



CORRUPTION AND CRIME COMMISSION

REPORT ON THE INVESTIGATION OF ALLEGED MISCONDUCT CONCERNING OFFICERS OF THE DEPARTMENT OF FISHERIES

30 October 2008

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Dear Mr Peacock
Dear Mr McHugh

As neither House of Parliament is presently sitting, in accordance with section 93 of the *Corruption and Crime Commission Act 2003* ("the Act"), the Commission hereby transmits to you a copy of the *Corruption and Crime Commission Report on the Investigation of Alleged Misconduct Concerning Officers of the Department of Fisheries*.

The Commission notes that under section 93(3) of the Act a copy of a report transmitted to a Clerk of a House is to be regarded as having been laid before that House.

Yours faithfully

A handwritten signature in black ink, appearing to read "Len Roberts-Smith".

The Hon L W Roberts-Smith RFD QC
COMMISSIONER

30 October 2008

ABBREVIATIONS AND ACRONYMS

“the Act”	<i>Corruption and Crime Commission Act 2003</i>
CCR	Call Charge Record
“the Commission”	Corruption and Crime Commission
“the Department” or DoF	Department of Fisheries Western Australia
“the PSA”	<i>Public Service Act 1978</i>
“the PSM Act”	<i>Public Sector Management Act 1994</i>
SOU	Serious Offences Unit, Regional Services Branch, Department of Fisheries Western Australia
TI	Telecommunications Intercept (or Interception)
“the TI Act”	Commonwealth <i>Telecommunications (Interception and Access) Act 1979</i>

TABLE OF CONTENTS

ABBREVIATIONS AND ACRONYMS	v
EXECUTIVE SUMMARY	1
Investigation by the Commission	1
Commission Assessments and Opinions	2
Mr Millington	2
Mr Williams	5
Release of Information to Mr Littleton	5
Advice to a Professional Fisherman	5
Mr Willey	5
Recommendations	6
Recommendation 1	6
Recommendation 2	7
Recommendation 3	7
CHAPTER ONE	
FOREWORD	9
1.1 Introduction	9
1.2 Jurisdiction of the Commission	9
1.3 Definitions	9
1.3.1 Public Officer	9
1.3.2 Misconduct	10
1.4 Reporting by the Commission	11
1.5 Disclosure	12
1.6 Telecommunications Interception Material	13
1.7 Privacy Considerations	13
1.8 Opinions of Misconduct: Standard of Proof	13
CHAPTER TWO	
COMMISSION INVESTIGATION	17
2.1 Background	17
2.2 Commission Investigation	17
2.3 Mr Millington's Evidence at a Commission Private Hearing	24
2.4 Mr Williams	28
2.4.1 Advice to a Professional Fisherman	29
2.5 Mr Willey	34
CHAPTER THREE	
OPINIONS AND CONCLUSIONS	41
3.1 Commission Opinions as to Misconduct	41
3.1.1 Mr Millington	41
3.1.2 Mr Williams	58
3.1.2.1 Release of Information to Mr Littleton	58
3.2.2.2 Advice to a Professional Fisherman	58
3.1.3 Mr Willey	59

3.2 Recommendations	60
Recommendation 1	61
Recommendation 2	61
Recommendation 3	61
APPENDIX	63
Media Release, Department of Fisheries Western Australia, Tuesday 27 November 2007: <i>Illegal Sale of Swan River Crabs</i> Nets Big Fine	65
ENDNOTES	67

EXECUTIVE SUMMARY

Investigation by the Commission

- [1] In late March 2007, following a report to the Corruption and Crime Commission (“the Commission”) by the Serious Offences Unit, Regional Services Branch, Department of Fisheries Western Australia (“the Department”), the Commission commenced an investigation to determine the nature and extent of associations that officers of the Department maintained with persons involved in the illegal fishing industry, and whether those officers had engaged, were engaging, or were likely to engage, in serious misconduct through these associations. The Commission investigation included the use of telecommunications warrants issued pursuant to section 46 of the Commonwealth *Telecommunications (Interception and Access) Act 1979*.
- [2] In particular, the Commission investigation concerned an allegation that a Department officer had compromised the Departmental investigation of suspected illegal crab fishing by Mr Kyran Richard Littleton by providing information about that investigation to Mr Littleton.
- [3] Mr Littleton was the subject of an investigation by the Department in respect of allegations that he was involved in illegal crab fishing. That investigation included physical surveillance of Mr Littleton and the execution of a search warrant on 10 May 2007 by the Serious Offences Unit of the Department. Mr Littleton was ultimately charged in respect of the illegal fishing and sale of blue swimmer crabs in the Swan River. On 27 November 2007 Mr Littleton pleaded guilty and was ordered to pay \$20,611 to cover a fine, court costs and mandatory penalty.
- [4] At the time of the Commission investigation Mr Peter James Millington was the Acting Chief Executive Officer of the Department.
- [5] One aspect of the Commission investigation concerned whether Mr Millington had compromised the Departmental investigation by providing information about it to Mr Littleton.
- [6] The Commission investigation has established that Mr Millington did in fact tell Mr Littleton that the Department was conducting an investigation about illegal crab fishing. In a lawfully intercepted telephone conversation with Mr Littleton on 23 April 2007 Mr Millington told Mr Littleton that there was a Departmental investigation in progress into illegal crab fishing in the Swan River and that he “would obviously be one of the people they’d [the Department] have to consider”.¹ Mr Millington provided this information to Mr Littleton contrary to specific advice that Mr Millington sought and obtained from the Manager of the Regional Services Branch.
- [7] The Commission investigation also considered allegations of misconduct by Mr John Graham Williams and Mr Peter Charles Willey, two experienced Fisheries and Marine Officers who had been re-appointed on short-term

contracts following their retirement from the Department. Mr Williams and Mr Willey were both employed as Fisheries and Marine Officers. However, Mr Willey's role at the relevant time² was primarily fleet maintenance rather than law enforcement.

- [8] During a lawfully intercepted telephone conversation between Mr Littleton and an unknown person, Mr Littleton said that Mr Williams had given him a cryptic message to stop illegal crab fishing by telling him to take a holiday.³ Consequently, the Commission investigation also considered whether Mr Williams had compromised the Departmental investigation by providing a warning to Mr Littleton.
- [9] Unrelated to the Departmental investigation of Mr Littleton, lawfully intercepted information also indicated that Mr Williams had given improper advice to another professional fisherman whose associate was being investigated by the Department.⁴
- [10] Lawfully intercepted telephone conversations obtained during the Commission investigation indicated that Mr Willey had disclosed Serious Offences Unit investigative methodologies to Mr Littleton and proffered false explanations for Mr Littleton to provide to Department investigators to avoid a successful prosecution for illegal crab fishing and the sale of illegally obtained crabs.⁵

Commission Assessments and Opinions

- [11] Commission assessments and opinions Commission are set out in Chapter Three. In summary, the Commission has formed the following opinions.

Mr Millington

- [12] There is no doubt what Mr Millington did was done deliberately. In the Commission's opinion, what he did was contrary to the duties incumbent upon him by virtue of his position. For the reasons explained in this report Mr Millington was under a duty, particularly as Acting Chief Executive Officer of the Department, to act in the public interest, to maintain the confidentiality of official information and to protect the integrity of Departmental investigations. As Acting Chief Executive Officer, he was responsible for ensuring the promotion and maintenance of appropriate standards of conduct within the Department. His obligations included that of leading by example.⁶ What he did was done deliberately contrary to the explicit advice and warning given to him, about what his duty required.
- [13] In the Commission's opinion, Mr Millington allowed his duty to act with fidelity and integrity in the public interest, to be perverted by his conduct. In the Commission's opinion, Mr Millington did not act out of any venal motive, but rather out of weakness: he sought to avoid what he saw as embarrassment at not being able to give a substantive answer to Mr Littleton's queries. He was unable to act with the firmness and propriety which his duty – and his role as Acting Chief Executive Officer – demanded. He chose to put what he saw as personal embarrassment, or an awkward situation, over his duty to act with

integrity and in the public interest. He acted with a wrongful intention. In the circumstances, his breach of duty was attended by moral turpitude of a nature and kind sufficient to bring it within the meaning of “corruptly” in section 4(a) of the *Corruption and Crime Commission Act 2003* (“the Act”).

- [14] Nor can there be any doubt that, notwithstanding that he was Acting Chief Executive Officer, Mr Millington was not purporting to exercise his official discretion or authority to “authorise” the release of the information to Mr Littleton. Although he conveyed that information to Mr Littleton, he also said he could neither “confirm nor deny it, but ...” and said “I didn’t tell you anything”.⁷ There would have been no need for him to caution Mr Littleton this way, if he was making a proper disclosure.
- [15] Mr Millington’s conduct accordingly constitutes serious misconduct within the meaning of sections 3 and 4(a) of the Act.
- [16] The Commission has considered whether the same conduct also constitutes serious misconduct under section 4(b). That deals with the conduct of a public officer who corruptly takes advantage of their office or employment to obtain a benefit for, or cause a detriment to, any person. It could be concluded that he took advantage of his position to give the information to Mr Littleton, because he could not have obtained it otherwise. The second aspect of the question is whether or not he did so to gain a benefit for himself or another, or to cause someone a detriment.
- [17] There is certainly no evidence of any financial benefit to be gained by Mr Millington from disclosing the information he did to Mr Littleton. Having regard to what he said at the time to both Mr Littleton and the Manager of the Regional Services Branch, and later to the Commission, it seems the only personal benefit Mr Millington sought to gain was the avoidance of awkwardness or embarrassment in his dealings with Mr Littleton. In the Commission’s assessment that could not reasonably be regarded as sufficient to constitute a “benefit” for himself for the purpose of forming an opinion whether or not his conduct was “corrupt”.
- [18] Further, there is nothing before the Commission to suggest Mr Millington’s purpose was to gain or provide a benefit to Mr Littleton. In particular, the material does not show that he sought to assist Mr Littleton escape discovery in the Departmental investigation, nor warn him to cease any unlawful activity (although on any reasonable view, if Mr Littleton had in fact been engaged in such activity, that would have been the likely consequence of revealing the information to him). When he gave Mr Littleton the information he did, Mr Millington knew there was an investigation being conducted, but not that Mr Littleton was then a subject of it. Nor (for the same reasons) could the material support an opinion that Mr Millington’s purpose was to cause detriment to the Department (and hence the State) by assisting Mr Littleton to defeat the Departmental investigation.
- [19] As the material before the Commission does not establish any specific purpose on Mr Millington’s part to gain a benefit for himself or another or to

cause detriment to another, his conduct cannot constitute “serious misconduct” under section 4(b) of the Act.

[20] The next question is whether it could also constitute misconduct under section 4(d)(iii) and (v) of the Act.

[21] Misconduct under section 4(d)(iii) and (v) will relevantly be shown where

- a public officer
- engages in conduct that
 - “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”, and
 - constitutes or could constitute an offence against a written law.

[22] Mr Millington was a public officer and in his dealings with Mr Littleton was acting or purporting to act in his official capacity.

[23] Mr Millington’s actions constituted or involved a breach of trust because as an officer of the Department – and in particular because he was Acting Chief Executive Officer – he was under a duty to act in the public interest, to maintain the confidentiality of official information and protect the integrity of Departmental investigations of possible offences against legislation it was the Department’s responsibility to administer. In the Commission’s opinion, his actions breached his duty in each of those respects.

[24] The Commission does not determine guilt or innocence of criminal offences – that is for the courts. The Commission is required only to form opinions, which have no binding effect in law. In the opinion of the Commission, Mr Millington made an unauthorised disclosure of official information to Mr Littleton, without lawful authority, in circumstances in which he was under a duty not to make the disclosure. In the Commission’s opinion, a properly instructed jury could be satisfied beyond reasonable doubt, on admissible evidence, that Mr Millington’s conduct constituted an offence contrary to section 81 of *The Criminal Code*. It follows that his actions constitute misconduct under section 4(d)(iii) and (v) of the Act.

[25] The Commission emphasises that an opinion by it that misconduct has occurred is not, and is not to be taken as, a finding or opinion that Mr Millington has committed a criminal or disciplinary offence.⁸

[26] In the Commission’s opinion Mr Millington’s conduct in disclosing the information he did to Mr Littleton, was misconduct, also because it:

- constituted or involved a breach of the trust placed in him by reason of his office or employment as a public officer (paragraph 4(d)(iii) of the Act); and

- 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*.

[27] The Commission is satisfied that Mr Millington's conduct meets the criteria of paragraph 4(d)(vi) of the Act in that it 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)".

Mr Williams

Release of Information to Mr Littleton

[28] Mr Williams did not engage in misconduct in respect of Mr Littleton by providing Mr Littleton with information about the Departmental investigation.

Advice to a Professional Fisherman

[29] Mr Williams engaged in serious misconduct within the meaning of section 4(a) of the Act in respect of his telephone conversations with a professional fisherman. During these conversations Mr Williams suggested that the fisherman's associate offer a false explanation to Fisheries and Marine Officers to explain an illegal catch by that fisherman's associate. Mr Williams also provided reasons why the fisherman's associate should not take part in a video record of interview with the Department.⁹ Mr Williams engaged in serious misconduct in that he used his experience as a Fisheries and Marine Officer to provide information to assist a person that he knew was being investigated by the Department. By so doing he corruptly failed to act in the performance of his functions as a Department officer in circumstances where his primary function included policing the Fisheries legislation.

Mr Willey

[30] Mr Willey engaged in serious misconduct within the meaning of section 4(a) of the Act when he suggested false explanations that Mr Littleton could provide to officers of the Department to explain the:

- presence of something (illegal crabs) in Mr Littleton's boat when he came out of the river;
- evidence relating to disposal (sale) of the crabs; and
- use and presence of a grappling hook.

[31] Mr Willey also told Mr Littleton that he should not take part in a video record of interview with the Department.¹⁰ Mr Willey engaged in serious misconduct in that he used his experience as a Fisheries and Marine Officer to provide

information to assist a person that he knew was being investigated by the Department. By so doing he corruptly failed to act in the performance of his functions as a Department officer in circumstances where he was at the time employed by the Department (albeit in a fleet maintenance role) and had previously been employed as a Fisheries and Marine Officer where his primary function included policing the Fisheries legislation.

Recommendations

[32] The Commission makes three specific recommendations. They relate to the conduct of Mr Millington, Mr Williams and Mr Willey.

[33] Given its conclusions at [165]-[166] below, the Commission has considered whether it should recommend that the Director of Public Prosecutions consider the prosecution of Mr Millington for an offence of unauthorised disclosure of official information, contrary to section 81 of *The Criminal Code*. In the Commission's opinion such a recommendation should not be made. Factors which weigh particularly in leading to that opinion include those detailed below.

- Although there was an unauthorised disclosure and it was made with a wrongful intention, it was not the product of any venal, dishonest or sinister purpose. Mr Millington did not do it to obtain any specific benefit for himself or Mr Littleton, nor to cause any specific detriment to anyone.
- The unauthorised disclosure was made out of personal weakness and an incapacity on his part to act with the firmness and propriety which his role and public duty demanded in the circumstances.
- Although his disclosure compromised the Departmental investigation, it (fortuitously) did not compromise the outcome of it.
- This was an isolated incident; there is no suggestion Mr Millington made an unauthorised disclosure on any other occasion.
- The seriousness of his conduct can be adequately recognised by disciplinary proceedings under the *Public Sector Management Act 1994*, should such proceedings be thought appropriate.

[34]

Recommendation 1

That consideration be given to the taking of disciplinary action against Mr Peter James Millington by the Director General of the Department of the Premier and Cabinet in relation to his disclosure of confidential information about a Department of Fisheries investigation to the target of that investigation, Mr Kyran Richard Littleton.

Recommendation 2

The Commission recommends that Mr John Graham Williams is not considered for future appointment or any contractual work by the Department of Fisheries.

Recommendation 3

The Commission recommends that Mr Peter Charles Willey is not considered for future appointment or any contractual work by the Department of Fisheries.

[35] The Commission does not recommend, for the reasons outlined in Chapter Three of this report, that the Director of Public Prosecutions consider the prosecution of:

- Mr Williams for attempting to pervert the course of justice pursuant to section 143 of *The Criminal Code*; or
- Mr Willey for attempting to pervert the course of justice pursuant to section 143 of *The Criminal Code*.

CHAPTER ONE

FOREWORD

1.1 Introduction

- [36] Between March and September 2007 the Corruption and Crime Commission (“the Commission”) conducted an investigation under the *Corruption and Crime Commission Act 2003* (“the Act”) in regard to possible serious misconduct by officers of the Department of Fisheries Western Australia (“the Department”) related to the suspected release of confidential information about a Departmental investigation of illegal crab fishing. Following the receipt of the allegation by the Commission of serious misconduct an investigation was commenced pursuant to section 33 of the Act.
- [37] In accordance with section 22 of the Act the purpose of the investigation was to assess the allegation and form an opinion as to the possible occurrence of “misconduct”, as defined in section 4 of the Act.
- [38] The Commission investigation encompassed a review of information provided by the Department to the Commission, interviews, private examinations and covert investigative techniques including the obtaining of warrants for the lawful interception of telecommunications pursuant to section 46 of the Commonwealth *Telecommunications (Interception and Access) Act 1979* (“the TI Act”).

1.2 Jurisdiction of the Commission

- [39] 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 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 Act.
- [40] It is a function of the Commission, pursuant to section 18 of the 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 Act.

1.3 Definitions

1.3.1 Public Officer

- [41] The term “public officer” is defined in section 3 of the Act by reference to the definition in section 1 of *The Criminal Code*. The term “public officer” includes

any of the following: police officers; 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; and public service officers and employees within the meaning of the *Public Sector Management Act 1994* (“the PSM Act”). Officers employed by the Department of Fisheries are “public service officers”. “Public service officers” are “public officers” for the purposes of the Act.

[42] Mr Peter James Millington, Mr John Graham Williams and Mr Peter Charles Willey were at the relevant time, or, in the case of Mr Millington, continue to be, employed by the Department and are thus public officers for the purposes of the Act.

1.3.2 Misconduct

[43] The term “misconduct” has a particular and specific meaning in the Act and it is that meaning which the Commission must apply. Section 4 of the 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).*

1.4 Reporting by the Commission

- [44] Under section 84(1) of the 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.*
- [45] The Commission may cause a report prepared under this section to be laid before each House of Parliament, as stipulated in section 84(4).
- [46] Section 86 of the 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.
- [47] Accordingly, Mr Millington was notified by letter dated Monday 15 September 2008 of possible adverse matters which it was proposed to include in this report. Mr Millington was invited to make representations about those matters by 4.00 p.m. on Monday 29 September 2008, and was advised that he and/or his legal adviser could inspect the transcript of the hearings before the Commission and evidentiary material going to matters identified, and any other matters about which he might wish to make representations. Mr

Millington's solicitors attended the Commission on 24 September 2008 to inspect a transcript of a Commission private hearing¹¹ and provided representations on Friday 26 September 2008, and the Commission has taken those into account in finalising this report.

- [48] Mr Willey and Mr Williams were notified by letter dated Monday 15 September 2008 of possible adverse matters which it was proposed to include in this report. They were invited to make representations about those matters by 4.00 p.m. on Monday 29 September 2008, and were advised that they and/or their legal advisers could inspect the transcript of the hearings before the Commission and evidentiary material going to matters identified, and any other matters about which they might wish to make representations. Neither Mr Willey nor Mr Williams provided any representations.
- [49] Despite the investigation being confined to the conduct of public officers, and the Commission making no assessment of, nor expressing any opinion about, Mr Kyran Richard Littleton in its report, the Commission accepts that the words "any matters adverse to a person" in section 86 of the Act have a meaning wider than merely the Commission's assessments and opinions.
- [50] As it was possible that the matters considered in this report may be regarded as matters adverse to Mr Littleton, the Commission has notified him of those matters, pursuant to section 86 of the Act, and afforded him an opportunity to make representations if he wished.
- [51] Mr Littleton was notified by letter dated Monday 15 September 2008 and invited to make representations by 4.00 p.m. on Monday 29 September 2008. Mr Littleton was advised that he and/or his legal adviser could inspect the transcript of the hearings before the Commission and evidentiary material going to the matters identified, and any other matters about which he might wish to make representations. Mr Littleton did not provide any representations.

1.5 Disclosure

- [52] The Commission has powers that include the capacity to apply for warrants to lawfully intercept telecommunications, utilise surveillance devices, 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 Commissioner.
- [53] Section 151 of the Act controls the disclosure of a "restricted matter" including evidence given before the Commission, information or documents produced to the Commission and the fact that any person has been or may be about to be examined by the Commission.
- [54] Section 151(4)(a) states that a restricted matter may be disclosed in accordance with a direction of the Commission. Pursuant to section 152(4) official information may be disclosed in various instances including: for the

purposes of the Act; for the purposes of prosecution or disciplinary action; when the Commission has certified that disclosure is necessary in the public interest; or to either House of Parliament.

[55] 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.

1.6 Telecommunications Interception Material

[56] 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.

[57] Section 67(1) of the TI Act allows certain intercepting agencies, including the Commission,¹² 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 that 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”.¹³

1.7 Privacy Considerations

[58] In formulating this report the Commission has considered the benefit of public exposure and public awareness and weighed this against the potential for prejudice and privacy infringements. The Commission has also complied with the strict requirements of the TI Act in the utilisation of intercepted information in this report.

[59] As a result of these considerations the Commission may decide not to include names of various individuals who assisted the Commission during its investigation. Similarly, some extracts from Telecommunications Intercept (TI) material set out in this report may have been edited by omitting the names of individuals or other information collateral to this inquiry.

1.8 Opinions of Misconduct: Standard of Proof

[60] 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.

- [61] The Commission is careful to bear these matters in mind, when forming opinions, when conducting inquiries and when publishing the results of its investigations.
- [62] 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.
- [63] 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 ...¹⁴

- [64] 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 judgment in Reifek 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 ...

- [65] 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 ...

[66] 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 ...

[67] 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 ...”.

[68] 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.¹⁵

[69] The Commission has borne all of the foregoing considerations in mind in forming its opinions about matters the subject of the investigation. Any expression of opinion in this report is so founded.

CHAPTER TWO

COMMISSION INVESTIGATION

2.1 Background

- [70] In February and March 2007 investigators from the Serious Offences Unit, Regional Services Branch of the Department, were conducting an investigation into allegations that a retired commercial fisherman, Mr Littleton, was crab fishing illegally and selling the illicit catch to Festival Fish Wholesalers.
- [71] During the course of the Departmental investigation Mr Littleton was placed under surveillance by officers of the Serious Offences Unit. After some weeks Mr Littleton's activity changed significantly, adopting anti-surveillance techniques. A telephone Call Charge Record [CCR] analysis indicated that, shortly prior to Mr Littleton's changed activity, services subscribed to by Mr Littleton had been used to contact telephone services subscribed to by the Department. Based on this analysis, members of the Serious Offences Unit reported a concern to the Commission that a Department officer may have released confidential information about the Departmental investigation to Mr Littleton.
- [72] The Commission has not been able to establish whether Mr Littleton did in fact receive information about the Departmental investigation from an officer of the Department in or about March 2007. However, during the course of the Commission investigation information was obtained that indicated that Mr Littleton and other professional fishermen were provided with confidential information by officers of the Department.

2.2 Commission Investigation

- [73] In late March 2007, as a consequence of the Department's concerns, the Commission commenced its investigation to determine the nature and extent of associations that officers of the Department maintained with persons involved in the illegal fishing industry, and whether those officers had engaged, were engaging, or were likely to engage, in serious misconduct through these associations.
- [74] In particular, the Commission investigation concerned an allegation that a Department officer had compromised the Departmental investigation, being conducted by the Serious Offences Unit, of Mr Littleton by providing information about that investigation to Mr Littleton.
- [75] At the time of the Commission investigation Mr Millington was the Acting Chief Executive Officer of the Department.

[76] One aspect of the Commission investigation concerned whether Mr Millington had compromised the Departmental investigation by providing information to Mr Littleton.

[77] On Friday 30 March 2007, at 4:35 p.m., Mr Millington received an email from Ms Helen Reynaldo, Executive Assistant to the Chief Executive Officer, that read:

pls call Kerry Littleton [number suppressed] re illegal crabs – very upset PLS CALL ASAP¹⁶

[78] Mr Millington gave evidence, at a Commission private hearing on 24 September 2007, that Mr Littleton had telephoned him on 30 March 2007 stating that he had been told that he was under investigation for illegal crab fishing, and wanted to know whether or not this was the case.¹⁷ Mr Millington emailed his record of the conversation (reproduced below) to the Serious Offences Unit on 3 April 2007, at 11:34 a.m.

From: Peter Millington
Sent: Tuesday, 3 April 2007 11:34 AM
To: Ian Jones
Subject: Facts - Littleton
Attachments: Mr Kerry Littleton.vcf

Phone call Friday 30 March from Mr Kerry Littleton

His informant is [informant and business name suppressed]

Allegation by a "Fisheries Officer" visiting [name suppressed], concerning (apparently) Kerry Littleton

*"investigating large scale illegal crab fisher"
"you [name suppressed] are suspected of being an agent"*

Mr Littleton - retired swan canning licensed fisherman. Bought out by Fisheries Adjustment Scheme 2 years ago. Early 70s. Injuries to hand due to accident last year - most fingers remaining non-functional – claims could not fish even if he wanted to.

Wants allegation investigated given apparent damage to reputation.

Concerned that long time rival and fellow swan canning fisher John Bails may have made allegation to DoF.

*Would appreciate contact with relevant investigating officer (if any).
Happy to be interviewed.*

*Peter Millington
CEO
Department of Fisheries¹⁸*

[79] A CCR analysis indicates that Mr Littleton called Ms Reynaldo's line on Wednesday 4 April 2007 at 9:52 a.m. At 1:46 p.m. that day Mr Millington received a reply from Mr Ian Jones, Officer in Charge of the Serious Offences Unit.

Peter – thanks for the information. I will advise you of any future developments should they come to hand in due course.¹⁹

At 2:36 p.m. Mr Millington sent an email to Ms Reynaldo saying:

track this for me pls – b/u [bring up] on my return²⁰

[80] Mr Millington was absent from the office during the period Easter Friday 6 April until Monday 16 April 2007.

[81] A CCR analysis indicates Mr Littleton called on Ms Reynaldo's line again at 4:13 p.m. on 8 April 2007.

[82] On 13 April 2007 Mr Littleton called the Department but was informed Mr Millington was away. On the same day, at 4:05 p.m., Mr John Looby, Manager of the Regional Services Branch of the Department, emailed Ms Reynaldo and stated:

Helen I usually deal with these matters and not SOU (Ian Jones) – I will have a look at it on Monday. Please send me any info you have in regard to this. Do you have Mr Littleton's mobile and home numbers – so I can contact him if necessary thks.²¹

At 4:38 p.m. Ms Reynaldo emailed Mr Looby and stated:

Sorry about that but Peter Millington contacted Ian. I was just following up today cause Kerry Littleton keeps calling. Kerry's home phone no is [number suppressed]. Peter sent Ian an email so you will have to get the email off Ian Jones. Mr Littleton called here and spoke to Peter M then Peter emailed in.²²

[83] On 16 April 2007 Mr Littleton spoke to Ms Reynaldo, and she advised him that Mr Looby would return his call.

[84] As Mr Looby had indicated in his email of 13 April, it was he who usually dealt with enquiries of this kind. The obvious response from Mr Millington (or his office) therefore would have been to explain that to Mr Littleton and have Mr Looby call him.

[85] Also on 16 April 2007, at 12:44 p.m., under instruction as to the content, Mr Looby sent an email to Mr Millington (reproduced below).

From: John Looby
Sent: Monday, 16 April 2007 12:44 PM
To: Peter Millington
Cc: Ian Jones
Subject: re: Littleton

Peter,

As per your email and my recent telephone discussion with [name suppressed], the SOU is currently not looking at Littleton. Having said this we have several information reports indicating that there may be some illegal crab fishing in the Swan River that may involve Littleton (he is subject of one of the information reports). I have spoken to RM Metro and his [sic] advises that his staff are not conducting any such investigations at this time.

The current SOU jobs that they are working on should be finalised in another 3-4 weeks, and just prior to this we will make the decision if we take on another abalone investigation or switch to the crab job.

In relation to telephoning Littleton to advise him that we are not currently investigating him - Not only is it improper to advise a person that he is under investigation as it would jeopardise [sic] the operation but it would be pointless in having a unit such as SOU if every time someone phoned up they were told whether or not they were being investigated.

*Let's leave him guessing - in the event he is doing anything wrong it may make him rethink his activities.*²³

(emphasis added)

- [86] As indicated above, in fact Mr Littleton was the main target of the illegal crab fishing investigation. But because of the indications that there may have been a source or sources within the Department leaking information about that, the investigators (into that aspect) had directed that knowledge of it should be confined to those actually involved, at that stage.
- [87] On 16 April 2007, at 1:41 p.m., Mr Millington responded to the above email (response reproduced below).

From: Peter Millington
Sent: Monday, 16 April 2007 1:41 PM
To: John Looby
Cc: Ian Jones
Subject: RE: re Littleton

I will need to tell him something, so "leaving him [sic] guessing" is not an option - so I suggest we agree on three or four points I can talk to him about eg

- . we have received information reports about illegal crab fishing (which he knows already, courtesy of an un-named FMO talking to his mate)
- . we are following up all the leads given to us in that Information as time and resources permit

*thoughts?*²⁴

[88] Again under instruction as to the content, the Manager of the Regional Services Branch responded to the above email from Mr Millington on 17 April 2007, at 8:20 a.m. (response reproduced below).

From: John Looby
Sent: Tuesday, 17 April 2007 8:20 AM
To: Peter Millington
Cc: Ian Jones
Subject: RE: re Littleton

Peter

Because there is the potential for Littleton to be a target in any future investigation of illegal Swan River crab fishing it is inappropriate to tell him anything even if such an investigation was not to occur for sometime. To mention any information report would also compromise the matter by confirming the information which he only has on hearsay and does not know if it is true. (There is doubt with the FMO story). The usual approach is to neither confirm nor deny any request as to whether or not a person is under investigation. We normally only confirm or announce an investigation once overt actions have occurred such as interviews of suspects, seizures and execution of warrants.

The best approach is to tell Littleton that you have no information in relation to any investigation involving him and that you cannot provide any further information. I cannot think of any points that you can meaningfully engage him on in regard to any investigation or Intel info and you may have to use your communication skills to divert the conversation to other matters if he presses the point.

*Sorry that I cannot be more helpful.*²⁵

(emphasis added)

[89] On 23 April 2007 Mr Littleton again spoke to Ms Reynaldo stating that Mr Millington had advised him he wished to speak to him. Ms Reynaldo advised Mr Littleton that Mr Millington was in meetings, and to call back at 2:00 p.m. Mr Littleton called again that afternoon, as advised, and spoke to Mr Millington. Despite the advice that Mr Millington had received from the Manager of the Regional Services Branch, the following conversation ensued.

MILLINGTON: *There's an enquiry generally, not necessarily targeted at you which is going on and uh, basically, uh, I can't really tell you much more 'cause it will compromise it.*

LITTLETON: *Oh I see but*

MILLINGTON: *Mmm*

LITTLETON: *it's not targeting me?*

MILLINGTON: *Nup.*

LITTLETON: *Oh okay.*

MILLINGTON: *Okay. I mean, you would obviously be one of the people they'd have to consider because you're, uhm, uhm, in the past but obviously you're not doing anything now then it's not an issue.*

LITTLETON: *Yeah well just from, so that they know*

MILLINGTON: *Mmm*

LITTLETON: *you can pass this along*

MILLINGTON: *Well I've passed it all along. Everything you gave to me I put ...*

LITTLETON: *Oh yeah, no I'm just talking about*

MILLINGTON: *Yep.*

LITTLETON: *me hand.*

MILLINGTON: *Yeah, exactly. I told them that. (laughs)*

LITTLETON: *(laughs) There's no way in the world I'm gonna be trying to get crabs out of a net with one hand.*

MILLINGTON: *Yeah exactly, exactly. So, you know, I really, you know it's the usual thing I can neither confirm or deny but I've sort of somewhat*

LITTLETON: *Oh right so it wasn't, uh, someone's tried to finger me*

MILLINGTON: *Nope*

LITTLETON: *and blacken my name*

MILLINGTON: Not as far as I'm aware.

LITTLETON: Okay mate.

MILLINGTON: Okay but otherwise I didn't tell you anything. And I'd prefer you didn't say anything.²⁶

(emphasis added)

[90] On 26 April 2007 the following email exchange²⁷ occurred between the Manager of the Regional Services Branch and Mr Millington.

From: John Looby

Sent: Thursday, 26 April 2007 9:01 AM

To: Peter Millington

Cc: Ian Jones

Subject: Littleton update – Confidential [sic]

Peter

SOU has information via Festival Seafoods (employee/ex employee?) is that Littleton is involved in major Swan River black-market crab operation, SOU will be be [sic] conducting some further investigative work and then executing a search warrant on Littleton's premises in the near future.

From: Peter Millington

Sent: Thursday, 26 April 2007 10:41 AM

To: John Looby

Cc: Ian Jones

Subject: RE: Littleton update – Confidential [sic]

John

Given that he has already contacted me about a possible investigation then this operation may be somewhat compromised. No doubt you have taken this into account.

I had a telephone conversation with Littleton earlier this week when he followed up his previous contact.

I told him we always try follow up any information on black market dealing and if there was such information on the table (as he had indicated there was) then he should not be surprised if we were following it up. However I indicated that I was not aware at that time of any specific operation targetted [sic] at him - which at the time was a true reflection of my state of knowledge.

He reiterated to me that he was no longer in the fishing game and pointed out again that given his accident last year with his hand he was in no physical condition to undertake illegal fishing.

No doubt I will get an interesting phone call when and if the search warrant is executed.

Peter

(emphasis added)

- [91] In evidence at a Commission private hearing on 24 September 2007 Mr Millington agreed that he had told Mr Littleton that there was a Department inquiry about crabs in the Swan River and that he had compromised the Departmental investigation in part by confirming the Department inquiry (which Mr Millington understood at the time was scheduled to commence at some time in May 2007).²⁸ Importantly, Mr Millington did not tell the Manager of the Regional Services Branch in his email dated 26 April 2007 (refer above) that he had advised Mr Littleton that there was a general Department inquiry and that Mr Littleton was one of the people that the Department would "have to consider". That gives rise to the inference that he knew he should not have done so.
- [92] However, while Mr Millington's actions compromised the fact of the investigation and had the potential to compromise its outcome, they did not in fact compromise the outcome because the substantial part of that investigation had occurred in February and March 2007, and Mr Littleton was subsequently charged with and convicted of numerous offences related to the illegal fishing and sale of blue swimmer crabs in the Swan River.²⁹

2.3 Mr Millington's Evidence at a Commission Private Hearing

- [93] On 24 September 2007 Mr Millington gave evidence at a Commission private hearing.
- [94] When he was asked whether or not he had been contacted by Mr Littleton about a potential Departmental investigation, Mr Millington said that he believed that he had been contacted on 3 occasions by Mr Littleton.³⁰
- [95] Mr Millington said that on the first occasion that he was contacted by Mr Littleton he notified the Manager of the Regional Services Branch and the Officer in Charge of the Serious Offences Unit.³¹
- [96] When Mr Millington was asked what his purpose was in making this notification he responded.

To find out what was going on because my normal protocol is not to get involved in any investigations, because I have to deal with these people on

*a policy basis and in a wide variety of - of arenas and I'd prefer not to know and in fact it is operationally safer if I don't know what's going on.*³²

[97] When Mr Millington was asked what he later told Mr Littleton he stated that he could not remember but had made a file note of it afterwards.³³ Following his examination Mr Millington was unable to find and produce this file note.

[98] In their section 86 representations, Mr Millington's lawyers³⁴ contend the Commission should expressly state that Mr Millington was not asked whether his email of Tuesday 4 [sic: 3] April 2007 to Mr Jones, was the file note to which he was referring. They assert in their representations that he says it was. The Commission notes the email was shown to Mr Millington during his examination and he did not suggest that then. Nonetheless, the email speaks for itself.

[99] Mr Millington was asked what he was told about the investigation. He stated that he had been told that there was a general investigation going on and that it would be preferable if he didn't talk to Mr Littleton about the matter. Again, he said that he had recorded this in "notes and emails".³⁵

[100] When Mr Millington was asked what he had told Mr Littleton he said that he might have said that there was a general investigation about illegal crab fishing but that he didn't know what he said about an investigation specifically targeted at Mr Littleton. Mr Millington said that this would be recorded in a file note. Mr Millington maintained that he was trying not to compromise the investigation.³⁶

[101] Mr Millington did not initially agree with a proposition put to him that he had compromised the investigation.³⁷ However, once he listened to a recording of his telephone conversation with Mr Littleton on 23 April 2007³⁸ Mr Millington accepted that he had compromised the investigation to the extent that he had confirmed that there was a Departmental investigation into illegal crab fishing in the Swan River.³⁹ That, of course, was so. Mr Millington was of the belief at that time (23 April 2007) that Mr Littleton was not (yet) the target of the illegal crab fishing investigation, however he told Mr Littleton –

- that there was an investigation under way,
- which was not targeting Mr Littleton, but
- he would obviously be one of the people they'd have to consider.

Mr Millington's lawyers claim, in the section 86 representations received by the Commission on 26 September 2008, the concession in evidence by Mr Millington that he had compromised the investigation to an extent should be removed as unfair,

*... in circumstances where it is accepted by the Commission ... that Mr Millington's actions did not in fact compromise the investigation at all.*⁴⁰

That is not an accurate statement of the Commission's opinion – which is that Mr Millington did compromise the investigation, but (fortunately) not the outcome of it.

- [102] Mr Millington was shown a series of emails between himself and the Manager of the Regional Services Branch dated 16 and 17 April 2007.⁴¹
- [103] The following is an excerpt of Mr Millington's evidence regarding some of the content of the emails:

Can I ask you why was leaving him guessing not an option?---Because of what I've said previously. The fact is that he would continue to phone me and me refusing to talk to him about the matter or lying to him about the matter I did not consider at the time in my judgment to be appropriate.

They weren't asking you to lie to him, were they?---No.

No? ---But refusing to take phone calls is not – not a matter of – of the way we do business or certainly not the way I do business: I return all phone calls.

In speaking---? ----So I then was in my judgement was put in the position I either lied – didn't receive his phone calls, which I didn't believe was acceptable, I lied to him, which I didn't believe was acceptable, or I gave him a prepared script.

THE COMMISSIONER: *Mr Millington, the usual acknowledged formula for something like that one might think is simply to say, "I can neither confirm nor deny", or words to that effect. Did that occur to you?---No.*

*That would not have presented you with any problem if you had put it that way though, would you, in terms of your dealing with him? ---No, it just simply didn't occur to me.*⁴²

- [104] Mr Millington was then asked to listen to and respond to lawfully intercepted information. At the completion of the audio recording of his telephone conversation with Mr Littleton on 23 April 2007⁴³ Mr Millington was asked, and responded to, several questions relating to this conversation.

*At the end there you tell him, "Otherwise I didn't tell you anything and I'd prefer you didn't say anything". Is that because you were aware that you were doing something you shouldn't have been doing?---No. Just that he'd - he'd asked - asked about an investigation and I told him there was a general one going on and generally, "Don't tell anybody", because he was a trusted individual.*⁴⁴

- [105] Mr Millington was asked to explain the following comment he made to Mr Littleton during the telephone conversation.

I mean, you would obviously be one of the people with - they'd have to consider because you're um - um er - in the past but there's obviously - you're not doing anything now, then it's not an issue.

What's that reference to "in the past"?---Well, he'd been a professional fisherman in the past, he'd been an informant about illegal activities in the past and one of the things they'd probably be looking at to him is to ask him what he knew.⁴⁵

[106] And later in his evidence Mr Millington further explained:

... They have to consider. If you had illegal fishing activity, then they'd actually have to have a look at his past activities to see what he could do to help them or how it fitted in.⁴⁶

[107] The evidence of Mr Williams was that Mr Littleton had previously been involved in illegal fishing in the 1980s⁴⁷ which appears to be a more plausible reason that Mr Millington may have made a reference to "in the past" – although Mr Millington denied that he knew that.⁴⁸

[108] Counsel Assisting the Commission asked Mr Millington questions about Mr Millington's comment to Mr Littleton that he could "neither confirm or deny".⁴⁹ The questions and responses are detailed below.

Did you tell him this because this is the official line that you wanted him to repeat if anyone ever asked you questions about this conversation?---I can't recall.

So why did you say this then?---I can't recall.

... and then you say, "But otherwise I didn't tell you anything" - - -?---Yep.

"- - - and I'd prefer you didn't say anything", and he says, "I won't say a word", and you say, "Thank you"?---Yep.

Why did you give him this warning, "But otherwise I didn't tell you anything"?---I can't recall. You're talking about a conversation which - amongst very many going back now six months.

Is it because you were aware that you had told him something that you weren't supposed to in light of the emails?---Again, you're asking me to speculate and I cannot recall.

You say, "I'd prefer you didn't say anything"?---Yes.

Why did you prefer that he didn't say anything?---Because if there's rumours of an investigation going around the place, the last thing you want to do is people to continually talk about it to - to - what's the word? - continue to pass on the rumours.

THE COMMISSIONER: *It's one thing of course to say, "I'd prefer you didn't say anything", for that reason?---Yes.*

But would you agree that reason doesn't actually fit with the sentence you have said before that, "Otherwise I didn't tell you anything". I mean, that doesn't matter does it if all you are saying to him is, "Don't tell anybody because we don't want more rumours spreading", or, "We don't want

*people to know"? You don't need to say, "I didn't tell you anything", in that context do you?---No, I probably shouldn't have said that.*⁵⁰

- [109] On numerous occasions during Mr Millington's evidence he referred to notes or file notes that he had made of his conversations with Mr Littleton.⁵¹
- [110] At the completion of his evidence Mr Millington was asked if he could produce these notes however, he has been unable to do so. The only handwritten notes located, which were on the file held by the Officer in Charge of the Serious Offences Unit, were in relation to the telephone call that Mr Millington received from Mr Littleton on the day that the Department executed the search warrant at Mr Littleton's premises.

2.4 Mr Williams

- [111] The following information was obtained in respect of Mr Williams.
- [112] During a lawfully intercepted telephone conversation between Mr Littleton and an unknown person,⁵² Mr Littleton said that he had seen a car following him and had telephoned Mr Williams a number of times to ask him if he could check the registration number of the vehicle.⁵³ Mr Littleton said that Mr Williams had been unavailable and that when he finally spoke to him Mr Williams had given Mr Littleton a cryptic message to stop illegal crab fishing by telling him to take a holiday.⁵⁴ Consequently, the Commission investigation also considered whether Mr Williams had compromised the Departmental investigation by providing a warning to Mr Littleton.

- [113] The following is an excerpt of this telephone conversation:

LITTLETON: *Ah, John Williams came out of retirement went back to the office.*

MALE: *Right.*

LITTLETON: *Uhm, it pissed me right off because I rang him and I said. Hey listen, this is what was going on and I said do you know anything about it? He said, I haven't heard anything, so.*

MALE: *Oh, right so you got, from the horses mouth then?*

LITTLETON: *You know. Yeah but then I, I rang him two days later and I saw another vehicle. And I got the rego number and I gave it to him. I said, does it ring any bells? And ah, he said, oh no. I said look I've got some people here, he says I'll have to ring you back. And then uhm, he didn't ring back, so I rang him.*

MALE: *Hmm.*

LITTLETON: *And uhm, he said oh, I don't know anything. Ah, oh I just suggest you take a holiday.*

MALE: *Hmm.*

LITTLETON: *And I said oh, is, is, is that a message is it?*

MALE: *I'd say so.*

LITTLETON: *No, I just think you should have a holiday.*

MALE: *Yeah.*

LITTLETON: *And ah, I said oh yeah. I said, well I'll ring you at home tonight and you can tell me why.⁵⁵*

- [114] Mr Williams gave evidence at a Commission private hearing on 27 September 2007 that he had received a telephone call from Mr Littleton during which Mr Littleton told him that a vehicle was following him which he suspected was a Department vehicle.⁵⁶ At the time Mr Williams said that he told Mr Littleton that he was busy and he excused himself. He said Mr Littleton telephoned him the next day and asked if he [Mr Williams] did not want to speak to him.⁵⁷
- [115] Mr Williams said that he was suspicious that Mr Littleton may be under investigation and he didn't want to scare him off, so Mr Williams said that he changed the subject and talked about a recent holiday that he and his wife had been on and suggested that Mr Littleton should take a holiday. He strenuously denied that this was a cryptic message to Mr Littleton that he was under investigation.⁵⁸

2.4.1 Advice to a Professional Fisherman

- [116] On 15 April 2007, during a telephone conversation between Mr Williams and a professional fisherman, Mr Williams was asked to provide advice for a friend of the caller who had recently been inspected by a Fisheries and Marine Officer after being caught fishing in a marine sanctuary with his two sons. They had a discussion about what was located and seized by the Department.⁵⁹ Mr Williams was told that the Department officers had requested that the friend take part in a video record of interview and that the caller was of the opinion that if his friend took part in the interview Department officers may be more lenient with him.⁶⁰
- [117] Mr Williams advised the caller that he should tell his friend not to take part in the video record of interview and that he should wait and see whether the Department had sufficient evidence to prosecute him.⁶¹
- [118] The following is an excerpt of the telephone conversation between Mr Williams and the professional fisherman on 15 April 2007.

WILLIAMS: *Ring him back and tell him, don't, don't engage in any video record. It's better not to come from me.*

FISHERMAN: *Oh, really?*

WILLIAMS: *Oh, shit yeah. I can't be seen to be a*

FISHERMAN: *No.*

WILLIAMS: *okay saying that sort of thing. But just tell him, say nothing. They've got his name and address and if they send him a, a thing to go to court well then he can, if they've got enough and then they send him something to go to court he can go and plead his case or say*

FISHERMAN: *Yeah.*

WILLIAMS: *I'm sorry, I didn't realize and give a, an excuse then but not, no, no, don't, don't talk, okay, ever.*

FISHERMAN: *No. Well that's just what he, he thought it might, especially if it's on a video, he says, without actually, you know*

WILLIAMS: *Oh, yeah.*

FISHERMAN: *See, well he thought it would be better, that he sh, you know shown to be a good bloke and shown that he's being*

WILLIAMS: *It won't help him, no.*

FISHERMAN: *cooperative and whatever else.*

WILLIAMS: *They never use it, they never use it to help ya.*

FISHERMAN: *No, that's what I sus, that's what I indicated. I said to him, I would have, I said I would have hoped you would have got an infringement notice but the fact that they're doing a, a video interview is, to me suggests that they're probably gunna go ahead with the prosecution. That's what I*

WILLIAMS: *That's right, so either way it won't make any difference but you don't want to give 'em anything so best not to talk to 'em at all. He's given 'em his name and address and that's it.*

FISHERMAN: *Yeah,*

WILLIAMS: *So he should.*⁶²

(emphasis added)

[119] And another excerpt later during the same telephone conversation:

WILLIAMS: *How old's his son?*

FISHERMAN: *Oh, ten or something.*

WILLIAMS: *Well they can't prosecute him, and, if it's in his son's name and his son's net well then, and they would want him to admit that he set the net.*

FISHERMAN: *Right.*

WILLIAMS: *See? So you don't want to be saying anything.*

FISHERMAN: *Yes, that's right.*

WILLIAMS: *It's the son's net so they can't prosecute him being ten. So, look he's just, all they can charge him with is fishing off the back of that boat.*

FISHERMAN: *Yeah, that's right.*

WILLIAMS: *Okay.*

FISHERMAN: *And then they've probably only got what he said at the time because*

WILLIAMS: *Yes that*

FISHERMAN: *I said if you had fish onboard your boat doesn't mean you caught 'em there even if you were fishing there.*

WILLIAMS: *No, definitely not. And at the moment they won't know, they probably won't even have asked how much of the fish they caught there or anything, you know.*

FISHERMAN: *Yeah, yeah.*

WILLIAMS: *I mean he can say oh no I didn't catch any of those fish I was just started when they came.*

FISHERMAN: *Yep, yep.*

WILLIAMS: *That's much better but I mean he can do all that later in court if it went that far, if they've got enough.*

FISHERMAN: *Yeah.*

WILLIAMS: *But don't give 'em anything. No don't talk to them for christ sake and I hope he hasn't spoken to them yet.*

FISHERMAN: *No I don't think so.*

WILLIAMS: *Oh good.*

FISHERMAN: *He said give me a couple of weeks to work out, uhm*

WILLIAMS: *Yeah.*

FISHERMAN: *timing and stuff.*

WILLIAMS: *Yeah so phone him back and tell him nothing, say nothing.⁶³*

(emphasis added)

[120] During this telephone conversation Mr Williams suggested that the caller's associate could infer that any fish that were in the boat had been caught before the associate entered the marine sanctuary and that the associate had just started to fish when the Department officers arrived. In effect, Mr Williams suggested a defence to the caller.

[121] On 16 April 2007 Mr Williams telephoned the same fisherman, and the following is an excerpt of that conversation.

WILLIAMS: *So he hasn't phoned me back but I thought maybe if you could ring him*

FISHERMAN: *Yep.*

WILLIAMS: *just to give him the word 'cos I don't really want to be in a position to have to.*

FISHERMAN: *No, no. Well I, I'd, I'm, I'm seeing Jeremy in a minute, so I'll, I'll talk to him about it. That, one thing I, I know he wanted, he was asking is, did you think that, ah, recreational type related offence, seeing he was just recreationally fishing, uhm, if he got a prosecution would that result in a black mark against his commercial licence?*

WILLIAMS: *No, no, not at all.*

FISHERMAN: Oh, okay.

WILLIAMS: No, definitely not.

FISHERMAN: Okay.

WILLIAMS: No, it's only if he was fishing off a rock lobster boat.

FISHERMAN: Which he was.

WILLIAMS: Oh, fuck.

FISHERMAN: (laughs)

WILLIAMS: Ah, yeah, but it's not in the rock lobster fisheries.

FISHERMAN: (laughs)

WILLIAMS: Nah, I'm saying he was only, he was only using it recreationally. He wasn't, and he wasn't

FISHERMAN: Oh yeah.

WILLIAMS: And he wasn't catchin' rock lobsters, so

FISHERMAN: No.

WILLIAMS: No, no. No, that

FISHERMAN: Okay.

WILLIAMS: No, that's alright.

FISHERMAN: Alright. So does that mean that, so that, that would, that would mean if I do anything that is, if I get knocked off for anything that's not abalone, commercial abalone related I can't get a black mark against Joe's licence?

WILLIAMS: No that's right.

FISHERMAN: Okay.

WILLIAMS: And I mean if, if you look at the legislation it says, ah, it's three offences under the, for the same offence sort of thing, two I think, it's not just (sighs)

FISHERMAN: Oh, okay.

WILLIAMS: Okay.

FISHERMAN: *Not just the one off.*

WILLIAMS: *Yeah, but say, say no, no.*

FISHERMAN: *Okay.*

WILLIAMS: *No worries at all.*

FISHERMAN: *Alright.*

WILLIAMS: *It's a separate thing and if he's only using it recre, because at that time he wasn't even allowed to be using it for rock lobster so he wasn't rock lobster fishing, so*

FISHERMAN: *No, no, that's right.*

WILLIAMS: *He's using the boat in the recreational sense anyway.*

FISHERMAN: *Yep.*

WILLIAMS: *No, no, tell him that's no worries.*

FISHERMAN: *Okay.*

WILLIAMS: *But put him out of his misery and tell him not to talk to anyone, but I didn't say that.⁶⁴*

[122] Mr Williams readily admitted to the conversations that he had with the caller about his friend and said that his conduct in relation to this matter was not appropriate.⁶⁵ Mr Williams expressed genuine regret about his behaviour, and subsequently resigned from the Department.

2.5 Mr Willey

[123] The following information was obtained in respect of Mr Willey.

[124] On 10 May 2007 investigators from the Department executed a search warrant at Mr Littleton's home address and seized property in relation to his illegal crab fishing including his boat, boat trailer, crab nets and other items of evidentiary value.⁶⁶

[125] The search was recorded on video and Mr Littleton was cautioned that he had the right to remain silent.⁶⁷

[126] That evening Mr Littleton telephoned Mr Willey, a former long-term Department officer, who had recently retired and been re-appointed on a short-term contract. During this telephone conversation, and another

conversation a short time later, Mr Willey continuously told Mr Littleton that he should not say anything if he was further interviewed by Department officers. Mr Willey also disclosed operational methodologies which may have been employed by the Department, such as, the placement of listening devices in Mr Littleton's car and the location of witnesses who could identify Mr Littleton's seized boat.⁶⁸

[127] During the following excerpt of the conversation between Mr Willey and Mr Littleton on 10 May 2007 Mr Willey told Mr Littleton how to deal with the Departmental investigation.

WILLEY: *Just say, uh, I never, never took anything there. Did he see ya take them there?*

LITTLETON: *See it's so bloody stupid, I mean nobody's, I thought they had to catch us with crabs*

WILLEY: *Well*

LITTLETON: *at one end or the other.*

WILLEY: *Yeah well the first, the first thing is, the first thing is if they've got no documentation saying that you got paid just say I never did it.*

LITTLETON: *Yeah.*

WILLEY: *That's it, I'm sorry I just never did it.*

LITTLETON: *Yep.*

WILLEY: *And, and that's it Kerry, it's finished. They're hunting for information on you. Right?*

LITTLETON: *So I don't have to justify?*

WILLEY: *You just shut up and say nothing. Just say look I've talked to you people, I haven't done anything wrong. When can I have my, uh, personal, when can I have my boat and anything else that you've taken back please? And that's it. But what about, look I have nothing more to talk to you. You know I'm Kerry Littleton. This is my home. You know that. I'm sorry I've got nothing more to talk to you, I haven't done anything wrong. That's it.*

LITTLETON: *...*

WILLEY: *Finished. Now sorry I've got things to do.*

LITTLETON: Alright.

WILLEY: Now that makes them then have to come forward and show there [sic] hand, see.

LITTLETON: Yeah well he kept on about, you know, saying that we, we saw what we thought was in, uh,

WILLEY: But Kerry ...

LITTLETON: ... your boat

WILLEY: Yeah he can think which he likes. It could have been bags of seaweed.

LITTLETON: Yeah, yeah.

WILLEY: It could have been anything. Well, you know.

LITTLETON: Yeah well, I mean, I got, I carry a couple of bags of blue metal that I

WILLEY: Now what

LITTLETON: put up the front

WILLEY: Yeah

LITTLETON: to keep the nose down.

WILLEY: Yeah just say you were out there fishing.

LITTLETON: Well

WILLEY: Line fishing.

LITTLETON: Yeah. Well, I mean, when they get here today the, the line, the fishing lines and everything are still in the boat.

WILLEY: Yep. Just say you were out line fishing.

LITTLETON: And uhm,

WILLEY: And you can see that there was line fishing, anyway see I've got nothing to talk to you about anymore. I haven't done anything wrong. When can I have my equipment back please?

LITTLETON: Yeah well I said to him

WILLEY: *That's all you say Kerry.*⁶⁹

(emphasis added)

[128] In a further part of the same conversation Mr Willey and Mr Littleton discussed the following:

LITTLETON: *On what I've told you, I, I don't believe that I've, that they can take it much further.*

WILLEY: *No well, unless, unless they find something at either of the places that you use to get rid of crabs.*

LITTLETON: *Yeah, unless they can find,*

WILLEY: *Yep.*

LITTLETON: *some paperwork relative to.*

WILLEY: *With your name on it.*

LITTLETON: *Yeah, well there was none of that.*

WILLEY: *Right. Or the people that run the place say no well he did come in and I, and I gave him such and such. But then that's his word against you.*

LITTLETON: *Yeah.*

WILLEY: *But then it startin' to get a bit heavy then. But uhm, there's no proof of it. I mean that's the whole thing, there's no proof of it. You know what I mean.*

LITTLETON: *Yeah, yeah.*

WILLEY: *There's no proof of it. He, he could be a bloke that doesn't like you and wants to say that to you.*⁷⁰

[129] In another excerpt:

WILLEY: *Well, how were you paid in your crabs? Were you paid by crab, by cash?*

LITTLETON: *Yeah.*

WILLEY: *Purely cash?*

LITTLETON: *Yeah.*

WILLEY: Now the people, the people that you sold the crabs to aren't gunna say, I hope

LITTLETON: Nuh. They, I

WILLEY: That they, that they bought any

LITTLETON: said to him one day

WILLEY: crabs. Eh?

LITTLETON: I said to him one day 'cos he short paid me and I called back in and he had a bit of paper. And I said, what are you gunna do with that? And he said, no, no, no, he said, that's just so uhm, the bloke in the next office, just so he knows what I've done. He said then it gets destroyed. And I said, you sure about that? And he said yeah. And I said alright, well, we'll call all this off now until everything cools down because I said it's just not worth it.⁷¹

[130] And another excerpt:

LITTLETON: If they had film footage they'd have to get pretty close to get film footage of

WILLEY: Yep.

LITTLETON: nets with crabs in 'em.

WILLEY: Yep. Oh look, they haven't. You would have had 'em covered anyway.

LITTLETON: Well, it was all covered. It was

WILLEY: Yeah, they,

LITTLETON: all tied up in hessian mate.

WILLEY: they wouldn't have a clue. They wouldn't, no, no that's alright, just don't say anything. You've said enough, you want a copy, you'd like you [sic] dingy and everything back please.⁷²

(emphasis added)

[131] During another part of the same conversation Mr Willey said:

WILLEY: They might have bugged your vehicle.

LITTLETON: Hey?

WILLEY: *They might have bugged your vehicle.*⁷³

(emphasis added)

[132] And another part:

WILLEY: *If they have got nothing on you, I wouldn't talk to them anymore, well, I wouldn't say anything to them anymore. Let them come to you with what they think. Don't talk to them, just say, look, I've talked to you people, I haven't done anything wrong. It's up to them to prove it.*⁷⁴

[133] In another excerpt Mr Willey and Mr Littleton talk about the presence of a grapple hook which is used to lift crab nets.⁷⁵

LITTLETON: *The only thing that could raise an eyebrow*

WILLEY: *Mm.*

LITTLETON: *in the boat was this old grapple but it's a super old, real old thing that we got from Roy Smith. It's a great big long thing with just three little hooks on the bottom.*

WILLEY: *That's what, that's what holds you on the bottom when you're fishing.*

LITTLETON: *That's right. I said*

WILLEY: *...*

LITTLETON: *You know, that's what, that's exactly what I said to him.*

WILLEY: *Yep.*

LITTLETON: *I said I haven't got sea anchor and it's to [sic] much trouble to throw it out but if I throw this out*

WILLEY: *Mm.*

LITTLETON: *it slow, it slows me down just enough to sorta drift*

WILLEY: *Yeah.*

LITTLETON: *along at a reasonable pace.*

WILLEY: *But isn't that a net, uh, uh, isn't that, isn't that a net grapple? Course it is. I used to be a professional fisherman but it's good for when I'm line fishing.*

LITTLETON: *Yeah, well*

WILLEY: *I'm not a professional fisherman any more.*⁷⁶

(emphasis added)

- [134] On numerous occasions Mr Willey told Mr Littleton not to say anything to Department officers and suggested excuses that he should use should he be questioned by the Department.⁷⁷
- [135] When questioned during a Commission private hearing on 27 September 2007 about his conversations with Mr Littleton, Mr Willey admitted that he had proffered explanations for Mr Littleton to provide to the Department.⁷⁸

CHAPTER THREE

OPINIONS AND CONCLUSIONS

3.1 Commission Opinions as to Misconduct

3.1.1 Mr Millington

[136] Having considered all the material gathered during the investigation the Commission has made the following assessment of the facts.

[137] Contrary to the advice provided to him by the Manager of the Regional Services Branch, Mr Millington told Mr Littleton that there was an investigation by the Department in respect of illegal crab fishing and said that Mr Littleton was one of the people that the Department would look at because of his past.

[138] The Commission does not accept Mr Millington's evidence that this was a reference by Mr Millington to Mr Littleton's potential to assist the investigation as an informant. In the Commission's assessment Mr Millington intended to indicate to Mr Littleton that the Department was conducting an investigation and he may be a person of interest. This is based on the facts detailed below.

1. Mr Littleton had asked Mr Millington whether there was a Departmental investigation about Mr Littleton being involved in illegal crab fishing in the Swan River. It was in this context that Mr Millington and Mr Littleton discussed the Departmental investigation.
2. Mr Millington had been told by the Serious Offences Unit that the Department had an information report that Mr Littleton had been involved in illegal crab fishing.
3. Mr Millington indicated that telling Mr Littleton nothing was "not an option", the consequence of which is that Mr Millington intended to tell Mr Littleton something about the Departmental investigation.
4. Mr Millington told Mr Littleton, during a telephone conversation on 23 April 2007, that: "There's a, an inquiry generally, not necessarily targeted at you, which is going on ..." and that "... you would obviously be one of the people with, they'd have to consider ...".⁷⁹
5. Mr Millington failed to tell the Manager of the Regional Services Branch by email on 26 April 2007 that he had in fact told Mr Littleton that there was a general investigation being conducted by the Department and that Mr Littleton was one of the people that the Department would "have to consider".⁸⁰

[139] Based on the above, the Commission has formed the opinion that Mr Millington intended to indicate to Mr Littleton that there was then an

investigation by the Department into illegal crab fishing in the Swan River and that he was potentially a target of that investigation.

[140] In summary, when he spoke to Mr Littleton on 23 April 2007 Mr Millington had been told that:

- the Serious Offences Unit was then conducting a (covert) investigation into illegal crab fishing in the Swan River;
- the Serious Offences Unit was “currently” not looking at Mr Littleton, but an information report indicated Mr Littleton may be involved in the illegal crab fishing;
- there was the potential for Mr Littleton to be a target in any future investigation of illegal Swan River fishing; and
- it was, therefore, inappropriate and improper to tell Mr Littleton anything, because it might compromise the investigation.

[141] The information Mr Millington in fact gave Mr Littleton on 23 April 2007 was that:

- the Department was conducting an investigation (into illegal crab fishing in the Swan River); and
- it was not (then) targeting Mr Littleton, but he would obviously be one of the people the investigators would have to consider.

[142] However, while Mr Millington’s actions had the potential to compromise the outcome of the Department’s investigation, it did not in fact do so because that investigation had substantially occurred in March 2007 and following it Mr Littleton was charged with the illegal fishing and sale of blue swimmer crabs.

[143] Nonetheless, the fact that Mr Millington provided information to Mr Littleton contrary to the entirely appropriate advice and specific warning of the Manager of the Regional Services Branch is concerning. The Commission has formed the opinion that at the time of the telephone conversation with Mr Littleton on 23 April 2007, Mr Millington knew that he should not have told Mr Littleton what he did, and this opinion is based on the following facts.

1. Mr Millington had been advised to neither confirm nor deny that there was any Departmental investigation. Yet Mr Millington was firm in his view that he would “need to tell him [Mr Littleton] something”.⁸¹ By reply email the point was reiterated to Mr Millington that Mr Littleton should not be told anything about the investigation.
2. During his telephone conversation with Mr Littleton on 23 April 2007 Mr Millington told Mr Littleton “but otherwise I didn’t tell you anything. And I’d prefer you didn’t say anything”.⁸² Mr Millington said this because he knew that he should not have told Mr Littleton what he did. The

Commission does not accept Mr Millington's evidence that he said this because he didn't want Mr Littleton to warn anyone else about the Departmental investigation. The information he had at that time was that Mr Littleton himself was a potential target.

- [144] In the Commission's assessment, Mr Millington's evidence at a Commission private hearing on 24 September 2007 showed a consciousness on his part that he knew he should not have told Mr Littleton what he did. Particularly, before being made aware that the Commission had a recording of a lawfully intercepted telephone call on 23 April 2007, in the Commission's assessment, Mr Millington was evasive and less than frank. His evidence that "it just simply didn't occur to [him]" to tell Mr Littleton he could neither confirm nor deny whether there was a Departmental investigation, cannot be accepted, in light of the advice earlier given to him by the Manager of the Regional Services Branch.
- [145] As the Acting Chief Executive Officer, Mr Millington should have acted in the interests of the Department so as to prevent the possible compromise of a covert Departmental investigation. In the Commission's opinion, by acting as he did Mr Millington acted with a lack of integrity by releasing confidential information about an investigation by the Department to a person he believed to be a potential target of that investigation, Mr Littleton.⁸³
- [146] The Commission has considered whether Mr Millington engaged in serious misconduct within the meaning of section 4(a) of the Act in that he corruptly acted in the performance of the functions of his office.
- [147] The essential elements of misconduct under section 4(a) of the Act are:
 - (1) the person is a public officer;
 - (2) the person corruptly acts or corruptly fails to act;
 - (3) in the performance of the functions of their employment.
- [148] Mr Millington is, and was at the relevant time, a public officer. Mr Millington released information about an investigation by the Department to a person he believed was potentially a target of that investigation. The fact that the Department was conducting an investigation was confidential on any view. The fact that it had been "leaked" did not alter that. As the Manager of the Regional Services Branch pointed out in his email to Mr Millington on 17 April 2007:

... To mention any information report would also compromise the matters by confirming the information which he [Mr Littleton] only has on hearsay and does not know if it is true. ...⁸⁴
- [149] As Acting Chief Executive Officer of the Department, Mr Millington's communications with Mr Littleton, and his response to the latter's inquiries about the Departmental investigation, were clearly made in the "performance

of the functions of [his] office or employment". In their section 86 representations Mr Millington's lawyers argue that the corrupt conduct to which section 4(a) of the Act is directed must occur in the exercise of some particular (that is, identified) function of the public officer's office or employment. Whether that be correct or not, Mr Millington was here dealing in his official capacity as acting Chief Executive Officer of the Department, with an inquiry by a member of the public, about an aspect of the operations of his Department. In the Commission's opinion, he was patently acting in the performance of the functions of his office or employment.⁸⁵

- [150] The question is whether Mr Millington could be said to have "corruptly acted" by releasing the information that he did to Mr Littleton.
- [151] Corruption is a notoriously difficult concept to define. The word is not defined in the 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.
- [152] 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* ("the Code"), Western Australia, "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 Code. 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 and so Malcolm CJ's reasons must be understood in that context. The case does, however, provide a useful guide to what is corruption in those circumstances.
- [153] 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)

- [154] 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.
- [155] 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, ie 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)

- [156] 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.
- [157] In the criminal law, the notion that a person may act corruptly does not of itself involve the gaining of a benefit or the causing of a detriment. For example, 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.

- [158] More importantly, the same distinction is made clear in section 4 of the Act itself. The word “corruptly” appears in both subsection 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.
- [159] 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.⁸⁶
- [160] Mr Millington’s lawyers submit⁸⁷ that if “corruptly” in section 4(a) and 4(b) were taken to mean no more than deliberate conduct contrary to the duties of a public officer, then any of the forms of misconduct in section 4(d) of the Act would also constitute “corruption” within the meaning of section 4(a).
- [161] That conduct proscribed in subsection 4(a) or (b) may also fall within subsection 4(d) is not only not to the point, but is not logical. The former represent more specific and more serious forms of misconduct; the greater (in section 4(a) and (b)) will necessarily also fall within the lesser (in section 4(d)), but the reverse is not the case. By way of example, conduct which “adversely affects, or could adversely affect, the honest or impartial performance of the functions of a public authority or [a] public officer ...”,⁸⁸ without more, would not likely fall within section 4(a) or (b). Furthermore, the qualification in section 4(d)(i)

... whether or not the public officer was acting in their public officer capacity ...

immediately covers conduct not within section 4(a), (b) or (c). So too, a public officer might contravene section 4(d)(ii) by conduct which “constitutes or involves” the performance of their functions in a manner that is not honest or impartial, in a way which does not constitute deliberate conduct contrary to the duties incumbent upon them by virtue of their office or employment (contrary to section 4(a)), or taking advantage of their office or employment to obtain a benefit or cause a detriment (contrary to section 4(b)); or whilst acting or purporting to act in their official capacity, committing an offence punishable by 2 or more years’ imprisonment. Even more clearly, a public officer might contravene section 4(d)(ii) by conduct which constitutes the performance of

their functions in a manner that is not honest or impartial, without that conduct amounting to

- an act (or failure to act) in the performance of their functions, deliberately and contrary to the duties imposed by their office or employment (section 4(a)); or which constitutes or involves the performance of their functions in a manner that is not honest or impartial (section 4(d)(ii)),
- conduct done deliberately, and contrary to the duties imposed by their office or employment, taking advantage of it, to gain a benefit or cause a detriment (section 4(b)); or which would constitute an offence of the kind nominated in section 4(c).

In short, conduct which falls within section 4(a), (b) or (c) would inevitably fall within one or more of section 4(d)(i), (ii), (iii) or (iv), but the converse would not be so.

[162] Ordinary dictionary definitions support the conclusion that in section 4 of the 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.⁸⁹ It involves the concept of a prohibited act undertaken with a wrongful intention.⁹⁰ The Commission accepts that the notion of “corruptly” in section 4(a) and (b) of the 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;⁹¹ an improper purpose;⁹² in circumstances in which there is some conflict between the public officer’s interests and their duty; or in some other relevant factor.⁹³

[163] 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 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.

[164] There is no doubt what Mr Millington did was done deliberately. In the Commission’s opinion, what he did was contrary to the duties incumbent upon him by virtue of his position. For the reasons explained below Mr Millington was under a duty, particularly as Acting Chief Executive Officer of the Department, to act in the public interest, to maintain the confidentiality of official information and to protect the integrity of Departmental investigations. As Acting Chief Executive Officer, he was responsible for ensuring the promotion and maintenance of appropriate standards of conduct within the Department. His obligations included that of leading by example.⁹⁴ What he

did was done deliberately contrary to the explicit advice and warning given to him, about what his duty required.

- [165] In the Commission’s opinion, Mr Millington allowed his duty to act with fidelity and integrity in the public interest, to be perverted by his conduct. In the Commission’s opinion, Mr Millington did not act out of any venal motive, but rather out of weakness: he sought to avoid what he saw as embarrassment at not being able to give a substantive answer to Mr Littleton’s queries. He was unable to act with the firmness and propriety which his duty – and his role as Acting Chief Executive Officer – demanded. He chose to put what he saw as personal embarrassment or an awkward situation, over his duty to act with integrity and in the public interest. He acted with a wrongful intention. In the circumstances, his breach of duty was attended by moral turpitude of a nature and kind sufficient to bring it within the meaning of “corruptly” in section 4(a) of the Act.
- [166] Nor can there be any doubt that, notwithstanding that he was Acting Chief Executive Officer, Mr Millington was not purporting to exercise his official discretion or authority to “authorise” the release of the information to Mr Littleton. Although he conveyed that information to Mr Littleton, he also said he could neither “confirm nor deny it, but ...” and said “I didn’t tell you anything”. There would have been no need for him to caution Mr Littleton this way, if he was making a proper disclosure.
- [167] Mr Millington’s conduct accordingly constitutes serious misconduct within the meaning of sections 3 and 4(a) of the Act.
- [168] The Commission has considered whether the same conduct also constitutes serious misconduct under section 4(b). That deals with the conduct of a public officer who corruptly takes advantage of their office or employment to obtain a benefit for, or cause a detriment to, any person. It could be concluded that he took advantage of his position to give the information to Mr Littleton, because he could not have obtained it otherwise. The second aspect of the question is whether or not he did so to gain a benefit for himself or another, or to cause someone a detriment.
- [169] There is certainly no evidence of any financial benefit to be gained by Mr Millington from disclosing the information he did to Mr Littleton. Having regard to what he said at the time to both Mr Littleton and the Manager of the Regional Services Branch, and later to the Commission, it seems the only personal benefit Mr Millington sought to gain was the avoidance of awkwardness or embarrassment in his dealings with Mr Littleton. In the Commission’s assessment that could not reasonably be regarded as sufficient to constitute a “benefit” for himself for the purpose of forming an opinion whether or not his conduct was “corrupt”.
- [170] Further, there is nothing before the Commission to suggest Mr Millington’s purpose was to gain or provide a benefit to Mr Littleton. In particular, the material does not show that he sought to assist Mr Littleton escape discovery in the Departmental investigation, nor warn him to cease any unlawful activity

(although on any reasonable view, if Mr Littleton had in fact been engaged in such activity, that would have been the likely consequence of revealing the information to him). When he gave Mr Littleton the information he did, Mr Millington knew there was an investigation being conducted, but not that Mr Littleton was then a subject of it. Nor (for the same reasons) could the material support an opinion that Mr Millington's purpose was to cause detriment to the Department (and hence the State) by assisting Mr Littleton to defeat the Departmental investigation.

- [171] As the material before the Commission does not establish any specific purpose on Mr Millington's part to gain a benefit for himself or another or to cause detriment to another, his conduct cannot constitute "serious misconduct" under section 4(b) of the Act. The Commission turns to consider whether it could also constitute misconduct under section 4(d)(iii) and (v) of the Act.
- [172] Misconduct under section 4(d)(iii) and (v) will relevantly be shown where
 - a public officer
 - engages in conduct that
 - "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", and
 - constitutes or could constitute an offence against a written law.
- [173] Mr Millington was a public officer and in his dealings with Mr Littleton was acting or purporting to act in his official capacity.
- [174] Mr Millington's actions constituted or involved a breach of trust because as an officer of the Department – and in particular because he was Acting Chief Executive Officer – he was under a duty to act in the public interest, to maintain the confidentiality of official information and protect the integrity of Departmental investigations of possible offences against legislation it was the Department's responsibility to administer. In the Commission's opinion, his actions breached his duty in each of those respects.
- [175] Section 81(2) of *The Criminal Code* provides that: "A person who, without lawful authority, makes an unauthorised disclosure is guilty of a crime and is liable to imprisonment for 3 years".
- [176] In section 81(1) of *The Criminal Code* an "unauthorised disclosure" is defined to include a "disclosure by a person who is a public servant ... of official information in circumstances where the person is under a duty not to make the disclosure".
- [177] "Official information" is defined in section 81(1) of *The Criminal Code* to mean "information, whether in a record or not, that comes to the knowledge of, or into the possession of, a person because the person is a public servant or government contractor".

- [178] The basis of the “duty not to disclose” official information is not set out in *The Criminal Code*.
- [179] The PSM Act and the *Public Sector Management (General) Regulations 1994* do not specify what a person may or may not disclose.
- [180] However, Administrative Instruction 711 does have statutory force through the PMS Act.
- [181] Administrative Instruction 711 provides that:

An officer shall not, except in the course of the officer’s official duty and with the express permission of the chief executive officer,

- 1. (a) *give to any person any information relating to the business of the Public Service or other Crown business that has been furnished to the officer or obtained by the officer in the course of his/her official duty as an officer; or*
- (b) *disclose the contents of any official papers or documents that have been supplied to the officer or seen by the officer in the course of his/her official duty as an officer or otherwise ...*

- [182] In 1994 the PMS Act was enacted and replaced the *Public Service Act 1978* (“the PSA”). Administrative Instructions were made pursuant to section 19 of the PSA. Section 19 provided that:
 - (1) *To the extent that it is practicable to do so, the Commissioner may perform his or her functions by administrative instructions published, notwithstanding section 41 of the “Interpretation Act 1984”, in Public Service notices but not in the “Gazette”.*
 - (2) *Administrative instructions are subsidiary legislation, but section 42 of the “Interpretation Act 1984” does not apply to or in relation to them.*
 - (3) *Administrative instructions shall come into operation on the day on which they are published under subsection (1) or on such later day as is specified in them.*

- [183] Although the PSA was repealed, Administrative Instructions made pursuant to section 19 of the PSA continue to have statutory force. This is because section 110 of the PMS Act provides that following the repeal of the PSA, the transitional provisions set out in Schedule 5 have effect.
- [184] Paragraph 5 of Schedule 5 relates to Administrative Instructions and reads as follows:

(1) Administrative instructions which were in operation under section 19 of the repealed Act immediately before the commencement of

this clause continue in operation, with such modifications as are necessary, after that commencement until repealed by –

- (a) *a public sector standard or code of ethics established under this Act;*
- (b) *approved procedures under this Act; or*
- (c) *regulations made under section 108.*

(2) The repeal under subclause (1) of any administrative instructions shall be accompanied on the day of that repeal by a notification of that repeal made by the Minister in public service notices.

[185] Administrative Instruction 711 has not been repealed and therefore continues to be subsidiary legislation.

[186] Similarly, Regulation 8 of the *Public Service Regulations 1988* continues to have statutory force under section 110 and paragraph 18 of Schedule 5 of the PSM Act. Regulation 8 provides that:

An officer shall not –

...

- (b) *use for any purpose, other than for the discharge of official duties as an officer, information gained by or conveyed to that officer through employment in the Public Service.*

[187] Public sector standards have statutory force as subsidiary legislation (section 9 and section 21 of the PSM Act). Public sector standards provide, among other things, that employees must: “refrain from using any circumstance or information connected to official duties for personal profit or gain” and “protect privacy and confidentiality”.

[188] In Cortis v R⁹⁵ Burt CJ held that the duty of a public servant not to disclose official information under the then relevant regulation⁹⁶ was to keep secret all documents that had been supplied or seen in the course of official duty, irrespective of the circumstances under which the information came to the knowledge of the public servant. The Chief Justice rejected the argument that the “duty not to make the disclosure” in section 81 of *The Criminal Code* arose from the facts and circumstances in which the information came to the knowledge of the public servant and only existed with respect to information not known to the world at large.

[189] A number of decisions relating to section 70 of the *Crimes Act 1914* (*Clth*) were initially decided similarly to Cortis.

[190] Section 70 of the *Crimes Act 1914* provides that:

- (1) *A person who, being a Commonwealth officer, publishes or communicates, except to some person to whom he is authorized to publish or communicate it, any fact or document which comes to his*

or her knowledge, or into his or her possession, by virtue of being a Commonwealth officer, and which it is his duty not to disclose, shall be guilty of an offence.

- [191] In News Corporation Ltd v National Companies and Securities Commission (1984) 52 ALR 277 at 282) and Federal Commissioner of Taxation v Swiss Aluminium Australia Ltd (1986) 66 ALR 159 at 163) it was held that section 70 defines the information which is not to be disclosed only by reference to the fact that it came into the possession of the officer by virtue of his office. This is a similar interpretation of the duty as accepted by Burt CJ in Cortis.
- [192] However, that position changed. In Re Lapham and Office of Community Advocate (1998) 53 ALD 485) it was held that in respect of section 70 information held by the public officers was forbidden from disclosure only if there was an obligation of confidentiality in relation to the information.
- [193] Importantly in Deacon v ACT [2001] ACTSC 8 it was held that:

Whether a duty of confidentiality arises so that s70 of the Crimes Act can punish its breach will depend on the type of information, the circumstances in which it has been acquired and the interests of relevant parties in keeping it confidential. A consideration of the public interest must also be relevant. The duty to keep information confidential may attach to information of any kind but it must be such and acquired in such circumstances that such a duty arises. It does not arise merely because the information is obtained by an officer in the course of his or her duties.

- [194] Under section 81(2) of *The Criminal Code*, the offence of unauthorised disclosure will be committed only if the disclosure is made “without lawful authority”.
- [195] In Deacon Higgins J said that the phrase “without lawful authority”
*would permit disclosure of information where the law would not recognise any need for confidentiality or, even if such a duty would usually be implied, where a higher public interest recognised by law would require or, at least authorise, disclosure.*⁹⁷
- [196] In Snell v Pryce⁹⁸ the court looked at the meaning of “confidential information”. It was held that the expression,

cannot ... without more, include matters of common knowledge or readily accessible information such as names and addresses published in the telephone directory. However confidential the circumstances of communication, there can be no breach of confidence in revealing to others something which is already common knowledge... Unquestionably the Police Department treats information stored in its computer or accessible through its terminals as confidential and so instructed its staff, including the appellant. However, in my view that is not enough. The prosecution must lead evidence that the information is otherwise inaccessible and therefore confidential.

[197] When considering authorities on questions of statutory construction, it is always necessary to have regard to the terms of the statutory provision and the factual circumstances which are held to fall within or outside it, in the particular case. It is not necessary to deal with those matters in detail here, but the Commission notes that in Deacon the question was whether the Commonwealth could rely upon a public service confidentiality provision to prevent a public servant giving a witness statement to a lawyer acting for a plaintiff in a personal injury action. In Snell, Angel J was dealing with the release by a police officer of names, addresses and dates of birth obtained from a police computer. Albeit coming from a “secure” source, all that information was otherwise publicly available. It was therefore not “confidential”.

[198] By contrast, the fact that the Department was conducting an investigation was confidential on any view. The fact that it had been “leaked” did not alter that. As Mr Looby pointed out in his email to Mr Millington on 17 April 2007,

To mention any information report would also compromise the matters by confirming the information which he only has on hearsay and does not know if it is true. ...

[199] Nor can there be any suggestion that, as Acting Director General, Mr Millington was deliberately making an authorised release of information – although he conveyed the information to Mr Littleton, he told Mr Littleton he could neither “confirm nor deny it” and said “I didn’t tell you anything”.

[200] The Commission does not determine guilt or innocence of criminal offences – that is for the courts. The Commission is required only to form opinions, which have no binding effect in law. In the opinion of the Commission, Mr Millington made an unauthorised disclosure of official information to Mr Littleton, without lawful authority, in circumstances in which he was under a duty not to make the disclosure. In the Commission’s opinion, a properly instructed jury could be satisfied beyond reasonable doubt, on admissible evidence, that Mr Millington’s conduct constituted an offence contrary to section 81 of *The Criminal Code*. It follows that his actions constitute misconduct under section 4(d)(iii) and (v) of the Act.

[201] The Commission reiterates that an opinion by it that misconduct has occurred is not, and is not to be taken as, a finding or opinion that Mr Millington has committed a criminal or disciplinary offence.⁹⁹

[202] In the Commission’s opinion Mr Millington’s conduct in disclosing the information he did to Mr Littleton, was misconduct, also because it –

- constituted or involved a breach of the trust placed in him by reason of his office or employment as a public officer (paragraph 4(d)(iii) of the Act); and
- 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 PSM Act.

[203] The Commission is satisfied that Mr Millington's conduct meets the criteria of paragraph 4(d)(vi) of the Act in that it 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)".

[204] 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.*

(emphasis added)

[205] 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.

- [206] A breach of discipline may be a minor breach or a serious breach.
- [207] 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.
- [208] 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.
- [209] The procedure for dealing with a charge of a serious breach of discipline is set out in section 86 of the PSM Act.
- [210] 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 ... and the employing authority finds the charge to be proved, the employing authority –

(b) *may –*

- (i) *reprimand the respondent;*
- (ii) *transfer the respondent ...;*
- (iii) *impose on the respondent a fine not exceeding an amount equal to the amount of remuneration received by the respondent in respect of the period of 5 days during which he or she was at work immediately before the day on which the finding of a breach of discipline was made;*
- (iv) *reduce the monetary remuneration of the respondent;*
- (v) *reduce the level of classification of the respondent; or*
- (vi) *dismiss the respondent,*
or, except when the respondent is dismissed under subparagraph (vi), take action under any 2 or more of the subparagraphs of this paragraph.

(emphasis added)

[211] 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).

[212] 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 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) of the PSM Act.

[213] The Department *Code of Conduct Policy* (last reviewed March 2003), with respect to release of information, provides that –

Department of Fisheries employees shall not release information determined by the Department, or by legislation, to be confidential. However, as a general rule, we should make available any non-confidential information and inform others about decisions that affect them.

- *The Department is responsible for specifying what is determined as confidential information. We are required to maintain the confidentiality of such information at all times, unless lawfully authorised or directed otherwise.*
- *We will observe the confidentiality provision of any Act of Parliament pertaining to our employment or to the operations of the Department.*
- *In every case, personal information about any individual or group obtained in the course of one's employment is to be kept confidential, unless lawfully authorised or directed otherwise.*
- *All other classes of information are to be treated in a manner consistent with the requirements of the "Freedom of Information Act 1992", in that information which has not been classified as protected should be available to the public.*

[214] The Commission has already noted above the confidentiality obligations imposed by Administrative Instruction 711 through the PSM Act.

[215] In the opinion of the Commission, the conduct described above could constitute a breach of a public sector standard or code of ethics contrary to section 80(b)(ii) of the PSM Act or an act of misconduct contrary to section 80(c) of the PSM Act.

[216] In ordinary use, "misconduct" means –

"unacceptable or improper behaviour, especially by a professional person."

(*Compact Oxford English Dictionary of Current English*, Third Edition, p.649)

“1 improper or unprofessional behaviour. 2 bad management ...”

(*The Australian Concise Oxford Dictionary*, Fourth Edition, p.895)

“1 improper conduct; wrong behaviour. 2 unlawful conduct by an official in regard to his or her office, or by a person in the administration of justice, such as a lawyer, witness or juror.”

(*Macquarie Dictionary*, Fourth Edition, p.914)

“1 Improper or wrong behaviour; (in *pl.*) instances of improper or wrong behaviour. 2 Bad management, mismanagement; *esp.* culpable neglect of duties ...”

(*Shorter Oxford English Dictionary*, Sixth Edition, p.1796)

The use of the word in a section of an Act regulating matters to do with the public service of the State and public officers specifically, obviously means the misconduct referred to in section 80(c) must relate to, or bear upon, the conduct of the person as a public officer. It would clearly include unlawful conduct but relevantly here must necessarily also encompass unacceptable, improper or unprofessional or wrong conduct less than that which is unlawful. For the reasons already given, it is the Commission’s opinion that Mr Millington’s conduct constituted a breach of the applicable public sector standard and code of ethics, a failure to act with integrity in the use of official information and a failure to be scrupulous in the use of official information. It could accordingly constitute a breach of discipline under the PSM Act.

[217] In the Commission’s assessment, Mr Millington’s actions could constitute a serious breach of discipline for the purposes of section 83(1)(b) and 86 of the PSM Act. That is because:

- he was at the time the Acting Chief Executive Officer of the Department, whose responsibility it was to instil and maintain a culture of integrity and compliance with public sector standards and ethics;
- the information he gave had the potential to compromise a Departmental investigation into possible criminal or regulatory offences; and
- his disclosure was deliberate and made in the face of clear departmental advice that it should not be made and how he should properly respond to Mr Littleton’s inquiries.

[218] In the Commission’s opinion his conduct could constitute a disciplinary offence providing reasonable grounds for termination of a person’s office or

employment as a public service officer, within the meaning of section 4(d)(vi) of the Act.

[219] The Commission notes that this opinion is not to be taken as a finding or opinion that Mr Millington has committed a disciplinary offence.¹⁰⁰ The Commission further notes that clearly enough, the notion that conduct could be of that character is not the same as whether it in fact is and that termination of office or employment is the penalty which ought to be imposed. As to those matters, the Commission makes no comment.

3.1.2 Mr Williams

3.1.2.1 Release of Information to Mr Littleton

[220] In the Commission's assessment Mr Williams did not engage in misconduct by providing Mr Littleton with information about the Departmental investigation. During a lawfully intercepted telephoned conversation between Mr Littleton and an unknown person, Mr Littleton said that Mr Williams had given him a cryptic message to stop illegal crab fishing by telling him to take a holiday.¹⁰¹ The telephone conversation referred to between Mr Littleton and Mr Williams was not intercepted.

[221] Mr Williams gave evidence at a Commission private hearing on 27 September 2007 that he did tell Mr Littleton to "take a holiday", but that he did not intend to provide Mr Littleton with a cryptic message to stop illegal crab fishing. Mr Williams said that he was suspicious that Mr Littleton may be under investigation and he didn't want to scare him off, so Mr Williams said that he changed the subject and talked about a recent holiday that he and his wife had been on and suggested that Mr Littleton should take a holiday. He strenuously denied that this was a cryptic message to Mr Littleton that he was under investigation.¹⁰²

[222] The comment made by Mr Williams was open to interpretation. However, without the conversation having been intercepted, Mr Williams' evidence that he was not warning Mr Littleton about the Departmental investigation but instead that he was literally meaning that Mr Littleton "take a holiday" cannot properly be assessed. Given Mr Littleton's evidence to the Commission, namely, that Mr Williams told him that he was not giving him a "message" and Mr Williams' evidence, namely, that he was not intending to give Mr Littleton a warning,¹⁰³ the Commission has formed the opinion that the evidence does not establish that Mr Williams engaged in misconduct by providing Mr Littleton with information about the Departmental investigation.

3.2.2.2 Advice to a Professional Fisherman

[223] In the Commission's opinion Mr Williams engaged in serious misconduct within the meaning of section 4(a) of the Act in respect of his telephone conversations with a professional fisherman. During these conversations he suggested that the fisherman's associate offer a false explanation to Fisheries and Marine Officers to explain an illegal catch by that fisherman's associate.

He also provided reasons why the fisherman's associate should not take part in a video record of interview with the Department. Mr Williams engaged in serious misconduct in that he used his experience as a Fisheries and Marine Officer to provide information to assist a person that he knew was being investigated by the Department. By so doing he corruptly failed to act in the performance of his functions as a Fisheries and Marine Officer in circumstances where his primary function included policing the Fisheries legislation.

- [224] In accordance with the essential elements of serious misconduct pursuant to section 4(a) of the Act and the law in respect of the meaning of "corruptly", the Commission has formed the opinion that what Mr Williams did was done deliberately. In the Commission's opinion, what he did was contrary to the duties incumbent upon him by virtue of his position and was done to benefit the person who was the subject of the investigation.
- [225] The Commission points out that an opinion by it that misconduct has occurred is not, and is not to be taken as, a finding or opinion that Mr Williams has committed a criminal or disciplinary offence.¹⁰⁴
- [226] In view of the fact that Mr Williams is no longer employed by the Department the Commission accepts that no disciplinary action can be commenced in respect of Mr Williams. However, the Commission recommends that Mr Williams is not considered for appointment for future short-term contracts with the Department.
- [227] Further, the Commission does not recommend that the Director of Public Prosecutions consider the prosecution of Mr Williams for attempting to pervert the course of justice contrary to section 143 of *The Criminal Code* because the Commission considers that there would be difficulty establishing a charge of attempt to pervert based on establishing the "course of justice" and because there is a strong public interest against proceeding with a charge against Mr Williams who cooperated with the Commission, resigned his position with the Department and because of the availability of alternatives to prosecution in accordance with paragraph 31(h)¹⁰⁵ of the Director of Public Prosecution's *Statement of Prosecution Policy and Guidelines 2005*.

3.1.3 Mr Willey

- [228] The Commission is of the opinion that Mr Willey engaged in serious misconduct within the meaning of section 4(a) of the Act in respect of his telephone conversations with Mr Littleton during which he suggested a false explanation that could be offered to officers of the Department to explain the:
 - presence of something (illegal crabs) in Mr Littleton's boat when he came out of the river;
 - evidence relating to disposal (sale) of the crabs; and
 - use and presence of a grappling hook.

- [229] Mr Willey also told Mr Littleton that he should not take part in a video record of interview with the Department. Mr Willey engaged in serious misconduct in that he used his experience as a Fisheries and Marine Officer to provide information to assist a person that he knew was being investigated by the Department. By so doing he corruptly failed to act in the performance of his functions as a Fisheries and Marine Officer in circumstances where he was at the time employed by the Department (albeit in a fleet maintenance role) and had previously been employed as a Fisheries and Marine Officer where his primary function included policing the Fisheries legislation.
- [230] In accordance with the essential elements of serious misconduct pursuant to section 4(a) of the Act and the law in respect of the meaning of “corruptly”, the Commission has formed the opinion that what Mr Willey did was done deliberately, it was contrary to the duties incumbent upon him by virtue of his employment with the Department and it was done to benefit the person the subject of the investigation.
- [231] The Commission points out that an opinion by it that misconduct has occurred is not, and is not to be taken as, a finding or opinion that Mr Willey has committed a criminal or disciplinary offence.¹⁰⁶
- [232] In view of the fact that Mr Willey is no longer employed by the Department the Commission accepts that no disciplinary action can be commenced in respect of Mr Willey. However, the Commission recommends that Mr Willey is not considered for appointment for future short-term contracts with the Department.
- [233] Further, the Commission does not recommend that the Director of Public Prosecutions consider the prosecution of Mr Willey for attempting to pervert the course of justice contrary to section 143 of *The Criminal Code* because the Commission considers that there would be difficulty establishing a charge of attempt to pervert based on establishing the “course of justice” and because there is a strong public interest against proceeding with a charge against Mr Willey who cooperated with the Commission, resigned his position with the Department and because of the availability of alternatives to prosecution in accordance with paragraph 31(h)¹⁰⁷ of the Director of Public Prosecution’s *Statement of Prosecution Policy and Guidelines 2005*.

3.2 Recommendations

- [234] The Commission makes three specific recommendations. They relate to the conduct of Mr Millington, Mr Williams and Mr Willey.
- [235] Given its conclusions at [165]-[166] above, the Commission has considered whether it should recommend that the Director of Public Prosecutions consider the prosecution of Mr Millington for an offence of unauthorised disclosure of official information, contrary to section 81 of *The Criminal Code*. In the Commission’s opinion such a recommendation should not be made.

Factors which weigh particularly in leading to that opinion include those detailed below.

- Although there was an unauthorised disclosure and it was made with a wrongful intention, it was not the product of any venal, dishonest or sinister purpose. Mr Millington did not do it to obtain any specific benefit for himself or Mr Littleton, nor to cause any specific detriment to anyone.
- The unauthorised disclosure was made out of personal weakness and an incapacity on his part to act with the firmness and propriety which his role and public duty demanded in the circumstances.
- Although his disclosure compromised the Departmental investigation, it (fortuitously) did not compromise the outcome of it.
- This was an isolated incident; there is no suggestion Mr Millington made an unauthorised disclosure on any other occasion.
- The seriousness of his conduct can be adequately recognised by disciplinary proceedings under the *Public Sector Management Act 1994*, should such proceedings be thought appropriate.

[236]

Recommendation 1

That consideration be given to the taking of disciplinary action against Mr Peter James Millington by the Director General of the Department of the Premier and Cabinet in relation to his disclosure of confidential information about a Department of Fisheries investigation to the target of that investigation, Mr Kyran Richard Littleton.

Recommendation 2

The Commission recommends that Mr John Graham Williams is not considered for future appointment or any contractual work by the Department of Fisheries.

Recommendation 3

The Commission recommends that Mr Peter Charles Willey is not considered for future appointment or any contractual work by the Department of Fisheries.

APPENDIX

**Media Release, Department of Fisheries Western Australia,
Tuesday 27 November 2007: *Illegal Sale of Swan River Crabs
Nets Big Fine***

Media Releases

Illegal sale of Swan River crabs nets big fine

Date: Tuesday, 27 November 2007

A Roleystone man was today ordered to pay a total of \$20,611 to cover a fine, court costs and mandatory penalty, for unlawfully selling crabs he had caught in the Swan River.

In the Perth Magistrates Court, 64-year-old Kyran Richard Littleton pleaded guilty and was fined \$2,000 plus costs of \$569.20 for the illegal fishing and sale of blue swimmer crabs, discovered through a Department of Fisheries surveillance operation in March.

A Perth court was told that Littleton did not have a commercial fishing permit to take blue swimmer crabs from the Swan River, when he illegally sold more than 300 kilograms of them between the 26 January and 31 March this year.

Under Section 222 of the Fish Resources Management Act, he was also ordered to pay a mandatory penalty of \$18,042 - ten times the prescribed value for the weight of crabs involved.

Littleton had previously worked as an authorised commercial fisher in the Swan River, which is part of the West Coast Estuarine Fishery. He sold his permit in December 2003.

Department of Fisheries Acting Regional Services Manager Tina Thorne said the fine and the additional mandatory penalty reflected the seriousness of the offender's actions, as did the court order for Littleton to forfeit his vessel (plus trailer) and the ruling that he be banned from any fishing activity for twelve months.

"This type of illegal activity is not only a significant threat to the sustainability of WA's fish stocks, it is also unfair on the recreational and commercial fishers who fish legitimately in the Swan River," Ms Thorne said.

"The offender used highly effective methods and equipment, which enabled him to catch commercial quantities of crabs.

"Offences like this are also very difficult to detect and the extent of this one only came to light as the result of a covert operation by Fisheries and Marine Officers and their follow-up investigation of the offenders activities."

Ms Thorne urged members of the public to report any illegal fishing and unlawful fish sales activity, by calling the Department's FISHWATCH number 1800 815 507. The service operates 24 hours a day 7 days a week.

More information about FISHWATCH is available online at www.fish.wa.gov.au.

ENDNOTES

All references to telephone intercepts are references to lawfully intercepted telephone intercepts.

¹ Telecommunications Intercept, T 1422, 23 April 2007.

² 10 May 2007

³ Telecommunications Intercept, T 1455, 11 April 2007.

⁴ Telecommunications Intercept, T 1447, 15 April 2007.

⁵ Telecommunications Intercepts, T 1430, T 1432, T 1427, T 1433, T 1435, T 1436 and T 1437, 10 May 2007.

⁶ Cox v Corruption and Crime Commission [2008] WASCA 199 per Martin CJ at [67].

⁷ Telecommunications Intercept, T 1422, 23 April 2007, *op cit.*

⁸ Section 23 of the *Corruption and Crime Act 2003*.

⁹ Telecommunications Intercept, T 1447, 15 April 2007, *op cit.*

¹⁰ Telecommunications Intercepts, T1430, T1432, T1427, T1433, T1435, T1436 and T1437, 10 May 2007, *op cit.*

¹¹ Transcript of Proceedings, Private Examination of Mr Peter James Millington on 24 September 2007.

¹² 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) Act 1979* of the Commonwealth and for related purposes.

¹³ *Telecommunications (Interception and Access) Act 1979* (Commonwealth), p.17.

¹⁴ Butterworths Concise Australian Legal Dictionary (Third Edition), Lexis Nexis Butterworths, Australia 2004, p.42.

¹⁵ *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.

¹⁶ Section 86 representations on behalf of Mr Peter James Millington dated 26 September 2008, Jackson McDonald Lawyers.

¹⁷ Transcript of Proceedings, Private Examination of Mr Peter James Millington on 24 September 2007, *op cit.*, pp.7-14.

¹⁸ Email to Mr Ian Jones, Officer in Charge, Serious Offences Unit, Regional Services Branch, Department of Fisheries Western Australia, of 3 April 2007, 11:34 a.m., from Mr Peter Millington [00676-2007-0037].

¹⁹ Section 86 representations on behalf of Mr Peter James Millington dated 26 September 2008, Jackson McDonald Lawyers, *op cit.*

²⁰ *Ibid.*

²¹ *Ibid.*

²² *Ibid.*

²³ Email to Mr Peter Millington of 16 April 2007, 12:44 p.m., from the Manager of the Regional Services Branch, Department of Fisheries Western Australia [00676-2007-0038].

²⁴ Email to the Manager of the Regional Services Branch, Department of Fisheries Western Australia, of 16 April 2007, 1:41 p.m., from Mr Peter Millington [00676-2007-0038].

²⁵ Email to Mr Peter Millington of 17 April 2007, 8:20 a.m., from the Manager of the Regional Services Branch, Department of Fisheries Western Australia [00676-2007-0038].

²⁶ Telecommunications Intercept, T 1422, 23 April 2007, *op cit.*

²⁷ Email exchange between the Manager of the Regional Services Branch, Department of Fisheries Western Australia, and Mr Millington of 26 April 2007, 9:01 a.m. and 10:41 a.m. [00676-2007-0028].

²⁸ Transcript of Proceedings, Private Examination of Mr Peter James Millington on 24 September 2007, *op cit.*, p.22.

²⁹ See Department of Fisheries Western Australia Media Release, Tuesday 27 November 2007, the Appendix to this report.

³⁰ Transcript of Proceedings, Private Examination of Mr Peter James Millington on 24 September 2007, *op cit.*, p.7.

³¹ *Ibid.*, p.8.

³² *Ibid.*, p.12.

³³ *Ibid.*

³⁴ Section 86 representations on behalf of Mr Peter James Millington dated 26 September 2008, Jackson McDonald Lawyers, *op cit.*, at [20].

³⁵ Transcript of Proceedings, Private Examination of Mr Peter James Millington on 24 September 2007, *op cit.*, p.13.

³⁶ *Ibid.*

³⁷ *Ibid.*

³⁸ *Ibid.*, pp.20-21, and Telecommunications Intercept, T 1422, 23 April 2007, *op cit.*, and Telecommunications Intercept T 1423, 23 April 2007.

³⁹ Transcript of Proceedings, Private Examination of Mr Peter James Millington on 24 September 2007, p.22, *loc cit.*

⁴⁰ Section 86 representations on behalf of Mr Peter James Millington dated 26 September 2008, Jackson McDonald Lawyers, *op cit.*, at [21].

⁴¹ See emails detailed previously in this Chapter.

⁴² Transcript of Proceedings, Private Examination of Mr Peter James Millington on 24 September 2007, *op cit.*, pp.17-18.

⁴³ Telecommunications Intercept, T 1422, 23 April 2008, *op cit.*

⁴⁴ Transcript of Proceedings, Private Examination of Mr Peter James Millington on 24 September 2007, *op cit.*, p.21.

⁴⁵ *Ibid.*, p.22. *Loc cit.*

⁴⁶ *Ibid.*, p.24

⁴⁷ Transcript of Proceedings, Private Examination of Mr John Graham Williams on 27 September 2007, p.73.

⁴⁸ Transcript of Proceedings, Private Examination of Mr Peter James Millington on 24 September 2007, p.22, *loc cit.*

⁴⁹ Telecommunications Intercept, T 1422, 23 April 2007, *op cit.*

⁵⁰ Transcript of Proceedings, Private Examination of Mr Peter James Millington on 24 September 2007, *op cit.*, p.26.

⁵¹ *Ibid.*, pp.8, 12 and 13. *Loc cit.* *Ibid.*, pp.20 and 30.

⁵² Telecommunications Intercept, T 1455, 11 April 2007, *op cit.*

⁵³ *Ibid.*

⁵⁴ *Ibid.*

⁵⁵ *Ibid.*

⁵⁶ Transcript of Proceedings, Private Examination of Mr John Graham Williams on 27 September 2007, *op cit*, pp.71 and 73-4.

⁵⁷ *Ibid*, p.80.

⁵⁸ *Ibid*, and pp. 87 and 89.

⁵⁹ Telecommunications Intercept, T 1446 and T 1447, 15 April 2007, *op cit*.

⁶⁰ Telecommunications Intercept, T 1446, 15 April 2007. *op cit*.

⁶¹ *Ibid*.

⁶² *Ibid*.

⁶³ Telecommunications Intercept, T 1447, 15 April 2007, *op cit*.

⁶⁴ Telecommunications Intercept, T 1450, 16 April 2007.

⁶⁵ ⁶⁶ Transcript of Proceedings, Private Examination of Mr John Graham Williams on 27 September 2007, *op cit*, p.86. *Loc cit* p.87.

⁶⁶ Information obtained from the Serious Offences Unit, Regional Services Branch, Department of Fisheries Western Australia.

⁶⁷ *Ibid*.

⁶⁸ Telecommunications Intercept, T 1427 and T 1435, 10 May 2007, *op cit*.

⁶⁹ Telecommunications Intercept, T 1430, 10 May 2007, *op cit*.

⁷⁰ Telecommunications Intercept, T 1432, 10 May 2007, *op cit*.

⁷¹ Telecommunications Intercept, T 1433, 10 May 2007, *op cit*.

⁷² Telecommunications Intercept, T 1436, 10 May 2007, *op cit*.

⁷³ Telecommunications Intercept, T 1427, 10 May 2007, op cit.

⁷⁴ Telecommunications Intercept, T 1429, 10 May 2007.

⁷⁵ Transcript of Proceedings, Private Examination of Mr Peter Charles Willey on 27 September 2007, p.116.

⁷⁶ Telecommunications Intercept, T 1437, 10 May 2007. *op cit*.

⁷⁷ *Ibid*, and T 1436, T 1435, T 1432 and T 1430, 10 May 2007, *op cit*.

⁷⁸ Transcript of Proceedings, Private Examination of Mr Peter Charles Willey on 27 September 2007, *op cit*, p.110.

⁷⁹ Telecommunications Intercept, T 1422, 23 April 2007, *op cit*.

⁸⁰ *Ibid*.

⁸¹ Email to the Manager of the Regional Services Branch, Department of Fisheries Western Australia, of 16 April 2007, 1:41 p.m., from Mr Peter Millington [00676-2007-0038], *op cit*.

⁸² Telecommunications Intercept, T 1422, 23 April 2007, *op cit*.

⁸³ As to Mr Millington's obligation to act with integrity, see the discussion at [174] and following below, and Cox v Corruption and Crime Commission, *supra*, per Martin CJ at [38]-[48] and Steytler P at [102]-[106].

⁸⁴ Email to Mr Peter Millington of 17 April 2007, 8:20 a.m., from the Manager of the Regional Services Branch, Department of Fisheries Western Australia [00676-2007-0038], *op cit*.

⁸⁵ See Cox v Corruption and Crime Commission, *supra*, per Martin CJ at [56]-[61] and Steytler P at [112]-[143].

⁸⁶ See Martin CJ (with whom Newnes AJA agreed) in Ex parte West Australian Newspapers Ltd [2008] WASCA 209 at [51].

⁸⁷ Section 86 representations on behalf of Mr Peter James Millington dated 26 September 2008, Jackson McDonald Lawyers, *op cit*, at [38]-[47].

⁸⁸ Note, “a public authority or [a] public officer”, not the public officer.

⁸⁹ Shorter Oxford English Dictionary, Sixth Edition, p.529; Macquarie Dictionary, 2nd Revised Edition, p.417.

⁹⁰ R v Gallagher (1987) 29 A Crim R 33.

⁹¹ Willers v R (1995) 81 A Crim R 219 per Malcolm CJ at 224.

⁹² 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.

⁹³ Williams v R (1979) 23 ALR 369 per Franki J at 381.

⁹⁴ Cox v Corruption and Crime Commission, *supra*, per Martin CJ at [67].

⁹⁵ Cortis v R [1979] WAR 31.

⁹⁶ Regulation 40, *Public Service Regulations 1988* – Administrative Instruction 711 is in similar terms.

⁹⁷ Deacon v Act [2001] ACTSC 8, per Higgins J at p.13.

⁹⁸ Snell v Pryce [1990] NTSC 2 at [14].

⁹⁹ Section 23 of the *Corruption and Crime Commission Act 2003*, *op cit*.

¹⁰⁰ Section 23 of the *Corruption and Crime Commission Act 2003*, *op cit*.

¹⁰¹ Telecommunications Intercept, T 1455, 11 April 2007, *op cit*.

¹⁰² Transcript of private examination of Mr Williams 27/9/07, p80, 87 and 89, *loc cit*.

¹⁰³ *Ibid.*

¹⁰⁴ Section 23 of the *Corruption and Crime Commission Act 2003*, *op cit*.

¹⁰⁵ Namely, the recommendation that Mr Williams receive no further contracts with the Department.

¹⁰⁶ Section 23 of the *Corruption and Crime Commission Act 2003*, *op cit*.

¹⁰⁷ Namely, the recommendation that Mr Willey receive no further contracts with the Department