crime Commission Act 2003* (WA)

- [70] Section 23(1) of the CCC Act prohibits the Commission from publishing or reporting a finding or opinion that a particular person has committed, is

committing or is about to commit a criminal offence or a disciplinary offence. Accordingly, the Commission must not publish or report an opinion that a person has engaged in misconduct of a kind described in section 4(c) unless they have been convicted (or at least pleaded guilty) to the relevant offences. In such a case the Commission would be reporting a fact, not its opinion, as to that.

ENDNOTES

¹ Section 7A of the *Corruption and Crime Commission Act 2003* (WA).

² *Ibid*, section 7B(1).

³ “Misconduct” is defined in section 4 of the *Corruption and Crime Commission Act 2003* (WA).

⁴ “Serious misconduct” is defined in section 3 of the *Corruption and Crime Commission Act 2003* (WA) (“the CCC Act”) as being misconduct of a kind described in section 4(a), (b) or (c) of the CCC Act.

⁵ Section 17(1) of the *Corruption and Crime Commission Act 2003* (WA).

⁶ *Ibid*, section 17(2)(cb).

⁷ *Ibid*, Section 18(1).

⁸ *Ibid*, section 18(2)(f).

⁹ *Ibid*, section 84(3).

¹⁰ *Ibid*, section 84(4).

¹¹ *Ibid*, section 93.

¹² *Disciplinary Procedures Guide*, Department of the Premier and Cabinet, Government of Western Australia, November 2007, p.9.

¹³ *Ibid*, p.28.

¹⁴ Section 152(1) of the *Corruption and Crime Commission Act 2003* (WA).

¹⁵ *Ibid*.

¹⁶ State legislation (the *Telecommunications (Interception) Western Australia Act 1996* (“the Western Australia Act”) gives the Corruption and Crime Commission (“the Commission”) its status as an intercepting agency. The Western Australia Act is an Act to enable the Commission to be declared an agency for the purposes of the *Telecommunications (Interception and Access) Act 1979* of the Commonwealth and for related purposes.

¹⁷ *Telecommunications (Interception and Access) Act 1979* (Commonwealth), p.17.

¹⁸ Butterworths Concise Australian Legal Dictionary (Third Edition), Lexis Nexis Butterworths, Australia 2004, p.42.

¹⁹ Briginshaw v Briginshaw (1938) 60 CLR 336 per Dixon J at 361-363; Rejzek v McElroy (1965) 112 CLR 517; Neat Holdings Pty Ltd v Karajan Holdings Pty Ltd (1992) 110 ALR 449.

²⁰ See Martin CJ (with whom Newnes AJA agreed) in Ex parte West Australian Newspapers Ltd [2008] WASCA 209 at [51].

²¹ Shorter Oxford English Dictionary, Sixth Edition, p.529; Macquarie Dictionary, 2nd Revised Edition, p.417.

²² R v Gallagher (1987) 29 A Crim R 33.

²³ Willers v R (1995) 81 A Crim R 219 per Malcolm CJ at 224.

²⁴ Willers v R, *supra*, per Malcolm CJ at 225; Rowland J at 231; Application by DPP (C'th) for a Superannuation Order in Respect of Hogarth (1995) 93 A Crim R 452 per Higgins J at 454-5.

²⁵ Williams v R (1979) 23 ALR 369 per Franki J at 381.