

**REPORT ON
AN INVESTIGATION INTO
A MEMORANDUM OF UNDERSTANDING
BETWEEN THE COALITION AND THE QPUE
AND
AN INVESTIGATION INTO AN ALLEGED DEAL
BETWEEN THE ALP AND THE SSAA**

DECEMBER 1996

© Criminal Justice Commission, 1996.

Apart from any fair dealing for the purpose of private study, research, criticism or review, as permitted under the COPYRIGHT ACT, no part may be reproduced by any process without permission. Inquiries should be made to the publisher, the Criminal Justice Commission.

ISBN 0 7242 7123 6

Printed by GOPRINT, Brisbane.



CRIMINAL JUSTICE COMMISSION

Telephone: (07) 3360 6060

Facsimile: (07) 3360 6333

19 December 1996

The Honourable Denver Beanland MLA
Attorney-General and Minister for Justice
Parliament House
George Street
BRISBANE Qld 4000

The Honourable Neil Turner MLA
Speaker of the Legislative Assembly
Parliament House
George Street
BRISBANE Qld 4000

The Honourable Vince Lester MLA
Chairman
Parliamentary Criminal Justice Committee
Parliament House
George Street
BRISBANE Qld 4000

Dear Sirs

In accordance with section 26 of the *Criminal Justice Act 1989*, the Commission hereby furnishes to each of you its report on:

- an investigation into the circumstances surrounding the creation and execution of a Memorandum of Understanding executed by the Honourable Robert Borbidge MLA (then Leader of the Opposition), the Honourable Theo Russell Cooper MLA (then Coalition Spokesman for Police, Corrective Services and Racing), and Sergeant Gary Wilkinson, the President of the Queensland Police Union of Employees, on a date not specified but believed to be in or about December 1995/January 1996; and
- an investigation into the circumstances surrounding any agreement between the ALP and the Sporting Shooters Association of Australia (Inc) and the Sporting Shooters Association of Australia (Qld) Inc. or either of them of the kind alleged in media reports on various dates in April 1996.

Yours faithfully


J G CROWBEY QC
Acting Chairperson

FOREWORD

On 21 March 1996 the CJC resolved to conduct an investigation into the circumstances surrounding the creation and execution of a Memorandum of Understanding which had been signed by the Honourable Robert Borbidge MLA, then Leader of the Opposition, the Honourable Theo Russell Cooper MLA, then Coalition Spokesman for Police, Corrective Services and Racing, and Sergeant Gary Wilkinson, the President of the Queensland Police Union of Employees (the MOU Inquiry). The purpose of the investigation was to determine whether any member of the Queensland Police Service or any other person should be charged with a disciplinary offence of official misconduct or misconduct or any other offence, criminal or disciplinary.

In recognition of the perception that the CJC may be seen as having a vested interest in the subject matter of the investigation it engaged the services of an independent qualified person, namely, the Honourable Kenneth Carruthers QC.

The hearing of evidence commenced on 22 April 1996.

On 16 May 1996 the CJC resolved to conduct an investigation into the circumstances surrounding any agreement between the Australian Labor Party and the Sporting Shooters Association of Australia which may have been a breach of the bribery provisions of the *Electoral Act 1992* (the Shooters' Inquiry).

On that date the CJC also resolved to appoint Mr Carruthers to investigate this matter.

The hearing of evidence and submissions in relation to each matter concluded on 2 September and 3 September 1996 respectively.

On 29 October 1996 Mr Carruthers publicly announced his intention to resign without completing and presenting his report. Subsequently, he did tender his resignation. As a result, the CJC decided to brief Senior Counsel to advise the CJC whether any report should be made by the Chairperson pursuant to section 33(2) of the *Criminal Justice Act 1989* in respect of any person as a result of the investigation conducted by Mr Carruthers QC.

In early November 1996 the CJC briefed Mr R W Gotterson QC and Mr B J Butler SC to advise on the matter. They were briefed with, inter alia, copies of:

- (a) the transcript of the public hearings including both the evidence of witnesses and submissions;
- (b) all of the exhibits tendered during the course of the public hearings; and
- (c) all written submissions made on behalf of parties represented at the public hearings.

The CJC was advised by joint memorandum dated 6 December 1996 in relation to the issues of possible criminal conduct or official misconduct arising from the MOU Inquiry. The CJC was advised by joint memorandum dated 18 December 1996 in relation to the issue of possible misconduct arising from the MOU Inquiry. In relation to the Shooters' Inquiry, the CJC was furnished with a joint memorandum of advice dated 13 December 1996. Consequently the brief of advice was not completed until 18 December 1996 when the last instalment was furnished.

This Report consists of the three memoranda in their entirety as well as a brief background of the two matters and all relevant resolutions. Part A of the Report relates to the MOU Inquiry and Part B of the Report relates to the Shooters' Inquiry.

The advices are to the effect that the evidence did not in either matter warrant any referral for criminal action or official misconduct proceedings. However, the report of 18 December 1996 was to the effect

that the available evidence establishes a prima facie case to support disciplinary action for misconduct against a number of police officers.

The Commission intends to act upon these advices.

The unusual format of this report is a consequence of the exceptional circumstances flowing from the departure of Mr Carruthers.

PART A
THE MOU INQUIRY

THE MOU INQUIRY

On 27 February 1996, *The Courier Mail* newspaper published an article under the heading "Police Claim Deal to Gut CJC". The article referred to an alleged deal between the Queensland Police Union of Employees ["the Union"] and the Coalition parties ["the Coalition"] in which the Coalition had allegedly agreed to:

- reduce the powers of the Criminal Justice Commission
- get rid of the Police Commissioner, and
- "water down" all police disciplinary measures.

The article noted that the claims about the deal were contained in a Police Union newsletter. Although the newsletter in question had already received limited circulation in police and government circles, *The Courier Mail* article was the first intimation to the general community that such an agreement might exist.

The article also noted that the Police Minister, Mr Russell Cooper MLA, had denied the previous night that he had made any deals with the Union, and said that he had 'only agreed to look at certain matters regarding the Police Service'.

On the same day that *The Courier Mail* article appeared, Mr Cooper wrote to the Chairperson of the CJC in the following terms:

You would be aware from a story in "The Courier Mail" today that an allegation has been raised that I, on behalf of the Coalition, have made some secret and improper alleged "deal" with the Queensland Police Union of Employees.

Attached is a copy of that Memorandum of Understanding and I would be grateful if you could review it and advise if, in your considered view, there is anything improper in it.

The statements contained therein are direct quotes from the Police Union document supplied to me. I am the author only of all comments under the heading of "response". For your clarification, you should be aware that my use of the word "agreed" in my responses indicates only an agreement to have the matter reviewed.

You will note that Item 21 on Page 7 makes mention of a number of Service Assistant Commissioners which the Union document named. I have deleted these as I believe their naming is totally inappropriate. Should you wish me to supply these names, I shall be more than happy to comply.

Your advice and conclusions are requested.

Mr Cooper's letter included a copy of a Memorandum of Understanding ["MOU"] which had been signed by the Honourable Rob Borbidge MLA, then Leader of the Opposition, the Honourable Russell Cooper MLA, then Coalition Spokesman for Police, Corrective Services and Racing, and Sergeant Gary Wilkinson, the President of the Police Union of Employees.

Upon receipt of the letter, the Chairperson of the CJC wrote to Mr Cooper requesting the names of the Assistant Commissioners which had been deleted from the original letter, and the names were supplied by Mr Cooper on the same day.

In view of the fact that the MOU recorded the desire of the Union to limit the CJC's statutory powers, and in recognition of the perception which might thereby arise that the CJC had a vested interest in undertaking an investigation of the matter, the CJC sought advice from Senior Counsel as to:

- whether the creation and execution of the MOU enlivened the CJC's jurisdiction to investigate, and
- if so, what should be the form of any investigation?

The CJC received advice that:

- there was a reasonable suspicion raised on the material of alleged or suspected official misconduct or misconduct by officers of the Queensland Police Service ["QPS"] within the CJC's jurisdiction to investigate
- in recognition of the perception that the CJC had a vested interest in undertaking such an investigation, the CJC should appoint an independent person pursuant to sections 25(2) and 66 of the *Criminal Justice Act 1989* ["the Act"] to undertake such investigation and to execute the CJC's hearing powers
- the independent person so appointed should be empowered in his/her discretion to convene public hearings as provided for by section 90 of the Act.

The CJC accepted this advice and, on 21 March 1996, resolved:

- (1) To conduct an investigation into the circumstances surrounding the creation and execution of the said MOU with a view to determining whether any member of the QPS or any other person should be charged with a disciplinary offence of official misconduct or misconduct or any other offence, criminal or disciplinary.
- (2) As part of the investigation referred to in paragraph (1) hereof, to consider generally such circumstances, and to make such recommendations as may seem appropriate in light of the Commission's responsibilities under section 23 of the Act and otherwise having regard to the statutory duty of the Commission imposed by section 93 of the Act.
- (3) To engage the services of an independent qualified person pursuant to sections 25(2)(c) and 66 of the Act, that person being The Honourable Kenneth Carruthers QC, to conduct the investigation, to hold such public or private hearings as may be appropriate and to report thereon to the Commission, to enable the Commission the Commissioners and the officers of the Commission to discharge the functions and responsibilities imposed upon them by the Act.

A copy of the resolution is included hereafter.

Pursuant to the resolution, a hearing in this matter began before Mr Carruthers QC on 2 April 1996 in the form of a directions hearing at which questions of procedure were settled and applications for leave to appear were heard.

The investigation which Mr Carruthers conducted was an investigation by the Official Misconduct Division of the Commission. Under section 33 of the Act, the Director of the OMD is required to report to the Chairperson on the results of such investigation, with a view to the Chairperson taking such action as he considers desirable. The Chairperson may then approve a report to one or more of the following:

- (a) the Director of Public Prosecutions, with a view to such prosecution proceedings as the Director considers warranted;
- (b) the executive director of the Commission with a view to a Misconduct Tribunal exercising jurisdiction in respect of the matter; and
- (g) the appropriate principal officer in a unit of public administration, with a view to disciplinary action being taken in respect of the matter.

In the present case, a report would be referred under (a) where the available evidence showed a prima facie case to support a criminal charge. A report would be referred under (b) where the available evidence showed a prima facie case to support a disciplinary charge of official misconduct. A report would be referred under (g) where the available evidence showed a prima facie case to support a disciplinary charge of misconduct against a police officer.

The hearing of evidence commenced on 22 April 1996 and concluded on 2 September 1996. The inquiry took evidence over 49 days. Forty-one witnesses were called, and 416 exhibits were tendered.

On 29 October 1996, Mr Carruthers announced his intention to resign without completing and presenting his report. Subsequently he tendered his resignation to the Chairperson of the CJC.

**CERTIFICATE UNDER SECTION 143 OF THE
CRIMINAL JUSTICE ACT 1989 EVIDENCING A
RESOLUTION BY THE CRIMINAL JUSTICE COMMISSION
TO CONDUCT AN INVESTIGATION AND APPOINT
AN INDEPENDENT PERSON**

WHEREAS:

1. On 27 February 1996 the Minister for Police and Corrective Services and the Minister for Racing, the Honourable Theo Russell Cooper MLA (the Minister) wrote to the Criminal Justice Commission (the Commission) asking it to review and advise whether, in the Chairperson's considered opinion, a Memorandum of Understanding (MOU) executed by the Honourable Robert Borbidge MLA (the Premier), the Minister and Sergeant Gary Wilkinson, the President of the Police Union of Employees (QPUE), on a date not specified but believed to be in or about December 1995/January 1996 contained "anything improper".
2. The Commission noted that the MOU recorded the desire of the QPUE to limit the Commission's statutory powers, functions and responsibilities and in recognition of the perception which might thereby arise that the Commission has a vested interest in undertaking an investigation of this matter, the Commission sought advice from Mr C E K Hampson AO QC of the Queensland Bar on the following questions:
 - whether the creation and execution of the MOU enlivened the Commission's jurisdiction to investigate?
 - if so, what should be the form of any investigation?
3. The Commission has received advice from Mr Hampson that:
 - there is a reasonable suspicion raised on the material of alleged or suspected official misconduct or misconduct by officers of the Queensland Police Service (QPS) within the Commission's jurisdiction to investigate
 - in recognition of the perception that the Commission has a vested interest in undertaking such an investigation as aforesaid, the Commission should appoint an independent person pursuant to s.25(2) and s.66 of the *Criminal Justice Act* 1989 (the Act) to undertake such investigation and to exercise the Commission's hearing powers
 - the independent person so appointed should be empowered in his/her discretion to convene public hearings as provided for by s.90 of the Act.

AND WHEREAS:

The Commission has considered and accepted the advice of Queen's Counsel so rendered as to the necessity for and form of such investigation.

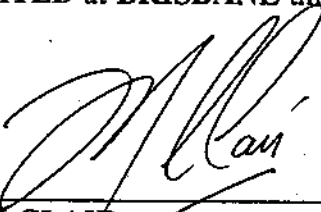
AND WHEREAS:

It is a function of the Official Misconduct Division of the Commission pursuant to the provisions of s.29(3)(d) of the Act to investigate alleged or suspected official misconduct or misconduct by members of the QPS that come to its notice from any source.

THE COMMISSION RESOLVED on 21 March 1996:

- (1) To conduct an investigation into the circumstances surrounding the creation and execution of the said MOU with a view to determining whether any member of the QPS or any other person should be charged with a disciplinary offence of official misconduct or misconduct or any other offence, criminal or disciplinary.
- (2) As part of the investigation referred to in paragraph (1) hereof, to consider generally such circumstances, and to make such recommendations as may seem appropriate in light of the Commission's responsibilities under s.23 of the Act and otherwise having regard to the statutory duty of the Commission imposed by s.93 of the Act.
- (3) To engage the services of an independent qualified person pursuant to sections 25(2)(c) and 66 of the Act, that person being The Honourable Kenneth Carruthers QC, to conduct the investigation, to hold such public or private hearings as may be appropriate and to report thereon to the Commission, to enable the Commission the Commissioners and the officers of the Commission to discharge the functions and responsibilities imposed upon them by the Act.

DATED at BRISBANE this 26th day of March 1996.



F J CLAIR
Chairperson

W G Strange
Official Solicitor
Criminal Justice Commission
PO Box 137
BRISBANE ALBERT STREET 4002

JOINT MEMORANDUM OF ADVICE

Re: Criminal Justice Act 1989 - Section 33(2)(a), (b)

Memorandum of Understanding

The focus of instructions is a document styled "Memorandum of Understanding" ("MOU") signed in January 1996 by Mr R Borbidge MLA ("Borbidge"), then Leader of the Opposition, Mr R Cooper MLA ("Cooper"), the then Coalition Spokesman for Police, Corrective Services and Racing and Senior Sergeant Gary Wilkinson ("Wilkinson"), President of the Queensland Police Union of Employees. The events leading towards the signing of the MOU, the circumstances in which it was signed, and the conduct of persons following on the signing of it were canvassed in great detail in public hearings before Mr Carruthers QC. He had been engaged by the Criminal Justice Commission ("CJC") pursuant to section 66 of the Criminal Justice Act 1989 ("CJ Act") to investigate these matters.

We have been briefed with copies of:--

- (a) the transcript of the public hearings including both the evidence of witnesses and submissions;
- (b) most exhibits tendered during the course of the public hearings; and
- (c) all written submissions made on behalf of parties represented at the public hearings.

Where it has been inconvenient to provide copies of them, access to those exhibits has been available to us.

We are briefed to advise inter alia whether reports should be made with the authority of the Chairperson of the CJC:-

- (a) to the Director of Public Prosecutions with a view to such prosecution proceedings as the Director considers warranted (subsection 33(2)(a) CJ Act); or
- (b) to the Executive Director of the CJC with a view to a Misconduct Tribunal exercising jurisdiction in respect of the matter (subsection 33(2)(b) CJ Act).

We are instructed that a report would be made under subsection 33(2)(a) where the available evidence shows a prima facie case to support a **criminal charge** against a person or persons, and that a report would be made under subsection 33(2)(b) where the available evidence shows a prima facie case to support a **disciplinary charge of official misconduct** against a person or persons. In this context, the familiar test of availability of sufficient evidence upon which a properly instructed tribunal of fact could reasonably conclude that a criminal

offence has been committed is to be adopted: compare Greiner v. Independent Commission against Corruption (1992) 28 NSWLR 125, 136. Thus the questions for advice resolve themselves into whether the available evidence shows a prima facie case to support a criminal charge or a disciplinary charge of official misconduct against any person or persons.

The scope of our brief differs markedly from the task for which Mr Carruthers QC was engaged. We are briefed to advise solely in relation to the two abovementioned matters and a third matter relating to disciplinary action which will be the subject of a separate joint advice. We have not been requested to comment otherwise upon the propriety of any person's behaviour or the sufficiency of the legislative provisions in Queensland concerning election conduct. Unlike Mr Carruthers QC, we have no investigative role. Moreover, we have the benefit of being asked to advise on the basis of evidence already available from the public hearings.

In the written submissions and in the course of oral submissions at the public hearings, the only criminal offence provisions that were addressed as possibly having been breached were subsections 155(1) and (2) of the Electoral Act 1992 ("EA"). In the material we have seen, there is no indication that any other criminal offence provisions warrant consideration.

Official misconduct is defined in subsections 31(1) and 32(1) CJ Act. It is clear from the definition that official misconduct may be committed by:-

- (a) a person who is the holder of an appointment in a unit of public administration; or
- (b) by a person who does not hold such an appointment.

In the case of category (a), the conduct will not be official misconduct unless it satisfies the test that it constitutes or could constitute either a criminal offence or a disciplinary breach that provides reasonable grounds for termination of the person's services in the unit of public administration (subsection 32(1)(d)). For category (b), the test is limited to: constitutes or could constitute a criminal offence (subsection 32(1)(e)).

A member of the Queensland Police Service ("QPS") holds an appointment in a unit of public administration (ss.3, 4 CJ Act). By virtue of the terms of employment (to which we refer in some detail later), the services of a member of QPS may be terminated when a disciplinary breach reasonably justifies termination. A member of the QPS may commit official misconduct under either the criminal offence limb or the disciplinary breach limb of subsection 32(1)(d).

The Legislative Assembly is a unit of public administration and an elected member of that House holds an appointment in a unit of public administration (ss.3, 4 CJ Act). A member of the Legislative Assembly does not render services in the House which may be terminated. Section 7 of the Legislative Assembly

Act 1867 provides for circumstances in which a member's seat shall become vacant. One of them is conviction of a crime. Upon a vacancy, the former member may no longer serve in the House but this is by virtue of the operation of this statute rather than by a termination of services. It follows then that a member of the Legislative Assembly may commit official misconduct only when the conduct in question constitutes or could constitute a criminal offence - the first limb in subsection 32(1)(d).

Where the Executive Director receives a report pursuant to subsection 33(2)(b), he may initiate proceedings in the original jurisdiction of a Misconduct Tribunal by a charge of official misconduct: s.51 CJ Act. The original jurisdiction of Misconduct Tribunals is conferred in terms of investigating and determining every charge, of a disciplinary nature, of official misconduct made against a **prescribed person**: subsection 46(1) CJ Act.

By virtue of s.40 CJ Act, the expression "prescribed person" is defined for jurisdictional purposes in terms of the definition in subsection 39(2) CJ Act to mean -

- "(a) a member of the police service;
- (b) a person who holds an appointment in a unit of public administration (other than the police service), which appointment or unit is declared by regulation to be subject to the jurisdiction of a misconduct tribunal."

Thus, notwithstanding the wide ambit of persons who may commit official misconduct, a charge of official misconduct may be brought in a Misconduct Tribunal only when the person involved is a prescribed person. Members of the QPS are prescribed persons but members of the Legislative Assembly are not, neither membership of the Legislative Assembly nor the Legislative Assembly itself having been the subject of a declaration by regulation made under subsection 39(2)(b). As things stand, there can be no proceedings in a Misconduct Tribunal for official misconduct committed by a member of the Legislative Assembly.

The jurisdictional limitation on Misconduct Tribunals and the fact that two of the three signatories to the MOU were members of the Legislative Assembly sharpen the focus on subsections 155(1) and (2) and place at the centrepiece of our review the question whether either provision was breached by any person or persons.

We now turn to examine s.155 in detail.

SECTION 155 EA - INTERPRETATIONAL ISSUES

Reprint No. 3 of the EA, as in force on and from 18th December 1995, sets out s.155 as follows:-

"Bribery

155.(1) A person must not -

- (a) ask for or receive; or
- (b) offer, or agree, to ask for or receive;

property or a benefit of any kind (whether for the person or someone else) on the understanding that the person's election conduct (as defined in subsection (3)) will be influenced or affected.

Maximum penalty - 85 penalty units or 2 years imprisonment.

(2) A person must not, in order to influence or affect another person's election conduct (as defined in subsection (3)), give, or promise or offer to give, property or a benefit of any kind to the other person or a third person.

Maximum penalty - 85 penalty units or 2 years imprisonment.

(3) In this section -

"election conduct" of a person means -

- (a) the way in which the person votes at an election; or
- (b) the person's nominating as a candidate for an election; or
- (c) the person's support of, or opposition to, a candidate or a political party at an election."

By virtue of subsections 14(2)(a) and 35C(1) of the Acts Interpretation Act 1954 ("AIA"), the heading to s.155, the word "Bribery", is part of that section.

Section 155 gives rise to numerous issues of statutory interpretation. We have devoted a good deal of time to researching these issues as thoroughly as we can. Some of the issues are complex and beyond straightforward resolution. However, to advise on the questions addressed to us, it has been necessary for us first to resolve these interpretational issues before attempting to apply the law as

stated in the section to the facts.

We propose at this point to state in detail our conclusions on these issues of interpretation.

Section 155 - A Corporation May Offend

By virtue of s.46 AIA, a provision of an Act relating to offences punishable on indictment or summary conviction applies to bodies corporate as well as individuals. Thus s.155 may apply to the conduct of corporations.

It was contended in submissions that only a natural person may offend against s.155. Both subsections 1 and 2 prohibit "a person" from engaging in certain conduct. Subsection 32D(1) AIA provides that a reference in an Act to a person generally includes a reference to a corporation as well as an individual. This definition is repeated in s.36 AIA where "person" is defined as including an individual and a corporation. The definition is not an inflexible rule and will yield when context or subject matter otherwise indicates or requires: s.32A AIA. There is nothing in the context or subject matter of s.155 which requires an interpretation of "A person" at the commencement of each of subsection 1 and subsection 2 which excludes a corporation.

Whilst each subsection does stipulate a mental element, it is now well settled that the state of mind of an employee may in certain circumstances be the state of mind of the corporation which employs him and that a corporation may commit

an offence via its employee in such circumstances: Tesco Supermarkets Ltd v. Nattrass [1972] AC 153, 173D. We conclude that a corporation may offend against subsections 155(1) and (2).

Section 155 - Mutuality not Required

Subsections 155(1) and (2) create two separate offences. Speaking broadly, subsection 1 prohibits soliciting an electoral bribe and subsection 2 prohibits giving an electoral bribe. In many instances, a transaction between two persons may constitute an offence by one of them against subsection 1 and by the other against subsection 2. However, s.155 does not expressly require that a breach of either subsection is dependent upon a contemporaneous breach of the other subsection. There is no express requirement of mutuality in this respect.

Nor is there a requirement in s.155 that the briborous intention of one person be reciprocated by the other person. In this regard, s.155 is similar to the common law of bribery which does not require that a corrupt intention exist in the mind of both parties to the offer, solicitation, or passage, of the bribe. It is sufficient if the intent exists in the mind of either person, the one having the corrupt intention being guilty: R v. Allen (1992) 27 NSWLR 398, 401-2; R v. Herscu (1991) 55 A Crim R 1.

Section 155 - The Mental Elements

The Express Mental Elements

Each of subsections 155(1) and (2) contain phrases which refer to states of mind.

In the case of subsection 1, a person who by conduct answers the description in paragraphs (a) or (b) thereof, must so act "on the understanding that (his or her) election conduct will be influenced or affected" in order to offend against the subsection. In the case of subsection 2, a person who gives, promises or offers to give property or a benefit can offend against the subsection only if he or she does so "in order to influence or affect another person's election conduct".

"On the Understanding"

The expression "on the understanding" refers to the basis on which the person receives or requests property or a benefit. It involves knowledge by the person receiving the same or making the request that the property or benefit is or will be given for the purpose of influencing the person's election conduct. The words do not require an intention on the part of the donee that his or her election conduct actually be influenced. This interpretation is consistent with the decisions in S v. Van Der Westhuisen [1974] (4) SA 61; R v. Carr 40 Crim App R 188; and R v. Mills 68 Crim App R 154 (obiter). Furthermore, this expression does not require that the person to whom the request is made should respond positively to it or intend to do so. Accordingly, the "understanding" is limited to knowledge in the mind of the requester. There is no basis for reaching a different conclusion where the person merely receives property or a benefit believing that its purpose is to influence his or her election conduct, no prior request for it having been made. Of course, if the donee knew that the property or benefit was given in circumstances where the donor had no such purpose, that would not constitute the necessary "understanding" within the meaning of

the expression. This conclusion is consistent with authorities from other jurisdictions: R v. Allen supra; Sims v. State (1917) 189 S.W. 883. It is also consistent with the reasoning of Mackenzie J in relation to s.87 of the Criminal Code in R v. Herscu supra at p.40 as approved in R v. Smith [1993] 1 Qd.R. 561.

"In Order to Influence or Affect"

This phrase constitutes a mental element which requires the offender to act (that is, give or promise or offer to give property or a benefit) with the purpose of influencing or affecting another person's election conduct. The words "in order to" bear the meanings "with a view to the bringing about of (something)" or "for the purpose of (some prospective end)": Shorter Oxford English Dictionary. In the present context to say one acts with a purpose probably connotes a desire or wish to bring about the result: see He Kaw Teh v. The Queen (1985) 157 CLR 523 per Brennan J at p.569.

The purpose which constitutes the mental element must be directed to the result of influencing another's election conduct. It will not be sufficient for the offender to act with a different purpose while knowing or foreseeing the relevant result to be a probable or even a certain consequence.

If the person acts with more than one purpose in mind it is sufficient if the relevant purpose be one of those. It is not necessary to seek a dominant purpose. In DPP v. Luft [1977] AC 962 at 983, Lord Diplock, with whose speech the other Lords agreed, made the following observations:

"To speak of a dominant intention suggests that a desire to achieve one particular purpose can alone be causative of human actions; whereas so many human actions are prompted by a desire to kill two birds with one stone. For my part I prefer to omit the adjective "dominant". In my view the offence under [the Representation of the People Act 1949 (UK); s.63] is committed by the accused if his desire to promote or procure the election of a candidate was one of the reasons which played a part in inducing him to incur the expense."

Lord Diplock's conclusion was adopted in Scott v. Martin (1988) 14 NSWLR 663 at 672.

No Implied Mental Element

Each of subsections 155(1) and (2) contain phrases which refer to states of mind. In the case of subsection 1, a person who by conduct answers the description in paragraphs (a) or (b) thereof must so act "on the understanding that (his or her) election conduct will be influenced or affected" in order to offend the subsection. In the case of subsection 2, a person who gives, promises or offers property or a benefit can offend the provision only if he or she does so "in order to influence or affect another person's election conduct".

These states of mind are the express mental elements for which the subsections respectively provide. Submissions have been made to the effect that another or a further, but not express, mental element is incorporated within each subsection. The submissions have their origin in common law conceptions of bribery. The following is a summary of the nature of the further mental element canvassed

in submissions.

Submissions of Counsel Assisting

Written - Joint Opinion (page 11)

"Mens rea" equivalent to "corruptly" meaning "wrongfully" imported via the heading "bribery."

Oral T.4963-4 (Reply)

"When there's some element of impropriety, that is conduct regarded by the community generally as contrary to proper standards. The 'impropriety' one could use the word perhaps, dishonesty or corruption or something of that kind. The actual epithet does not greatly matter ... So whether you say that the question is - under s.155 for bribery, you're looking at whether the conduct was improper, corrupt, dishonest; one would seem to have to look at it by first of all objective standards - what would the community say it was when we talk about the community, reasonable and honest people in the community. Now, we would submit that really is the path, and it probably doesn't make much difference in the end."

Submissions on behalf of Cooper

Written - Opinion (p.10)

"An identifiable element of corruption".

Oral T.4857

An intention to influence conduct; an intention to give that benefit.

Submissions on behalf of Borbidge

Written - A corrupt purpose or corrupt intent ... doing

something knowing it is wrong or doing it with the object and intention of doing that which the law intends to forbid (p.9).

An intention to confer the benefit to influence the vote (p.11).

Oral

T.4680-2.

The plain language of the section requires an intention to influence or affect (relies on heading to s.155 merely as confirming this mental element).

Submissions on behalf of OPS Senior Executives

Oral

T.4667-9.

"It would be necessary to show that the conduct in question was lacking in integrity or dishonest; that is, improper according to normally received standards of honest conduct, and it would be necessary, in a nutshell, in our submission, to show that it's conduct deserving of criminal punishment."

It will be noted that there is little symmetry in these submissions as to content of the suggested further mental element. Some of the submissions are quite unclear in themselves; for example, the first mentioned oral submissions identify a mental element of dishonesty or corruption and treat that as the same as impropriety, a term more appropriately referable to the quality of conduct judged by objective standards than to a mental element. The last-mentioned submissions are similar in this respect. We note that the third-mentioned written submissions (at p.9) hint at a further mental element which later in the written submissions (at p.11) and in oral submissions is described in terms co-extensive with, and in substance the same as, the express mental element in the

subsections.

In this diversity of submissions, it is difficult to discern any statement which clearly articulates the further mental element suggested. We have come to the view that there is no other or further mental element to be implied in subsections 1 and 2 and for the following reasons.

The suggestions of such an element appear to be based on a common law meaning, and/or dictionary definitions, of bribery, such as the definitions in the Oxford Dictionary namely:-

"4. The act or practice of giving or accepting money or some other payment with the object of corruptly influencing the judgment or action; the offer or acceptance of bribes; spec. The application of such influences to gain votes at parliamentary or other election."

"'Bribing' is defined as 'the action of the verb 'bribe'; a. thieving b. extortion and c. corruption by bribes."

The suggestions have drawn on meanings and definitions such as this to identify a corrupt intent as a mental element of bribery. That element must be acknowledged but at the same time, its meaning should be understood. Useful expositions of the meaning of the adverb "corruptly" are to be found in a number of authorities dealing with that word in statutory electoral offence provisions.

- In Cooper v. Slade (1858) 6 H.L. Cas. 746; 10 ER 1488, the House of Lords

was required to consider the meaning of s.2 of the Corrupt Practices Prevention Act 1854 as follows:-

"Every person who shall, directly or indirectly, by himself, or by any other person, give or agree to give, or promise any money or valuable consideration to any voter, in order to induce any voter to vote, or refrain from voting, etc., or shall *corruptly* do any such act as aforesaid, on account of any voter having voted or refrained from voting, ...".

The case concerned both limbs of the section, that is, conduct before and conduct after an election. It does not appear to have been submitted - certainly it was not canvassed by the judges - that the first limb contained any mental element beyond that expressed, namely, an intention to induce a voter so to act. Only the second limb contained the word "corruptly". Willes J interpreted "corruptly" as meaning:

"not 'dishonestly', but in purposely doing an act which the law forbids as tending to corrupt voters, whether it be to give a pecuniary inducement to vote, or a reward for having voted in any particular manner. ... The word 'corruptly' seems to be used as a designation of the act of rewarding a man for having voted in a particular way as being corrupt, rather than as part of the definition of the offence" (at p.1499).

Lord Cranworth said at p.1504:

"I cannot give the word 'corruptly', as there used, referring to a payment after voting, any other meaning than a payment in violation of that which the statute was passed to prohibit". (at p.1504). See also Lord Wensleydale at p.1505.

- In Mugliston v. Dillon (1891) 13 ALT 44, the Full Court of Tasmania considered the Electoral Act offence of corrupt treating. At p.47, the Chief Justice (the other judges concurring) observed:

"With reference to treating, it must, in the language of the Electoral Act, be corruptly done. This word does not mean wickedly or dishonestly or anything of that sort, with the object and intention of doing that which the legislature plainly means to forbid."

We draw from these authorities the proposition that, in this context, the word "corruptly" means intending by the briberous act to do what the law prohibits, for example, inducing a person to vote, or influencing or affecting a person's electoral conduct, depending on the wording of the statute. This meaning has been given to the word "corruptly" in a similar statutory setting: R v. Smith (1959) Cr.App. R.55; R v. Wellburn and Others (1979) 69 Cr.App. R.254; R v. Parker 82 Cr.App. R.69; R v. Kelly (1989) 52 C.C.C. (3d) 137, 152-155 and the cases there cited.

The modern trend in drafting electoral offence provisions has been against using the word "corruptly": for example, Commonwealth Electoral Act s.158; Parliamentary Electorate and Elections Act 1912 (NSW) s.147; Constitution Act Amendment Act 1958 (Vic) s.241; Electoral Act 1992 (Qld) s.155. By contrast, the trend has been towards using phrases such as "in order to influence or affect"

(Commonwealth, Queensland) and "in order to induce" (NSW, Vic). In the few Australian cases dealing with provisions of this kind, it has never been held that a further mental element additional to that which the statute expresses is an element of the offence: Woodward v. Maltby [1959] VR 794; Scott v. Martin supra. This approach reflects the approach taken by the House of Lords to the first limb of s.2 of the 1854 Act in Cooper v. Slade, supra.

"To influence or affect" not synonymous with "to change"

What is required in order "to influence or affect"? Obviously, if a person is induced by the gift, promise or offer of a benefit to change his or her vote or support, that will suffice. However, the question arises as to whether a benefit given, promised or offered for the purpose of maintaining a person's pre-existing voting intention or support is encompassed by the expression "to influence or affect".

There is clear authority for the proposition that it is an offence to give a bribe for the purpose of encouraging a person to do his or her duty (Williams v. R (1979) 23 ALR 369, 374) or to exercise a discretion so as to reach what, from an objective standpoint, is the correct result (R v. Patel [1944] AD 511; approved in Herscu, supra, at 18 and 47-49). The argument was developed in the following passage from Lavenstein (1919) TPD 348 cited by Mackenzie J in Herscu at 48-49:-

"If the official has a discretion, what the law requires of an official is to exercise that discretion with sole regard to the public interest. That is his duty. That is the act he has to do. When once he

exercises his discretion with regard to the private interests of any individual, he is doing an act in conflict with his duty. ..."

The same considerations apply where a person is given, promised or offered a benefit to maintain support for a political party. The purpose is that the election behaviour be influenced, in the sense that the person act conformably with the wishes or interests of the individual or entity giving, promising or offering the benefit, and not independently.

Election Conduct Need Not be Influenced or Affected

Although the mental element in each of subsections 1 and 2 concerns influencing or affecting a person's election conduct, neither subsection requires as an element of the offence that that person's election conduct actually have been influenced or affected by the briborous conduct.

Section 155 - "Property or a Benefit of any Kind"

Origins and Uses of the Expression

Both subsections 155(1) and (2) contain the expression "property or a benefit of any kind". Subsection (1) may be breached only if a person asks for, receives, or offers or agrees to ask for or receive "property or a benefit of any kind". Subsection(2) may be breached only if a person gives, promises or offers to give "property or a benefit of any kind".

The expression "property or benefit of any kind" has long been a feature of

Queensland bribery and corruption legislation: see Criminal Code sections 87 (official corruption), 103 (electoral bribery), 120 (judicial corruption) and 121 (official corruption relating to offences). It appears to have been coined by Sir Samuel Griffith. In all probability, he favoured it as a more comprehensive expression than expressions such as "money" or "valuable consideration". Those more narrow expressions had been used in The Corrupt Practices Prevention Act 1854 (UK) s.2 in defining electoral bribery and later in The Corrupt and Illegal Practices Prevention Act 1883 (UK). They were also used in the bribery provision in The Elections Act of 1885 (Qld), to which Griffith referred in drafting the Criminal Code and which was repealed upon enactment of the Criminal Code in 1899: Draft of a Code of Criminal Law pp.45-47.

It may be noted that the same expression is used extensively in the corruption provisions of the Crimes Act 1914 (Commonwealth). It has been a feature of that legislation since 1914: see sections 32, 33, 37, 44, 73. This is explained by the fact that that Act was based on the Criminal Code: Parliamentary Debates (Cwth) Vol. LXXV pp.264-5. However, the bribery provisions of the Commonwealth Electoral Act 1918, upon enactment, contained a different expression, namely, "valuable consideration, advantage, recompense, reward, or benefit": see s.156. The original electoral offence provisions in that Act were repealed and replaced in 1983: Commonwealth Electoral Legislation Amendment Act 1983 s.114. In the new s.158, now renumbered s.326, the expression "property or benefit of any kind" is used in lieu of the expression originally enacted.

Section 155 was enacted in 1992. At the same time, the Criminal Code was amended to exclude the application of Chapter 14 thereof (sections 98 to 117 inclusive) to elections for the Legislative Assembly: EA s.197. There is one difference between the expression as found in other statutes and the expression in s.155 and that is the insertion in s.155 of the definite article "a" before the word benefit. We do not attach any significance to this.

Notwithstanding its rather extensive use legislatively, the meaning of the expression "property or benefit of any kind" as used in any of these statutory contexts, has received little judicial attention. It appears never to have been subjected to extensive consideration by the courts. In academic writings, it has been given passing reference only: see Lanham anors, Criminal Fraud, p.212.

Meaning of the Expression

The expression is not a composite description of the one thing; rather, it refers to two categories of things: property and benefits. The adjectival phrase "of any kind" arguably qualifies both "property" and "a benefit". On this basis, the expression encompasses "property of any kind" and "a benefit of any kind". The phrase may qualify only "a benefit". In this case nothing turns on whether it qualifies both or "a benefit" only.

Property

The word "property" is defined in s.36 AIA as follows:-

"Any legal or equitable estate or interest (whether present or future, vested or contingent, or tangible or intangible) in real or personal property of any description (including money), and includes things in action."

This definition applies to s.155 "except so far as the context or subject matter otherwise indicates or requires": s.32A AIA. It may be noted that "property" is defined for the purposes of the Criminal Code as including "every thing, animate or inanimate, capable of being the subject of ownership" (s.1). This definition applies to sections 87, 103, 120 and 121 of the Criminal Code. Notwithstanding this and the history of electoral offence legislation in Queensland, the definition of "property" in AIA is, in our view, the applicable definition for the purposes of s.155.

Benefit

By contrast, the word "benefit" is not defined in the AIA or elsewhere for the purposes of the EA including s.155. It is not a legal term of art with an ascertained legal meaning. The Macquarie Dictionary offers four meanings for the word as a noun, only one of which is relevant, namely, "anything that is for the good of a person or thing". The Oxford Dictionary gives as the ordinary meaning "advantage, profit, good".

Like so many other words, the word "benefit" in s.155 takes its meaning from context and subject matter. The governance of meaning by context and subject matter in this connection is recognised in R. v. Smith [1993] 1 Qd.R. 541 in the following observations of Thomas J at p.560:-

"There is nothing in the context of the section which requires the word to be read in other than its natural sense ... In the context of a section aimed against official corruption, there is every reason to think that it was intended that public officers should be deterred from trading official favours for such rewards ..."

The conceptions of "property" and "property of any kind" are very comprehensive ones, apt to include all categories of property and interests in property. It may be assumed that the conception of "a benefit of any kind" was purposely included in s.155 to extend both subsections 1 and 2 beyond property to benefits of a non-proprietary kind. In Smith, Thomas J, at p.560, rejected an argument which sought to restrict the meaning of benefit in s.121 of the Criminal Code (official corruption) to a proprietary benefit. We think that "a benefit" in s.155 should be similarly interpreted. We note that the word when used in other statutory settings has been interpreted to include non-proprietary advantages, for example:

- in Smith supra - prostitution services to policemen (Criminal Code, s.121);
- in Yates v. Wilson (1982) 22 FCR 397, 400 - financial advantage obtained by the non-collection of sales tax (Crimes Act, s.29A(2));
- Davidson v. Director of Public Prosecutions (1988) 93 FLR 388 - financial benefit of obtaining an assessment of income tax less than the amount properly assessable (Crimes Act, s.29B).

A common feature of these benefits, whether of a financial nature or not, is that they are directly given to or received by an identified and, usually, single person. However, apart from illustrating the potentially broad scope of the meaning of the word "benefit" in any statutory setting, these authorities render little assistance in interpreting the meaning of the word in s.155.

It is obvious to say it, but the subject matter of the EA is elections for members or a member of the Legislative Assembly and the subject matter of s.155, as the heading to that section states, is bribery. Thus the context in which the expression "a benefit of any kind" is placed is an electoral bribery offence provision. If the expression "a benefit of any kind" were to be given as broad a meaning as "any advantage whatsoever", it would be capable of including advantages of a non-personal nature in the sense of advantages enjoyed by the public at large or by relatively large groups of persons, and advantages which flow indirectly from action by a person. On a broad interpretation, a promised reduction in taxes could be said to benefit taxpayers at large by increasing their disposable income. A promised improvement in the working conditions of nurses could be said to benefit individual nurses directly and, arguably, also the population at large indirectly by fostering an efficient and enthusiastic nursing workforce.

To interpret "a benefit of any kind" so broadly can lead to the absurd conclusions that promises such as these are illegal as election bribes. That kind of conclusion confronts the contemporary democratic electoral process in which politicians and

political parties run on platforms which consist of promises of action in government. If s.155 were to be interpreted so as to prohibit this kind of conduct, then the achievement of an informed electorate and informed political debate would be threatened. It is inconceivable that consequences of this kind were intended. An interpretation of the expression which prohibits conventional democratic conduct of this kind must be rejected. It cannot be imagined that such conduct was perceived by the legislature to be a mischief which s.155 was enacted to overcome. Submissions on behalf of represented parties rejected such a broad interpretation: Joint opinion, pp.10-11; written submissions on behalf of Borbidge, pp.11-12; Opinion, p.10; Submissions on behalf of Cooper, T.4863. In our view, subject matter and context demand that the expression "benefit of any kind" be interpreted so as to exclude advantages of the kind discussed in the immediately preceding paragraphs. It may be noted by way of illustration that in a quite different statutory context, the word "benefit" was given an interpretation which would avoid an absurd and unjust result: Hilton v. Federal Commissioner of Taxation (1992) 38 FCR 170, 176-8.

Election Promises

Subsection 14A(1) AIA directs that in the interpretation of a provision of an Act, the interpretation that will best achieve the purpose of the Act is to be preferred to any other interpretation. To propose that a purpose of the EA is to facilitate free and democratic elections for the Legislative Assembly or that the purpose of s.155 is to prohibit electoral bribery may be correct but does not reveal a purpose or purposes which offers or offer a great deal of assistance in defining precisely

the boundary between benefits which should be, and therefore are, caught by s.155 and those which should not be, and therefore are not, caught by it.

Legislatures and courts in other jurisdictions have attempted to cater for the legitimate election campaign promise by a number of different techniques.

The Commonwealth Electoral Act expressly provides that the electoral bribery provision, s.326, "does not apply in relation to a declaration of public policy or a promise of public action": subsection 326(3). Given its widest meaning, s.326 might have prohibited campaign promises of this kind but for the exception.

The Model Penal Code (US) which has been adopted as the basis of bribery legislation in a number of jurisdictions in the United States, seeks to resolve the issue in the definitions of "benefit" and "pecuniary benefit" in Art. 240 "Bribery and Corrupt Influence". Article 240.1 deals with bribery in official and political matters and, relevantly, provides as follows:-

"A person is guilty of bribery ... if he offers, confers or agrees to confer upon another, or solicits, accepts or agrees to accept from another:

- (1) any pecuniary benefit as consideration for the recipient's decision, opinion, recommendation, vote or other exercise of discretion as a public servant, party official or voter; or
- (2) any benefit as consideration for the recipient's decision, vote, recommendation or other exercise of official discretion in a judicial or administrative proceeding; or
- (3) any benefit as a consideration for a violation of a known legal

duty as public servant or party official ...".

It can be seen that paragraph (1) alone has an application to electoral bribery, paragraphs (2) and (3) being concerned with judicial and official bribery. Paragraph (1) prohibits bribery of a voter by a pecuniary benefit. The word "benefit" is defined in Art. 240 to mean:-

"Gain or advantage, or anything regarded by the beneficiary as gain or advantage, including benefit to any other person or entity in whose welfare he is interested, *but not an advantage promised generally to a group or class of voters as a consequence of public measures which a candidate engages to support to oppose.*" (Our emphasis).

(Note that the exception in this definition applies only to a promised advantage and is clearly focused on election promises.)

"Pecuniary benefit" is a narrower concept limited to a benefit "in the form of money, property, commercial interests or anything else the primary significance of which is economic gain."

These definitions characterise a benefit for electoral bribery purposes in terms of economic gain and exclude advantages promised generally to a group or class of voters as a consequence of public measures which a candidate undertakes to support or oppose.

Aside from legislative definitions of benefit, judicial interpretations which

exclude from electoral bribery advantages to flow from promised action which the candidate, if elected to office, could properly undertake in the discharge of that office, have been adopted by United States courts in construing electoral bribery statutes. In Stebbins v. White 235 Cal. Rptr. 656 (Cal. App. 3 Dist. 1987) the Californian Court of Appeals was required to consider whether White's promise to help secure the release of the voter's brother from jail if the voter would vote for White was a "promise to pay, lend or contribute ... (a) valuable consideration". In holding that it was, the court observed at p.668:-

"... White's promise to the voter to endeavour to free his brother from custody in return for his vote did not relate to the proper administration of the office of city counselor. ... A candidate cannot lawfully promise to render a valuable service for a voter in return for his vote when that service is unconnected with the proper discharge of an office holder's duties and responsibilities. Such a promise to render a valuable service unrelated to the office sought in return for a vote crosses the line between campaign rhetoric and election bribery."

In the course of the judgment, the court cited the following passage from a decision of the Supreme Court of California, Bush v. Head (1908) 154 Cal. 277 at p.283:-

"It is, of course, not every promise of pecuniary benefit to the voter that is in violation of the statute. A promise by a candidate to limit the cost of maintaining an office by administering it economically is no more than an undertaking to perform his duty, and is clearly not in conflict with the statute. But the promise here made went further than this. By it the candidate held out to the voters as an inducement, not the proper and efficient administration of the office, but the destruction, at least for a time, of an office created by law."

A rather different judicial technique can be seen in the approach of some US courts to the interpretation of electoral bribery statutes which use the expression "to corruptly influence" the casting of a vote. The technique, which focuses on intention rather than benefit, is illustrated in the following passage from the judgment of Schwartz J in Trushin v. State of Florida Fla. App. 384 So. 2d 668 (1980) at p.676:-

"Nor is there any possibility that a candidate may be punished for making a promise as to the official actions he would take if elected. Campaign rhetoric of this kind is simply not uttered with the criminal intent explicitly required by the statute. See Adair v. McElreath 167 Ga. 207, 145 S.E. 841 (1928); see also Douglass v. County of Baker 23 Fla. 419, 2 So. 776 (1887)."

The statutory formulations in subsection 326(3) and in the Model Penal Code have similarities, but are not precisely the same. Subsection 326(3) raises its own interpretational issues which have not as yet been considered judicially: for example, what precisely is connoted by "a promise of public action"? Does it require that the promise be made publicly; or is it sufficient that, however made, it promise public action? Is "public action" any action as a public official in the proper discharge of that official's duties and responsibilities; or has it some other meaning?

The definition of "benefit" in the Model Penal Code is not entirely free of interpretational issues. However, in our opinion, it offers the most useful

assistance in identifying criteria that mark out those advantages which, in this context, fall outside the ambit of "benefit" in s.155. On our analysis, the exception identifies the following criteria.

The first is that where the election promise is to advantage a group or class of persons, the promise is to benefit the members of the group or class generally - no one member or small clique of members is singled out to be specially advantaged. This criterion derives support from the language of s.155. Subsection (2) refers to a "promise ... to give ... a benefit of any kind to the other person or a third person". Equivalent words are to be found in subsection (1). The singular may be read as including the plural: s.32C AIA. However, the person or persons must be ascertained and be particularised by name in the charge. The expression "other person or a third person" does not extend to the world at large or to unincorporated groups which are not persons at law. Accordingly, the first criterion is consistent with the constraints placed upon the form of any charge by the words of the section.

The second criterion is that the promise is to confer advantage by way of measures taken as part of the normal processes of government. The legislature could not have intended that this electoral bribery provision would strike at promises by candidates and political parties to undertake measures in the course of the proper discharge of public office.

Where a gain or advantage exhibits these criteria, it is not, in our opinion,

within the scope of benefit for the purposes of s.155.

There are two further matters that we wish to mention. The first is that we have not adopted as a criterion of benefit, as the Model Penal Code does for electoral bribery, primacy of economic gain. A qualification in those terms is not required by the subject matter or context of s.155 and would potentially exclude the application of the section to some kinds of benefits when it would be illogical or inappropriate to do so: for example, the services or favours considered in Smith and Stebbins supra.

The second matter is that the US Supreme Court has had occasion to consider the constitutional validity of state electoral bribery legislation. In Brown v. Hartlage 456 U.S. 45 (1982), the question presented was whether the First Amendment to the US Constitution, as applied to the States through the Fourteenth Amendment, prohibits a State from declaring an election void because the victorious candidate had announced to the voters during his campaign that he intended to serve at a salary less than that "fixed by law". According to the Kentucky Court of Appeals, the announcement breached a Kentucky electoral bribery statute. Explaining the impact of the First Amendment, the Supreme Court observed at pp.53-4:-

"When a State seeks to restrict directly the offer of ideas by a candidate to the voters, the First Amendment surely requires that the restriction be demonstrably supported by not only a legitimate State interest, but a compelling one, and that the restriction operate without unnecessarily circumscribing protected expression."

One legitimate State interest canvassed was the State's interest in prohibiting vote buying. Speaking of that interest, the court said at pp.55-56:-

"It is thus plain that *some* kinds of promises made by a candidate to voters, and *some* kinds of promises elicited by voters from candidates, may be declared illegal without constitutional difficulty. But it is equally plain that there are constitutional limits on the State's power to prohibit candidates from making promises in the course of an election campaign. Some promises are universally acknowledged as legitimate, indeed 'indispensable to decisionmaking in a democracy,' First National Bank of Boston v. Bellotti, 435 U.S. 765, 777 (1978); and the 'maintenance of the opportunity for free political discussion to the end that government may be responsive to the will of the people and that changes may be obtained by lawful means ... is a fundamental principle of our constitutional system.' Stromberg v. California, 283 U.S. 359, 369 (1931). Candidate commitments enhance the accountability of government officials to the people whom they represent, and assist the voters in predicting the effect of their vote. The fact that some voters may find their self-interest reflected in a candidate's commitment does not place that commitment beyond the reach of the First Amendment. We have never insisted that the franchise be exercised without taint of individual benefit; indeed, our tradition of political pluralism is partly predicated on the expectation that voters will pursue their individual good through the political process, and that the summation of these individual pursuits will further collective welfare. So long as the hoped-for personal benefit is to be achieved through the normal processes of government, and not through some private arrangement, it has always been, and remains, a reputable basis upon which to cast one's ballot."

The court then proceeded to countenance some "private arrangements" as constitutionally lawful and some as not. As to these, it said at p.56:-

"It remains to determine the standards by which we might distinguish between those 'private arrangements' that are inconsistent with democratic government, and those candidate assurances that promote the representative foundation of our political system. We hesitate before attempting to formulate some test of constitutional legitimacy: the precise nature of the promise, the conditions upon which it is given, the circumstances under which it is made, the size of the audience, the nature and size of the group to be benefited, all might, in some instance and to varying extents, bear upon the constitutional assessment. But acknowledging the difficulty of rendering a concise formulation, or recognizing the possibility of borderline cases, does not disable us from identifying cases far from any troublesome border."

As this last passage reveals, the US Supreme Court has not settled any formulation by which "private arrangements" may be constitutionally protected. This lack of precision and the peculiar constitutional context limit the adaptability of these observations to the issue we are considering. Notwithstanding, it may be noted that the factors mentioned in the passage at p.56, one way or other, fall for consideration in applying the criteria we have nominated for identifying gains or advantages which fall outside the scope of "benefit" in s.155.

Subsection 155(1) - "The person's election conduct"

A question arises in the context of subsection 155(1) as to whether the person whose election conduct is to be influenced or affected must be the person receiving or requesting a benefit. That question is easily answered with respect to the equivalent provision in subsection 326(1) of the Commonwealth Electoral Act. The relevant conduct is there defined as being support or opposition given "by the first-mentioned person". Although the wording of subsection 155(1) is

not as clear, an analysis of the section supports the conclusion that the legislature intended the same result.

It is true that in subsection 155(1), reference to "the person's election conduct" follows both the expression "A person" at the beginning of the subsection and the phrase in parenthesis "whether for the person or for someone else." Conceivably, the persons referred to in the possessive "the person's" immediately preceding the words "election conduct" could be the person referred to at the beginning of the subsection or the person or persons referred to by the word "someone else" in the parenthetical phrase. To our minds, the expression "the person's election conduct" more naturally refers to the earlier expression "A person" than to the alternative expression "someone else". If the alternative reference had been intended, the draftsman could have used the expression "another person" rather than the expression "someone else", or, perhaps more effectively, the relevant possessive could have been expressed as "a person's" rather than "the person's". The preferable interpretation is that the person to be influenced or affected is the person receiving or requesting the benefit.

Subsection 155(2) - "Give, or Promise or Offer to Give"

Subsection 155(2) provides that a person must not, with the relevant mental purpose, "give, or promise or offer to give", property or a benefit of any kind to another. The phrase "give, or promise or offer to give", should be read as encompassing three separate acts. They are:

- (a) give;

- (b) promise to give; and
- (c) offer to give.

To say one promises property or a benefit is really to say one promises to do an act which will bestow the property or a benefit upon the donee.

Identity of the Donee

As to the phrase "to the other person or a third person" at the end of the subsection, the following points may be made:

- (a) the phrase clearly qualifies the verb "give" and the infinitive "to give" which precede it. It has a function of identifying the donee of the gift, the promised gift or the offered gift;
- (b) within the phrase, the expression "other person" must mean the person referred to in the expression "another person's" which precedes it, that is, the person sought to be influenced. A "third person" may be any person other than that person; and
- (c) since the singular includes the plural (s.32C AIA), more than one person may be a "third person" in the context of a particular benefit. As we suggested ante, this factor does not, in our opinion, justify an interpretation of "a third person" which includes groupings of numerous unascertained persons or, for that matter, the world at large. The "third person" donee or donees must be capable of being ascertained and of identification by name. They must be so identified in any charge. The same may be said in respect of the "other person" donee or donees.

Implication for meaning of "benefit"

This lastmentioned point (paragraph (c) ante) reflects in the kind of benefit with which s.155 is concerned. The benefit must be one that is capable of being given to persons who are ascertained and identified by name. A promise which will advantage those who do, and might in the future, fall within a group or class description, does not have this attribute. That kind of promise does not fit with the concept in the subsection of a promise to give a benefit to an identified person or persons.

Gift

Where a gift is involved (para. (a) ante), subsection 155(2) may be breached when property or a benefit is given either to the person sought to be influenced or to another person. Thus, the subsection would catch both a gift to A made with the intention of influencing or affecting A's election conduct and a gift to B made with the intention of influencing or affecting A's election conduct. Two quite different circumstances may be postulated in which a gift to B might be made with the requisite intention. One is where the gift is made with A's knowledge and the donor's intention is based on some request on A's part that it be made. The other is where A may have no knowledge of the gift at all but there are circumstances in which it might be supposed by the donor that B is in a position of influence over A. Where the gift is to A and in the first mentioned circumstance where the gift is to B, A is bribed. In the second mentioned circumstance where the gift is to B, B is bribed. In all instances, it is A's election conduct that is sought to be influenced or affected by the making of the gift.

Promise or Offer

Where a promise to give or an offer to give (paras. (b) and (c) ante) is involved, the act of bribery proscribed by the subsection is the promising or offering to give property or a benefit with the necessary mental intention. The subsection clearly contemplates and requires that the promise or offer be addressed and communicated to the person whom it is sought to bribe. In this respect, it mirrors the common law misdemeanour of bribery: R. v. Glynn (1994) 33 NSWLR 139, 145. This requirement is to be found in the ordinary meaning of the words "promise" and "offer" and in the express stipulation that the promise or offer be made with the purpose of influencing election conduct, a circumstance which requires communication of the undertaking promised or offered in order that that purpose might be fulfilled. Relevantly, the Macquarie Dictionary gives as its first meaning for "promise" as a noun "a declaration made, as to another person, with respect to the future, giving assurance that one will do, not do, give, not give etc. something" and as its first meaning for "offer" as a noun "act of offering", "offer" as a verb being first defined as "to present for acceptance or rejection; proffer".

That being so, it is appropriate to enquire whether the subsection requires the promise or offer to be addressed and communicated to any particular person or persons or whether it is sufficient that it have been addressed and communicated to some person with the requisite intention. In this respect, a second function for the phrase "to the other person or a third person" may be suggested - a

function of defining the promisee or offeree. The suggestion rather loses its force, however, once it is acknowledged that that phrase is so broad as to include any person at all. There is no other feature of the subsection which indicates, expressly or by implication, that a particular person or persons is required in this respect.

On this aspect, the decision of the Supreme Court of Arkansas in Wright v. State of Arkansas (1918) 202 S.W. 236 is a useful reference. The statutes of Arkansas contained an electoral bribery provision rather similar to subsection 155(2) as follows:

"It shall be unlawful for any candidate for office or any officer in such city, directly or indirectly, to give or promise any person or persons any office, position, employment, benefit, or anything of value for the purpose of influencing or obtaining the political support, aid or vote of any person or persons ..."

Wright was convicted of an offence against this provision. On appeal, it was argued for him that the indictment was bad because it did not allege that X and Y, the persons to whom the promise of a civic office to Z was made, were themselves promised civic offices. In rejecting this argument, Wood J said at pp.238-9:-

"The statute does not require that the promise be made to the person to whom the office, position, employment, benefit, or anything of value is to be given. It meets the requirement of the statute if it is alleged and proved that the promise was made to a person and the office, position, employment, benefit, or anything of value was to be received either by the person to whom the promise is made or by some other person. In other words, it was sufficient to

charge as was done in the indictment under review that appellant made the promise to (X and Y) that he would use his influence in behalf of and vote for (Z) for city attorney for the purpose of influencing or obtaining the political support, aid, or vote of (X and Y), and the evidence was sufficient if it tended to prove these allegations.

The purpose of the law was to prohibit the debauchery of the electorate and the elected by preventing any candidate for office from obtaining votes by holding out to the voters the inducement that if elected he would give to one or more of them, or to some one whom they might designate, an office, position, employment, benefit, or anything of value."

These observations assist in identifying the range of mischiefs that is sought to be countered by an electoral offence provision such as subsection 155(2).

So interpreted, the subsection would catch the following:-

- (a) a promise or offer communicated to A of a gift to A;
- (b) a promise or offer communicated to A of a gift to B; and
- (c) a promise or offer communicated to B of a gift to B,

so long as the promise or offer in each of these cases was made with the intention of influencing or affecting A's electoral conduct.

Here, too, two different circumstances may be envisaged in which a promise or offer to B is made with the requisite intention. One is where the promise or offer is made with A's knowledge and the donor's intention is based on some request, on A's part that the promised or offered gift be made. The other is where A may have no knowledge of the promise or offer at all but there are circumstances in which it might be supposed by the donor that B is in a position of influence over

A. Where the promise or offer is made to A (paragraphs (a) and (b) ante), A is bribed. Where it is made to B, B is bribed.

For completeness, it may be noted that this subsection could also extend to a further type of promise or offer, namely, one communicated to B of a gift to C but made with the intention of influencing or affecting A's election conduct. The relationships between A, B and C would have to be close and influential ones for it to be proved that the donor had the requisite intention.

In criminal proceedings,

- (a) in all instances, the person whose election conduct was sought to be influenced or affected must be particularised in the charge;
- (b) where a gift is involved, the donee, be it the person whose election conduct it was sought to influence or affect or be it a third person, must also be particularised in the charge; and
- (c) where a promise or an offer is involved, both the promisee or offeree and the proposed donee, be they the person whose election conduct it was sought to influence or affect or be they third persons, must also be particularised in the charge.

Subsection 155(3) - Paragraph (c) Interpretational Issues

Paragraph 1(c) of subsection 155(3) presents a number of interpretational issues which are considered in the following paragraphs.

"Person's"

In context, the word "person's" obviously refers to the same person as is referred to in the possessive form "person's" in subsections 155(1) and (2), that is, the person whose election conduct is sought to be influenced or affected.

As is noted earlier, by virtue of s.32D(1) AIA, reference in an Act to a person generally includes a reference to a corporation as well as an individual. This definition is repeated in s.36 AIA where "person" is defined as including an individual and a corporation. This definition is not an inflexible rule and will yield when context or subject matter otherwise indicates or requires: s.32A AIA. Prima facie, a person to which paragraph 155(3)(c) applies may be a corporation. There is nothing in context or subject matter which precludes this meaning. Whilst it is true that the words "person" in paragraph (a) and "person's" in paragraph (b) of the subsection are capable of applying to natural persons only and by context exclude corporations, no similar contextual restraint applies in respect of paragraph (c). Although a corporation may not vote at an election or nominate as a candidate for an election, it may support or oppose a candidate or a political party at an election within the meaning which we give to those expressions.

Little, if anything, should be drawn from the restricted application of paragraphs (a) and (b) to natural persons only. A corporation might ask for a benefit (subsection (1)) or confer a benefit (subsection (2)) and might offend against either subsection: compare Scott v. Martin (1983) 14 NSWLR 663, 671. Clearly, the

word "person" is not used with any consistency throughout s.155 so as to exclude reference to a corporation.

For these reasons, we would resist a conclusion that the expression "election conduct" implies that paragraph (c) is concerned only with the conduct of an elector, that is to say, a natural person who by virtue of s.101 of the EA may vote at an election.

"Support of, or Opposition to"

Neither of these expressions is defined for the purposes of the EA, but each of them has a generally accepted broad meaning in the election context. "Support", according to its ordinary meaning, connotes "speaking in favour of; giving approval or assistance to"; whereas "opposition", according to its ordinary meaning, connotes "speaking against; being hostile or resistant to". Neither word has a meaning which limits its application to any particular form or forms of support or opposition. Advertisements are well recognised as forms of political support or opposition. They are vehicles for political endorsement or disapproval which are available to be used as much by corporations as by natural persons.

"At an Election"

Whilst the word "election" is defined in the EA to mean an election of a member or members of the Legislative Assembly, the expression "at an election" is not defined for the purposes of that Act. The expression is used frequently

throughout the Act usually qualifying the verb "vote" as it does in paragraph (a) of subsection 155(3) and also in ss.99, 101(1), 115, 163(1), 164(1), (2), (4), (5), 165(1) and (2), 168, 173 and 176. It is also used to qualify "any proceeding" in s.167(b) which prohibits wilful interruption, obstruction or disturbance at polling booths.

In these contexts, the phrase connotes electoral proceedings that take place on polling day including the conduct of the poll at polling places and the casting of votes. A meaning that limits paragraph (c) to the polling day only seems too restrictive. Given the scope of paragraph (a) - "the way in which a person votes at an election", it is difficult to see where and how paragraph (c) might apply to individuals were that restrictive meaning to be adopted.

The conduct which paragraph (c) selects as its focus is political support or opposition. These types of conduct, as interpreted ante, are by their nature not confined to the polling place or to polling day. By contrast, they are engaged in what customarily is called the election campaign period.

Elsewhere in the EA, the expression "during the election period for an election" is used to connote the campaign period. The expression "election period" for an election is defined by the EA to mean "the period -

- (a) beginning on the day after the writ for the election is issued; and
- (b) ending at 6 pm on the polling day for the election."

Notable instances of the use of this expression are in respect of the regulation of

conduct which has similarities to expressions of political support and opposition. For example, subsection 161(1) prohibits dissemination of election advertisements, pamphlets etc during the election period for an election unless certain stipulated information is stated on the material. Likewise, for misleading publications: subsection 163(1).

In all probability, the expression "at an election" in paragraph (c) is intended to have a meaning akin to the meaning of the expression "during the election period for an election". Clearly, this is the most appropriate meaning for its context. It should be adopted.

SECTION 155 - FACTUAL ISSUES

Counsel Assisting submitted (written submissions pp.33-35) that the evidence indicated that a prima facie case of breach of the following statutory provisions by the following persons:-

Wilkinson -	Subsection 155(1)
Hocken -	Subsection 155(1)
Cooper -	Subsection 155(2)

and suggested a form of charge in each case. The possibility of a charge against Borbidge under subsection 155(2) was also canvassed but regarded as limited because of evidentiary difficulties (p.35).

Apart from consideration of the QPUE itself having breached subsection 155(1) and of Wilkinson and/or Hocken as parties to that breach, in our opinion, there are no other persons who, it might be said, breached s.155.

We propose to analyse the possible case against each of the abovenamed separately. Rather than, in each case, dealing with each element of the offence and the available admissible evidence to prove it, the analysis focuses on the element or elements on which we consider a prosecution would founder.

Wilkinson

As we explained in some detail ante, the correct interpretation of subsection 155(1) requires that the understanding be that the election conduct of the person who asks for or receives, or offers, or agrees, to ask for or receive property or a benefit of any kind - and of no other person - will be influenced or affected. The person referred to in the possessive "the person's" immediately before the words "election conduct" must be the same person as is referred to in the expression "A person" at the commencement of the subsection. To succeed in a case against Wilkinson as a principal offender, it would be necessary for the prosecution to prove that any property or benefit solicited or received by him was solicited or received on the understanding that his election conduct would be influenced or affected thereby. As explained ante, the expression "on the understanding" is concerned with the state of mind of the requester/recipient, but it is a state of mind about the purpose for which property or a benefit is or will be given.

Assume for the moment that Wilkinson had a relevant understanding at the time when he submitted the wish list or, later, when he signed the MOU - that he understood that the purpose for which the property or a benefit was being, or would be, given was to influence or affect a person's election conduct. On the evidence, there is only one entity whose election conduct could have been the object of that understanding. That entity is the QPUE and not Wilkinson. The following facts compel this ultimate conclusion of fact:-

- (a) Wilkinson was not eligible to vote in the by-election; nor was he a candidate or prospective candidate for the by-election.
- (b) Wilkinson was president of the QPUE and influential in its affairs.
- (c) The QPUE had the financial capacity to mount an advertising campaign in the by-election. The QPUE Executive resolved on 3 January 1996 to conduct an advertising campaign during the Mundingburra by-election with a cost cap of \$20,000: Secretary's notes, Ex. 19. The wish list was first communicated to Cooper on 8 January 1996: MOU, Ex. 33.
- (d) There is no evidence that Wilkinson had funds of his own to undertake an advertising campaign at his own expense or a preparedness to do so.
- (e) The wish list and the MOU concerned QPUE objectives; not objectives personal to Wilkinson: MOU, Ex. 33.

- (f) Advocacy by Wilkinson within the forums of the QPUE for involvement of the Union in an advertising campaign in the by-election did not constitute "election conduct" by Wilkinson within the meaning of that term as defined in subsection (c) as it was not capable of constituting support by Wilkinson of a political party "at an election".
- (g) The QPUE had sufficient financial and human resources at its disposal for the personal involvement of Wilkinson to be unnecessary to the success of any campaign it embarked upon.

For this reason at least, we advise that a charge under subsection 155(1) against Wilkinson as a principal offender would fail.

Hocken

A charge under subsection 155(1) against Hocken as a principal offender would also fail at least for the same reason as it would in the case of Wilkinson.

Cooper

An ultimate conclusion of fact available on the evidence is that Cooper signed the MOU with the objective of encouraging the QPUE to run an anti-ALP advertising campaign in the by-election. However, Cooper will have breached subsection 155(2) only if at that time, he gave, or promised or offered to give, property or a benefit of any kind within the meaning of s.155 to a person.

Plainly, no gift, promise or offer of property was involved. That leaves for consideration whether a benefit of any kind was given, promised or offered.

The MOU adopts the format of listing objectives and proposals submitted by the QPUE in its wish list. The list is divided into topics such as Staffing, Promotion and Discipline. The submitted objectives and proposals have the flavour of an industrial log of claims. Under each of them is a heading "Response" which details the attitude of "a Coalition Government" to the objective or proposal. The responses are variously worded as "Agreed", "Agreed in Principle", "Partially Agreed", "Subject to Negotiation" and "Not Agreed". Often the response is elaborated with further detail of what a coalition government would do to achieve or partially achieve the objective or proposal.

Cooper gave evidence to the effect that he understood the response "Agreed" to signify an agreement to negotiate further on the objective or proposal rather than acceptance of it as an objective or proposal to be supported by a coalition government. This understanding rather stands at odds with the context in which the word "Agreed" is used in the MOU. For example, Objective (1) is "Increase operational numbers". The response is "Agreed" which is followed by some detail as to how a coalition government would increase operational numbers. It would be curious indeed to state these details if all that was signified by the response was that a coalition government was prepared to negotiate further on whether there should be an increase in operational numbers. We consider that a tribunal of fact would be likely to take the word "Agreed" as

having its ordinary meaning especially since context suggests that that was the meaning it was intended to have.

Any gain or advantage given, promised or offered by the coalition signatories to the MOU must be found within the Responses rather than in the statements of the objectives or proposals to which the Responses are addressed. We discern within the Responses undertakings made by the coalition signatories to pursue in government the listed objectives and proposals to the extent that they are agreed, agreed in principle or partially agreed and in the manner detailed in the Responses. In our view, these undertakings have the character of promises rather than offers or gifts.

To make a promise of action in government to meet the objectives or proposals of a person or persons is, in our view, capable of being categorised as a promise to give a gain or advantage to that person or those persons, especially where the promise is preceded by a request that the objectives and proposals be met. The gain or advantage is the realisation or potential realisation of the objectives and proposals. Here the promises were clearly made to Wilkinson acting on behalf of the QPUE. They were not made to the members of the QPUE directly. It may be debated whether those to be advantaged by the promises were the QPUE itself or its members. We prefer the view that it was the members or, in some instances, groups of members because it was they, rather than the QPUE, who directly stood to gain. Nothing turns on the fact that the promises were not communicated to the members because, as we have noted, subsection 155(2) may be breached by a

promise communicated to A to give a benefit to B.

The critical issue

We now turn to what we identify as the critical issue: whether the gains or advantages promised by the MOU are benefits for the purposes of s.155.

In our view, the gains or advantages promised in the Responses all have the two criteria identified earlier in this advice as marking out those gains or advantages which are not benefits for the purposes of s.155. Insofar as they advantage the members of the QPUE or groups of its members, they do so indiscriminately; no individuals are nominated for special advantage. The point may be made by taking as an example Objective (7) "The reintroduction of Constable First Class as a grade of the Constable rank after a specified period of service and suitable qualifications to be agreed upon between the Minister and the QPUE" to which the coalition signatories agreed. This objective stood to advantage all members, and for that matter future members, of the QPS eligible to be appointed Constable First Class. It may be contrasted with a promise that named individuals will be immediately appointed to that grade upon its reintroduction. A promise of the latter kind would not satisfy the criterion.

As to the second criterion, the provision of police services is an important and essential function of State Government. The organisational structure of the police service and its operational efficiency, covering topics such as staffing, promotion and discipline, are all matters with which a government charged

with this function is properly concerned. It would be legitimate for a coalition in government to adopt and implement objectives and proposals in respect of these matters by means of appropriate legislative or administrative measures. In this context, one is not concerned with merit or the relative merit of any particular objective or proposal over any other objective or proposal that might be imagined. In our opinion, the second criterion is satisfied.

We conclude that the gains or advantages promised in the MOU are not benefits within the meaning of s.155. It is on this element of subsection 155(2) that a prosecution against Cooper would founder. A further difficulty for a prosecution is that in every instance, those to be advantaged or potentially advantaged can be described in general terms only. The description "all members and future members of the QPS eligible to be appointed Constable First Class" is illustrative of this. For other objectives, different, but similarly broad, descriptions are appropriate. As we have noted ante, descriptions such as this do not sufficiently define persons as donees or identify them by name for the purpose of formulating a charge.

The MOU document

At this point, there are two further matters that should be mentioned. The first is that the form of charge suggested in submissions is that Cooper offered to give a benefit, namely, a Memorandum of Understanding signed by himself, Wilkinson and Borbidge. We do not regard the signed MOU as itself a benefit. The gains or advantages promised are to be found in the objectives and proposals

to which the coalition signatories agreed, agreed in principle or partially agreed, rather than in the MOU document as such.

Objectives (20) and (21) - The Assistant Commissioners

The second matter concerns some Objectives which occupied a good deal of time in evidence and in submissions at the public hearings. We refer first to Objectives (20) and (21). They and the respective Responses to them are as follows:-

- "(20) The number of Assistant Commissioners shall be reduced to five: A/C Crime, A/C Northern Regions, A/C Southern Regions, A/C Traffic and A/C HRM or Personnel.**

Response: Agreed in principle.

A Coalition Government will review the regional and district command and operational structure to ensure a truly decentralised organisation and a fairer allocation of resources to all Police regions and to curb empire building in the regions. There is no doubt some Assistant Commissioner positions will be abolished although the exact number depends upon the review and further consideration.

- (21) The following Assistant Commissioners are viewed by the Union and its members as unsuccessful and it is strongly recommended that they become 'redundant':**

Allan Honor; Andrew Kidcaff; Ron McGibbon; John Banham; Graham Williams; Errol Walker;

A/C Mercer has only recently been appointed and is yet untested.

Response: See (20) above."

Reading them together, the Responses contain, at most, a promise to review the regional and district command and operational structure and an acknowledgment that a review would lead to the abolition of some Assistant Commissioner positions. Viewed objectively, the Responses cannot be interpreted as a promise to implement the recommendation that the named Assistant Commissioners be made redundant or even as a favourable disposition towards the recommendation. A properly instructed tribunal of fact could not put such an interpretation on them.

Objective (27) - The Commissioner

Next we refer to Objective (27) "The Government shall take advice from the QPUE when selecting the next Commissioner of Police and shall not select an individual for this position that the Union has genuine reason for opposing" to which the Response was "Agreed". Insofar as the Response signifies a promise, it is a promise:-

- (a) to receive advice - not a promise to act upon it; and
- (b) not to select as the next Commissioner of Police an individual whom the QPUE opposes for genuine reasons.

It seems that this Response may have been interpreted in some quarters as promising the QPUE an opportunity to engineer the termination of the appointment of the present Commissioner of Police, Mr J O'Sullivan. There are grounds for suspecting that some, at least, of the members of the QPUE executive would have been pleased to see that happen. However, viewed objectively, the

Response to Objective (27) is not open to that interpretation. On its face, the Response does not relate to the present Commissioner but to whomever may succeed him as the next Commissioner.

The second limb of the promise (paragraph (b) ante) is qualified by the phrase "for genuine reasons". The promise is not an absolute one to reject any individual whom the QPUE opposes. Aside from its qualifying effect, the phrase is ambiguous. In this context, the word "genuine" could import several different meanings. It might mean a reason which is sincerely held without reference to its content; it might mean a reason which is an authentic or true reason judged by its content; or it might combine both the subjective and objective connotations. It is not at all clear which meaning is intended.

Because of these ambiguities, the second limb of the promise is capable of at least two meanings. One of them is that the promise confers a veto on the QPUE so long as its reason for opposition to an individual is one that it believes is genuine. There are strong reasons for arguing that to allow the QPUE a veto in those terms would not accord with the proper discharge of public office by a government having the responsibility to appoint a new Commissioner of Police: see generally, Police Service Administration Act 1990 ("PSAA") ss.5.2(2), 4.2(1). However, another meaning is no more than a promise to act upon the QPUE's opposition to an individual only if the reason, viewed objectively, would justify not selecting the individual on fitness grounds - that is, the reason is a true or authentic one. It is strongly arguable that a promise in these more limited terms

would not be objectionable because it would be consistent with the proper discharge of public office not to appoint a person Commissioner of Police who is unsuitable on fitness grounds for appointment if the means selected for achieving that objective be lawful.

It is against this background that we apply the two criteria to this Response. At one level, it might be said that those to benefit from the promise are the members and future members of the QPS. At another level, those to benefit might be identified as the members of the QPUE executive from time to time since they are the persons who would make any decision to oppose any individual and would formulate any reason or reasons for opposition. As we have stated, identification of donees in such descriptive terms is insufficient for prosecution purposes. The donees must be ascertained and named.

In regard to the second criterion, the ambiguities we have mentioned highlight a difficulty for prosecution. On one interpretation of it, the promise is consistent with the proper discharge of public office. We do not find evidence in the surrounding circumstances capable of displacing this innocent hypothesis. Accordingly, it would not be open to a tribunal of fact to be satisfied beyond a reasonable doubt that a benefit within the meaning of s.155 was promised in the Response to Objective (27).

Borbidge

A charge under subsection 155(2) against Borbidge as a principal offender would

also fail at least for the same reason as it would in the case of Cooper.

QPUE

We now turn to consider whether QPUE may have breached subsection 155(1) as a principal offender. The QPUE was registered as an Industrial Union under the Industrial Arbitration Act 1916 (Q) on 12th June 1917. It is now registered under the Industrial Relations Act 1990 (IRA). An industrial organisation registered under that Act is a body corporate: s.334 IRA. As explained ante, a body corporate may breach subsections 155(1) and (2).

Criminal Corporate Liability

The analysis of corporate criminal liability by the House of Lords in Tesco Supermarkets, supra, has been widely adopted in Australia: see, generally, Environment Protection Authority v. Caltex Refining Co Pty Ltd (1994) 178 CLR 477 per Brennan J at 514-5. A corporation is criminally responsible where the mental and conduct elements of an offence are performed on behalf of the company by the board of directors, the managing director or another to whom the board has delegated some part of their functions of management giving the delegate full discretion to act independently: per Lord Reid at 170. In Keho v. Dacol Motors Pty Ltd ex parte Dacol Motors [1972] Qd.R. 59 at 79, Andrews J was of the view, applying Tesco Supermarkets, that the knowledge and conscience of an employee left in control of a motor dealership for a week was the knowledge and conscience of the company: see also Grain Sorghum Marketing Board v. Supastok Pty Ltd ex parte: Grain Sorghum Marketing Board [1964] Qd.R. 98 at 112.

It is not necessary that the authorisation extend to commission of the offence. The corporation will be liable if the natural person acted "within the scope of delegation", per Lord Reid in Tesco, supra, at p.171 or if the act in question was done "by the directing force of the company when carrying out his assigned function in the corporation": Canadian Dredge & Dock Co Ltd v. The Queen (1985) 19 DLR (4th) 315 at at 330. It is no defence to the application of this doctrine to say that a criminal act by a corporate employee cannot be within the scope of his authority unless he was expressly ordered to do the act in question: Canadian Dredge & Dock, supra, at 331.

Wilkinson's Authority

The Rules of the QPUE (Ex. 31) provide for the affairs of the Union to be managed by the Executive: Rule 10A(a). The Executive consists of the General President and nine financial members. In the union context, the Executive committee is the equivalent of a company board of directors.

The MOU was signed by Wilkinson above the title "President of Queensland Police Union of Employees". Wilkinson clearly intended to sign on behalf of the QPUE.

Wilkinson kept the majority of executive members informed of events leading up to the signing of the MOU. Wilkinson spoke with Hocken about compiling a wish list prior to the executive meeting of 13 December 1995.(T.850-851). The

wish list was drafted by Wilkinson between 13 December 1995 and 2 January 1996 (T.4023). The wish list was shown to eight of the executive members after the executive meeting of 3 January (T.89-90). Another member, Melling, had been shown the wish list before the meeting (T.398-399). Also, at the meeting of 3 January, the executive reached general agreement that the QPUE would conduct an advertising campaign at the Mundingburra election. The wish list was faxed to Cooper by Wilkinson on 8 January 1996 (T.89-90). The draft MOU, incorporating the coalition response to the wish list, was faxed to Wilkinson at the Union office on 10 January 1996. Hocken read the draft MOU in Townsville on the night of 10 January 1996. Wilkinson telephoned seven of the executive members and obtained their "permission or authorisation to sign" the MOU before doing so (T.92). Wilkinson signed the MOU on 15 January 1996 (T.4254).

It is apparent that in signing the MOU, Wilkinson was acting as General President of the Police Union with the informed authorisation of a majority of executive members. It is also clear that in faxing the wish list to Cooper, Wilkinson was acting with implied, if not express, authority for the QPUE.

Relevant Requests

In the immediately preceding paragraph, we refer to two activities in which Wilkinson engaged, namely, faxing the wish list to Cooper and signing the MOU. In our view, faxing the wish list could constitute asking Cooper for something and signing the MOU could constitute either asking Cooper for something or receiving something from Cooper, or both.

In the context of subsection 155(1), it becomes necessary to determine what it was that was requested or received on each occasion. With the faxing, it is quite clear that what was requested was agreement by Cooper to all of the objectives and proposals in the wish list. With the signing, the facts are not so obvious. The expression "Memorandum of Understanding" connotes a meeting of minds on a topic or topics recorded in writing. Speaking of the meaning of the term "understanding" in a trade practices context in Top Performance Motors Pty Ltd v. Ira Berk (O) Pty Ltd (1975) 24 FLR 286 at 291, Smithers J said:-

"An understanding must involve the meeting of two or more minds. Where the minds of the parties are at one that a proposed transaction between them proceeds on the basis of the maintenance of a particular state of affairs or the adoption of a particular course of conduct, it would seem that there would be an understanding within the meaning of the Act."

In light of this, we reject an interpretation of Wilkinson's signing the MOU as a "re-asking" for all that was sought when the wish list was faxed. In the context of an understanding, there must be correspondence between what is requested and what is received. The better interpretation is that what Wilkinson was requesting at that point was a commitment from Cooper of action in accordance with the Responses in the MOU, although this fell significantly short of adoption of the wish list in toto. Certainly, this was all that Wilkinson received from Cooper.

Wilkinson's state of mind

In order to succeed in a prosecution, it will be necessary to prove that at the time of faxing the wish list and/or signing the MOU, Wilkinson acted with the state of mind required by subsection 155(1). On this issue, the available evidence will be entirely circumstantial.

In our opinion, there is sufficient circumstantial evidence on which a tribunal of fact could be satisfied to the applicable degree of proof, that at the time of signing the MOU, Wilkinson knew that coalition agreement to many of the QPUE requests was being given for the purpose of encouraging the QPUE to maintain an anti-ALP advertising campaign.

This conclusion is compelling when regard is had to the behaviour of the relevant participants viewed in the context of the circumstances of the by-election. The Mundingburra by-election was exceptional because the outcome of the contest in a single seat was capable of changing government. This magnified the importance to the coalition of any campaign by the QPUE. On any objective view, concessions extending well beyond existing coalition policy commitments and of significant potential financial cost to an incoming government were intimated by the MOU. Cooper responded to the wish list within two days and the MOU was signed by all parties within a week of the coalition first receiving the submission. The wish list was not sent to the Labor Party. Indeed, certain issues in the wish list had never been raised with the Police Minister, Mr P Braddy ("Braddy") (T.254-260). Cooper was advised prior to or on 8 January that

there would be a Mundingburra advertising campaign by the Union (T.3181). Braddy was not given prior notice that the QPUE would campaign in Mundingburra (T.259-260). On 15 January 1996, the day the MOU was signed by Wilkinson, additional television and radio advertising was ordered on behalf of the QPUE. On the following day, Wilkinson and the QPUE Vice-President, Mr Bainbridge, travelled to Townsville and actively advanced the campaign. The advertising emphasised the "broken promises" of the existing government. The QPUE representatives resisted attempts by the Labor candidate to respond to demands for more police in Townsville. The remainder of the QPUE campaign was consistently anti-government in theme.

By contrast, the circumstantial evidence as to Wilkinson's state of mind at the time of faxing the wish list is problematical. From the sequence of events on and after signing the MOU, one might suspect that Wilkinson may have had the requisite state of mind at the earlier date, but a mere suspicion is insufficient as proof of his state of mind to the requisite degree.

The wish list was faxed to Cooper on 8 January 1996. Although by that time Cooper had been told by Wilkinson that the QPUE intended to campaign in Mundingburra, both Wilkinson and Cooper denied that perseverance with the proposed advertising campaign was linked to a positive response to the wish list. It is not possible, having regard to available circumstantial evidence, to establish to the exclusion of any innocent possibility that Wilkinson submitted the wish list on the basis that election support by the Union was contingent upon the

proposals contained therein being satisfied. A purpose linking the coalition response and the QPUE campaign may have only formed in the mind of Wilkinson after Cooper had responded to Wilkinson upon receiving the wish list.

The same difficulty does not exist in the case of the MOU. The circumstantial evidence supports the conclusion that by 15 January, the actions of both parties were consistent with the existence of an agreement linking the MOU concessions and the anti-government election campaign.

Evidence admissible against OPUE as principal offender

This analysis has proceeded on the assumption that admissions made by Wilkinson during evidence before the Inquiry would be admissible against the corporate body of which he was President. The correctness of his assumption must be doubted. Although it is not essential to resolve the matter for the purpose of the conclusions we have reached, nevertheless, the additional difficulty of obtaining proof against the QPUE must be acknowledged.

The authorities reveal uncertainty as to the ability of a corporation to confess to criminal behaviour. It is true that privilege against self incrimination is not available to corporations in Australia: Environmental Protection Authority v. Caltex, supra. However, it is only in the production of documents that this is likely to operate against the interests of the corporation. It is also true that there are circumstances where a corporation may respond to legal process through its

officers and that response will amount to an admission receivable against the corporation. However, these circumstances do not extend to testimony given by an officer in court. An officer or employee called as a witness testifies on his or her own behalf and accordingly cannot refuse to answer upon the basis that the answer would tend to incriminate the corporation. Testimony given during the Carruthers Inquiry by such a witness does not amount to a confession by the corporation and therefore is not admissible in a subsequent trial of the corporation. It is necessary to call the officer as a witness in order to adduce the evidence in a later criminal trial. Furthermore, where the officer is capable of being characterised as a possible accessory to the offence alleged against the corporation, he or she may claim privilege against self incrimination, incidentally making the testimony unavailable against the corporation.

Accordingly, in the present case, evidence available to be called on a prosecution of the QPUE is limited to documentary material and testimony of witnesses with no personal claim of privilege against self incrimination. It therefore appears that the Inquiry testimony of Wilkinson would not be available.

Benefit

In submissions, Counsel Assisting proposed a charge against Wilkinson as a principal offender which specified the signed MOU as the benefit which Wilkinson "agreed to receive"; a charge in terms of requesting the wish list was not canvassed.

If the MOU is taken as the point of reference, then, as we have explained, the gains or advantages requested and received were the objectives and proposals to which the coalition signatories had agreed, agreed in principle, or partially agreed, according to the tenor of the Responses. The conclusion that we have already expressed is that these gains and advantages are not benefits within the meaning of s.155. It follows in our view that a prosecution against QPUE which adopts the signed MOU as its point of reference will fail at least on this element of the offence.

A prosecution against the QPUE which adopts the wish list as its point of reference would specify the objectives and proposals requested in that document as the benefits sought at the time when it was faxed. Those objectives and proposals are different from the objectives and proposals requested in the MOU. Where the differences arise is in respect of objectives and proposals which were not agreed or to which the responses intimated coalition government action different from the objective or proposal as stated in the wish list.

We have considered the objectives and proposals that fall into this category. We do not think that the available evidence is capable of proving to the applicable standard that they are benefits within the meaning of s.155. A properly instructed tribunal of fact could not be satisfied that, by these particular objectives and proposals, it was sought to advantage ascertained individuals who can be named or to achieve gains or advantages other than by way of measures taken as part of the normal process of government.

In this context, Objectives (20) and (21) and the Responses to them which are set out ante, warrant particular reference. At the public hearings, the evidence canvassed in detail the circumstances in which the named Assistant Commissioners marked for redundancy were included on the wish list and the soundness of the reasons given by witnesses for their inclusion. From this and other evidence, it is clear that some at least of the members of the QPUE executive had antipathetic dispositions towards some of the named Assistant Commissioners. There was a background of resentment by two members of the QPUE executive towards one of the named Assistant Commissioners - by Wilkinson and Hocken, on the one hand, towards Assistant Commissioner Williams ("Williams") on the other. Assistant Commissioner McGibbon was suspected by a number of executive members of assisting the defence in a police prosecution matter and of being overzealous in disciplinary matters. Assistant Commissioner Walker, it seems, was disliked by executive members for allegedly spending money on expensive fitout at his regional headquarters at the expense of local police stations.

An available inference is that some members of the QPUE executive may have had personal reasons for listing some of the named Assistant Commissioners. For example, it may be inferred that Wilkinson and Hocken regarded themselves as having a score to settle with Williams.

Given this, it is appropriate to ask whether in submitting Objectives (20) and (21),

the QPUE was requesting an advantage personal to those members of the QPUE executive who harboured such grudges - an advantage in terms of retribution by way of removal. Arguably, an advantage of that kind might be a benefit within the meaning of s.155 although it must seriously be doubted that such an advantage has the connotation of benefit with which s.155 is concerned. If it were, it would not satisfy the first criterion we have adopted, being specific to members of the QPUE executive.

The evidence from QPUE executive members was to the effect that names were included on the list after consideration of those persons' success as managers in their respective divisions. Those factors which the executive members said they took into account in this process were examined in detail in evidence.

To our minds, the available evidence is, in any event, insufficient to warrant the further factual inference that Objectives (20) and (21) were submitted by the QPUE for the purpose of securing personal advantages of this kind for members of the executive including Wilkinson and Hocken, rather than for the reasons canvassed in the evidence. We say this for the following reasons. The list of Assistant Commissioners sought to be made redundant was prepared in something of a consultative process in which some, if not all, of the members of the QPUE executive participated by nominating persons for the list, by voicing reasons for or against persons being on the list, and in deciding whether a nominated person was to be, or not to be, on the list. All names were placed on the list through this process. Sometimes the decision to include a name was

unanimous; sometimes it was not. Those who agreed to include a name in each case were not confined to those who, it may be inferred, had a score to settle or bore a grudge.

In this rather inconclusive state, the evidence does not allow for a further inference that in any case, the advantage, if any, sought by the members of the executive who voted in favour of including the name on the list was to secure a personal advantage for a member or members of the executive. In our view, this further inference does not arise merely because almost all of the reasons given for including names on the list were shown, upon examination, not to be soundly based.

In light of the difficulties with the elements of state of mind and benefit, we consider that a properly instructed tribunal of fact would not be entitled to convict the QPUE as a principal offender.

Wilkinson - As Accessory

An individual may be charged as an accessory to the offence of a corporation where he or she is the directing mind of the corporation and the offence was committed acting through him or her: Hamilton v. Whitehead (1988) 166 CLR 121; Re Goodall (1975) 11 SASR 94. Circumstances may be envisaged where, because of admissibility of evidence against an accessory but not against the corporation, the former is convicted of the offence but not the latter. These circumstances would be quite unusual.

Here, however, because of the difficulties with the elements of benefit and state of mind, a prosecution against Wilkinson as accessory would not be available.

OFFICIAL MISCONDUCT

As we explained above, for conduct to amount to official misconduct, it must satisfy the test that it constitutes or could constitute either a criminal offence or a disciplinary breach that provides reasonable grounds for termination of the person's services in the unit of public administration (subsection 32(1)(d)(e) CJ Act).

Having regard to the conclusion which we have reached that the evidence does not disclose a prima facie case of breach of subsections 155(1) or (2) by any person, it follows that no charge of official misconduct is available on the basis that the conduct constitutes or could constitute a criminal offence.

We also concluded that a member of the Legislative Assembly may commit official misconduct only when the conduct in question constitutes or could constitute a criminal offence. Accordingly, there is no prima facie case of official misconduct by Cooper or Borbidge.

Counsel Assisting submitted that the evidence indicated a prima facie case to support a disciplinary charge of official misconduct against Wilkinson and Hocken on the basis of a disciplinary breach providing reasonable grounds for

termination of the person's services in the Police Service.

Prescribed Person

Proceedings for a disciplinary charge of official misconduct may only be initiated in a Misconduct Tribunal. The original jurisdiction of Misconduct Tribunals is limited to the hearing of a charge made against a "prescribed person": subsection 46(1) CJ Act.

Subsection 39(2) CJ Act defines a "prescribed person" as, inter alia, a member of the Police Service. A body described as the Queensland Police Service is provided for in the PSAA.

Wilkinson was seconded to be full time President of the QPUE by arrangement with the Commissioner of Police: T.321-322. The terms of that secondment are set out in Exhibit 51. Those terms were agreed in October 1994. They provide for the President to continue to be paid his salary by the QPS with reimbursement by the QPUE. The terms implicitly recognise that the person will continue to be a member of the QPS. For example, it is provided that: "the period of secondment shall come to a conclusion by the person's retirement, resignation or dismissal from the Police Service". The terms of the secondment provided that:

"the person shall be bound by their oath of office as a police officer and the person recognises that they are still subject to the discipline provisions of the Public Service Administration Act and Regulations."

The Police Gazette of 5 May 1995 recorded the appointment of Sgt G J Wilkinson to a position in the South Eastern Region. The position was designated as surplus: Ex. 53; T.322. This appointment was obviously arranged to facilitate Wilkinson's secondment.

The PSAA defines the QPS as consisting of "police officers, police recruits and staff members": subsection 2.2(1). Included in the category of police officer are "persons holding appointment as a non-commissioned police officer": subsection 2.2(2)(d).

It seems clear that Wilkinson continued to hold appointment as a non-commissioned police officer in the QPS during the term of his secondment to the QPUE. It follows that by operation of the PSAA, the disciplinary provision in subsection 7.4 which applies to officers, continued to apply to Wilkinson.

Hocken is a serving member of the QPS who was stationed in Townsville at the time.

As a police officer holding an appointment in the QPS, Wilkinson and Hocken were each "a member of the police service" within the meaning of that expression in the definition of "prescribed person" in subsection 39(2) CJ Act.

Disciplinary Breach

In the case of police officers, the question whether conduct amounts to a

disciplinary breach is answered by reference to the provisions of the PSAA and delegated legislation made thereunder. An officer is liable to disciplinary action in respect of conduct considered to be misconduct or a breach of discipline on such grounds as are prescribed by the regulations: subsection 7.4(2) PSAA. Clause 9 of the Police Service (Discipline) Regulations 1990 provides, inter alia, that for the purposes of subsection 7.4 PSAA, the following are grounds for disciplinary action:

"(c) a contravention of, or failure to comply with, a provision of a code of conduct, or any direction, instruction or order given by, or caused to be issued by, the Commissioner;

...

(f) misconduct;"

The definition of "misconduct" in the PSAA is as follows:

"'Misconduct' means conduct that -

- (a) is disgraceful, improper or unbecoming an officer; or
- (b) shows unfitness to be or continue as an officer; or
- (c) does not meet the standard of conduct the community reasonably expects of a police officer;"

Certain limitations on political activity and public comment are imposed on officers by the Police Code of Conduct.

Even though the identified behaviour amounts to misconduct under the PSAA, it must satisfy two other requirements before giving rise to a charge of official misconduct under the CJ Act. First, it must fall within one of the categories of conduct specified in paragraphs (a) and (b) of subsection 32(1). Paragraph (c) is clearly inapplicable to the facts in this case. Second, it must be capable of constituting a breach "that provides reasonable grounds for termination of the person's services" in the Police Service: subsection 32(1)(d) CJ Act.

Section 32

Section 32 identifies three separate types of conduct which may constitute official misconduct subject to the constraints imposed by paragraphs (d) and (e) of subsection 1. These types of conduct are set out in paragraphs (a), (b) and (c) of subsection 32(1) respectively. Paragraphs (a) and (b) only need to be considered in the present case. They are as follows:-

- "(a) conduct of a person, whether or not the person holds an appointment in a unit of public administration, that adversely affects, or could adversely affect, directly or indirectly, the honest and impartial discharge of functions or exercise of powers or authority of a unit of public administration or of any person holding an appointment in a unit of public administration; or
- (b) conduct of a person while the person holds or held an appointment in a unit of public administration -
 - (i) that constitutes or involves the discharge of the person's functions or exercise of his or her powers or authority, as the holder of the appointment, in a manner that is not honest or is not impartial; or
 - (ii) that constitutes or involves a breach of the trust placed

in the person by reason of his or her holding the appointment in a unit of public administration;"

In the present context, the conduct of Wilkinson or Hocken which requires assessment is his participation in the submission of the wish list to Cooper, particularly having regard to the inclusion of the names of the six Assistant Commissioners and the identification of those persons as unsuccessful.

Subsection 32(1)(a)

The focus in paragraph (a) is on the honest and impartial discharge of an official's functions. Only conduct that adversely affects or could adversely affect, directly or indirectly, the discharge of those functions will constitute official misconduct. Conduct "could adversely affect" future official action if the conduct, viewed objectively in the whole of the relevant circumstances, could produce the consequence of dishonesty or partiality on the part of the official in the performance of his or her duties.

The concept of dishonesty is not without difficulty. The courts have preferred to allow juries to apply community understandings of what amounts to dishonesty. However, secrecy alone will not constitute dishonesty. The Macquarie Dictionary relevantly defines dishonesty as meaning "disposed to lie, cheat or steal". The concepts of partiality and impartiality also raise difficulties. We prefer the view of Gleeson CJ expressed in Greiner v. ICAC, *supra*, at 144 in relation to the equivalent New South Wales section:

"At the very least, having regard to the statutory context (a definition of corruption in an Act aimed at suppressing official corruption), the references to partial and impartial conduct in s.8 must be read as relating to conduct where there is a duty to behave impartially."

Pursuant to subsection 5.2(2) of the PSAA, the appointment of all police officers, including the Commissioner and executive officers, must be made by fair and equitable procedures on the basis of merit and without unjust discrimination. The appointment by the Governor in Council of the Commissioner may only be made on a recommendation agreed to by the Chairperson of the CJC and appointment of Assistant Commissioners may only be of persons recommended by the Commissioner: subsections 4.2(1); 5.3(1) PSAA. Ministers of the Government have a duty to act lawfully in regard to those appointments.

We earlier considered the request contained in Objective (27) of the MOU and identified the ambiguity of meaning contained therein. Notwithstanding the different standard of proof which applies when considering official misconduct, we consider, for the reasons given earlier, that a tribunal of fact would not be entitled to conclude that any agreement reached in relation to the MOU involved an undertaking by the coalition to act unlawfully in respect to the appointment of the next Commissioner of Police.

It is our view, as expressed above, that the evidence is capable of establishing

that, by the time of the signing of the MOU, an agreement existed between Wilkinson and Cooper linking the Union support and the undertakings given by the coalition. However, we do not view any of the promises contained in the MOU as being to act other than honestly and impartially in the discharge of public duty. The circumstances are not capable of displacing that view in favour of contrary interpretations consistent with guilt.

In a different context, we considered that there was insufficient evidence to establish that Wilkinson, at the time of the forwarding of the wish list, had in mind the provision of election support in return for future delivery of the objectives on the list. Even on the civil standard, we consider that the circumstantial evidence fails to sufficiently support the existence of that mental element. Accordingly, when viewed at the time of the submission of the wish list, the conduct of Wilkinson must be understood as a request unaccompanied by any intended inducement to the coalition.

We now turn to Objectives (20) and (21) in relation to the "strong recommendation" that the "unsuccessful" Assistant Commissioners become redundant. This request, like that in respect of the Commissioner's position, may be construed as inviting an incoming government to act contrary to law or alternatively as requesting the coalition to take whatever lawful steps are available to it to achieve the objectives sought. One obvious and lawful alternative would be to legislate to change the selection requirements and process. We do not find in the surrounding circumstances, particularly in the

absence of any intention or agreement as to electoral support, evidence capable of establishing that the request urged unlawful behaviour. In those circumstances, we do not consider that the wish list, objectively viewed in all the circumstances, could produce dishonesty or partiality on the part of the recipient.

The absence of evidence capable of establishing that Wilkinson deliberately proposed unlawful behaviour by the incoming government is also of considerable relevance as to whether there are reasonable grounds for termination of his services: see Greiner v. ICAC per Gleeson CJ at 140. Conduct lacking an element of dishonesty or intended illegality, however misguided or politically manipulative it might be, could not in our view constitute sufficient grounds in the circumstances of this case to justify dismissal of a police officer.

We consider that there is insufficient evidence to entitle a tribunal of fact to conclude that Wilkinson's conduct in submitting the wish list and in signing the MOU could adversely affect the honest and impartial discharge of official functions within the meaning of paragraph (a). Furthermore, we do not consider that the conduct capable of proof on the evidence could constitute reasonable grounds for termination. These conclusions apply equally to Hocken.

Subsection 32(1)(b)

The conduct specified in subparagraph (i) of subsection 32(1)(b) is not apposite to the behaviour under consideration in this matter. The submission of the wish list on behalf of the QPUE clearly did not constitute the exercise of an official

power or the discharge of an official function.

Subparagraph (ii) requires more detailed consideration. It refers to conduct that constitutes or involves a breach of trust placed in the person by reason of his holding an appointment in a unit of public administration.

Conduct potentially falling within this subparagraph was the subject of the decision by Lee J in Re Mullen [1995] 2 Qd.R. 608. In that case, a police officer was dismissed by a Misconduct Tribunal for having assaulted another motorist at the scene of a traffic incident when she was off duty and in plain clothes. His Honour held that in order to constitute "official misconduct", the act of the officer must occur "in the course of or pertaining to the exercise of the powers, functions, duties or responsibilities attaching to his or her office": Re Mullen, supra, at 613. In reaching that conclusion, Lee J had regard to the effect of the term "official" when used in the section and to the circumstance that the trust referred to in subsection (ii) must be that which was reposed in the person by virtue of his or her position. The decision of the Misconduct Tribunal was quashed.

Turning to the present facts, the submission of the wish list was expressed as being on behalf of the QPUE. Wilkinson ultimately signed as President. Some items (see e.g. Objectives (21) and (27)) specifically refer to the QPUE or the members. The wish list was drafted and discussed in private or within the executive group of the QPUE. It was transmitted in private to Cooper. Hocken's

contribution was through private conversations with Wilkinson and Cooper. Neither Wilkinson nor Hocken purported to act or speak on behalf of the QPS or in the exercise of their duties as police officers. The conduct of Wilkinson in submitting the wish list does not have the character of an act pertaining to the exercise of the powers, functions, duties or responsibilities of a police officer.

It is ordinarily a prerequisite of membership of the QPUE that a person be a police officer. However, we do not consider that circumstance to have any relevant bearing on whether the necessary nexus existed. Even though a person's union membership is contingent upon him or her being a police officer, it does not follow that all the person's acts as a unionist must therefore pertain to the exercise of the functions of his or her office.

We conclude that the conduct of Wilkinson in submitting the wish list to Cooper lacked the necessary connection with his appointment as a police officer so as to allow it to be described as "official" within the meaning of that section. The behaviour of Hocken is similarly not capable of constituting official misconduct in breach of paragraph (b).

Conclusion

In light of the above, we conclude that there is no prima facie case of official misconduct by any person.

TIME LIMITATION

A breach of s.155 EA may only be prosecuted summarily under the Justices Act 1886 ("JA"). This is so because the EA does not expressly or by implication provide that the offences created under that section are indictable offences. Section 44 AIA states that where an offence has not been made an indictable offence by an express or implied provision, then prosecution must be by way of a summary proceeding under the JA.

The EA is silent on the matter of the time limit for the making of a complaint. In the absence of such a provision, s.52 JA requires a complaint to be made "within one year from the time when the matter of complaint arose". Accordingly, should it be desired to prosecute any person under either of these subsections, such prosecution must be commenced before 15th January 1997.

SUMMARY

In our opinion, for all the reasons we have stated in this joint advice, the material briefed to us does not disclose a prima facie case of:

- (a) breach of subsections 155(1) or (2) EA: or
- (b) official misconduct,

by any individual or by the QPUE itself.

In our opinion, the circumstances do not warrant the making of reports pursuant to subsections 33(2)(a) or 33(2)(b) CJ Act.

We advise accordingly.

With Compliments,



R.W. GOTTERSON QC



B.I. BUTLER SC

Chambers

6 December 1996

W G Strange
Official Solicitor
Criminal Justice Commission
PO Box 137
BRISBANE ALBERT STREET 4002

JOINT MEMORANDUM OF ADVICE

Re: Criminal Justice Act 1989 - Section 33(2)(g)

Memorandum of Understanding

In our joint advice dated 6th December 1996, we advised as to whether circumstances existed to warrant the making of reports pursuant to subsections 33(2)(a) or 33(2)(b) CJ Act in relation to the MOU. It remains for us to advise as to the making of a report pursuant to subsection 33(2)(g) in relation to that document. For convenience, we propose to adopt the abbreviations used in our earlier joint advice.

Under subsection 33(2)(g), a report may be made with authority of the Chairman of the CJC to the principal officer in a unit of public administration with a view to disciplinary action being taken in respect of the matter to which the report relates. We are instructed that a report would be made under this subsection where the available evidence shows a prima facie case to support disciplinary action being taken.

Counsel Assisting submitted (written submissions pp.41-43) that the evidence indicated a prima facie case:-

- (a) of a disciplinary breach of misconduct by each of the serving police officers who were members of the QPUE, except Sergeant S. MacFarlane, in relation to the submission of the wish list insofar as it contained what Counsel Assisting described as "offensive matters"; and
- (b) of a disciplinary breach of misconduct in relation to the giving of false evidence at the public hearings before Mr Carruthers QC.

In the material briefed to us, there is no indication of conduct which could have constituted a disciplinary breach of misconduct on the part of any other person or on the part of any of the abovementioned persons in relation to any other matter. This being so, any disciplinary breach of misconduct here would have been committed by a serving member of the QPS and any report that might be made under subsection 33(2)(g) would be made to the Commissioner of Police.

Before addressing these particular submissions, we propose to outline the legislative framework relevant to police discipline.

LEGISLATIVE FRAMEWORK

Since 1990, the QPS has been constituted and regulated by the Police Service Administration Act 1990 ("PSAA"). Part 7 of that Act deals with Internal

Command and Discipline. Relevantly, subsection 7.4(2) provides as follows:-

"An officer is liable to disciplinary action in respect of the officer's conduct, which the prescribed officer considers to be misconduct or a breach of discipline on such grounds as are prescribed by the regulations."

This subsection provides that disciplinary action may be taken in respect of two types of conduct: **misconduct** or a **breach of discipline** on grounds prescribed by the regulations. As to the first type, the expression "misconduct" is defined for the purposes of the PSAA to mean "conduct that -

- (a) is disgraceful, improper or unbecoming of an officer; or
- (b) shows unfitness to be or continue as an officer; or
- (c) does not meet the standard of conduct the community reasonably expects of a police officer."

It is apparent from this definition that "misconduct" is not limited to a police officer's behaviour when he or she is on duty. Discreditable conduct in private life is capable of constituting misconduct against the discipline of the police force:

Henry v. Ryan [1963] Tas. S.R. 90.

As to the second type of conduct, regulations made pursuant to the PSAA, namely, the Police Service (Discipline) Regulations 1990 ("Regulations") provide that for the purposes of s.7.4 PSAA, the following are grounds for disciplinary action:-

- "(a) unfitness, incompetence or inefficiency in the discharge of the duties of an officers' position;
- (b) negligence, carelessness or indolence in the discharge of the duties of an officers' position;
- (c) a contravention of, or failure to comply with, a provision of a code of conduct, or any direction, instruction or order given by, or caused to be issued by, the Commissioner;
- (d) a contravention of, or failure to comply with, a direction, instruction or order given by any superior officer or any other person who has authority over the officer concerned;
- (e) absence from duty except -
 - (i) upon leave duly granted;
 - or
 - (ii) with reasonable cause;
- (f) misconduct;
- (g) conviction in Queensland of an indictable offence, or outside Queensland of an offence which, if it had have been committed in Queensland would have been an indictable offence." (Subsection 9(1) Regulations).

It will be noted that paragraph (f) stipulates misconduct as a ground for disciplinary action. There is no definition of misconduct in the Regulations themselves. By virtue of s.37 Statutory Instruments Act 1992, that word is to have the same meaning in the Regulations as it has in the PSAA. In the result, conduct of the kind described in paragraphs (a), (b) and (c) in the definition of "misconduct" in the PSAA may be both misconduct and a breach of discipline for the purposes of subsection 7.4(2) PSAA.

Paragraph (c) of subsection 9(1) Regulations refers to a code of conduct. Subsection 4.9(1) PSAA empowers the Police Commissioner ("the Commissioner") to issue directions as the Commissioner considers necessary or convenient for the efficient and proper functioning of the QPS. Pursuant to that power, the Commissioner has issued a document entitled "Code of Conduct" ("Code"), clause 2.4 of which states that the failure to comply with its provisions may subject the officer to appropriate disciplinary action under s.7.4 PSAA and the Regulations. We do not propose to set out here particular provisions in the Code but shall refer to them as is necessary during the course of this joint advice.

The Object of Disciplinary Proceedings

In considering the application of disciplinary action in respect to misconduct or a breach of discipline, it is helpful to have regard to the object of disciplinary proceedings within a police service as expressed in the judgment of the Full Court of the Federal Court in Hardcastle v. Commissioner of Police (1984) 53 ALR 593 at 597:

"The object of disciplinary proceedings under the Discipline Regulations is to protect the public, to maintain proper standards of conduct by members of the Australian Federal Police and to protect the reputation of that body. The object of disciplinary proceedings is not to punish (see Harvey v. Law Society of New South Wales (1975) 49 ALJR 362 per Barwick CJ at 364; 7 ALR 227) or to exact retribution (see Ex Parte Attorney-General (Cth); Re a Barrister and Solicitor (1972) 20 FLR 234 per Fox, Blackburn and Woodward JJ at 244)."

Proceedings for Misconduct or Disciplinary Breach

Disciplinary action may be instituted by a prescribed officer pursuant to subsection 7.4(2) PSAA. A prescribed officer for the purpose of that subsection is defined as "an officer authorised by the regulations to take disciplinary action in the circumstances of any case in question". Sections 5 to 8 of the Regulations extend disciplinary powers to various levels of officer. Except in the case of the Commissioner or a Deputy Commissioner, the empowering regulation limits the disciplinary sanctions that the particular level of officer may impose. The hearing by the prescribed officer will be in the nature of a disciplinary proceeding: R v. Blizzard, Ex Parte Downs [1993] 1 Qd.R. 151 at 159. An appeal from a decision is available pursuant to the provision of s.49 CJ Act. The appeal lies to a Misconduct Tribunal constituted under the CJ Act.

Standard of Proof

The relevant standard of proof in disciplinary proceedings is the civil standard as enunciated in Briginshaw v. Briginshaw (1938) 60 CLR 336: see Adamson v. Queensland Law Society Inc [1990] 1 Qd.R. 498.

Time Limitation

No legislative limitation is placed upon the time period within which disciplinary action may be commenced.

Wilkinson's Position

The disciplinary provision in subsection 7.4(2) PSAA applies to a person who is

an "officer". That word is defined to mean a "police officer" and that expression is, in turn, defined to mean "a person declared under subsection 2.2(2) to be a police officer": s.1.4 PSAA. The PSAA defines the QPS as consisting of "police officers, police recruits and staff members": subsection 2.2(1). Included in the category of police officer are "persons holding appointment as a non-commissioned police officer": subsection 2.2(2)(d).

The Police Gazette of 5th May 1995 recorded the appointment of Sergeant G J Wilkinson to a position in the South East Region. The position was designated as surplus: Ex. 53; T.322. This appointment was obviously arranged to facilitate Wilkinson's secondment to the QPUE. He was seconded to be full time President of the QPUE by arrangement with the Commissioner of Police: T.321-322. The terms of that secondment are set out in Ex. 51. Those terms were agreed in October 1994. They provide for the President to continue to be paid his salary by the QPS with reimbursement by the QPUE. The terms implicitly recognise that the person will continue to be a member of the QPS. For example, it is provided that: "the period of secondment shall come to a conclusion by the person's retirement, resignation or dismissal from the Police Service". The terms of the secondment provide that:

"The person shall be bound by their oath of office as a police officer and the person recognises that they are still subject to the discipline provisions of the Police Service Administration Act and Regulations."

It is clear from this that Wilkinson continued to hold appointment as a non-

commissioned police officer in the QPS during the term of this secondment to the QPUE. It follows that by operation of the PSAA, the disciplinary provision in subsection 7.4 which applies to officers continued to apply to Wilkinson. It is also clear that the provision always applied to the other members of the QPUE Executive who were serving police officers.

Persons Liable to Disciplinary Action

As we have noted, only officers are liable to disciplinary action under s.7.4. Thus this section can apply to the members of the QPUE Executive who continue to be police officers. The word "officer" is not defined in the PSAA so as to include former officers. Thus, a person who was, but no longer is, an officer in the QPS is not liable to disciplinary action under this section. Mr M Bainbridge was a police officer at the relevant time but has since resigned from the QPS to become General Secretary of the QPUE. Even if it be assumed that he had committed a disciplinary breach, he is not now liable to disciplinary action under the PSAA.

Non-officer Members of the QPUE Executive

Two members of the QPUE Executive, Mr M Melling and Mr R Brummell, were not police officers at the relevant time. Therefore they were not then, and are not now, subject to the disciplinary provision in s.7.4 PSAA.

Protection of Trade Union Officials from Discrimination

A submission was advanced by Counsel on behalf of the QPUE that the Industrial Relations Act 1990 ("IR Act") and the Anti-Discrimination Act 1991

("A-D Act") extend statutory protection to trade union officials in respect of their activity. Accordingly, it was submitted, trade union activity cannot amount to misconduct. We do not, with respect, find that submission convincing. In our opinion, disciplinary charges properly directed to conduct proscribed by the PSAA and regulations, namely misconduct or breach of discipline as defined in the legislation, will not offend against the IR Act or the A-D Act. This is so because the attribute of trade union activity will not be an operative factor in the taking of proper disciplinary action in respect of such conduct: See General Motors Holden's v. Bowling (1976) 51 ALJR 235; Mount Isa Mines Ltd v. Manufacturing Workers Union Supreme Court (Qld), Shepherdson J, 19 February 1996, unreported.

THE OPUE EXECUTIVE MEMBERS

It is convenient at this point to quote the following extract (pp.41-42) set out under the heading "Misconduct" in the written submissions of Counsel Assisting:-

"It is not necessary here to develop at great length the case for misconduct against members of the Police Union Executive. It is submitted that they conducted a political campaign well knowing it to be a political campaign. This was really in breach of Rule 3(n) of their Union Rules. However it is submitted that this is not the worst part of the case against them. There is evidence that all serving police officers on the Executive, other than MacFarlane, authorised the submission of the wish list to Cooper. This authorisation carried with it an effort to obtain a role for the Union, which of course in practice would be exercised by the executive members, in the selection of Commissioners of the Queensland Police Service, but even more importantly involved the gratuitous defamation of six of the most senior officers in the Queensland

Police Service. The assertion to a member of Parliament that six Assistant Commissioners had proved unsuccessful in the opinion of the Union and ought to be made redundant was something that was completely contrary to the disciplinary spirit of an organisation such as a police force. Rule 6.5 of the Code of Conduct expressly deals with political activity by officers. It is as follows:

6.5 *Political activity by officers:*

Officers have the same right as any other citizen to freedom of political views and association. However, any political activity by officers should be conducted clearly in a private capacity.

For officers engaged in political activity, such as seeking or holding office or membership of a party or committee, care should be exercised that a conflict of interest does not arise with official duties.

IT IS ESSENTIAL THAT OFFICERS CLEARLY SEPARATE ANY OFFICIAL ACTION OR VIEWS FROM THEIR POLITICAL ACTION OR VIEWS.

Examples of permissible conduct under this rule are:

- *Registering and voting in an election.*
- *Expressing an opinion as an individual privately and publicly on political subjects and candidates.*
- *Displaying political advertising (except in situations that are connected to the officers' official duties, i.e., such advertising may not be displayed whilst on duty or on Queensland Police Service property).*
- *Signing a political petition as a private individual.*

It is probably also desirable to note the provision dealing with public comment. This is 7.4 which is as follows:

7.4 *Public comment:*

7.4.1 *As members of the community, officers have a right to make public comment and enter into public debate on political and social issues. However, there are circumstances where public comment or debate by officers is not acceptable. These include circumstances where:*

- *A public comment made in a private capacity may give rise to a public perception that it is in some way an official comment of the Government or the Queensland Police Service.*
- *An officer is directly involved in advising on or directing the implementation or administration of Government policy, and the public comment would compromise the officer's ability to do so.*
- *A public comment amounts to improper and undue criticism of the Queensland Police Service administration or its policies.*
- *A public comment amounts to an unwarranted personal attack on the character or integrity of another.*

It is submitted that a prima facie case of misconduct is available against all the members of the Police Union Executive, with the exception of MacFarlane, in relation to the submission of the wish list containing those offensive matters."

This aspect of the submissions was not supplemented by any further particulars during the course of oral submissions. It may be inferred from the references to the Code of Conduct that the submissions are not confined to misconduct as defined for the purposes of the PSAA but extend also to paragraph (c) of subsection 9(1) of the Regulations - contravention of the Code of Conduct.

We discern in the submissions three separate matters which, it was submitted, justified disciplinary action under subsection 7.4(2) PSAA. They are:-

- (i) participating in a political campaign knowing it to be political - this conduct appears to be impugned first as a breach of Rule 3(n) of the

- QPUE Rules and then as a contravention of the Code of Conduct;
- (ii) attempting to obtain a role for the QPUE in the selection of Police Commissioners; and
 - (iii) the "gratuitous defamation" of the six named Assistant Commissioners who, in the wish list, were described as "viewed by QPUE and its members as unsuccessful" and were recommended for redundancy.

We propose to deal with each of these matters separately.

Participation in a Political Campaign

Rule 3(n)

The Objects of the QPUE are set out in Rule 3 of its Rules registered with the Industrial Registrar. Rule 3(n) is as follows:-

"The Union shall be non-political and no part of its funds shall be used for any political purposes. The Union may, however, affiliate with a political party organisation after approval of such action by referendum of the Union."

The written submissions on behalf of the QPUE (pp.47-60) raise a number of interpretational issues concerning Rule 3(n) and argue that, correctly interpreted, it means that the QPUE shall not be involved in supporting a political party and shall not use its funds to support a political party. That interpretation, it is said, will not inhibit the QPUE's ability to engage in legitimate industrial activity, will

not infringe the constitutional guarantee of free speech enunciated in Theophanous v. The Herald & Weekly Times Limited (1993-94) 182 CLR 104 and Stephens v. West Australia Newspapers Limited (1993-94) 182 CLR 211, and is precise. Applying that interpretation, the QPUE submitted that there had been no breach of Rule 3(n) because, it was argued, the QPUE's activity was essentially an industrial, rather than a political campaign, and did not amount to supporting any political party.

It is, however, unnecessary for us to resolve these interpretational issues or to come to a view as to whether Rule 3(n) was breached or not. This is because even if it be assumed that there was a breach, there are real difficulties in characterising participation in that breach of itself as misconduct as defined in s.1.4 PSAA. The evidence would not support a conclusion that any such breach was deliberate. If committed, it would not attract any sanction of a criminal or quasi-criminal kind. The difficulties to which we refer are implicitly recognised in the submission by Counsel Assisting (at p.41) that the breach "is not the worst part of the case against" the members of the Executive. These submissions do not identify what qualitative description or descriptions of conduct in any of the paragraphs in the definition of "misconduct" would accommodate such participation. This omission rather illustrates the difficulty with characterisation.

Code of Conduct

This Code applies to the conduct of officers of the QPS. It does not in any way

regulate the conduct of the QPUE. The difference, although obvious, is important in the present circumstances because it was the QPUE, and not individual officers or the members of the QPUE Executive collectively, who engaged in the public advertising campaign. To the extent that the advertisements were, or may have been, public comment on a political issue, they were the comment of the QPUE and not of individuals. In light of this, Rule 7.4.1 of the Code of Conduct which is concerned with participation in public debate and public comment by police officers on political and social issues, is irrelevant to present circumstances.

The other provision in the Code of Conduct to which Counsel Assisting referred, Rule 6.5, relates to political activity by officers. This Rule does not proscribe political activity by police officers; it affirms their right to freedom of political views and association. What the Rule requires is that police officers who engage in political activity do so in a way which clearly distances them from the QPS. The purpose of the Rule is to avoid circumstances from which it might appear that the QPS is engaging in political activity.

In the context of this Rule, the conduct of the members of the Executive that falls for consideration is the approval and submission of the wish list. In our view, this conduct cannot be described as political activity - it did not involve the propagation of political views or doctrines, the public endorsement of or financial support for, candidates or political parties, or anything else that falls within the ordinary conception of political activity. The approval and

submission of the wish list was part of a process of negotiation with political interests but, in substance, the negotiations were about industrial matters. From the Executive's perspective, the conduct in question is appropriately characterised as industrial activity rather than as political activity. But even if the conduct could be characterised as political activity, it was clearly carried out by the police officers concerned as members of the QPUE Executive and not as members of the QPS. The conduct is not open to the interpretation that it involved the QPS in political activity.

The evidence also indicates involvement by individual police officers in the Mundingburra by-election campaign, for example, by driving around a truck with a large advertising hoarding on it. This involvement, too, was carried out by those police officers clearly in their role as members of the QPUE and did not give the appearance that the QPS was participating in political activity.

Conclusion

For the reasons we have stated, we do not consider that there is a prima facie case in support of disciplinary action based on breach of Rule 3(n) or on breach of the Code of Conduct.

Selection of Police Commissioner

Objective (27) in the wish list is as follows:-

"The Government shall take advice from the QPUE when selecting

the new Commissioner of Police and shall not select an individual for this position that the Union has genuine reasons for opposing."

In our joint advice dated 6th December 1996 (p.54), we noted that, viewed objectively, this Objective does not relate to the present Commissioner but to whomever may succeed him as the next Commissioner. We also drew attention to the qualifying effect of, and the ambiguous connotations in, the word "genuine". In that context, we canvassed two of the possible meanings of the second limb of the Objective. One meaning is that the QPUE have a veto over the appointment of the next Commissioner so long as its reason for opposition to an individual is one that it believes is genuine. Another meaning is that a coalition government act not to appoint an individual as Commissioner against the QPUE's opposition so long as the reason for opposition, viewed objectively, would justify not selecting that individual on grounds of unfitness or unsuitability for the office. It follows from our advice (at p.74) that it is not open to a tribunal of fact to conclude that in submitting this Objective, the members of the QPUE Executive were asking a coalition government to act unlawfully in respect to the appointment of the next Commissioner of Police.

In our view, it is relevant that in submitting this Objective, the persons concerned were acting in their capacity as members of the QPUE Executive to which the management of the Union's affairs was entrusted: Rule 10A. The Executive has the responsibility of pursuing the QPUE's objects which include protecting and advancing the interests of members (Rule 3(d)). The probability is

that in submitting Objective (27), the members of the Executive considered that they were acting to advance the interests of members of the QPUE by ensuring that the views of their representative body were heard and acted upon in the appointment of the next Police Commissioner.

Given this and given the features of Objective (27) to which we have referred, we have difficulty in identifying how it might be said that the submission of the Objective amounts to misconduct within the statutory definition. We note that the submissions of Counsel Assisting are not specific on this issue. Paragraphs (a) and (b) in the definition appear to be inapplicable. It stretches the imagination to suggest that the conduct of these individuals, acting as they were as members of the QPUE Executive, fell below the standard of conduct reasonably expected by the community of a police officer.

Conclusion

In our view, the evidence does not indicate a prima facie case in support of disciplinary action based on the submission of Objective (27).

Criticism of the Six Assistant Commissioners

Objective (21) in the wish list is as follows:-

"The following Assistant Commissioners are viewed by the Union and its members as unsuccessful and it is strongly recommended that they become 'redundant':

Allan Honor; Andrew Kidcaff; Ron McGibbon; John Banham;

Graham Williams; Errol Walker;

A/C Mercer has only recently been appointed and is yet untested."

On a fair reading of them, the submissions by Counsel Assisting are not grounded in some doctrine that in no circumstance may a member of the QPS make a criticism of a commissioned officer to any person, including a member of State Parliament. The proposition which the submission really advances is that that may not be done where the criticism is unfair or is excessive in light of the true facts. In our opinion, this proposition is soundly based. It finds support in the following examples given in Rule 7.4.1 in the Code of Conduct of circumstances where public comment or debate by officers is not acceptable:-

- "• A public comment amounts to improper and undue criticism of the Queensland Police Service administration or its policies.
- A public comment amounts to an unwarranted personal attack on the character or integrity of another."

If this proposition is correct, as we think it is, then there is no reason at all why it should not apply to members of the QPUE Executive who are serving police officers in the course of attending to the Union's affairs. We see no scope for argument that when acting in that capacity, executive members may unfairly or excessively criticise other members of the QPS including commissioned officers. Criticism of that kind could, in our view, be held to be improper conduct (paragraph (a)) or as not meeting the standard of conduct the community

reasonably expects of a police officer (paragraph (c)). Where criticisms of that kind are made by way of public comment, they could also be held to be in breach of Rule 7.4.1 in the Code of Conduct.

The Inquiry was concerned to elicit what reasons the Executive had for labelling the six Assistant Commissioners as unsuccessful and to test whether the reasons alleged withstood scrutiny, and whether they could justify the label of unsuccessful and a recommendation for redundancy.

The evidence before the Inquiry lends to the inferences that in the number of instances the criticism was unfair or excessive and that, as a consequence, the label of unsuccessful and the recommendation for redundancy were unfair. The following are instances which appear to us to fall into this category.

Honor

1. The allegation that he was responsible for problems regarding an incident at the Rockhampton Watchhouse which occurred on 7th August 1995 (T.285, 291, 505, 578) - contrast Honor's response, Ex. 376, which rather indicates that the allegation was not reasonably based. The allegation was not put to Honor by the QPUE Executive for the purpose of seeking his response to it.

2. The allegation that he was responsible for insufficient relief at small police stations in his Region and staffing problems experienced at Gladstone (T.505-6, 578). Honor's response indicates that he had taken the steps available to him to

address the situation within the constraints of the staffing model and budgets.

3. The allegation that he had issued a directive regarding "on call" allowance in the Central Region (T.285-6, 988, 1037-8). Honor's response and a concession made by the witness Ballin at T.1037-8 reveal this allegation to be quite unfounded.

Kidcaff

4. The allegation of inaction on the part of Kidcaff regarding overcrowding and conditions at the Southport and Beenleigh Watchhouses in the South Eastern Region during his period as Chief Superintendent (T.1252, 1432-6). Kidcaff's response, Ex. 377, details a number of instances when he took action directed at alleviating situations that were occurring at those watchhouses. The QPUE had not put this allegation to Kidcaff. His version was not sought. The criticism appears not to be factually based.

McGibbon

5. The allegation that he caused copies of CJC statements from two police officers to be given to the legal representatives defending two persons charged with street offences in the Magistrates Court, those persons having previously complained to the CJC about the conduct of the police officers (T.295-6, 576-7, 1111-5). McGibbon's response, Ex. 378, indicates that he acted lawfully and in accordance with written advice from the Acting Director of the CJC Misconduct Division dated 8th September 1995 that the CJC had no objection to that course.

The advice stated in part:-

"This in the Commission's view would be consistent with a prosecutor's responsibility in the event that the prosecutor becomes aware of a conflicting statement made by a witness proposed to be called for the prosecution in a proceeding."

6. The allegation that he mismanaged staff levels in the Southern Region, particularly at Lowood in the Ipswich area (T.1091). McGibbon's response indicates that in allocating personnel within the area, he adhered to the procedures laid down in the staffing model.

7. The allegation that he directed Detective Inspector Pugh not to give evidence at the trial of a woman who had made a complaint to the CJC against the police officers who arrested her (T.1137-8). It appears from McGibbon's response that the direction given was not to breach the confidentiality provisions of the CJ Act by giving evidence of the outcome of the CJC investigation. This direction was proper and lawful.

Banham

8. The allegation that he was overly strict on discipline because he refused to allow a police officer to be promoted when a discipline sanction against that officer had only three days left to run (T.299). Banham's response, Ex. 374, acknowledges that this was a reason for his action but explains that other reasons caused him to refuse to allow the promotion.

9. The further allegation of disciplinary strictness in rescinding permission for a police officer to be involved in a private business (T.300). It appears that this criticism was made in the absence of knowledge of that officer's undertaking to restrict his business to civil matters only to avoid the possibility of a conflict of interest. In light of this, Banham's objection was quite reasonable.

10. The allegations against Banham resulting from advice from Simpson:

- that he had prevented two police officers from undertaking a Scene of Crimes course (T.389, 507);
- that he disregarded procedures in relation to a transfer of a sergeant from the Water Police to the Communications Centre (T.390);
- that he acted stupidly in circulating a memorandum to staff concerning dress standards (T.390);
- that he took disciplinary action against a police officer for taking less than the ten hours break between shifts as stipulated for in the Enterprise Bargaining Agreement (T.478-81).

When the responses to these allegations (Ex. 374) are considered, it can be seen that these criticisms are largely based on incorrect information or errors of fact which could have been discerned if they had been put to Banham by the QPUE and he had been given an opportunity to respond to them.

Williams

11. Although allegations against Williams were made of not properly investigating a report which had named Hocken "as being associated with criminals" (T.758) and of being biased and manipulating promotion panels (T.302, 507, 758, 893-4) in view of the response from Williams, these allegations appear to have no factual basis. A strong motivation for the inclusion of Williams' name on the wish list was the personal antipathy harboured by Wilkinson and Hocken for him (T.1457).

Walker

12. The allegation that he spent disproportionately on fit out at the Regional Headquarters causing the closure of police stations (Ex. 89, T.574-6, 809-2). It appears from Walker's response, Ex. 379, that these expenses were not debited to the regional budget and the allegation that closure of police stations resulted is unfounded.

Conclusion

In our view, there is a prima facie case to support disciplinary action against the members of the QPUE Executive who were serving police officers (with the exception of MacFarlane) in unfairly and excessively criticising the named Assistant Commissioners by describing them as unsuccessful and requesting their redundancy. It is open to a tribunal of fact to conclude that this conduct was improper and/or fell below the standard of conduct reasonably expected by the community of a police officer (misconduct). It may also be fairly argued that in

submitting the wish list to a member of Parliament who was then Shadow Police Minister, with the intention that it be shown to the Leader of the Opposition, at least, the criticism was publicly made. Accepting that argument, a tribunal of fact could find that this conduct was also improper and undue criticism of the QPS administration and/or an unwarranted personal attack on the character or integrity of the Assistant Commissioners (disciplinary breach).

Misleading the Inquiry - Hocken

Counsel Assisting submitted that a finding was open that Hocken attempted to mislead the Inquiry and therefore was guilty of misconduct pursuant to the PSAA. The submission identifies two aspects of Hocken's evidence before the Inquiry which are said to be deliberately misleading. First, Hocken's denial that he told Heery, or indeed knew until late in the piece, that the Green candidate, Bradshaw, was going to take an anti-ALP stance. Second, Hocken's denial that he had prior knowledge of the purpose of a conference call between Heery and Suter. The motivation in both instances is said to be a desire by Hocken to minimise in his testimony the extent of his involvement with the campaigns of Bradshaw and the Concerned Citizens of Mundingburra and thus with Heery and Suter.

An attempt to deliberately mislead an inquiry properly constituted under the CJ Act is, in our view, capable of constituting misconduct, in that it is behaviour capable of falling below the standard of conduct reasonably expected of a police officer by the community. To amount to misconduct, the testimony must not

only be false but be deliberately or intentionally so and must constitute a falsehood of some moment. A deliberate lie as to a trivial matter of no relevance to the Inquiry or to any wrongdoing of the witness may be too insubstantial to constitute misconduct. On the other hand, a lie about a matter not material to any potential determination by the Inquiry, may fall short of the standard of conduct expected of police officers if it is told for an improper purpose. Behaviour falling short of a criminal offence such as perjury may nevertheless amount to misconduct. It would be sufficient if the witness were motivated to lie by a mistaken belief that the truth, if revealed, would influence the findings of the Inquiry.

In the present case, Hocken was questioned before the Inquiry about his involvement with persons engaged in anti-Government political campaigns in the Mundingburra election. The nature and extent of the QPUE campaign, especially whether it was anti-ALP in nature, was clearly a matter of interest to Counsel Assisting. A tribunal of fact would be entitled to conclude that Hocken believed acknowledgment by him of any deliberate involvement on his part in the coalition or Green campaigns might reflect negatively upon the QPUE in the findings of the Inquiry.

In our view, to deliberately mislead a properly constituted Inquiry by testimony directed to minimising such involvement may constitute conduct falling below the standard required of a police officer.

Hocken denied knowing until close to polling day that Bradshaw was going to take an anti-ALP stance (T.785-6). Hocken's testimony places his first knowledge of this after Bradshaw's arrival in Townsville on 18 January 1996 (T.786). He denied knowing that Bradshaw would be directing preferences away from the ALP (T.790; T.879, T.898-899, T.938).

Hocken's evidence on this topic conflicts with that of Heery who said that Hocken told him that Bradshaw's intention was to take an anti-ALP stance (T.3701). Suter was less certain. While he claimed to have told Hocken "the full story", he went no further than to say it was possible that he explained that one reason for Bradshaw's running as a candidate was to stop preferences going to the ALP (T.2852-3). Nevertheless, on 5 January, at the time of the conference call between Heery and Suter, Hocken knew that Heery was actively involved in National Party politics (T.872). He knew that Heery and Suter were discussing the running of an independent Green candidate (T.791). Hocken's knowledge of the discussions between Heery and Suter is inconsistent with his denial of knowledge that Bradshaw was anti-ALP. Furthermore, these conflicts may be viewed in the light of an arguably implausible account by Hocken as to how he came to be involved in the conference call.

Conclusion

A properly instructed tribunal of fact would be entitled to conclude that Hocken lied in denying early knowledge that Bradshaw was going to take an anti-ALP position for the purpose of misleading the Inquiry. Such behaviour is capable of

constituting misconduct. Accordingly, we find that a prima facie case of misconduct is made out against Hocken.

SUMMARY

We advise that a report pursuant to subsection 33(2)(g) CJ Act be made to the Commissioner of Police by the Chairman of the CJC on the basis that available evidence establishes a prima facie case to support disciplinary action in the instances detailed above, namely:-

- (a) against Ballin, Barnes, Hall, Hocken, Lewis, Sycz, Taylor and Wilkinson in respect of describing the Assistant Commissioners as unsuccessful and in recommending their redundancy; and
- (b) against Hocken for misleading the Inquiry.

DISCRETION TO TAKE DISCIPLINARY ACTION

It is appropriate to observe that upon receipt of the report, the Commissioner of Police or the prescribed officer to whom the Commissioner refers the report will have a discretion to exercise in determining whether or not disciplinary action should be taken. In exercising that discretion, relevant factors to be taken into account will include the following:

- (a) the seriousness of the alleged behaviour taking into account its actual or potential consequences;
- (b) the existence of any mitigating or aggravating circumstances;

- (c) whether similar conduct has or has not been the subject of disciplinary action in the past; and
- (d) whether it is necessary to deter such behaviour in order to maintain proper standards of conduct by police officers.

The Commissioner of Police or the responsible prescribed officer must exercise an independent discretion in determining whether or not disciplinary action should be taken.

We advise accordingly.

With Compliments,



R.W. GOTTERSON QC



B.I. BUTLER SC

Chambers

18 December 1996

PART B
THE SHOOTERS' INQUIRY

THE SHOOTERS' INQUIRY

On various dates in early April 1996 newspaper articles appeared in which allegations were made suggesting a "deal" had been struck, prior to the State election in July 1995, between the Australian Labor Party (ALP) and the Sporting Shooters' Association of Australia. In particular, it was alleged that the then Premier, the Honourable Wayne Goss MLA, and the State Secretary of the ALP, Michael Kaiser, had made a "deal", with the Sporting Shooters' Association of Australia which might have been in breach of the "bribery" provisions of the *Electoral Act 1992*. It was alleged that the "deal" involved an agreement or arrangement between the ALP and the Sporting Shooters' Association of Australia, whereby the Sporting Shooters' Association of Australia had abandoned a planned anti-ALP advertising campaign after it had received a letter from Goss which had given a written commitment to the Sporting Shooters' Association of Australia that his Government, if re-elected, would not introduce stricter firearm controls. The articles also suggested that the ALP had paid for and had used the advertising space which had been abandoned by the Sporting Shooters' Association of Australia. Reference was made to the advertising space having been worth in excess of \$22,000.00.

On 15 April 1996, after having considered the media reports, the CJC determined to conduct preliminary enquiries to ascertain whether the matter enlivened its jurisdiction to investigate alleged or suspected official misconduct. Thereafter, the CJC conducted a number of preliminary inquiries in relation to the matter.

On 16 May 1996, after consideration of the information obtained in the course of its preliminary enquiries, the Commission resolved to conduct an investigation into the matter. It resolved to investigate the circumstances surrounding any agreement between the ALP and the Sporting Shooters' Association of Australia of the kind alleged in the media reports with a view to investigating whether any person had engaged in official misconduct.

The Commission also resolved that as part of the investigation there should be made such recommendations as were appropriate in light of the Commission's responsibilities under section 23 of the *Criminal Justice Act 1989* (the Act) and otherwise having regard to the statutory duty of the Commission imposed by section 93 of the Act.

The Commission considered that, in all the circumstances, it was desirable that an independent qualified person be appointed to carry out the further investigation and resolved to engage Mr Carruther's services pursuant to sections 25(2)(d) and 66 of the Act.

A copy of the resolution is included hereafter.

On 6 June 1996 a further resolution was passed by the Commission. The resolution reflected the fact that the Sporting Shooters' Association of Australia had been used as a compendious term to describe the Sporting Shooters' Association of Australia Inc. (the National body) and/or the Sporting Shooters' Association of Australia (Qld) Inc. (the State branch). It was thought appropriate to specify precisely the two Associations which may have been involved.

A copy of this resolution is also included hereafter.

The investigation which Mr Carruthers conducted was an investigation by the Official Misconduct Division of the Commission. Under section 33 of the Act, the Director of the OMD is required to report to the Chairperson on the results of such investigation, with a view to the Chairperson taking such action as he considers desirable. The Chairperson may then approve a report to one or more of the following:

- (a) the Director of Public Prosecutions, with a view to such prosecution proceedings as the Director considers warranted;
- (b) the executive director of the Commission with a view to a Misconduct Tribunal exercising jurisdiction in respect of the matter; and
- ...
- (g) the appropriate principal officer in a unit of public administration, with a view to disciplinary action being taken in respect of the matter.

In the present case, a report would be referred under (a) where the available evidence showed a prima facie case to support a criminal charge. A report would be referred under (b) where the available evidence showed a prima facie case to support a disciplinary charge of official misconduct.

The hearings commenced on 5 August 1996 and concluded on 3 September 1996. The inquiry took evidence over 11 days. Twenty witnesses were called and 92 exhibits were tendered.

On 29 October 1996, Mr Carruthers announced his intention to resign without completing and presenting his report. Subsequently he tendered his resignation to the Chairperson of the Commission.

**CERTIFICATE UNDER SECTION 143 OF THE
CRIMINAL JUSTICE ACT 1989 EVIDENCING A
RESOLUTION BY THE CRIMINAL JUSTICE COMMISSION
TO CONDUCT AN INVESTIGATION AND APPOINT
AN INDEPENDENT PERSON**

WHEREAS:

1. It was alleged in the media on various dates in April 1996 that the Australian Labor Party (ALP) and in particular the then Premier The Honourable Wayne GOSS MLA and the State Secretary, Michael KAISER, had made a 'deal' with the Sporting Shooters Association of Australia (SSAA) which might be in breach of the "bribery" provisions of *The Electoral Act 1992*.
2. It was further alleged that the "deal" involved an agreement or arrangement between the ALP and the SSAA, whereby the SSAA abandoned a planned anti-ALP advertising campaign after the SSAA received a letter from the then Premier which gave a written commitment to the SSAA that his government if re-elected would not introduce stricter firearm controls. It was also alleged that the ALP paid for and used the advertising space abandoned by the SSAA to a value in excess of \$22,000.
3. On 15 April 1996, upon consideration of the media reports, the Commission determined to conduct preliminary enquiries to ascertain whether the matter enlivened its jurisdiction to investigate alleged or suspected official misconduct.
4. The Commission has conducted preliminary inquiries and is satisfied that its jurisdiction is enlivened to investigate further.
5. The Commission is of the view that, in all the circumstances, it is desirable that an independent qualified person be appointed to carry out those further investigations.

AND WHEREAS:

It is a function of the Official Misconduct Division of the Commission pursuant to the provisions of s.29(3)(d) of the *Criminal Justice Act 1989* (the Act) to investigate alleged or suspected official misconduct that comes to its notice from any source.

THE COMMISSION RESOLVED on 16 May 1996:

- (1) To conduct an investigation into the circumstances surrounding any agreement between the ALP and the SSAA of the kind alleged in the media reports referred to above with a view to investigating whether any person has engaged in official misconduct.

- (2) As part of the investigation referred to in paragraph (1) hereof, to consider generally such circumstances, and to make such recommendations as may seem appropriate in light of the Commission's responsibilities under s.23 of the Act and otherwise having regard to the statutory duty of the Commission imposed by s.93 of the Act.
- (3) To engage the services of an independent qualified person pursuant to sections 25(2)(d) and 66 of the Act, that person being The Honourable Kenneth John Carruthers QC, to conduct the investigation, to hold such public or private hearings as may be appropriate and to report thereon to the Commission, to enable the Commission, the Commissioners and the officers of the Commission to discharge the functions and responsibilities imposed upon them by the Act.

DATED at BRISBANE this 17th day of May 1996.



F J CLAIR
Chairperson

**CERTIFICATE UNDER SECTION 143 OF THE
CRIMINAL JUSTICE ACT 1989 EVIDENCING A
RESOLUTION BY THE CRIMINAL JUSTICE COMMISSION
TO CONDUCT AN INVESTIGATION AND APPOINT
AN INDEPENDENT PERSON**

WHEREAS:

1. It was alleged in the media on various dates in April 1996 that the Australian Labor Party (ALP) and in particular the then Premier The Honourable Wayne GOSS MLA and the State Secretary, Michael KAISER, had made a 'deal' with the "Sporting Shooters Association of Australia" (SSAA) which might be in breach of the "bribery" provisions of *The Electoral Act 1992*.
2. It was further alleged that the "deal" involved an agreement or arrangement between the ALP and the SSAA, whereby the SSAA abandoned a planned anti-ALP advertising campaign after the SSAA received a letter from the then Premier which gave a written commitment to the SSAA that his government if re-elected would not introduce stricter firearm controls. It was also alleged that the ALP paid for and used the advertising space abandoned by the SSAA to a value in excess of \$22,000.
3. On 15 April 1996, upon consideration of the media reports, the Commission determined to conduct preliminary enquiries to ascertain whether the matter enlivened its jurisdiction to investigate alleged or suspected official misconduct.
4. The Commission has conducted preliminary inquiries and is satisfied that its jurisdiction is enlivened to investigate further.
5. The Commission is of the view that, in all the circumstances, it is desirable that an independent qualified person be appointed to carry out those further investigations.

AND WHEREAS:

It is a function of the Official Misconduct Division of the Commission pursuant to the provisions of s.29(3)(d) of the *Criminal Justice Act 1989* (the Act) to investigate alleged or suspected official misconduct that comes to its notice from any source.

THE COMMISSION RESOLVED on 16 May 1996:

- (1) To conduct an investigation into the circumstances surrounding any agreement between the ALP and the Sporting Shooters Association of Australia (Inc) and the Sporting Shooters Association of Australia (Qld) Inc. or either of them of the kind alleged in the media reports, referred to above, with a view to investigating whether any person has engaged in official misconduct.

- (2) As part of the investigation referred to in paragraph (1) hereof, to consider generally such circumstances, and to make such recommendations as may seem appropriate in light of the Commission's responsibilities under s.23 of the Act and otherwise having regard to the statutory duty of the Commission imposed by s.93 of the Act.
- (3) To engage the services of an independent qualified person pursuant to sections 25(2)(d) and 66 of the Act, that person being The Honourable Kenneth John Carruthers QC, to conduct the investigation, to hold such public or private hearings as may be appropriate and to report thereon to the Commission, to enable the Commission, the Commissioners and the officers of the Commission to discharge the functions and responsibilities imposed upon them by the Act.

DATED at BRISBANE this *SIXTH* day of *JUNE* 1996.



F.J. CLAIR
Chairperson

W G Strange
Official Solicitor
Criminal Justice Commission
PO Box 137
BRISBANE ALBERT ST QLD 4002

JOINT MEMORANDUM OF ADVICE

Re: Criminal Justice Act 1989 - Section 33(2)(a), (b) and (g)

Shooters' Inquiry

The Criminal Justice Commission ("CJC") has conducted an inquiry into an arrangement allegedly entered into between Mr W Goss MLA ("Goss"), then Premier of Queensland and/or Mr M Kaiser ("Kaiser"), State Secretary of the Australian Labor Party ("ALP") on the one side, and the Sporting Shooters' Association of Australia Inc ("SSAA") and/or the Sporting Shooters' Association of Australia (Qld) Inc ("SSAA (Qld)") on the other side, shortly prior to the Queensland State election held in July 1995. At that time, Mr E Drane ("Drane") was National President of SSAA, Mr R Green ("Green") was President of SSAA (Qld) and Vice President of SSAA, and Mr T Rafter ("Rafter") was Treasurer of both SSAA and SSAA (Qld). The relevant events preceding, attending and following the making of the alleged arrangement were canvassed in great detail in public hearings before Mr Carruthers QC who had been engaged by the CJC pursuant to s.66 of the Criminal Justice Act 1989 ("CJ Act") to investigate these matters.

We have been briefed with copies of:-

- (a) the transcript of the public hearings including both the evidence of witnesses and submissions;
- (b) all of the exhibits tendered during the course of the public hearing; and
- (c) all written submissions made on behalf of parties represented at the public hearings.

We are briefed to advise whether reports should be made with the authority of the Chairperson of the CJC:-

- (a) to the Director of Public Prosecutions with a view to such prosecution proceedings as the Director considers warranted (subsection 33(2)(a) CJ Act);
- (b) to the Executive Director of the CJC with a view to a misconduct tribunal exercising jurisdiction in respect of the matter (subsection 33(2)(b) CJ Act);
or
- (c) to the appropriate principal officer in a unit of public administration, with a view to disciplinary action being taken in respect of the matter (subsection 33(2)(g) CJ Act).

We are instructed that a report would be made under subsection 33(2)(a) where the available evidence shows a prima facie case to support a **criminal charge** against a person or persons; that a report would be made under subsection 33(2)(b) where the available evidence shows a prima facie case to support a **disciplinary charge of official misconduct** against a person or persons; and that a

report would be made under subsection 33(2)(g) where the available evidence shows a prima facie case to support **disciplinary action** being taken against a person or persons. In this context, the familiar test of availability of sufficient evidence upon which a properly instructed tribunal of fact could reasonably conclude that a criminal offence has been committed is to be adopted: compare Greiner v. Independent Commission Against Corruption (1992) 28 NSWLR 125, 136. Thus the questions for advice resolve themselves into whether the available evidence shows a prima facie case to support a criminal charge, a disciplinary charge of official misconduct, or disciplinary action against any person or persons.

The scope of our brief differs markedly from the task for which Mr Carruthers QC was engaged. We are briefed to advise solely in relation to the three abovementioned matters. We have not been requested to comment otherwise upon the propriety of any person's behaviour or the sufficiency of the legislative provisions in Queensland concerning election conduct. Unlike Mr Carruthers QC, we have no investigative role. Moreover, we have the benefit of being asked to advise on the basis of evidence already available from the public hearings.

Official misconduct is defined in subsections 31(1) and 32(1) Cj Act. It is clear from the definition that official misconduct may be committed by:-

- (a) a person who is the holder of an appointment in a unit of public administration; or
- (b) by a person who does not hold such an appointment.

In the case of category (a), the conduct will not be official misconduct unless it satisfies the test that it constitutes or could constitute either a criminal offence or a disciplinary breach that provides reasonable grounds for termination of the person's services in the unit of public administration (subsection 32(1)(d)). For category (b), the test is limited to: constitutes or could constitute a criminal offence (subsection 32(1)(e)).

The Legislative Assembly is a unit of public administration and an elected member of that House holds an appointment in a unit of public administration (ss.3, 4 CJ Act). A member of the Legislative Assembly does not render services in the House which may be terminated. Section 7 of the Legislative Assembly Act 1867 provides for circumstances in which a member's seat shall become vacant. One of them is conviction of a crime. Upon a vacancy, the former member may no longer serve in the House, but this is by virtue of the operation of this statute rather than by a termination of services. It follows that a member of the Legislative Assembly may commit official misconduct only when the conduct in question constitutes or could constitute a criminal offence - the first limb in subsection 32(1)(d).

At the relevant time, Coss was not only a member of the Legislative Assembly but also a member of Executive Council. It was unnecessary for us to advise with respect to the position of a member of Executive Council in our joint advice dated 6th December 1996 because no person whose conduct required consideration was a member of Executive Council at the time, although two of those persons were members of the Legislative Assembly.

The Executive Council is also a unit of public administration (s.3 CJ Act). A person appointed to Executive Council, as a person who holds office as Premier of Queensland is, also holds an appointment in a unit of public administration by virtue of this appointment (s.4 CJ Act). Executive Council was created by Imperial Letters Patent constituting the Colony of Queensland dated 6th June 1859 "to advise and assist" the Governor, and was continued by Imperial Letters Patent constituting the Office of Governor of the State of Queensland dated 10th June 1925. Those who are appointed members of Executive Council are appointed "during our pleasure" (Letters Patent 1859, clause 3).

The expression "during our pleasure" connotes the reserve power exercisable by the Governor as the Sovereign's representative, to dismiss members of Executive Council. In Greiner, supra, the Court of Appeal of New South Wales was required to consider whether subsection 9(1)(c) of the Independent Commission Against Corruption Act 1988 (NSW) could apply to conduct of Ministers of the Crown who, in New South Wales, also hold office at the Governor's pleasure. That provision applies to conduct which could constitute or involve "reasonable grounds for dismissing, dispensing with the services of or otherwise terminating the services of a public official". All members of the Court agreed (pp 142B-C, 169G - 170A, 192G) that the provision was capable of applying to the conduct of Ministers although their opinions varied in interpreting the scope of the provision and as to the correctness of the application of the provision by the ICAC Commissioner.

The second limb in subsection 32(1)(d) CJ Act is in similar, but not precisely the same, terms as subsection 9(1)(c). The similarities are in the use of the terms

"reasonable grounds" for "terminating (termination of) services". In our view, the provisions are sufficiently similar for us to adopt the reasoning of the Court of Appeal and to conclude that the second limb of subsection 32(1)(d) is capable of applying to the conduct of members of Executive Council. The implication of this interpretation for present purposes is that the second limb is capable of applying to conduct on the part of Goss.

The members of the Court of Appeal were divided as to the result in the case. By majority (Gleeson CJ, Priestley JA), the appeal was allowed. The majority judges did not have identical opinions as to the scope of subsection 9(1)(c). Gleeson CJ said at p.146:-

"For my part, I have the gravest difficulty in understanding how conduct that has not been found to be unlawful, that was believed to be in all respects lawful, and that would not be seen by a notional jury as being contrary to known and recognised standards of honesty and integrity, could reasonably be regarded by a Governor or an Executive Council as grounds for dismissal of a Premier or a Minister."

Priestley JA (at p.192) took a much narrower view of the power. He limited its scope to conduct which would fall within paragraph (a) of the subsection - the criminal offence limb.

It is unnecessary for us to resolve the difficulties in interpreting the scope of the second limb. It is sufficient to recognise in these divergent views the range of tests that might be applied in determining whether the second limb was satisfied in any given case. As we explain, post, the evidence in respect of Goss would fail to satisfy any of these tests.

Counsel Assisting submitted (written submissions pp.10-13) that the evidence indicated the following in respect of four persons:

Goss - a prima facie case of breach of s.155

Green and Rafter - a prima facie case of breach of s.155

Kaiser - a prima facie case of breach of s.155.

The written submissions also left open the possibility that if an individual had breached s.155, then that could constitute official misconduct by that individual.

As to this, Counsel Assisting submitted (written submissions p.4) the following:-

"Translating this to the principal persons in this inquiry, Mr Goss or Mr Braddy could be guilty of official misconduct only if they were guilty of a criminal offence; Section 155 of the Electoral Act would seem to be the only possible offence. Messrs Drane, Green or Rafter could be guilty of official misconduct only if guilty of conduct which adversely affected the conduct of Messrs Goss or Braddy, as earlier discussed, and also guilty of a criminal offence; that is, contravention of Section 155 of the Electoral Act 1992."

We infer from this paragraph and from our perusal of the transcript and the exhibits that separate consideration may not have been given to Goss as a member of Executive Council. When that office is taken into account, the true position is that Goss could be guilty of official misconduct by conduct which falls within either the first limb or the second limb in subsection 32(1)(d). We note that no submission was made by Counsel Assisting in support of disciplinary action being taken against any person.

In the written submissions and in the course of oral submissions at the public hearings, the only criminal offence provisions that were addressed as possibly having been breached were subsections 155(1) and (2) of the Electoral Act 1992 ("EA"). In the material that we have seen, there is no indication that any other criminal offence provisions warrant consideration.

Having reviewed the material briefed, we consider that Counsel Assisting was correct not to name any other person in submissions as possibly having committed a criminal offence or official misconduct. Particularly, we agree in the submission that no case of either kind is disclosed in respect of Mr P Braddy, then Police Minister, or Mr T Drane, President of SSAA. We also consider that the material briefed does not disclose any conduct on the part of any person in respect of which disciplinary action as referred to in subsection 33(2)(g) is warranted.

In light of the three immediately preceding paragraphs, the principal question for opinion is whether there is evidence of a prima facie case of breach of s.155 EA by Goss, Green, Rafter or Kaiser. If there is such evidence in the case of any one of these individuals, then the conduct in question might, but not necessarily must, also constitute official misconduct by that person. By contrast, if the evidence does not disclose a prima facie case of breach of s.155, then for each of Green, Rafter and Kaiser, there will be no evidence of a prima facie case of official misconduct.

TIME LIMITATION AND JURISDICTIONAL ISSUES

A breach of s.155 EA may only be prosecuted summarily under the Justices Act

1886 ("JA"). This is so because the EA does not expressly or by implication provide that the offences created under that section are indictable offences. Section 44 of the Acts Interpretation Act 1954 states that where an offence has not been made an indictable offence by an express or implied provision, then prosecution must be by way of a summary proceeding under the JA.

The EA is silent on the matter of the time limit for the making of a complaint. In the absence of such a provision, s.52 JA requires a complaint to be made "within one year from the time when the matter of complaint arose". Since all conduct in question occurred no later than July 1995, it is now too late to prosecute any person for an offence against s.155.

The time limitation for prosecution does not operate in respect of official misconduct. Subsection 32(2) CJ Act states as follows:-

"It is irrelevant that proceedings or action in respect of an offence to which the conduct is relevant can no longer be brought or continued or that action for termination of services on account of the conduct can no longer be taken."

We interpret this provision as operating in both a substantive and a procedural way: that is to say, official misconduct constituted by the commission of a criminal offence is still official misconduct notwithstanding that the time for prosecuting the offence has elapsed, and also proceedings for such official misconduct may be initiated, heard and determined notwithstanding the lapse of time. It follows that proceedings for official misconduct committed in July 1995 would not be subject to a statutory time limitation.

Original jurisdiction is conferred on Misconduct Tribunals by subsection 46(1) CJ Act. The jurisdiction conferred is one to investigate and determine every charge, of a disciplinary nature, of official misconduct made against a prescribed person. The jurisdiction is exclusive (subsection 47(1) CJ Act), but is limited by subsection 46(1) to official misconduct alleged against prescribed persons. The term "prescribed person" is defined to mean -

- "(a) a member of the police service;
- (b) a person who holds an appointment in a unit of public administration (other than the police service), which appointment or unit is declared by regulation to be subject to the jurisdiction of a misconduct tribunal"

(Section 40, subsection 39(2) CJ Act).

None of the four individuals, Goss, Green, Rafter or Kaiser, were or are members of the police service. Neither Green, Rafter nor Kaiser held or hold any appointment in a unit of public administration. As we have noted, Goss did hold appointments in two units of public administration - the Legislative Assembly and Executive Council. He continues to be a member of the Legislative Assembly. To this point, neither his membership of the House or of Executive Council, nor the Legislative Assembly nor Executive Council themselves, have been declared by regulation to be subject to the jurisdiction of a Misconduct Tribunal within the meaning of paragraph (b) in the definition of prescribed person. The position then is this: even if any one of Green, Rafter or Kaiser had committed official misconduct by virtue of having breached s.155, no proceedings for official misconduct could ever be, or have been, initiated against him in a Misconduct Tribunal in respect of that official misconduct. In the case

of Goss, if he had committed official misconduct by virtue of having breached s.155, no proceeding for official misconduct could be initiated against him in a Misconduct Tribunal unless a declaration is made having the consequence that he becomes a prescribed person within the definition in subsection 39(2) CJ Act.

It might be suggested that because any prosecution for an offence against s.155 would now be time-barred and because proceedings for official misconduct in a Misconduct Tribunal are not presently available, then any further consideration of the question we have identified as the principal question would be of little practical consequence. A ready and convincing response to that suggestion is that allegations of possible criminal conduct and of possible official misconduct have been made. They have been investigated at length and at very considerable expense to those represented before the Inquiry. Those persons, as well as the community, have a clear interest in the investigation being finalised and in conclusions being reached as far as it is possible to do so. It is for this purpose that we turn to address the principal question, namely, is there evidence of a prima facie case of breach of s.155 EA by Goss, Green, Rafter or Kaiser?

SECTION 155 - INTERPRETATIONAL ISSUES

The numerous and rather complex issues of statutory interpretation thrown up by s.155 were examined in detail in our joint advice concerning the Memorandum of Understanding dated 6th December 1996. We rely on the advice given and conclusions expressed on these issues in that document. It is unnecessary to restate them here.

SECTION 155 - FACTUAL ISSUES

The aspect of dealings between the ALP personalities and the Shooters' representatives which prompted the CJC investigation was the taking over by the ALP of the advertising space booked by SSAA (Qld) and the subsequent reimbursement by the ALP to the SSAA (Qld) of the cost of the advertising space in the amount of \$22,703.20.

Although at the public hearings, this aspect was adopted as a reference point for identifying property or a benefit of any kind, the written submissions by Counsel Assisting (at p.11) canvass another possibility, namely, that the ALP's election promise in respect of fire-arm legislation is a benefit for the purposes of s.155.

We turn to consider what might be property or a benefit of any kind for the purposes of this section in the circumstances under review.

The Election Promise as a Benefit

The election promise is best evidenced in the letter dated 13th July 1995 (Ex. 11) signed by Goss and addressed to Green of SSAA (Qld) as follows:-

"I make the commitment that if re-elected to Parliament on 15 July 1995, the Queensland Australian Labor Party will not introduce any sort of longarms registration or defacto registration (eg. all private sales must go through a dealer) into Queensland.

I also agree that my party will not support Federal registration being introduced into this State through recommendations of the Australasian Police Minister's Council and we will not support any moves to place firearms into central repositories.

This commitment will stand for the duration of our term if elected on 15 July 1995."

This promise adopts the wording of a draft which had been prepared by Green and forwarded to Kaiser. Kaiser had arranged for the draft to be engrossed on the stationary of the Premier of Queensland and then faxed to Goss in Hervey Bay for signature.

In our joint advice dated 6th December 1996, we analysed the meaning of the expression "benefit of any kind" and concluded that it did not extend to election promises which satisfy two criteria. The first is that where the election promise is to advantage a group or class of persons, the promise is to benefit the members of the group or class generally - no one member or small clique of members is singled out to be specially advantaged. The second criteria is that the promise is to confer advantage by way of measures taken as part of the normal processes of government.

In our view, the election promise contained in Ex. 11 satisfies both of these criteria. Insofar as it advantages owners and future owners of firearms and of longarms, it does so indiscriminately. No one or more persons within these descriptions is to be specially advantaged. Further, promises not to introduce longarms registration or de facto registration and not to support any moves to place longarms in central repositories are promises to achieve results through the normal processes of government whether by legislative or executive action. In our opinion, the promise contained in Ex. 11 is not a benefit for the purposes of s.155.

We note at this point that a considerable amount of time was devoted during the public hearings to investigating whether this promise marked a divergence from

ALP party policy on firearms control. An inference available from the evidence is that the promise does differ significantly from the ALP's published policy, at least insofar as the promise went beyond the matters addressed in the published policy. To our minds, however, a change in policy of itself has little, if any, relevance in determining whether a gain or advantage is a benefit for the purposes of s.155. A promise of a gain or advantage will not be a benefit if it satisfies the criteria to which we have referred, whether it involves a change of policy or not.

The Advertising Arrangement as a Benefit

Unlike the election promise, the taking over by the ALP of the advertising space and the reimbursement of the advertising expenses are readily characterised as two benefits, or one composite benefit, to SSAA (Qld). By these steps, it was advantaged in that it was compensated for the cost of advertising space which it had booked but for which it no longer had any need. Absent the reimbursement, SSAA (Qld) would have stood the cost of the advertising space itself. Neither of the two criteria applicable to election promise could apply to this advantage to except it from the scope of the expression "a benefit of any kind".

The Advertising Arrangement as a Gift of Property

We have given consideration to whether these arrangements bear the character of a gift, or promise or offer of a gift, of property for the purposes of subsection 155(2). We are unable to discern within the taking over of the booked advertising space, of itself, any disposal of property or interest in property in favour of SSAA (Qld). By contrast, the reimbursement to SSAA (Qld) of \$22,703.20 clearly involved a disposal by payment of property, money, by the ALP

to SSAA (Qld). It does not follow, however, that the payment was a gift of property or that any promise or offer of payment was a promise or offer to give property. There is doubt in this regard arising from uncertainty as to the meaning to be attributed to the word "give" in subsection 155(2) EA. The possible alternative meanings are illustrated in the following passage from the judgment of Martin C.J.S. in Zdrok (Shukin Estate) v. Shukin (No. 2) [1943] 1 W.W.R. 724 at 727:-

"The primary meaning of the word ['give'] appears to have been the placing of a material object in the hands of another person; the usual sense now however is that of freely and gratuitously conferring on a person the ownership of something as an act of bounty."

If the primary meaning is taken here, then the payment was a gift. However, if the usual meaning is taken, it was not because the payment was not gratuitous; it was for advertising space booked by SSAA (Qld).

Whilst there is room for debate as to whether "give" in subsection 155(2) has the primary meaning or the usual meaning as described by Martin C.J.S., there are sound reasons for preferring the primary meaning: the discernible purpose of an election bribery provision is better served by the broader meaning, and that meaning avoids any scope for argument about the adequacy of the quid pro quo for any benefit when, in context, arguments of that kind are wholly unattractive.

In present circumstances, it is unnecessary to resolve this interpretational issue because, as we have noted, the advantages are clearly benefits within the meaning of s.155. That one of them might also be property for the purposes of

the section does not preclude it from being a benefit.

The Mental Elements

The mental elements required by subsections 155(1) and (2) respectively are also examined in detail in our joint advice dated 6th December 1996. In the present case, the marshalling of evidence sufficient to prove these elements presents very substantial challenges. That task is complicated by the inconclusiveness of evidence on some important factual issues, for example, when the matter of reimbursement was first raised in discussions between Kaiser and Rafter and by whom.

We turn now to review the mental element in respect of each of the aboveramed individuals. In the course of so doing, we will refer, as is necessary, to the factual issues on which the evidence is inconclusive.

Proof of Mental Elements

Subsection 155(2) - Goss

Goss denied that any one advised him that the SSAA (Qld) had incurred a debt for advertising (T.113). He also denied seeing Kaiser's letter agreeing to pay for the advertising (Ex. 12) or Rafter's letter confirming the "guarantee for payment" (Ex. 13) until a month or two prior to the hearing (TT.112-113).

Both Goss and Kaiser claim Goss was first consulted about the SSAA's request for a policy assurance at 7 am on 13th July (T.488). Kaiser's notes confirm the conversation sworn to by both Goss and Kaiser. The notes record Goss as saying: "not our policy, no intention - draft letter" (T.543). Goss confirmed, as this

statement implies, that in his view neither State Government policy nor intentions differed from the assurance that was being requested (T.100).

The first opportunity for Kaiser to discuss advertising space was between 10 am and 11 am when he spoke in turn to Drane, Green and Rafter. Kaiser says the matter of the ALP taking over the advertising was raised between him and Rafter at that time.

Goss spoke with Kaiser during the morning. The only matter reported as being discussed was an arrangement for Goss to sign a draft letter to the SSAA (Qld) at Harvey Bay (T.494). The letter signed by Goss at Harvey Bay makes no reference to the advertising space (Ex. 11).

In summary there is no evidence from any source that Goss knew of any arrangement for the ALP to take over advertising space from the SSAA (Qld) or to reimburse it. There is no evidence Goss ever knew that the SSAA (Qld) had incurred a debt for proposed advertising. Goss denied any such knowledge. The contemporaneous documents raise no contrary inference.

It necessarily follows that there is no evidence that any benefit constituted by the takeover of the booked advertising space and the reimbursement of cost was given, promised or offered by Goss to any person, or that, at any relevant time, he knew that that benefit had been canvassed in communications between others on 13th July 1995. Since there is no evidence of a gift, or a promise or an offer of a gift of this benefit, strictly speaking, the occasion for considering whether there is evidence of the mental element required by subsection 155(2) on

the part of Goss, does not arise. Notwithstanding this, we record that there is no evidence that Goss acted in respect of this benefit in order to influence or affect the SSAA (Qld)'s election conduct.

Circumstantial Evidence - SSAA (Qld) Officeholders

In summary, all relevant parties denied that there was any link in their minds between the termination of the SSAA (Qld) advertising campaign and the taking over of the advertising space by the ALP. In the absence of any direct evidence of guilt, the available circumstantial evidence must be considered to determine if it excludes all innocent explanations beyond reasonable doubt.

The evidence of Rafter and the other SSAA (Qld) officers is that they were focused on obtaining a suitable undertaking about firearm registration. The surrounding circumstances are consistent with that claim. The original request (Ex. 8) and response (Ex. 9) were limited to the registration issue. The letter of response from Kaiser advising that Goss was prepared to give an assurance ruling out firearms legislation was communicated before any conversation occurred between Kaiser and SSAA/SSAA (Qld) officials. Thus, the question of taking over the advertising space could only have been canvassed after Kaiser had forwarded his response. It seems unlikely that the SSAA (Qld), once having received this response, would then have made a further demand which may have jeopardised written confirmation of that assurance by Goss.

The circumstantial evidence referred to in the next three paragraphs tends to support the claim of Kaiser and Rafter that the advertising arrangement was made because the SSAA (Qld) had no further use for the space to attack the ALP's

registration policy and on the basis that it provided a commercial benefit for each party.

The draft campaign advertisements aggressively attacked the ALP position on firearms registration and were based upon a promise that the ALP would register all firearms. That campaign could not credibly proceed in the face of a written assurance to the contrary by Goss.

The payment made by the ALP did not compensate the SSAA (Qld) for the overall cost of their aborted campaign. It was limited to the precise cost of the newspaper space. Nothing was paid to compensate the SSAA (Qld) for other costs incurred towards the proposed campaign such as the preparation of advertisements and letterbox material.

Kaiser's claim that the advertising space had genuine value to the ALP is supported by the evidence. All the space was utilised by the ALP and additional newspaper advertising space was booked by the ALP on Friday 14th July (Ex. 51). Close polling results provided justification for the ALP to seek more advertising exposure in the last days of the campaign (TT.496-497). Although the space taken over included three locations of little value to the ALP, the remaining bookings provided advertising in marginal electorates of better quality than could have been booked on the market at that time.

Drane, Green and Rafter all asserted that they had not been concerned about the debt incurred for advertising because the space could have been used for a purpose other than the planned anti-ALP advertising campaign. Furthermore,

according to them, the amount of the debt, almost \$23,000.00, was not large in the context of the overall SSAA advertising budget (Drane at T.202; Green at T.329; Rafter at T.402 and T.463).

On 13th July 1995, Rafter sent a letter on SSAA letterhead which included the following paragraphs to Kaiser:

"We hereby confirm that the letter provided by Mr Goss dated 13th July 1995 is acceptable to our Association as is your guarantee for payment of the advertising account of \$22,703.80 to Advantage Pty Ltd.

Accordingly we hereby relinquish the advertising space booked to the Queensland Labor Party and have advised our advertising agency of this."

On one view the letter is consistent with there having been an agreement linking payment for the advertising by the ALP with termination of the SSAA Qld campaign. Both Rafter and Kaiser denied that there was any such "package deal" (Rafter at T.461 and T.466; Kaiser at T.507 and T.561). It is true that provision of the undertaking to pay for the advertising was a condition precedent to release of the advertising space. However, it does not necessarily follow that provision of that undertaking was required before the SSAA (Qld) was prepared to terminate its campaign. Stopping the anti-ALP campaign and relinquishing the advertising space involved separate decisions capable of being made after a consideration of quite different factors. On careful examination, the terms of the letter refer only to the bases for relinquishing the advertising space and not to the reasons for terminating the campaign.

In our assessment, the above circumstances are more consistent with the denial by Drane, Green, Rafter and Kaiser that there was any agreement requiring that the termination of the SSAA (Qld) campaign be dependent upon the payment by the ALP for the advertising space. They are also more consistent with the assertion by Green and Rafter that there was no link in their minds between Kaiser's decision to take over the space and the electoral conduct of the SSAA (Qld). Given this, any argument that the circumstantial evidence can give rise to an inference as to intention consistent only with guilt is untenable.

Circumstantial Evidence - Kaiser

It remains to be considered whether Kaiser acted unilaterally for a proscribed purpose in promising to take over the space.

Kaiser testified that he agreed with Rafter that the ALP would take over the SSAA (Qld) advertising space (see Ex. 12). He asserted in evidence that he was motivated to "purchase" the advertising space because it was of value to the ALP campaign (T.539; T.560). However, one may hypothesise other motivations. Kaiser may have assumed, even mistakenly, that such a promise would provide further inducement to the SSAA (Qld) to terminate the campaign. Furthermore, it is conceivable that if Kaiser did not trust the SSAA (Qld) officers to desist from their anti-ALP campaign, he might have seen the "purchase" of the advertising space as a way of ensuring that it could not be used against the ALP. To act to deny a person the opportunity to advertise clearly affects his or her ability to support or oppose a party during an election campaign. To do so for that purpose would satisfy an element of subsection 155(2).

Kaiser denied that he acted with any such motivation (T.566). There is no direct evidence he held such an intention. However, an inference that he had such an intention does arise from the circumstance that that there was an advantage to the ALP in ensuring that SSAA (Qld) officers lost the option to reverse the decision to terminate the anti-ALP advertising campaign. Facts which tend against that inference are that the advertising space had real value to the ALP, that the SSAA (Qld) had made no demand in relation to the space, and that Kaiser had a sound basis for being confident that the undertaking by Goss would meet all the SSAA (Qld) concerns.

As the inference that Kaiser held the intention proscribed by subsection 155(2) arises from circumstantial evidence, it is necessary to exclude all reasonable inferences consistent with innocence before a tribunal of fact may act upon that inference in order to convict. The proscribed intention need not be the sole intention. However, the evidence must be capable of excluding an inference that Kaiser acted other than with the proscribed intention.

It is apparent on the evidence that a legitimate purpose may have acted on Kaiser's mind, namely to obtain for the ALP valuable advertising space no longer available directly from the newspapers. When the evidence we have canvassed is viewed as a whole, it is not possible to exclude this legitimate purpose as the only purpose operating on Kaiser's mind at the relevant time.

Conflict in Evidence - Kaiser and Rafter

One matter remains to be considered. It has been mentioned above that the evidence of Rafter and Kaiser differed significantly as to when the advertising

campaign was discussed between them and as to who first raised the idea that the ALP might take it over and pay for it.

The question arises as to whether the conflict between the evidence of Rafter and of Kaiser is capable of establishing untruthfulness on the part of either Rafter or Kaiser which might amount to a circumstance indicative of a guilty mind.

Rafter denied that he discussed the advertising with Kaiser on the morning of 13th July 1995 (T.401-402). While conceding that Kaiser may have raised the topic of advertising space, he insisted that he refused to discuss it until a written commitment from Goss was received (T.439-440; T.443). He denied discussing the cost of the advertising with Kaiser that morning.

Rafter testified that it was only after receipt of the Premier's facsimile at about 2 pm that he spoke with Kaiser about the advertising. It was at that time, according to Rafter, that Kaiser offered to take over the advertising space (T.456).

Kaiser's testimony differed from Rafter's in two aspects. He said Rafter raised the idea of the ALP purchasing the space and he placed that conversation in the morning (T.497). He said that an understanding was reached about taking over the space provisional upon the delivery of a signed policy assurance from Goss (T.533). Kaiser claimed that in the morning conversation, he was given the cost of the advertising and in rough terms where it had been booked (T.497-498). He said he also received from Rafter the given name and telephone number of a person "Samantha" at the SSAA (Qld) advertising agency (T.501).

There is evidence supporting Kaiser's assertion that a conversation about taking over the advertising space occurred in the morning. Prior to midday on 13th July, Kaiser told the ALP advertising personnel at Toad Show that space might be taken over from the SSAA (Qld) and, also, artwork for the advertisements commenced. The name of "Sam" and a telephone number was passed on and Samantha Grove of Advantage, the SSAA advertising agency was telephoned, according to testimony and phone records, at 12.40 pm. The sequence of communications is as follows:

12.40pm	Phone Call - Toad Show to Advantage	5 mins 4 secs
12.48pm	Phone call - Advantage to Rafter	1 min 13 secs
12.54pm	Facsimile - Advantage to Toad Show	53 secs
13.01pm	Phone call - Advantage to Toad Show	2 mins 3 secs

Although Grove and Rafter have no recollection of the conversation, it seems highly likely that at 12.54pm, Rafter approved the release of the details of the booked advertising space to the ALP agency. The facsimile received by Toad Show contained details of the size of the advertisements, deadlines and the newspapers in which the advertisements were to be placed. Approval of the provision of this information tends to confirm that advertising was discussed by Rafter and Kaiser in the morning conversation.

While this conclusion establishes that Rafter was inaccurate in testifying that the ALP take over of the advertising was not discussed until after 2 pm, it does not necessarily follow that he deliberately lied about this. It also does not resolve whether Rafter or Kaiser first suggested the take over of the advertising space or

the reimbursement of the cost of it.

Before a lie may be used as an implied admission of guilt, it must be demonstrated to be deliberate, to relate to a material issue, and to be told because the truth would implicate the person in the offence: Edwards v. R. (1993) 178 CLR 193.

The motivation for Rafter to lie may have been to conceal that he asked for or agreed to receive payment for the advertising space with the knowledge that Kaiser intended that the payment would result in the SSAA (Qld) not engaging in an anti-Labor advertising campaign. Such a lie would meet the criteria in Edwards.

When all the known circumstances are taken into account, it would appear unlikely that Rafter lied for the reason outlined above. In our view, it is more likely that he was honestly mistaken as to when the conversation occurred and as to how the idea arose.

As to Kaiser's evidence, he may have been motivated to lie in order to conceal that he promised to reimburse the cost of the advertising space with the intention of inducing the SSAA (Qld) to stop its anti-ALP campaign or of ensuring that the space was not available to the SSAA (Qld).

Once again, we consider it more likely that the conflict arose from honest differences in recollection possibly arising from the different knowledge and focus which Kaiser and Rafter had at the time of their conversation.

However, it is not part of our function to make findings of fact on the credibility of witnesses. Consequently, we conclude that if there be admissible evidence capable of establishing that either Rafter or Kaiser lied about a material matter in their evidence, then that circumstance would tip the balance so as to establish a bare prima facie case of breach of s.155 EA by whoever lied.

We foresee evidentiary difficulties which, in our view, would prevent the proof of a lie in either case. Because of the significant conflict between Rafter and Kaiser, it cannot realistically be asserted that they reached an agreement and were both lying to deny it. Certainly, the conflict excludes any suggestion that they collaborated to lie about the matter. To establish a lie by one, it would be necessary to call the other to give evidence of the conversation. It seems inevitable that the witness in such a situation would be entitled to claim privilege against self incrimination as he would be entitled to do. Furthermore, on our view of the evidence, it is difficult to see how a prosecutor would determine which one of them to prosecute and which to call as a witness.

In the case of Kaiser, the only evidence of a lie could come from Rafter. Should Rafter be called for that purpose, the accuracy of his recollection would be seriously challenged because of the demonstrated mistake as to the timing of the conversation. In the case of Rafter, it might be thought that proof in respect of the timing of the conversation would be available from the ALP advertising agency witnesses, even in the absence of Kaiser. However, it would remain necessary to exclude the possibility that Kaiser obtained the information passed on by him, from a source other than Rafter. That would seem impossible to

prove unless Kaiser were to testify.

For the evidentiary reasons we have outlined, we do not consider that the conflict between the accounts of Rafter and Kaiser could be proved through available admissible evidence establishing that one or the other lied in respect of a material matter out of a consciousness of guilt.

Conclusion

Subject to our reservation concerning the evidentiary value of the conflict in evidence as an implied admission of guilt, we conclude that there is no prima facie case of breach of s.155 by any person.

OFFICIAL MISCONDUCT

Our earlier conclusion that there was no evidence of a breach of subsection 155(2) by Goss rules out a prima facie case of official misconduct by Goss based on the criminal offence limb in subsection 32(1)(d) CJ Act. As to the second limb of that subsection, the position is clear. In the material briefed to us, essential features of which are set out ante, there is no evidence of any conduct by Goss which conceivably could constitute a disciplinary breach providing reasonable grounds for termination of his appointment to Executive Council. As we have outlined, the commission of official misconduct by any of the others is dependent upon the commission of an offence against s.155. Thus a prima facie case of official misconduct depends upon whether there is a prima facie case of breach of s.155. Our views on that issue are as stated ante.

SUMMARY

For all the reasons we have stated in this joint advice, on our assessment of the evidence available to a prosecuting authority, there is no prima facie case:

- (a) of breach of subsections 155(1) or (2) EA, or
- (b) of official misconduct,
by any individual; or
- (c) in support of disciplinary action being taken against any individual.

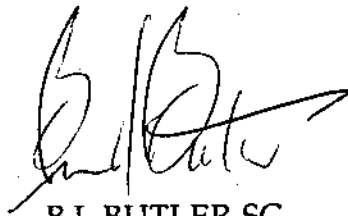
In our opinion, the evidence does not warrant the making of reports pursuant to subsections 33(2)(a), 33(2)(b) or 33(2)(g) CJ Act.

We advise accordingly.

With Compliments,



R.W. GOTTERSON QC



E.J. BUTLER SC

Chambers

13 December 1996