



CORRUPTION AND CRIME COMMISSION



REPORT ON THE INVESTIGATION OF ALLEGED PUBLIC SECTOR MISCONDUCT BY A LOCAL GOVERNMENT EMPLOYEE IN RELATION TO THE PURCHASE OF MANAGEMENT SYSTEMS SOFTWARE

19 DECEMBER 2013

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CORRUPTION AND CRIME COMMISSION

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Dear Mr Lake
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 CCC Act"), the Commission hereby transmits to you a copy of its *Report on the Investigation of Alleged Public Sector Misconduct by a Local Government Employee in Relation to the Purchase of Management Systems Software*.

The Commission notes that under section 93(3) of the CCC 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

Roger Macknay, QC
COMMISSIONER

19 December 2013

ABBREVIATIONS AND ACRONYMS

("the A-MR Shire")	Augusta-Margaret River Shire
CAMMS	CA Technology Pty Ltd or CAM Management Solutions
("the CCC Act")	<i>Corruption and Crime Commission Act 2003</i>
CEO	Chief Executive Officer
("the Commission")	Corruption and Crime Commission
DLG	Department of Local Government
GST	Goods and Services Tax
("the Handbook")	<i>Procurement Handbook</i> , Western Australian Local Government Association
ICAC	Independent Commission Against Corruption, New South Wales
IT	Information Technology
("the LG Act")	<i>Local Government Act 1995</i>
("the Parliament")	Parliament of Western Australia
PES	Personnel Evaluation System (CAMMS)
("the PS Committee" or "the Committee")	Planning Services Committee, Kalamunda Shire
("the PSM Act" or PSMA)	<i>Public Sector Management Act 1994</i>
("the Sycle Agreement")	Software licence agreement relating to the upgrade of the CAMMS Interplan® package known as Sycle.
WALGA	Western Australian Local Government Association

TABLE OF CONTENTS

ABBREVIATIONS AND ACRONYMS	v
EXECUTIVE SUMMARY	ix
Overview	ix
Misconduct Opinions	xi
Recommendations	xii
1. INTRODUCTION	1
2. ALLEGATIONS	2
3. GENESIS OF COMMISSION INVESTIGATION	3
4. REPORTING BY THE COMMISSION	3
5. COMMISSION INVESTIGATION	4
5.1 Background: Procurement Legislation and Policies	4
5.2 Software Package	7
5.3 Procurement of CAMMS by Augusta-Margaret River Shire	8
5.3.1 Department of Local Government Investigation	10
5.3.2 Analysis and Opinion	11
5.4 Procurement of CAMMS by the Kalamunda Shire	13
5.4.1 Department of Local Government Investigation	17
5.4.2 Analysis and Opinion	18
5.5 Gifts from CAMMS to Mr Trail and Conflicts of Interest	20
5.5.1 Analysis and Opinion	23
6. MISCONDUCT OPINIONS	24
7. RECOMMENDATIONS	25
7.1 Failure to Declare Gifts in Annual Return	25
7.2 Effectiveness of Regulation 12 of the <i>Local Government (Functions and General) Regulations 1996</i> to Prevent Contract Splitting in Procurement	25
7.3 Review of Local Government Legislation with Respect to Gifts and Financial Contributions	26
7.4 Statement of Business Ethics	27
7.5 Guide for the Procurement of Information Technology	28
APPENDICES	29
APPENDIX 1	
Commission Opinions of Misconduct	31
APPENDIX 2	
Extract from Corruption and Crime Commission Report of November 2011 (Paragraphs [230]-[233])	39

EXECUTIVE SUMMARY

Overview

- [1] In September 2012 the Corruption and Crime Commission ("the Commission") commenced an investigation, subsequent to a preliminary investigation, into alleged serious misconduct by Mr James Trail, the then Kalamunda Shire Chief Executive Officer (CEO), with respect to the procurement of Information Technology (IT) software, specifically management systems software, from CA Technology Pty Ltd, trading as CAMMS.
- [2] Mr Trail was CEO of Kalamunda Shire between 2008 and 2012. Prior to that he was CEO of the Augusta-Margaret River Shire ("the A-MR Shire"). Mr Trail was dismissed from the Kalamunda Shire on 10 December 2012, following receipt of an external audit report identifying issues relating to the procurement of CAMMS IT software by Mr Trail while at the Kalamunda Shire, as well as other matters
- [3] The Commission investigation covered Mr Trail's procurement activities during the periods that he was employed by both Shires.
- [4] The CAMMS software that was purchased by A-MR Shire and the Kalamunda Shire involved a suite of software products which are said to integrate planning and corporate performance.
- [5] The core CAMMS software (Interplan[®]) is integrated with other CAMMS software modules, each performing different functions. For example, planning, performance management, risk management and budgets. The products were also said to be able to integrate with non-CAMMS systems.
- [6] From 1 July 2006 to 1 July 2007 the A-MR Shire spent \$230,947 procuring IT software from CAMMS. A single approval dated 24 April 2007 by the A-MR Council authorising procurement of CAMMS IT software in the sum of \$60,000 was sought and obtained. Each contract with CAMMS was signed on behalf of the A-MR Shire during this period by Mr Trail. The procurement did not go to tender and no other companies were asked to quote.
- [7] The total expenditure on CAMMS IT softwareⁱ by the Kalamunda Shire from its initial purchase in late 2008 to 11 September 2012 was just over \$1 million. A single approval by the Kalamunda Council authorising procurement of CAMMS IT software in the sum of approximately \$200,000 on 15 December 2008 was sought and obtained. Each contract with CAMMS was signed on behalf of the Kalamunda Shire during this period by Mr Trail. The procurement did not go to tender and no other companies were asked to quote.
- [8] From 2006 to 2012 Mr Trail received gifts, some which he declared and others which he did not declare, from CAMMS including interstate and

ⁱ Including implementation, training and licensing fees.

overseas travel, tickets to football and cricket matches in Australia and overseas and payment for golf played by Mr Trail in Dubai.

[9] At both Shires the decision to purchase CAMMS products was made by Mr Trail prior to seeking Shire approval. The report presented by Mr Trail to the A-MR Shire on 24 April 2007 sought approval for the purchase of CAMMS IT software. However, at that time Mr Trail had already agreed to purchase Interplan® and had in fact been invoiced for that purchase. In May 2008 Mr Trail obtained a proposal from CAMMS detailing the cost of the purchase to the Kalamunda Shire after being engaged as CEO by that Shire, but more than two months prior to formal commencement in the role. Mr Trail subsequently signed that proposal on behalf of the Kalamunda Shire three weeks after he commenced his employment, which was three and a half months before he sought approval for the purchase from the Kalamunda Shire.

[10] Information presented by Mr Trail to both Shires about the CAMMS purchases was lacking certain relevant information or was presented in an arguably misleading way.

[11] Purchases of separate CAMMS modules were regarded by Mr Trail and presented to the Shires as "distinct" purchases, notwithstanding Mr Trail had made a decision in each case to purchase more modules than he disclosed to the Shires. Contract splitting is prohibited by Regulation 12 of the *Local Government (Functions and General) Regulations 1996*. In the Commission's opinion, in some instances outlined in this report, the purchases of various modules by each Shire ought to have been considered as a single purchase. Had that occurred the required procurement method would have been by public tender, unless an exemption applied.

[12] The Commission's investigation of matters relating to Mr Trail's conduct also identified issues and associated misconduct risks that can arise with the procurement of IT software within the local government sphere. Those risks and issues are outlined below, and are considered in greater detail in the body of this report.

- The calculation of the total cost of IT software procurement is an issue, given that it is the total cost which determines the appropriate method of procurement, for example, through written quotations or by public tender. Procurement of IT software ordinarily involves the cost of the software, together with implementation, training and licensing fees, which can be substantial. It is recommended that a more detailed guide for the procurement of IT by local governments be developed, with a particular focus on how the total cost of the purchase is to be determined to ensure compliance with procurement legislation and policies.
- Guarding the "gateway" through which contractors enter the organisation can be another issue. The question arises as to whether or not a sole decision-maker in relation to procurement involves risk. With respect to the purchases of CAMMS IT by the

A-MR Shire and the Kalamunda Shire the primary gateway through which the contractor entered was Mr Trail.

- The acceptance of gifts, of whatever kind, by a public officer who is engaged in commercial dealings with a private contractor on behalf of a public authority is a significant issue with associated misconduct risks. There is a need to communicate to suppliers a clear set of supplier behaviour expectations and the associated consequences for non-compliance.
- The receipt of gifts should be prohibited rather than be authorised by the applicable legislation and the question arises as to whether or not the governing legislation is adequate in this regard.

[13] Annually the WA public sector spends about \$4 billion on all goods and services. Approximately \$800 million of that - or one dollar in every five - is spent procuring IT goods and services.ⁱⁱ In that context, in the Commission's opinion, misconduct risks arising with respect to this type of procurement need to be carefully considered and responded to, particularly in the context of the local government legislation which authorises the receipt of gifts by those employees engaging in commercial dealings.

Misconduct Opinions

[14] As a result of this investigation the Commission has formed three opinions of misconduct with respect to Mr Trail which are detailed below.

[15] In the opinion of the Commission Mr Trail engaged in misconduct pursuant to sections 4(d)(iii) and (vi) in that his failure to properly inform A-MR Council with respect to the purchase of CAMMS IT software and his failure to properly advise A-MR Council with respect to its procurement obligations amounted to a breach of trust placed in him by virtue of his position and is conduct which, in all of the circumstances, could provide reasonable grounds for termination.

[16] In the opinion of the Commission Mr Trail engaged in misconduct pursuant to sections 4(d)(i), (ii) and (vi) of the CCC Act. He made a decision to purchase Interplan® and other modules for the Kalamunda Shire prior to commencing his employment at the Kalamunda Shire on 21 July 2008. In May 2008 he sought a proposal from CAMMS for the Kalamunda Shire to purchase Interplan® and other modules. Once he commenced his role as CEO he signed, in August 2008, the CAMMS proposal that he had earlier received. Mr Trail received an invoice for the purchase of Interplan® and he accepted a licensing agreement with CAMMS on 13 August 2008. Proper procurement processes were not followed. Mr Trail engaged in this conduct prior to seeking the approval of the Kalamunda Shire to purchase CAMMS products. Information about this was either not presented to the Kalamunda Council (in particular the Committee on 10 November 2008) or was presented arguably in a misleading way (to the Kalamunda Council

ⁱⁱ Extract from *ICT Procurement in Health and Training* published by the Western Australian Auditor General in October 2010.

meeting on 15 December 2008). In the opinion of the Commission Mr Trail did not perform his functions in an impartial way.

[17] Mr Trail's conduct advantaged CAMMS over other potential suppliers as it disadvantaged other suppliers by denying them the opportunity to tender and get the work. It resulted in CAMMS repeatedly gaining further contracts as other integrated modules were later purchased. Having regard to the fact that there is a positive obligation upon public officers to act impartially, without bias or without favour, and because of the harm to public confidence in the public sector and in government when they do not do so, the Commission is of the opinion that Mr Trail's conduct was not impartial and that it is conduct which could constitute a disciplinary offence providing reasonable grounds for termination of his employment.

[18] In the opinion of the Commission Mr Trail engaged in misconduct pursuant to sections 4(d)(ii) and/or (iii) together with 4(d)(v) and/or (vi) of the *Corruption and Crime Commission Act 2003* ("the CCC Act") because Mr Trail's failure to declare gifts in his annual return, or fill in paperwork for "notifiable gifts" within the 10-day period, or properly determine the cost of the gift so that he didn't receive a "prohibited gift" constitute a breach of trust placed in him by virtue of his office pursuant to section 4(d)(iii) and is conduct in the performance of his functions which is not honest pursuant to section 4(d)(ii). With respect to any failure to declare gifts in his annual return such conduct could, in accordance with section 4(d)(v), constitute an offence against section 5.89 of the *Local Government Act 1996* and, consequently, in the Commission's opinion Mr Trail engaged in misconduct. With respect to any failure to follow the Kalamunda Shire Code of Conduct which reflected section 34B of the *Local Government (Administration) Regulations 1996*, such conduct could, in accordance with section 4(d)(vi), constitute a disciplinary offence providing reasonable grounds for termination in all of the circumstances. The basis for this position is that it could amount to misconduct within the meaning of the *Public Sector Management Act 1994* because it occurred on more than one occasion in circumstances where Mr Trail was the head of the agency and ought to have complied and where he was engaging in commercial transactions involving large sums of money with CAMMS on behalf of the Kalamunda Shire.

Recommendations

[19] The Commission makes the following recommendations.

Recommendation 1

It is recommended that the Department of Local Government give consideration to the prosecution of Mr James Trail pursuant to section 5.89 of the *Local Government Act 1995* for a failure to declare gifts in his annual return.

[20] Regulation 12 of the *Local Government (Functions and General) Regulations 1996* provides that contract splitting is not permitted in order

to avoid the requirement to go to public tender for purchases above \$100,000. Regulation 12 provides:

Anti-avoidance provision for r. 11(1)

If a local government enters into 2 or more contracts in circumstances such that the desire to avoid the requirements of [R]egulation 11(1) is a significant reason for not dealing with the matters in a single contract, tenders are to be publicly invited according to the requirements of this Division before entering into any of the contracts regardless of the consideration.

[21] The intent of the regulation is to prevent contract splitting, but a plain reading of this provision is that it requires tenders to be invited after a local government has already entered into two or more contracts. Once contracts have been entered into, tenders cannot be invited. Given that the purpose of the provision is to prevent local government from entering into two or more contracts to avoid the requirement to go to public tender for purchases above \$100,000, in the Commission's view, the provision requires legislative amendment.

[22]

Recommendation 2

It is recommended that Regulation 12 of the *Local Government (Functions and General) Regulations 1996* be legislatively reviewed so that its plain meaning reflects the legislative intent.

[23] A recommendation made in the Commission *Report on the Investigation of Alleged Public Sector Misconduct in Relation to the Purchase of Toner Cartridges in Exchange for Gifts Outside Government Procurement Policies and Arrangements* tabled in the Parliament of Western Australia on 24 November 2011 relates to a review of the LG Act and associated Regulations. As that review has not been undertaken the Commission repeats that recommendation below.

[24]

Recommendation 3

The Commission recommends that *Local Government Regulations, and/or Local Government Act, be reviewed and amended ... particularly in terms of the requirement for auditing of gift registers, gifts from relatives, "notifiable" and "prohibited" gifts, and monetary thresholds ...*

[25] The acceptance of gifts, no matter how small, from suppliers and contractors by those conducting public business, is a misconduct risk.ⁱⁱⁱ

ⁱⁱⁱ See Appendix 2 of this report.

- [26] A legislative regime that endorses the receipt of gifts and contributions to travel in circumstances where a public officer is engaged in commercial dealings with the gift giver requires rigorous review.
- [27] The receipt of gifts such as corporate box football tickets by public officers while conducting public business should be prohibited rather than be authorised by the applicable legislation.
- [28]

Recommendation 4

The Commission recommends that the Department of Local Government, in consultation with the Western Australian Local Government Association, formulate a "Statement of Business Ethics" in relation to incentives, gifts and benefits, for use by local governments, to provide a clear set of supplier behaviour expectations and the associated consequences for non-compliance. Such a statement would be applicable to all sectors of the community that conduct business with local government authorities.

- [29]

Recommendation 5

The Commission recommends that consideration be given by the Department of Local Government, in consultation with the Western Australian Local Government Association, to the development of a more detailed guide for the procurement of Information Technology by local governments, with a particular focus on how the total cost of the purchase is to be determined to ensure compliance with procurement legislation and policies.

- [30] The procurement of IT software may involve the purchase of integrated modules and will inevitably involve implementation, training and licensing fees over a period of time. In the context of a legislative requirement to go to public tender for contracts of \$100,000 or more, clear guidance should be provided to local government as to how to determine the total cost of this type of complex purchase.

1. INTRODUCTION

- [1] In September 2012 the Corruption and Crime Commission ("the Commission") commenced an investigation, subsequent to a preliminary investigation, into alleged serious misconduct by Mr James Trail, the then Kalamunda Shire Chief Executive Officer (CEO), with respect to the procurement of Information Technology (IT) software, specifically management systems software, from CA Technology Pty Ltd, trading as CAMMS. Mr Trail was CEO of Kalamunda Shire from 21 July 2008 until his dismissal on 10 December 2012. Prior to that, from January 2004 until mid-2008, he was CEO of the Augusta-Margaret River Shire ("the A-MR Shire"). The Commission investigation covered Mr Trail's procurement activities during the periods that he was employed by both of these Shires.
- [2] Mr Trail was dismissed as CEO of Kalamunda Shire following the receipt of an external audit report by the Kalamunda Shire identifying issues relating to the procurement of CAMMS IT software by Mr Trail while at the Kalamunda Shire, as well as other matters.
- [3] Local governments have substantial budgets in the millions of dollars. The spending of public monies is guided by legislation and policies. As CEO Mr Trail had delegated authority both at the Kalamunda Shire and A-MR Shire to authorise expenditure of local government funds, provided that expenditure was within delegation, within policy and complied with legislative requirements.
- [4] From 1 July 2006 to 1 July 2007 the A-MR Shire spent \$230,947 procuring IT software from CAMMS. A single approval by A-MR Council authorising procurement of CAMMS IT software in the sum of \$60,000 on 24 April 2007 was sought and obtained. Each contract with CAMMS was signed on behalf of the A-MR Shire during this period by Mr Trail. The procurement did not go to tender and no other companies were asked to quote.
- [5] The total expenditure on CAMMS IT software¹ by the Kalamunda Shire from its initial purchase in late 2008 to 11 September 2012 was just over \$1 million. A single approval by the Kalamunda Council authorising procurement of CAMMS IT software in the sum of approximately \$200,000 on 15 December 2008 was sought and obtained. Each contract with CAMMS was signed on behalf of the Kalamunda Shire during this period by Mr Trail. The procurement did not go to tender and no other companies were asked to quote.
- [6] From 2006 to 2012 Mr Trail received gifts, some which he declared and others which he did not declare, from CAMMS including interstate and overseas travel, tickets to football and cricket matches in Australia and overseas and payment for golf played in Dubai and the United Kingdom.
- [7] While IT is critical to the efficient and effective delivery of government services, it is also costly. Annually the WA public sector spends about

¹ Including implementation, training and licensing fees.

\$4 billion on all goods and services. Approximately \$800 million of that - or one dollar in every five - is spent procuring IT goods and services.²

- [8] Consequently, procurement in this area can and does involve significant public expenditure. The Commission's investigation involving Mr Trail's conduct has a dual purpose. As well as examining his activities it also serves to highlight the critical risks and issues that can arise with the procurement of IT software within the local government sphere. Increasing awareness of those issues and the associated misconduct risks together with recommendations about what action should be taken to minimise those risks is part of the Commission's prevention and education function.³
- [9] As a result of this investigation the Commission has formed three opinions of misconduct with respect to Mr Trail which are set out in section 6 of this report.
- [10] The Commission's recommendations are set out in section 7 of this report.

2. Allegations

- [11] The Commission's investigation considered whether Mr Trail engaged in misconduct in relation to the procurement of CAMMS IT software, particularly as outlined below.
 - Did Mr Trail ensure that advice and information was available to the Kalamunda Shire and A-MR Shire so that informed decisions could be made?
 - Did Mr Trail authorise or engage in "contract splitting"?
 - Did Mr Trail act in circumstances where he had a conflict of interest?
 - Did Mr Trail misapply procurement legislation and policies, including the "uniqueness" provision and assessment of the "total cost" of the purchase?
- [12] Mr Trail was a public officer for the purposes of the *Corruption and Crime Commission Act 2003* ("the CCC Act").⁴ Misconduct as defined by sections 3 and 4 of the CCC Act applies only to the conduct of public officers.⁵
- [13] It is a function of the Commission, pursuant to section 18 of the CCC Act to ensure that an allegation about, or information or matters involving

² Extract from *ICT Procurement in Health and Training* published by the Western Australian Auditor General in October 2010.

³ Section 17 of the *Corruption and Crime Commission Act 2003*.

⁴ Section 3 of the *Corruption and Crime Commission Act 2003*.

⁵ See Appendix 1 of this report.

misconduct by public officers is dealt with in an appropriate way. An allegation can be made to the Commission.

[14] The Commission investigation encompassed a review and analysis of documentation provided to the Commission voluntarily and in response to notices served pursuant to section 95 of the CCC Act, interviews with various persons and private examinations in February 2013.

3. Genesis of Commission Investigation

[15] The Commission was notified of the allegations with respect to Mr Trail by the Department of Local Government (DLG) on 2 July 2010 pursuant to section 28 of the CCC Act. Initially the allegations were referred to the DLG for investigation on 31 August 2010 with respect to the procurement of CAMMS IT software by the Kalamunda Shire and the A-MR Shire.

[16] The DLG notified the Commission of the outcome of its investigation on 28 April 2011 with respect to A-MR Shire and on 2 November 2011 with respect to the Kalamunda Shire. As a result of information received and further assessment of documentation and the allegations the Commission conducted a preliminary investigation (authorised on 17 July 2012). Following that, on 7 September 2012 the Commission determined to further investigate the allegations itself in accordance with sections 39(1) and 33(1)(a) of the CCC Act.

[17] The scope and purpose of the investigation was, *inter alia*, to determine if any public officer employed by, or formerly employed by, the Shire of Kalamunda and/or the A-MR Shire engaged in misconduct in relation to the purchase of CAMMS software. In October 2012 the Commission expanded its investigation to include another allegation in relation to the purchase of CAMMS software. With respect to that other allegation the Commission formed no opinion of misconduct and it is not referred to in this report. Inevitably investigation of that matter delayed finalisation of matters relating to Mr Trail.

4. Reporting by the Commission

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

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

[19] The Commission may cause a report prepared under this section to be laid before each House of the Parliament of Western Australia ("the

Parliament"), as stipulated in section 84(4) of the CCC Act, or dealt with under section 93 of the CCC Act.

- [20] Section 86 of the CCC Act requires that before reporting any matters adverse to a person or body in a report under section 84 the Commission must give the person or body a reasonable opportunity to make representations to the Commission concerning those matters.
- [21] A number of persons and bodies were notified by letter dated 11 October 2013 of matters which it proposed to include in this report. They were invited to make representations about those and other matters about which they wished to do so by 1 November 2013. They were advised that they and/or their legal advisor could inspect the transcripts of examinations before the Commission and evidentiary material going to matters identified. All, except one, of those persons and bodies invited to make representations did so and the Commission has given consideration to them.
- [22] The Commission has taken all representations into account in finalising this report.

5. Commission Investigation

5.1 Background: Procurement Legislation and Policies

- [23] The *Local Government Act 1995* ("the LG Act") provides for the continuation and regulation of local government. Each local government has an administration that is responsible for implementing council decisions and managing local government operations. The CEO is employed by the council to head the administration, manage day to day operations and ensure that council decisions are implemented.
- [24] Section 5.41 of the LG Act sets out the functions of the CEO. Relevantly, the functions of the CEO are to:
 - (a) *advise the council in relation to the functions of a local government under this Act and other written laws; and*
 - (b) *ensure that advice and information is available to the council so that informed decisions can be made; and*
 - ...
 - (e) *liaise with the mayor or president on the local government's affairs and the performance of the local government's functions; and*
 - ...
 - (h) *ensure that records and documents of the local government are properly kept for the purposes of this Act and any other written law ...*
 - ...

- [25] The CEO has particular duties with respect to financial management including: to establish efficient systems and procedures; to ensure proper authorisation for the incurring of liabilities and the making of payments; and ensuring that the resources of the local government are effectively and efficiently managed.⁶
- [26] Procurement within local government is primarily governed by the LG Act (section 3.57), and Part 4 of the *Local Government (Functions and General) Regulations 1996*.
- [27] These provisions in essence require that for purchases under the value of \$100,000 councils are required to have written policies.⁷ For purchases where the value of the contract or purchase is or is expected to be \$100,000 or greater (exclusive of the Goods and Services Tax (GST)) public tenders must be called unless certain circumstances apply.⁸ Specifically this provision refers to the "contract" and, therefore, the cost of the purchase is required to take into account the cost over the full contract period. The requirement to tender for goods and services is found in Part 3 (Functions of Local Government), Subdivision 6 (Various Executive Functions) of the LG Act. Consequently, this is a "function" with respect to which the CEO is required to advise council in accordance with section 5.41(a) of the LG Act.
- [28] One exception set out in Regulation 11(2)(f) is that public tender for a purchase above \$100,000 is not required if the local government has good reason to believe that, because of the unique nature of the goods and services required or for any other reason, it is unlikely that there is more than one potential supplier ("the uniqueness provision"). In order to utilise Regulation 11(2)(f) the authority must be given by council in a resolution approving the purchase.
- [29] Regulation 12 of the *Local Government (Functions and General) Regulations 1996* provides that contract splitting is not permitted in order to avoid the requirement to go to public tender for purchases above \$100,000. Regulation 12 provides:

Anti-avoidance provision for r. 11(1)

If a local government enters into 2 or more contracts in circumstances such that the desire to avoid the requirements of [R]egulation 11(1) is a significant reason for not dealing with the matters in a single contract, tenders are to be publicly invited according to the requirements of this Division before entering into any of the contracts regardless of the consideration.

⁶ Regulation 5, *Local Government (Financial Management) Regulations 1996*.

⁷ Regulation 11A, *Local Government (Functions and General) Regulations 1996*.

⁸ *Ibid*, Regulation 11.

- [30] The intent of the regulation is to prevent contract splitting, but a plain reading of this provision is that it requires tenders to be invited after a local government has already entered into two or more contracts. Once contracts have been entered into, tenders cannot be invited. Given that the purpose of the provision is to prevent local government from entering into 2 or more contracts to avoid the requirement to go to public tender for purchases above \$100,000, in the Commission's view, the provision requires legislative amendment.
- [31] The A-MR Shire purchasing policy which applied at the relevant time required at least 3 written quotations to be obtained for purchases above \$5,001 and below \$50,000. Between \$50,000 and below \$100,000, more detailed records were required including 3 written quotations containing price and specification of goods and services (with procurement decisions based on value for money considerations).
- [32] Paragraph 5.10 of the Kalamunda Shire purchasing policy, which applied at the time that Mr Trail was CEO, put in place strict policy guidelines relating to purchases where the circumstances are of the type contemplated by Regulation 11(2)(f) (referred to above). Paragraph 5.10 provides:

Sole Source of Supply (Monopoly Suppliers)

The procurement of goods and/or services available from only one private sector source of supply (ie manufacturer, supplier or agency) is permitted, without the need to call competitive quotations, provided that there must genuinely be only one source of supply. Every endeavour to find alternative sources must be made. Written confirmation of this must be kept on file for later audit.

Note: The application of the "sole source of supply" provision should only occur in limited cases, and procurement experience indicates that generally more than one supplier can be identified.

- [33] Further, that policy required that "where the value of procurement (excluding GST) for the value of the contract over the full contract period (including options to extend) is, or is expected to be ... \$100,000 and over, full public tender" is required following council approval. For purchases above \$10,000 and below \$100,000 the policy required 3 written quotations be obtained.
- [34] The Western Australian Local Government Association (WALGA), which is an independent body working on behalf of Western Australian local governments, produces a *Procurement Handbook* ("the Handbook") to guide local governments through legislative requirements. That Handbook contains a section (4.4) about the procurement of IT goods and services and notes that they can be "quite complex to source". The Handbook indicates that WALGA has Procurement Consultancy Services that it recommends local governments utilise when procuring IT goods and services. Further, WALGA offers access to preferred supplier arrangements.

[35] Regulation 11(2)(b) of the *Local Government (Functions and General) Regulations 1996* sets out another circumstance in respect of which public tender for a purchase above \$100,000 is not required, which is if the supply of the goods or services is to be obtained through the purchasing service of WALGA. At the time that Mr Trail procured CAMMS IT software from the A-MR Shire and the Kalamunda Shire WALGA's purchasing service was not utilised. Consequently, Regulation 11(2)(b) does not relate to the CAMMS IT software purchases for either A-MR Shire or the Kalamunda Shire.

[36] With respect to the procurement of software WALGA recommends consideration be given to:

- (a) *Licence type*
 - (i) *Standalone*
 - (ii) *Network*
 - (iii) *Enterprise*
- (b) *Maintenance and support costs*
- (c) *Training costs*
- (d) *Conditions of use, eg: costs to transfer named users or servers*
- (e) *Intellectual Property (IP) considerations.*

[37] In the above context, the value of a contract to purchase IT software ought to include the entire cost of the purchase over the full contract period including the software component, implementation, training and licensing fees.

5.2 Software Package

[38] The CAMMS software that was purchased by A-MR Shire and the Kalamunda Shire involved a suite of software products which are said to integrate planning and corporate performance.

[39] The core CAMMS software (Interplan[®]) is integrated with other CAMMS software modules, each performing different functions. For example, planning, performance management, risk management and budgets. The products were also said to be able to integrate with non-CAMMS systems.

[40] At both A-MR Shire and Kalamunda Shire Interplan[®] and a number of other integrated modules were purchased.

[41] Prior to his dismissal from Kalamunda Shire Mr Trail entered into a licensing contract with CAMMS relating to an upgrade to the entire software package. This was known as "Sycle". Sycle was not procured by A-MR Shire.

5.3 Procurement of CAMMS by Augusta-Margaret River Shire

- [42] On 21 February 2007, Mr Trail and other staff from A-MR Shire attended a luncheon presentation about CAMMS technology at a venue in Burswood, Western Australia. The CAMMS contact, Ms A, then Regional Manager WA, CA Technology Pty Ltd, was known to Mr Trail as she had previously worked for another IT company with which Mr Trail had dealt.
- [43] Following that presentation email documentation and evidence obtained by the Commission indicates that there was a desire by those A-MR Shire representatives who attended the presentation to support the purchase of the CAMMS IT software.
- [44] Despite the fact that there is an email communication from the then Manager of Human Resources, A-MR Shire, dated 26 February 2007, indicating that he would "chase alternative systems and prices but I note that this product is unique to any system I have seen in respect to its integration ability", there is no evidence that this occurred.
- [45] The decision to purchase CAMMS products was made without obtaining quotes and the purchase preceded formal A-MR Council approval.
- [46] On 30 March 2007 an invoice was issued to Mr Trail at A-MR Shire for the purchase of Interplan® in the total sum of \$52,250, which included the software (\$36,000) and training and implementation (\$11,500), plus GST. On this invoice it was separately stated that the licensing fee would be invoiced in the next financial year, July 2007. This split the whole cost of the purchase and kept the cost (excluding GST of \$4,750) of the purchase under \$50,000.
- [47] Together with the invoice a letter dated 2 April 2007 from CAMMS, again addressed to Mr Trail, thanked Mr Trail for purchasing Interplan®.
- [48] Email communications make it clear that around this time discussions were taking place between Mr Trail and Ms A regarding the purchase of further modules.
- [49] On 12 April 2007 in an email to Mr Trail Ms A referred to "our discussions on Friday 30 March regarding considerations for future Interplan® module purchases in 2007/08" and referred to the A-MR Shire's interest in a new financial analysis module that would be provided free of charge if A-MR Shire purchased the Personnel Evaluation System (PES) at a cost of \$20,000 with an annual licence fee of \$4,000.
- [50] On 23 April 2007 in an email to Mr Trail Ms A apologised for getting her wires crossed stating that she had only thought Mr Trail was interested in PES and the financial analysis module (over and above the purchase of Interplan®). She then provided information regarding the cost of the project management module which was \$18,000. Again it was stated that the cost of the purchase could be split over two financial years (\$9,000 in each year).

- [51] On 24 April 2007 a recommendation went to the A-MR Council, by report from Mr Trail, that it should endorse the purchase of Interplan® and PES. It was noted in the report that in the budget review adopted by the A-MR Council on 28 March 2007 \$40,000 was allocated for the purchase of Interplan®. The report further notes that a "further \$20,000 is required for the purchase of the Personnel Evaluation System (PES). The reallocation of funds to purchase PES will not increase the 2006/2007 Budget".
- [52] The next day, 25 April 2007, Mr Trail emailed Ms A indicating that, given the A-MR Council's approval the night before, in Mr Trail's absence (he was going on leave), the payments for Interplan®, PES and 50% of the project management module could be arranged by another staff member at A-MR Shire.
- [53] A question arises as to whether Mr Trail ensured that full information was before the A-MR Council because the purchase of the project management module was not raised with the A-MR Council notwithstanding Mr Trail's intention to make the purchase.
- [54] Questions also arise as to what consideration was given to assessing the total cost of the CAMMS purchases, whether procurement policy and legislation was complied with and whether information about this was provided to the A-MR Council. These issues will be addressed in the analysis portion below.
- [55] In early June 2007 Mr Trail agreed to purchase the risk management module which was again split into invoices over two financial years, the first being for \$5,000 and the second for \$14,500.
- [56] On 25 June 2007 a report was presented to the A-MR Council for the financials for the period ended 30 June 2007. In the period between April 2007 and May 2007 A-MR Shire had been billed \$90,200 by CAMMS. The report included the following:

During the year council authorised the purchase of Interplan® software that would facilitate the planning and monitoring of the performance of the various activities of the shire and allocated a sum of \$60,000. Implementation and associated training costs have resulted in expenses exceeding the budget amount but the long-term benefits are expected to justify the over-run at this stage.
- [57] Given that the cost of the project management module and the purchase of the risk management module were not included in the \$60,000 approved by the A-MR Council on 24 April 2007 and those purchases would account for a sum of approximately \$40,500 (with software and licensing costs), a question arises as to whether the A-MR Council was provided with full information about the cost over-run.
- [58] The total cost of CAMMS products and licensing costs to the A-MR Shire over two financial years (2006-2008) was \$230,947.58. The total amount authorised by the A-MR Council was \$60,000.

[59] Mr Trail gave evidence during a Commission private examination on 12 February 2013 about how he calculated the cost of IT software procurement which he explained as follows:

I look at: is there a training component, is there a software component, is there a hardware component, and then I look at the totality of that cost ... and then determine whether that's something that is in its own right going over the threshold for tender on all of it or is it a component that can be separated into training, because we have an annual training budget or an annual licenses [sic] budget or an annual software budget.

and

... making a judgement call or a decision about whether in totality they should be in a contract or whether they were separate contracts or whether they were just operational expenses in line with operating budgets we had. That's how I would look at it.

5.3.1 Department of Local Government Investigation

[60] The DLG conducted an investigation into the purchase of CAMMS software by the A-MR Shire following a referral to the DLG by the Commission to investigate the allegations. The DLG investigation focussed on whether the A-MR Shire had failed to comply with the tender regulations. The reason for this focus, as the Commission understands based on information provided by DLG, is that the regulations place the obligation to go to tender on the local government itself rather than on an individual such as the CEO.

[61] The Commission's role is distinct. Rather than a limited focus on the issue of whether the regulations were or were not complied with, the Commission's role is to determine whether any public officer may have engaged in misconduct with respect to that.

[62] The DLG concluded that:

... there was no evidence to conclude that the AMRS [A-MR Shire] knew at the time that the purchase was going to exceed the tender threshold. Whilst the overall cost to the Shire has been well over the \$100,000 tender threshold in the F&G Regs⁹ to date, there is little evidence available to support the conclusion that the tender provisions of the F&G Regs were contravened.

Regulation 11 of the F&G Regs refers to "contract" in a singular sense. The purchase of Interplan® modules appear to have been on individual contracts, particularly after the initial budgetary allocation and the Shire's initial requirement had been satisfied. This could potentially be a flaw of Regulation 11 in that it does not have a "catch all" that would encompass expensive incremental purchases such as

⁹ Local Government (Functions and General) Regulations 1996.

software upgrades. The Department has not been provided with any evidence that would suggest the purchase was conducted incrementally on purpose.

[63] The DLG then considered Regulation 12 (the contract splitting provision) and, based on the information available to the DLG, formed the view that:

The initial consideration for purchase of the software system was a general management system. Modules were offered later on after the initial purchase which were designed to add on to the original system. It would appear that this was not anticipated. In the absence of any evidence demonstrating intent to split or avoid going to tender, it is not reasonable to support the concept that tender avoidance or splitting had occurred.

[64] The Commission has reached a different conclusion.¹⁰

[65] Finally the DLG expressed the view that:

... the need and scope of the software purchase should have been determined prior to proceeding with requests for quotations with firm guidelines imposed at that stage as to exactly what was to be implemented and when, instead of the "ad-hoc" manner in which additional modules were procured. In addition, in the absence of information to the contrary, strict compliance with the Shire's purchasing policy should have been observed, or the reasons for setting aside the provisions of the policy clearly documented and made available for public scrutiny.

5.3.2 Analysis and Opinion

[66] As set out above the functions of the CEO include that he will ensure that advice and information is available to the A-MR Council so that informed decisions can be made and advise the A-MR Council in relation to its functions (including about the requirement to go to tender).

[67] The question arises as to whether or not the A-MR Council was properly informed. No information was provided to the A-MR Council about the intention to purchase the project management module notwithstanding that Mr Trail emailed Ms A about it the day before the A-MR Council meeting and the day after the A-MR Council meeting. Consequently, no information was provided to A-MR Council about the cost of the project management module. In the Commission's view in this instance Mr Trail failed in his duty to properly inform A-MR Council.

[68] The report to the A-MR Council on 24 April 2007 sought approval for the purchase of Interplan® and PES. However, at that time Mr Trail had already agreed to purchase Interplan® and had in fact been invoiced for that purchase. Notwithstanding that there is evidence that the A-MR

¹⁰ See paragraph [71] of this report.

Council had set a budget for Interplan® when it met on 28 March 2007, in this instance it is the Commission's view that Mr Trail failed in his duty to fully inform the A-MR Council that he had, prior to 24 April 2007, already agreed to the purchase in respect of which the A-MR Council's later approval was sought and been invoiced for that purchase.

- [69] Further, at the time of the 24 June 2007 budget report to the A-MR Council no information was provided to the A-MR Council about the purchase of the project management module or the risk management module and the impact that the cost of those purchases had on the over-run with respect to CAMMS purchases. The purchase of those modules was directly handled by Mr Trail. In the Commission's view in this instance Mr Trail failed in his duty to properly inform the A-MR Council.
- [70] Mr Trail's method of calculating the total cost of IT expenditure appears to be contrary to the intent of the legislation and policies. Under the legislation, the overall cost of a purchase determines the appropriate procurement method. An approach put forward by Mr Trail which depends on an analysis of whether there is room in the current budget to cover part of the expenditure fails to take account of the requirement, irrespective of budget, to determine the overall cost of the purchase so that the correct procurement method can be used.
- [71] Given Mr Trail's accounting background, documentary evidence that indicates communications between Mr Trail and CAMMS regarding the splitting of costs incurred between financial years, emails regarding his intention to purchase Interplan®, PES and the project management module all in and around the same period, and his failure to ensure that the A-MR Council was fully informed about the extent of the purchase, the Commission has formed the view that Mr Trail intended to avoid proper procurement. In this context his evidence regarding the *ad hoc* method that he adopted to assess the total cost of a particular procurement based on what parts of the expenditure could be covered by the budget is not accepted. Rather, this evidence is considered to be a position that Mr Trail subsequently determined in an attempt to excuse his failure to follow proper process.
- [72] The total cost of the purchase of Interplan®, PES and the project management module including licensing fees (with a calculation based on one year of licensing fees because the life of the contract is not known) and implementation costs was above the \$100,000 threshold¹¹ and ought to have gone to public tender or been approved by the A-MR Council as falling within an exemption provision, for example, Regulation 11(2)(f) *Local Government (Functions and General) Regulations 1996*. This did not occur.
- [73] Even based on a calculation of the total cost simply as the software component (Interplan® being \$36,000, PES being \$20,000 and project

¹¹ \$47,500 (Interplan® software and implementation) + \$9,500 annual licensing fee + \$20,000 (PES software) + \$4,000 annual licensing fee + \$18,000 (Project management software) + \$3,000 annual licensing fee.

management being \$18,000, with a total of \$74,000) there was a requirement under the A-MR Shire purchasing policy to obtain 3 detailed written quotations. This did not occur.

[74] In the Commission's opinion Mr Trail engaged in misconduct pursuant to sections 4(d)(iii) and (vi) in that his failure to properly inform the A-MR Council with respect to the purchase of CAMMS IT software and his failure to properly advise the A-MR Council with respect to its procurement obligations amounts to a breach of trust placed in him by virtue of his position and is conduct which, in all of the circumstances, could provide reasonable grounds for termination.

5.4 Procurement of CAMMS by the Kalamunda Shire

[75] On 21 July 2008 Mr Trail became the CEO of the Kalamunda Shire.

[76] On 6 May 2008, prior to Mr Trail starting work at the Kalamunda Shire, a document was prepared by CAMMS for the Kalamunda Shire. This document was addressed to and prepared at the request of Mr Trail. It was a proposal to purchase Interplan®, with "optional modules" being the project management module, the risk management module, PES and the community connect portal. Mr Trail did not involve the Kalamunda Shire IT experts in the decision to seek to procure CAMMS IT software. Nor was this proposal to purchase CAMMS IT software an issue that was raised by Mr Trail with the Kalamunda Council at that time. Mr Trail signed an acceptance of the proposal to purchase CAMMS software on 12 August 2008, only 3 weeks after he commenced employment as CEO. On the same date an invoice was issued, marked to the attention of Mr Trail, in the sum of \$49,500. Later licensing agreements between CAMMS and the Kalamunda Shire for the purchase of other modules were drafted as addendum agreements and made reference to the original licensing agreement dated 13 August 2008.

[77] Although Mr Trail indicated, during a Commission private examination on 12 February 2013, that he did not regard his acceptance of the proposal to purchase as the purchase itself, the fact that an invoice was issued and future licensing agreements between CAMMS and the Kalamunda Shire were described as addendums to the 13 August 2008 agreement,¹² supports the view that Mr Trail had agreed to the purchase prior to obtaining the approval of the Kalamunda Shire and the Commission considers that to be so.

[78] Further, during the Commission private examination on 12 February 2013, Mr Trail gave evidence that, at the time he requested the proposal dated

¹² This agreement was signed on 11 November 2008 but in the opinion of the Commission the evidence suggests that Mr Trail agreed to the substance of it in August 2008.

6 May 2008, he intended to and wanted to purchase all of the "optional modules".

- [79] On 19 August 2008 Mr Trail sent an email to the then Director of Corporate Services, Kalamunda Shire, forwarding a copy of this proposal and acceptance stating that "if at all possible would like to try to buy PES before the end of financial year".
- [80] On 31 October 2008 an implementation agreement, prepared by CAMMS, was sent to Mr Trail. This included the proposed implementation costs for Interplan®, and the software and implementation costs for PES and risk management modules which amounted to \$162,350.¹³ No annual licensing costs appeared in this document. This indicated Mr Trail's intention to purchase the PES and the risk management module.
- [81] On 17 November 2008 a revised implementation agreement, prepared by CAMMS, was sent to Mr Trail. Added to it was the shuttle plans software module at a cost of \$19,800. Otherwise it was the same as the 31 October 2008 document. This indicated Mr Trail's intention to purchase the shuttle plans module.
- [82] On 10 November 2008 Mr Trail put a report to the Kalamunda Shire Planning Services Committee ("the Committee") for the purchase of software from CAMMS. The implementation agreement dated 31 October 2008 was presented to the Committee. No information was put before the Committee about the signed proposal dated 12 August 2008 or the invoice that had already been issued. The purpose was stated as seeking endorsement for the software and implementation proposal.
- [83] Following receipt of the endorsement of the Committee on 19 November 2008 Mr Trail signed the revised implementation agreement (that is, the agreement dated 17 November 2008 rather than the one that was put to the Committee dated 31 October 2008).
- [84] On 15 December 2008 a CEO report was put to the Kalamunda Council stating that the Kalamunda Shire "is purchasing the PES and community connect portal software", and "it is intended to contract CAMMS to facilitate business planning and the development of the Kalamunda Shire departmental business plans" and that previously that year the Kalamunda Shire had "contracted to purchase and install the Interplan® Management Information System from CA Technology who are now CAM Management Solutions". However, given that all councillors are members of the Kalamunda Shire PS Committee, which had just over a month prior, endorsed the CAMMS software and implementation proposal put up by Mr Trail it was open to the Kalamunda Shire to reasonably assume that the reference in the report to the Kalamunda Council on 15 December 2008 about the Kalamunda Shire contracting previously that year to purchase Interplan® from CAMMS occurred following the endorsement given by the Committee on 10 November

¹³ \$87,400 for Interplan®, \$25,000 + \$11,500 for PES, and \$25,000 + \$13,450 for risk management.

2008. Minutes of the Kalamunda Council meeting on 15 December 2008 indicate that the Kalamunda Council made reference to the "last meeting" where the figure approved was around "\$200,000", this being the total of the software and implementation costs proposal endorsed by the Committee.

- [85] In fact, unknown to the Kalamunda Council, the purchase had been made by Mr Trail on 12 August 2008 and the purchase process had been commenced solely by Mr Trail in May 2008 following his appointment as CEO but prior to him taking up the position in July 2008.
- [86] The report recommended that the Kalamunda Shire resolve to apply Regulation 11(2)(f) (the uniqueness provision) to avoid the requirement to go to public tender. It was also stated in the report that there were 3 distinct purchases being the purchase and installation of Interplan®, the purchase and installation of PES and the community connect portal, and CAMMS providing support and expertise in the development of business plans.¹⁴ Based on this advice the Kalamunda Council resolved unanimously to rely on the uniqueness provision in the procurement of CAMMS software.
- [87] A transcript of this the Kalamunda Council meeting indicates that the Kalamunda Council was informed that the value of CAMMS purchases was to be in the vicinity of \$200,000.
- [88] This purchase did not go to public tender and no quotations were sought from any other provider. The Kalamunda Council was not provided with any documented research supporting the uniqueness of CAMMS software.
- [89] Significantly, Mr Trail did not seek Kalamunda Shire IT advice prior to the purchase and he didn't make, or cause any other person to make, any inquiry regarding the uniqueness of the CAMMS software. No records were kept to substantiate the basis for the view that CAMMS software was unique. Written records were required to be kept under Kalamunda Shire procurement policy to justify reliance on a sole source of supply and every endeavour was required to be made to locate other suppliers. This did not occur. Importantly, there is no evidence that the Kalamunda Shire was properly informed about these matters.
- [90] Following the Kalamunda Council's resolution on 15 December 2008 Mr Trail signed an addendum licensing agreement with respect to the purchase of PES and the community connect portal. The agreement was dated 21 November 2008 but was signed on 19 December 2012. The sum of the purchase was \$37,500 with annual licensing fees of \$5,000 per module.

¹⁴ Note the provision of support and expertise by CAMMS in the development of business plans was facilitated through Shuttle Plans, the additional software module in the implementation agreement.

[91] Between May 2009 and May 2012 Mr Trail signed 4 additional contracts with CAMMS as follows:

- (a) the purchase of Integrated Risk Management Product, Integrated Project Manager and Shuttle Plans on 5 May 2009 for \$66,800 (with licensing fees);
- (c) the purchase of Budget Management Centre Product and the Workforce Planning Centre Product on 26 February 2010 (date of the agreement was 21 December 2009) for \$31,750 for the software, implementation costs of \$10,400 and licensing fees of \$12,700;
- (d) the purchase of CAMMS Learning Management Centre E-Training on 9 May 2011 for \$14,928 with an annual licensing fee of \$15,000; and
- (e) the software licence agreement relating to the upgrade of the Interplan® package, known as, Sycle on 24 May 2012 for \$103,000 per year for four years ("the Sycle Agreement").

[92] The Sycle Agreement superseded all previous agreements between the Kalamunda Shire and CAMMS and replaced annual licence fees under those previous agreements. Mr Trail's evidence, during a Commission private examination on 11 February 2013, was that those annual fees that were replaced were in the sum of \$70,000 to \$80,000. In written submissions he later claimed the particular sum to be \$71,400. Analysis of financial records conducted by the Commission indicates that the annual licence fees prior to the signing of the Sycle licence agreement were \$74,287.40 (including GST). The total value of the contract was of course, \$412,000,¹⁵ with the additional cost to the Kalamunda Shire being around \$114,850.40¹⁶ over the life of the contract. Prior to the Commission's investigation the Kalamunda Council had no knowledge that Mr Trail had signed the Sycle Agreement. Mr Trail gave evidence, during the Commission private examination on 11 February 2013, that he did not seek input from IT experts at the Kalamunda Shire as to the need for an upgrade. In his written submissions Mr Trail claimed that the Sycle Agreement was not a capital upgrade but was an increase to annual operating costs and that there was an agreement with CAMMS that the Kalamunda Shire would not be required to pay for the cost of the software upgrade. There was, however, an increase in the annual licensing fees.

[93] The total expenditure on CAMMS IT software by the Kalamunda Shire from its initial purchase in late 2008 to 11 September 2012 was just over \$1 million.

¹⁵ \$103,000 per annum over 4 years.

¹⁶ Calculated on the basis that the annual licence fees prior to the Sycle licence agreement were \$74,287.40 per annum.

5.4.1 Department of Local Government Investigation

- [94] The DLG conducted an investigation into the purchase of CAMMS software by the Kalamunda Shire following a referral to the DLG by the Commission to investigate the allegations. The DLG investigation focussed on whether the Kalamunda Shire had failed to comply with the tender regulations and Kalamunda Shire purchasing policy.
- [95] On 4 November 2011 the Commission received the DLG report. Based on material then available to the DLG it concluded that although there was a breach of the Kalamunda Shire's purchasing policy there was no breach of Local Government Regulations. The DLG reported that:

The Shire considered that the software purchase from CAM Management Solutions was a "unique" circumstance in accordance with Regulation 11(2)(f) of the Regulations and did not put the purchase out for public tender. In this instance, the purchasing policy was relevant as it contained a crucial provision to guide the local government's purchasing (and accountability) practices in circumstances where Regulation 11(2)(f) is exercised. Whilst the Department's assessment did not identify any breaches of the Regulations, the Department notes that the Shire's purchasing policy was effectively bypassed to conduct the purchase.

As the Regulations do not contain offence provisions for failing to comply with a purchasing policy, the Department has requested process improvement by the Shire. The Shire has given a commitment to conduct process improvement in respect of purchasing in the future.

- [96] The DLG report was critical of the use of the uniqueness provision contained in Regulation 11(2)(f) *Local Government (Functions and General) Regulations 1996* in circumstances where the purchase was already in progress.

The Shire argued that the products it purchased from CAMMS were unique and could only be sourced from one supplier, and hence, applied the provisions of Regulation 11(2)(f) so that a tender did not have to be called. However, the officer's report indicates that the purchase from CAMMS was already in progress and that [c]ouncil approval to utilise Regulation 11(2)(f) was only sought at a later date. This appears to be an attempt to: legitimise the process by obtaining [c]ouncil's retrospective endorsement of the purchase, without giving the detail and justification for this action as required by the purchasing policy.

The Commission shares this view.¹⁷

¹⁷ See paragraph [101] of this report.

[97] During the course of the DLG investigation the DLG corresponded with the Kalamunda Shire through Mr Trail personally. A series of letters, between 21 February 2011 and 21 September 2011, seeking information were written by the DLG and Mr Trail responded or caused responses to be prepared which he then signed. Mr Trail never brought this investigation or the details of it to the attention of the Kalamunda Council or Kalamunda Shire President. The DLG, in written submissions, informed the Commission in November 2013 that its internal processes have been amended to ensure that communications with a local government in relation to allegations that relate wholly or in part to the conduct of a local government CEO will be brought to the attention of the elected council as employer of the CEO.

[98] After Mr Trail was advised of the outcome of the DLG investigation a Kalamunda Shire officer drafted a short letter to the DLG for Mr Trail's consideration, which included the following:

The contents of your letter have been noted and I have directed my Manager of Governance to ensure all requirements of the Purchasing Policy are complied with in the event of any similar purchases in the future. The Manager Governance will also bring this matter to the attention of all relevant staff to ensure full compliance with the policy.

Mr Trail responded and expressed his satisfaction with the draft by saying:

Like it short and sweet and polite way of saying ...

[99] Following receipt of correspondence expressing the DLG's concerns about the application of the uniqueness provision and failure to comply with Kalamunda Shire policy, Mr Trail signed an agreement to procure Sycle in May 2012 and the concerns set out by the DLG were ignored.

5.4.2 Analysis and Opinion

[100] As set out above the functions of the CEO include that he will ensure that advice and information is available to the council so that informed decisions can be made and that council is advised in relation to its functions (including the requirement to go to tender).

[101] In essence the DLG noted that given the report before the Kalamunda Council on 15 December 2008 indicated that the purchase was already in progress this was not a proper application of the uniqueness provision. The uniqueness provision is an exemption from the requirement to go to tender for purchases above \$100,000. Without that exemption the purchase ought not have occurred.

[102] To describe the three purchases as "distinct purchases" reflects a proposition that they were separate and unrelated purchases. The Commission considers that this proposition is not sustainable in light of the fact that each purchase was for a module of an integrated software system, a "suite of products", that Mr Trail said he always intended to purchase. Perhaps the report to the Kalamunda Council recognised this by

seeking a recommendation that the Kalamunda Council endorse the application of the uniqueness provision.

- [103] The question arises as to whether or not the Kalamunda Council was properly advised about the performance of its functions and the application of its procurement policy. The Commission's opinion is that the Kalamunda Council was not given proper advice because the purchase had already commenced the three purchases should have been considered to be a combined single purchase, and because the procurement policy required some investigation to be done to establish uniqueness and this had not occurred.
- [104] The report before the Kalamunda Council on 15 December 2008 did present in an open and transparent way the proposition that the three purchases were considered to be distinct, although, in the opinion of the Commission, they ought to have been considered a single purchase.
- [105] There is a question about whether the report was misleading in its reference to the contract entered into previously that year, in the sense that no information had been provided to the Kalamunda Council to indicate that Mr Trail had in fact agreed to purchase Interplan® in August 2008 and that he had taken action to get the purchase process commenced (by seeking the preparation of a proposal) in May 2008, prior to taking up his appointment. In the context of the Committee's endorsement of the software and implementation proposal on 10 November 2008, the Kalamunda Council could reasonably have formed the view that purchases had only occurred following that date. As noted previously the minutes for the Kalamunda Council meeting dated 15 December 2008 indicate that specific reference was made to that earlier meeting (November 2008 and there were no other meetings of the Kalamunda Council at this time which considered CAMMS purchases).
- [106] In the Commission's opinion Mr Trail engaged in misconduct pursuant to sections 4(d)(i), (ii) and (vi) of the CCC Act. He made a decision to purchase Interplan® and other modules for the Kalamunda Shire prior to commencing his employment at the Kalamunda Shire on 21 July 2008. In May 2008 he sought a proposal from CAMMS for the Kalamunda Shire to purchase Interplan® and other modules. Once he commenced his role as CEO he signed, in August 2008, the CAMMS proposal that he had earlier received. Mr Trail received an invoice for the purchase of Interplan® and he accepted a licensing agreement with CAMMS on 13 August 2008. Proper procurement processes were not followed. Mr Trail engaged in this conduct prior to seeking the approval of the Kalamunda Shire to purchase CAMMS products. Information about this was either not presented to the Kalamunda Council (in particular the Committee on 10 November 2008) or was presented arguably in a misleading way (to the Kalamunda Council meeting on 15 December 2008). In the opinion of the Commission Mr Trail did not perform his functions in an impartial way.
- [107] Mr Trail's conduct advantaged CAMMS over other potential suppliers as it disadvantaged other suppliers by denying them the opportunity to tender

and get the work. It resulted in CAMMS repeatedly gaining further contracts as other integrated modules were later purchased. Having regard to the fact that there is a positive obligation upon public officers to act impartially, without bias or without favour, and because of the harm to public confidence in the public sector and in government when they do not do so, the Commission is of the opinion that Mr Trail's conduct was not impartial and that it is conduct which could constitute a disciplinary offence providing reasonable grounds for termination of his employment.

- [108] In these circumstances, the Commission's opinion is that Mr Trail engaged in misconduct pursuant to sections 4(d)(i), (ii) and (vi) of the CCC Act.

5.5 Gifts from CAMMS to Mr Trail and Conflicts of Interest

- [109] From 2006 to 2012 Mr Trail received gifts, some which he declared and others which he did not declare, from CAMMS including, interstate and overseas travel, tickets to football and cricket, and payment for golf played by Mr Trail in Dubai and the United Kingdom.
- [110] What gifts can be received and how they are to be declared is set out in the LG Act. Section 5.82 requires gifts received to be disclosed in annual returns. This, and associated provisions, applies to a CEO.
- [111] The amount of the gift prescribed for the purposes of section 5.82 is \$200 for returns lodged after 1 January 2000.
- [112] Contributions to travel are also required to be disclosed in annual returns by section 5.83 of the LG Act, with the amount prescribed being \$200.¹⁸
- [113] Regulation 34B of the *Local Government (Administration) Regulations* 1996 requires local government codes of conduct to require disclosure of the receipt of "prohibited gifts" and "notifiable gifts" by employees when they are accepted from a person undertaking, seeking to undertake or it is reasonable to believe that they will undertake an activity involving a local government discretion. "Local government discretion" is defined as an activity that cannot be undertaken without an authorisation from the local government or by way of a commercial dealing with the local government.
- [114] A prohibited gift is worth \$300 or more, or a gift that is one or two or more gifts given by the same person within a period of six months that are in total worth \$300 or more.
- [115] A notifiable gift is a gift between \$50 and \$300 or a gift that is one or two or more gifts given by the same person within a period of 6 months that are in total worth between \$50 and \$300. These gifts must be notified to the CEO within 10 days of acceptance of the gift.
- [116] A Code of Conduct adopted by the Kalamunda Shire on 19 May 2008 included these obligations for employees of the Kalamunda Shire. The Kalamunda Shire CEO is an employee of that Shire. The CEO was to maintain a register of declared gifts.

¹⁸ *Local Government (Administration) Regulations* 1996, Regulation 26.

[117] The same Code of Conduct provided that "Shire employees will ensure that there is no conflict of interest between their personal interests and the impartial fulfilment of their professional duties".

[118] The gift regime under the local government legislation and regulations does not prevent the acceptance of gifts under a particular value but instead requires the declaration of them. The report by the Commission entitled *Report on the Investigation of Alleged Public Sector Misconduct in Relation to the Purchase of Toner Cartridges in Exchange for Gifts Outside Government Procurement Policies and Arrangements* tabled on 24 November 2011 in the Parliament referred at paragraph 234 to the guide prepared by the Western Australian Integrity Co-ordinating Group entitled *Conflict of Interest*. Scenario 6 contained therein, entitled *Gifts, Benefits and Hospitality*, states that "[p]referably, gifts [to public officers] should be politely declined unless ... [to do so] would cause offence".

[119] The Commission stated at paragraph 235 of that report that:¹⁹

[i]n order to reduce the misconduct risks associated with gifts to public officers, the Commission considers it critical to record the offer of a gift, not just gifts received or accepted. Not only does this give the public officer the opportunity to declare their actions, but it also provides the public authority the opportunity to identify any potential trends in gift-giving, or attempted gift-giving. By only recording gifts that have been accepted, important information and a true record of attempted influence of public officers, is lost.

[120] Relevantly, in that report the Commission stated that "[t]he Local Government Act and Regulations, in particular Regulation 25 and 34B, as they relate to the disclosure, acceptance and recording of gifts, are inconsistent with the Commission's recommended position and approach". Consequently, it was recommended that:

... The Local Government Regulations, and/or Local Government Act, be reviewed and amended to reflect a position consistent with the intent and recommendations of this report. To the extent that they are inconsistent, particularly in terms of the requirement for auditing of gift registers, gifts from relatives, "notifiable" and "prohibited" gifts, and monetary thresholds, it is recommended that they be amended.

[121] That review has not been conducted. The context in which Mr Trail's receipt of gifts from CAMMS must be viewed was one where the receipt of gifts was permissible provided those gifts were within the Code of Conduct and were declared.

[122] From the commencement of Mr Trail's contact with CAMMS, he attended numerous conferences endorsing CAMMS products. Initially expenses

¹⁹ Paragraphs [230]-[233] of the November 2011 report by the Corruption and Crime Commission consider the relationship between gift-offerer/gift-giver and the gift-recipient. Those paragraphs are repeated in this report at Appendix 2.

associated with his attendance were paid for by CAMMS but later these expenses were paid for by the Kalamunda Shire. Mr Trail regularly presented at these conferences about the benefits of CAMMS software and, in fact, CAMMS wrote Mr Trail's presentation for the first conference at which he presented.

- [123] In March 2010 CAMMS invited Mr Trail to attend a conference in London.
- [124] At an ordinary Kalamunda Council meeting held on 15 March 2010 the offer by CAMMS was discussed. The offer was for CAMMS to organise and fund an overseas visit by Mr Trail to promote the achievements of Kalamunda Shire and the Kalamunda Shire as being one of the most progressive local governments in Australia, and to discuss integrated planning and performance management.
- [125] The Kalamunda Council authorised the travel at the expense of CAMMS, although there were three councillors who voted against the motion. One of those councillors made the following statement which, in the opinion of the Commission, was a relevant consideration that the Kalamunda Council ought to have taken into account.

... this is a very well established tactic by software firms to market their, their software. It's, it's a tactic that they try to use in [S]tate [G]overnment and various other times with organisations but it is not often that they're actually taken up because in fact the purpose is to sell software.
- [126] Mr Trail was not required to take leave as he stated that he would be contactable by telephone. Mr Trail subsequently travelled business class overseas from 8 July 2010 to 31 July 2010 and attended the conference in London on 14 July 2010. Mr Trail presented a paper entitled *Streamlining Performance Management to Achieve Maximum Financial and Cultural Value: An Australian Perspective*. During the overseas trip to England Mr Trail sought and/or was provided with gifts including tickets to the cricket at Lords for an Australia v Pakistan Test Match (approximate value \$450.00), free admission to golf in Wales and Dubai (value unknown) and \$2,054.15 in travel allowance. By email Mr Trail requested the tickets to the Lords Test Match from the Managing Director of CAMMS.
- [127] Mr Trail did not disclose these gifts in his annual return.
- [128] Mr Trail also received tickets to cricket and football games within Australia from CAMMS over the period 2008 to 2012.
- [129] In many cases Mr Trail sought these gifts from CAMMS. In one instance he was in Canberra for a work conference and had the Kalamunda Shire pay for his flight to Melbourne to attend a football game and CAMMS paid for his tickets to the football. Some tickets received by Mr Trail were for finals football and some were catered for in a corporate box provided by CAMMS.
- [130] On seven occasions Mr Trail completed the forms entitled *Notification of the Acceptance of a Gift* which disclosed gifts he received to attend sporting events in Western Australia and interstate, including football and

cricket matches. It is of concern that Mr Trail gave evidence that he "estimated" the value of the gift on each occasion without making any inquiry as to the true cost. A number of these notifications were provided after Mr Trail became aware of the Commission investigation. Questions arise as to why this occurred and whether Mr Trail properly disclosed the receipt of these gifts. On other occasions Mr Trail received gifts but failed to disclose them at all.

- [131] Throughout the period that Mr Trail received gifts he continued to contract with CAMMS for the purchase of IT software. In some instances the receipt of gifts was juxtaposed to business negotiations. For example, during the week starting 21 May 2012 Mr Trail travelled to Melbourne and met with CAMMS to discuss the Sycle upgrade software. On 23 May 2012 he sought three tickets to the football (cost \$180.00) from CAMMS. CAMMS agreed to, and did in fact, provide the tickets.
- [132] On 26 May 2012 Mr Trail attended the football. During the same week on 24 May 2012 he signed a new agreement with CAMMS for the software called Sycle. Questions arise as to whether Mr Trail's actions breached the conflict of interest provisions of the Kalamunda Shire Code of Conduct. However, the Commission's opinion is that notwithstanding Mr Trail's actions in procuring the tickets put his personal interests in conflict with the Kalamunda Shire's commercial dealings with CAMMS, no opinion of misconduct is open in the context of the local government legislation and regulations with respect to the receipt of gifts. This illustrates the Commission's concern with the current legislative regime.

5.5.1 Analysis and Opinion

- [133] During his examination Mr Trail gave evidence to the effect that the travel allowance, the golf in Dubai and the cricket match at Lords were travel expenses to be paid for by CAMMS. If they were then they were required to be declared as contributions to travel. If they were not travel expenses, then they were gifts, and they were required to be declared as gifts in Mr Trail's annual return and their value would have to have been taken into account by him in determining whether or not they amounted to a "prohibited gift" (which would have been the case had they been treated by Mr Trail as gifts as he had accepted other gifts from CAMMS within the six-month period when he travelled to the United Kingdom). Neither occurred.
- [134] Mr Trail's failure to declare gifts in his annual return, or fill in paperwork for "notifiable gifts" within the 10-day period, or properly determine the cost of the gift so that he didn't receive a "prohibited gift" constitute a breach of trust placed in him by virtue of his office pursuant to section 4(d)(iii) and is conduct in the performance of his functions which is not honest pursuant to section 4(d)(ii). With respect to any failure to declare gifts in his annual return such conduct could constitute an offence against section 5.89 of the *Local Government Act 1996* and, consequently, in the Commission's opinion Mr Trail engaged in misconduct. With respect to any failure to follow the Kalamunda Shire Code of Conduct which reflected section 34B of the *Local Government (Administration) Regulations 1996*, such conduct could

constitute a disciplinary offence providing reasonable grounds for termination in all of the circumstances. The basis for this position is that it could amount to misconduct within the meaning of the *Public Sector Management Act 1994* because it occurred on more than one occasion in circumstances where Mr Trail was the head of the agency and ought to have complied and where he was engaging in commercial transactions involving large sums of money with CAMMS on behalf of the Kalamunda Shire.

6. Misconduct Opinions

- [135] In the Commission's opinion Mr Trail engaged in misconduct pursuant to sections 4(d)(iii) and (vi) of the CCC Act in that his failure to properly inform A-MR Council with respect to the purchase of CAMMS IT software and his failure to properly advise A-MR Council with respect to its procurement obligations amounts to a breach of trust placed in him by virtue of his position and is conduct which, in all of the circumstances, could provide reasonable grounds for termination.
- [136] In the Commission's opinion Mr Trail engaged in misconduct pursuant to section 4(d)(i), (ii) and (vi) of the CCC Act. He made a decision to purchase Interplan® and other modules for the Kalamunda Shire prior to commencing his employment at the Kalamunda Shire on 21 July 2008. In May 2008 he sought a proposal from CAMMS for the Kalamunda Shire to purchase Interplan® and other modules. Once he commenced his role as CEO he signed, in August 2008, the CAMMS proposal that he had earlier received. Mr Trail received an invoice for the purchase of Interplan® and he accepted a licensing agreement with CAMMS on 13 August 2008. Proper procurement processes were not followed. Mr Trail engaged in this conduct prior to seeking the approval of the Kalamunda Shire to purchase CAMMS products. Information about this was either not presented to the Kalamunda Council (in particular the Committee on 10 November 2008) or was presented arguably in a misleading way (to the Kalamunda Council meeting on 15 December 2008). In the opinion of the Commission Mr Trail did not perform his functions in an impartial way.
- [137] Mr Trail's conduct advantaged CAMMS over other potential suppliers as it disadvantaged other suppliers by denying them the opportunity to tender and get the work. It resulted in CAMMS repeatedly gaining further contracts as other integrated modules were later purchased. Having regard to the fact that there is a positive obligation upon public officers to act impartially, without bias or without favour, and because of the harm to public confidence in the public sector and in government when they do not do so, the Commission is of the opinion that Mr Trail's conduct was not impartial and that it is conduct which could constitute a disciplinary offence providing reasonable grounds for termination of his employment.
- [138] In the Commission's opinion Mr Trail engaged in misconduct pursuant to sections 4(d)(ii) and/or (iii) together with 4(d)(v) and/or (vi) of the CCC Act because Mr Trail's failure to declare gifts in his annual return, or fill in paperwork for "notifiable gifts" within the 10-day period, or properly determine the cost of the gift so that he didn't receive a "prohibited gift"

constitute a breach of trust placed in him by virtue of his office pursuant to section 4(d)(iii) and is conduct in the performance of his functions which is not honest pursuant to section 4(d)(ii). With respect to any failure to declare gifts in his annual return such conduct could, in accordance with section 4(d)(v), constitute an offence against section 5.89 of the *Local Government Act 1996* and, consequently, in the Commission's opinion Mr Trail engaged in misconduct. With respect to any failure to follow the Kalamunda Shire Code of Conduct which reflected section 34B of the *Local Government (Administration) Regulations 1996*, such conduct could, in accordance with section 4(d)(vi), constitute a disciplinary offence providing reasonable grounds for termination in all of the circumstances. The basis for this position is that it could amount to misconduct within the meaning of the *Public Sector Management Act 1994* because it occurred on more than one occasion in circumstances where Mr Trail was the head of the agency and ought to have complied and where he was engaging in commercial transactions involving large sums of money with CAMMS on behalf of the Kalamunda Shire.

7. Recommendations

[139] The Commission makes the following recommendations.

7.1 Failure to Declare Gifts in Annual Return

[140]

Recommendation 1

It is recommended that the Department of Local Government give consideration to the prosecution of Mr James Trail pursuant to section 5.89 of the *Local Government Act 1995* for a failure to declare gifts in his annual return.

7.2 Effectiveness of Regulation 12 of the *Local Government (Functions and General) Regulations 1996* to Prevent Contract Splitting in Procurement

[141]

Recommendation 2

It is recommended that Regulation 12 of the *Local Government (Functions and General) Regulations 1996* be legislatively reviewed so that its plain meaning reflects the legislative intent.²⁰

²⁰ See paragraphs [29]-[30] of this report.

7.3 Review of Local Government Legislation with Respect to Gifts and Financial Contributions

[142] A recommendation made in the Commission *Report on the Investigation of Alleged Public Sector Misconduct in Relation to the Purchase of Toner Cartridges in Exchange for Gifts Outside Government Procurement Policies and Arrangements* tabled in the Parliament on 24 November 2011 relates to a review of the LG Act and associated Regulations. As that review has not been undertaken the Commission repeats that recommendation below.

[143]

Recommendation 3

The Commission recommends that *Local Government Regulations, and/or Local Government Act, be reviewed and amended ... particularly in terms of the requirement for auditing of gift registers, gifts from relatives, "notifiable" and "prohibited" gifts, and monetary thresholds ...*

[144] The acceptance of gifts, no matter how small, from suppliers and contractors by those conducting public business, is a misconduct risk.

[145] A legislative regime that endorses the receipt of gifts and contributions to travel in circumstances where a public officer is engaged in commercial dealings with the gift giver requires rigorous review.

[146] The guide prepared by the Western Australian Integrity Co-ordinating Group entitled *Conflict of Interest* in Scenario 6 contained therein, entitled *Gifts, Benefits and Hospitality*, states that:

...

The receipt of gifts, or other non-monetary benefits including rewards or offers of hospitality, can place a public officer in a position of actual, perceived or potential conflict of interest. Public authorities should develop clear and consistent protocols for all employees to follow in the event that a gift or benefit is offered to them or their employer. This is particularly important where employees are involved in procurement functions, sponsorship or commercial dealings with the private sector.

Public sector employees should not believe that accepting gifts will go undetected, or that it would not affect their relationship with the supplier ...

...

[147] The receipt of gifts such as corporate box football tickets by public officers while conducting public business should be prohibited rather than be authorised by the applicable legislation.

7.4 Statement of Business Ethics

[148]

Recommendation 4

The Commission recommends that the Department of Local Government, in consultation with the Western Australian Local Government Association, formulate a "Statement of Business Ethics" in relation to incentives, gifts and benefits, for use by local governments, to provide a clear set of supplier behaviour expectations and the associated consequences for non-compliance. Such a statement would be applicable to all sectors of the community that conduct business with local government authorities.

[149] The above recommendation is supported by a New South Wales Independent Commission Against Corruption (ICAC) October 2012 report on an investigation into allegations that employees of a number of public authorities, including local government authorities, accepted secret benefits from companies that supplied goods to the public authorities in return for the employees placing orders with the companies, which quoting from a 2011 report, stated that:

... public authorities need to take more action to communicate with suppliers in order to both improve procurement and to reduce corruption risks. Engagement with suppliers, where public officials take the initiative and control the interaction, provides the public sector with the opportunity to communicate ethical obligations, principals and standards of behaviour to suppliers.²¹

In its 2012 report ICAC stated further that:

... it is clear from the evidence of the suppliers that what was missing with regard to their interactions with the public sector, and what may have curtailed the practice of gift giving, was communication of a definitive position on gifts from the public sector ...

...

If any information was provided at all to suppliers ... about their expected behaviour and the consequences of poor behaviour, it would have been through a statement of business ethics ...

An expert witness at ICAC's public inquiry advised that:

²¹ Independent Commission Against Corruption, New South Wales, report entitled *Corruption Risks in NSW Government Procurement: The Management Challenge*, December 2011.

[a]n advantage of informing all suppliers [that gifts are not permitted] is that they become aware and can't deny that they know what is going on. It also sets the standard ...

In its 2012 report ICAC recommended that:

councils communicate to suppliers a clear set of supplier behaviour expectations and the associated consequences for non-compliance.

7.5 Guide for the Procurement of Information Technology

[150]

Recommendation 5

The Commission recommends that consideration be given by the Department of Local Government, in consultation with the Western Australian Local Government Association, to the development of a more detailed guide for the procurement of Information Technology by local governments, with a particular focus on how the total cost of the purchase is to be determined to ensure compliance with procurement legislation and policies.

[151] The procurement of IT software may involve the purchase of integrated modules and will inevitably involve implementation, training and licensing fees over a period of time. In the context of a legislative requirement to go to public tender for contracts of \$100,000 or more, clear guidance should be provided to local government as to how to determine the total cost of this type of complex purchase.

[152] IT procurement is a high value and high risk procurement area for misconduct. Apart from the report by the Western Australian Auditor General, other agencies throughout Australia have considered the issues which arise with respect to IT procurement.²²

[153] Relevantly, guarding the "gateway" through which contractors enter the organisation is one of five key areas that ICAC considered essential with respect to IT procurement. Further, ICAC found that the opportunities and motivation for corrupt behaviour occurred in organisations that had not paid attention to one or more of the identified five areas. With respect to the purchases of CAMMS IT by the A-MR Shire and the Kalamunda Shire the primary gateway through which the contractor entered was Mr Trail, which clearly involved risk.

²² *Managing IT Contractors, Improving IT Outcomes* published by the Independent Commission Against Corruption (NSW), August 2013; *Own Motion Investigation Into ICT Enabled Projects* published by GE Brouwer, the Victorian Ombudsman, 2011; and *Review of the Australian Government's Use of Information and Communication Technology* by Sir Peter Gershon, 2008.

APPENDICES

APPENDIX 1
Commission Opinions of Misconduct

Commission Opinions of Misconduct

Definition of Misconduct

[154] The term “misconduct” has a particular and specific meaning pursuant to sections 3 and 4 of the CCC Act and it is that meaning which the Commission must apply. Section 4 of the CCC Act states that:

Misconduct occurs if —

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

and constitutes or could constitute —

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

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

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

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

Steytler P at [116] stated that:

... there is nothing in s 4(d)(vi) of the CCC Act that requires the public officer in question to have been a public service officer under the PSM Act.

That is made plain by the words “(whether or not the public officer to whom the allegation relates is a public service officer or is a person whose office or employment could be terminated on the grounds of such conduct)”. It is consequently irrelevant whether Dr Cox was, or was not, a public service officer for the purpose of the PSM Act.

[162] Further, the Commission refers to and incorporates into this report paragraphs [28] to [30] inclusive, of the *Special Report by the Corruption and Crime Commission on its Reporting Function with Respect to Misconduct Under Part 5 of the “Corruption and Crime Commission Act 2003” (WA)* (“the Special Report”), tabled in the Parliament on 21 October 2010.²³

Publication of an Opinion

[163] 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.

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

[165] It should be noted, however, that as a standing or permanent commission of inquiry, section 7B(1) of the CCC Act, which, *inter alia*, conducts administrative investigations, the Commission does not determine whether any person has committed a criminal or disciplinary offence. The opinions of the Commission are confined to whether or not a public officer has engaged in misconduct according to the particular definition pursuant to sections 3 and 4 of the CCC Act.

Balance of Probabilities

[166] 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.

[167] The balance of probabilities is defined as:

[t]he weighing up and comparison of the likelihood of the existence of competing facts or conclusions. A fact is proved to be true on the

²³ Sections 83-86 of the *Public Sector Management Act 1994* (“the PSM Act”) were deleted by Amendment No. 39 of 2010 s. 99. Any reference to these sections in the *Special Report by the Corruption and Crime Commission on its Reporting Function with Respect to Misconduct Under Part 5 of the “Corruption and Crime Commission Act 2003” (WA)* (“the Special Report”) should be disregarded. In addition, parts of paragraphs [31]-[38] of the Special Report are no longer applicable as a result of other amendments made to the PSM Act by Amendment No. 39 of 2010.

balance of probabilities if its existence is more probable than not, or if it is established by a preponderance of probability ...²⁴

[168] 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 Rejzek v McElroy (1965) 112 CLR 517, as detailed below:

... 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 ...

[169] Furthermore, the Commission refers to and incorporates into this report paragraphs [55]-[57] of its Special Report.

Section 4(c), Section 23(1) and Section 23(2) of the Corruption and Crime Commission Act 2003

[170] Section 23(1) of the CCC Act prohibits the Commission from publishing or reporting a finding or opinion that a particular person has committed, is committing or is about to commit a criminal offence or a disciplinary offence. However, section 23(1) of the CCC Act allows the Commission to publish or report that a person has been convicted of, or pleaded guilty to, a criminal offence or disciplinary offence. In such a case the Commission would be reporting a fact, not its opinion, as to that. Further, section 23(2) of the CCC Act provides that an opinion that misconduct has occurred, is occurring or is about to occur is not, and is not to be taken as, a finding or opinion that a particular person has committed, or is committing or is about to commit a criminal offence or disciplinary offence.

(emphasis added)

[171] In the Commission's opinion section 23(2) allows the Commission to publish or report a finding or an opinion that the relevant conduct constitutes misconduct under section 4(c) of the CCC Act without the person having been convicted of an offence punishable by two or more years' imprisonment. Acknowledging that whether a criminal offence has been committed can only be determined by a court and that the elements of the offence must be proved beyond reasonable doubt, and further acknowledging that the Commission is not a court, does not make legally binding determinations and may form an opinion as to misconduct on the balance of probabilities, the Commission, in expressing and reporting an

²⁴ Butterworths *Concise Australian Legal Dictionary* (Third Edition), Lexis Nexis Butterworths, Australia 2004, p.42.

opinion that the misconduct constitutes serious misconduct under section 4(c) of the CCC Act is expressing and reporting an opinion that facts if proved beyond a reasonable doubt in a court could satisfy the elements of an offence, not that a particular person has committed an offence.

Expression of an Opinion

- [172] The Commission has borne all of the foregoing considerations (as set out in paragraphs [163]-[171] above) in mind in forming its opinions about matters the subject of the investigation. Any expression of opinion in this report is so founded.

APPENDIX 2

**Extract from Corruption and Crime Commission
Report of November 2011
(Paragraphs [230]-[233])**

Relationship Between Gift-Offerer/Gift-Giver and Gift-Recipient

[173] With respect to the management of gifts in a public sector context, it has been common practice within many public authorities, where policies relating to gifts exist, to allocate "token" values or a threshold to declaring gifts. This approach does not fully consider the relationship between gift-offerer/gift-giver and gift-recipient. In the Commission's view, the first question that needs to be asked is: "What is the relationship between gift-offerer/gift-giver and gift-recipient?" There are three relevant answers to this question.

- (1) **A discretionary authority, such as purchasing discretion, exists between the gift-recipient and the gift-offerer/gift-giver.** In this relationship the possibility to directly influence the gift-recipient's behaviour, to the advantage of the gift-offerer/gift-giver, exists and the question of misconduct therefore arises. The misconduct risk is not eliminated, or even significantly reduced, if the gift is below a certain monetary value, or is of token or negligible value.
- (2) **No direct discretionary authority exists between the gift-recipient and gift-offerer/gift-giver, however, the receipt or offer of a gift to the gift-recipient, may indirectly influence the outcome of a discretionary decision made by another.** In this relationship the possibility to indirectly influence public officer behaviour, to the advantage of the gift-offerer/gift-giver exists, and therefore the question of misconduct arises. In these circumstances, where a discretionary decision is indirectly influenced, or may be seen to have been influenced, by the offer of a gift, the gift should be refused. The misconduct risk is not eliminated, or even significantly reduced, if the gift is below a certain monetary value, or is of token or negligible value.
- (3) **No discretionary authority exists between the gift-recipient and gift-offerer/gift-giver.** In this relationship there is no "direct" possibility to influence the gift-recipient's behaviour to the advantage of the gift-offerer/gift-giver. The question of misconduct, therefore, is less likely to arise.

[174] Since purchasing decisions necessarily involve the exercise of some discretionary authority, the issue of the relationship between a potential gift-offerer/gift-giver and gift-recipient is readily apparent and gifts should, therefore, be refused.

[175] This issue is to some extent recognised in the gift policies examined by the Commission. Of these, 32% of policies articulated that no gifts of any kind were to be accepted by officers in procurement positions. Almost half of the policies (52%) considered the relationships surrounding the offer of the gift, but only 10% of gift registers reflected this as an element.

[176] The *Local Government (Administration) Regulations 1996* indicate that in the case of a “notifiable” gift the nature of the relationship between the employee and gift-giver is to be recorded. However, as there is no legislated requirement for these details to be audited, and without these or any secondary controls in place, the likelihood of any improper behaviour being detected is lessened.

