



ALLEGATIONS OF ELECTORAL FRAUD

REPORT ON AN ADVICE BY P.D. MCMURDO QC

SEPTEMBER 2000

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Report on an Advice by P.D. McMurdo QC

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CJC Mission:
To promote integrity in the Queensland Public Sector and an effective, fair and accessible criminal justice system.

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Dear Sirs

In accordance with Section 26 of the *Criminal Justice Act 1989*, the Commission hereby furnishes to each of you its report titled *Allegations of Electoral Fraud: Report on an Advice by P D McMurdo QC*. The Commission adopted Mr McMurdo's advice as its report.

Yours faithfully



BRENDAN BUTLER SC
Chairperson



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FOREWORD

On 11 August 2000, Karen Lynn Ehrmann pleaded guilty in proceedings in the District Court of Townsville to 24 counts of forging and 23 counts of uttering Commonwealth Electoral Enrolment forms and was sentenced to three years imprisonment.

During the course of the said proceedings documents were filed on behalf of Ms Ehrmann alleging the involvement or possible involvement of Australian Labor Party (ALP) members, including elected representatives, in electoral fraud.

On 15 August 2000, allegations were made in the Senate by Senator Brandis that in 1998 Jennifer Hill, an ALP Councillor in the Townsville City Council, fraudulently caused a person to be recorded as a member of the ALP.

On and from 15 August 2000, the Criminal Justice Commission (the Commission) operated, of its own initiative, in conducting preliminary investigations of the allegations referred to above.

By letters to the Commission dated 17 August 2000 and 21 August 2000, the Leader of the Opposition, the Honourable R J Borbidge MLA, submitted that the allegations made by Ms Ehrmann enlivened the jurisdiction of the Commission and called for a full and independent inquiry.

By letter to the Commission dated 18 August 2000, the Electoral Commissioner, Mr D J O'Shea, referred to the Commission documents relating to the said proceedings against Ms Ehrmann and requested the Commission to conduct an investigation into allegations of electoral fraud raised by Ms Ehrmann or to refer those allegations to the Queensland Police Service where the Commission does not have the power to so investigate.

On 22 August 2000 the Commission resolved to engage the services of an independent qualified person pursuant to Section 66 of the *Criminal Justice Act 1989* (the Act) to advise, among other matters, on whether the allegations raise a reasonable suspicion of official misconduct and whether open hearings should be held.

The Commission further resolved on 22 August 2000 that Mr P D McMurdo QC be engaged as the independent qualified person.

By letter dated 22 August 2000 and received by the Commission on 23 August 2000, Dr David Watson MLA, Leader of the Liberal Party in the Legislative Assembly, referred the Commission to a private members statement he made in Parliament on the morning of 22 August 2000 alleging electoral fraud in preselections for council wards and state electorates in Brisbane.

On 23 August 2000 Mr McMurdo was briefed with all material obtained by the Commission in the course of its preliminary investigations including the correspondence received from Mr Borbidge, Dr Watson and the Electoral Commissioner. Since that time, Mr McMurdo has directed and supervised further preliminary investigations and considered the results of those investigations.

Under cover of a letter dated 1 September 2000 from Carne and Herd, Solicitors representing the ALP, the Commission received a copy of an opinion of Queen's Counsel dated 30 August 2000 concerning these matters. The Commission furnished a copy of this advice to Mr McMurdo for his consideration.

The material considered by Mr McMurdo includes complaints received from members of the public, the results of interviews with twenty-seven persons, material obtained from the Australian Federal

Police and the Commonwealth Director of Public Prosecutions in relation to the investigation and prosecution of Ms Ehrmann, Shane Foster and Andrew Kehoe, further information obtained from the Electoral Commissioner and some documents relating to the ALP Rules provided to the Commission by the ALP through its solicitors. Mr McMurdo was also briefed with relevant passages from Hansard.

By letter dated 31 August 2000 to the Chairperson of the Parliamentary Criminal Justice Committee (the Committee) the Commission explained that it was anticipated that Mr McMurdo would deliver his advice early in the week of 4 September 2000 and sought a direction in advance from the Committee pursuant to section 26 of the Act allowing it to deliver that advice as a report to the Speaker of the Legislative Assembly as soon as is practicable following its receipt.

The Committee advised the Commission, in a letter dated 1 September 2000, that it had met to consider the Commission's request and, pursuant to section 26(9)(b) of the Act, had resolved to direct the Commission to provide the advice to the Speaker of the Legislative Assembly, subject to the advice being adopted as a report of the Commission.

The Commission has received and considered Mr McMurdo's memorandum of advice dated 5 September 2000.

On 5 September 2000 the Commission accepted the advice of Mr McMurdo and resolved to engage the services of an independent qualified legal practitioner to conduct investigations and report thereon to the Commission. The Commission also resolved to authorise that person to conduct such open or closed hearings as may be appropriate having regard to the requirements of section 90 of the Act.

**RESOLUTION OF THE CRIMINAL JUSTICE COMMISSION
TO APPOINT AN INDEPENDENT PERSON TO
DIRECT AND SUPERVISE INVESTIGATIONS AND TO ADVISE**

WHEREAS:

- (1) On 11 August 2000, Karen Lynn Ehrmann pleaded guilty in proceedings in the District Court of Townsville to 24 counts of forging and 23 counts of uttering Commonwealth Electoral Enrolment forms and was sentenced to three years imprisonment;
- (2) During the course of the said proceedings documents were filed on behalf of Karen Lynn Ehrmann alleging the involvement or possible involvement of Australian Labor Party (ALP) members, including elected representatives, in electoral fraud;
- (3) On 15 August 2000, allegations were made in the Senate by Senator Brandis that in 1998 Jennifer Hill, an ALP Councillor in the Townsville City Council, fraudulently caused a person to be recorded as a member of the ALP;
- (4) On and from 15 August 2000, the Criminal Justice Commission (the Commission) has operated, of its own initiative, in conducting preliminary investigations of the allegations referred to in paragraphs (2) and (3);
- (5) By letters to the Commission dated 17 August 2000 and 21 August 2000, the Leader of the Opposition, the Honourable R J Borbidge MLA, called for a full and independent inquiry into the allegations made by Ms Ehrmann and the issues relevant to them;
- (6) By letter to the Commission dated 18 August 2000, the Electoral Commissioner, Mr D J O'Shea, referred to the Commission documents relating to the said proceedings against Ms Ehrmann and requested the Commission to conduct an investigation into allegations of electoral fraud raised by Ms Ehrmann or to refer those allegations to the Queensland Police Service where the Commission does not have the power to so investigate;

AND WHEREAS

- (7) It is a function of the Commission, pursuant to sections 23(f)(iii) and 29 of the *Criminal Justice Act 1989* (the Act) to investigate official misconduct as defined in the Act;
- (8) The Commission acts independently, impartially, fairly and in the public interest in accordance with section 22 of the Act,

THE COMMISSION HEREBY RESOLVES

To engage the services of an independent qualified person pursuant to section 66 of the Act:

- (a) to examine the information gathered during the Commission's preliminary investigation relating to the allegations referred to in paragraphs (2) and (3);
- (b) to direct and supervise such further investigations as counsel considers appropriate in order to assess whether a reasonable suspicion of official misconduct exists in respect of the allegations referred to in paragraphs (2) and (3);

- (c) to advise if a reasonable suspicion of official misconduct exists in respect of the allegations referred to in paragraphs (2) and (3) and, if it does, to advise on:
 - (i) the nature of the investigation of the suspected official misconduct that the Commission should conduct
 - (ii) whether, having regard to section 90 of the Act, an open hearing should be held for the purpose of such investigation
 - (iii) the terms of reference of any such open hearing;
- (d) to advise, in respect of any allegations referred to in paragraphs (2) and (3) not giving rise to a reasonable suspicion of official misconduct, whether such allegations should be referred to the Queensland Police Service or any other agency for investigation of possible criminal offences.

22 August 2000

Mr B J Butler S.C.
Chairperson
Criminal Justice Commission
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ELECTORAL FRAUD COMPLAINTS

OPINION

The Commission's Instructions

1. On 22 August 2000, the commission resolved to engage the services of an independent qualified person pursuant to s.66 of the *Criminal Justice Act* 1989 ("the Act") to direct and supervise preliminary inquiries and to advise in relation to allegations of electoral fraud. On the same date, I was engaged by the commission to provide those services.

Background to the Commission's Instructions

2. The circumstances giving rise to the commission's instructions to me, which are set out in its resolution, are as follows:
 - (1) On 11 August 2000, Karen Lynn Ehrmann pleaded guilty in proceedings in the District Court of Townsville to 24 counts of forging and 23 counts of uttering Commonwealth Electoral Enrolment forms and was sentenced to three years imprisonment;

- (2) During the course of the said proceedings documents were filed on behalf of Karen Lynn Ehrmann alleging the involvement or possible involvement of Australian Labor Party (ALP) members, including elected representatives, in electoral fraud;
- (3) On 15 August 2000, allegations were made in the Senate by Senator Brandis that in 1998 Jennifer Hill, an ALP Councillor in the Townsville City Council, fraudulently caused a person to be recorded as a member of the ALP;
- (4) On and from 15 August 2000, the Criminal Justice Commission (the commission), of its own initiative, has conducted preliminary investigations of the allegations referred to in paragraphs (2) and (3);
- (5) By letters to the commission dated 17 August 2000 and 21 August 2000, the Leader of the Opposition, the Honourable R J Borbidge MLA, called for a full and independent inquiry into the allegations made by Ms Ehrmann and the issues relevant to them;
- (6) By letter to the commission dated 18 August 2000, the Electoral Commissioner, Mr D J O'Shea, referred to the commission documents relating to the said proceedings against Ms Ehrmann and requested the commission to conduct an investigation into the allegations of electoral fraud raised by Ms Ehrmann or to refer those allegations to the Queensland Police Service where the commission does not have the power to so investigate.

Scope of Brief

3. I am briefed to:

- (a) examine the information gathered during the commission's preliminary investigation relating to the allegations referred to in paragraphs (2) and (3);
- (b) direct and supervise such further investigations as I consider appropriate in order to assess whether a reasonable suspicion of official misconduct exists in respect of the allegations referred to in paragraphs (2) and (3);
- (c) advise if a reasonable suspicion of official misconduct exists in respect of the allegations referred to in paragraphs (2) and (3) and, if it does, to advise on:
 - (i) the nature of the investigation of the suspected official misconduct that the commission should conduct;
 - (ii) whether, having regard to section 90 of the Act, an open hearing should be held for the purpose of such investigation;
 - (iii) the terms of reference of any such open hearing;
- (d) advise, in respect of any allegations referred to in paragraphs (2) and (3) not giving rise to a reasonable suspicion of official misconduct, whether such allegations should be referred to the Queensland Police Service or any other agency for investigation of possible criminal offences.

Criminal Justice Act – the investigative responsibilities and powers

4. The commission has responsibilities and powers to investigate “official misconduct”, as to both its incidence generally in the State, and in particular cases of alleged or suspected official misconduct¹.

5. In Queensland, there is no criminal offence of official misconduct, so called. In some cases, the outcome of the commission’s investigation is a disciplinary charge of official misconduct, which is dealt with under the *Misconduct Tribunals Act 1997*². The evident intent of the Act, so far as the commission’s investigative responsibilities and powers are concerned, is to provide a regime whereby matters of public concern, potentially involving the neglect of, or abuse of the powers or the authority of public officials, can be investigated in a way which is not facilitated by other processes and institutions.

6. Official misconduct for the purposes of the Act is defined by ss.31 and 32. By s.31(1), official misconduct is conduct of the general nature prescribed by s.32, or a conspiracy or attempt to engage in such conduct.

7. Section 32(1) provides that official misconduct is conduct of a kind described in paragraphs (a), (b) or (c) of that sub-section, if that conduct also “... constitutes or could constitute –
 - (d) in the case of conduct of a person who is the holder of an appointment in the unit of public administration – a criminal offence, or a disciplinary breach that provides reasonable grounds for termination of the person’s services in the unit of public administration; or

¹ ss.2(a)(v), 23(f)(iii), 29(3)(a), (d).

² *Criminal Justice Act* s.39.

(e) in the case of any other person – a criminal offence.”

8. It is convenient to discuss first the terms of paragraph (d). In the present cases, the potentially relevant units of public administration are the Legislative Assembly and one or more local governments within Queensland. Section 7 of the *Legislative Assembly Acts 1867-1978* provides that the seat of a member of the Legislative Assembly becomes vacant in certain circumstances but does not provide for any disciplinary regime for the “termination of the person’s services”. Section 7B provides that in the circumstances there set out³, the Assembly may resolve that the person should not continue as a member of the Assembly and that the seat of that person shall become vacant. But circumstances which might engage s.7B do not arise here. There is no relevant disciplinary standard or norm of conduct, nor is there any provision for the disciplining of a member under some regime which might terminate the member’s services.

9. The *Local Government Act 1993* provides for the disqualification and vacation of office of a councillor in certain circumstances as set out in s.221, or (by s.222) if a person is found guilty of certain offences against that Act. Again, there is no prescribed disciplinary standard or disciplinary regime.

10. Accordingly, in the case of conduct of either a member of the Legislative Assembly or a councillor, there must be conduct which constitutes or could constitute a criminal offence, for paragraph (d) to be satisfied, as there must be for paragraph (e) cases.

³ Where a member transacts any business or performs any duty or service for the Crown or a Crown instrumentality or a body representing the Crown.

11. In *Greiner v. ICAC* (1992) 28 NSWLR 125, consideration was given to what was meant by “could” in the context of the analogous provisions of the *Independent Commission Against Corruption Act* 1988 (NSW), ss.8, 9. At page 187, Priestley JA held that “could” in that provision means “would, if proved”. At page 136, Gleeson CJ noted that it was common ground that, in determining whether conduct could constitute a criminal offence in this context, consideration would have to be given to whether, if there were evidence of certain facts before a properly constituted jury, such a jury could reasonably conclude that a criminal offence had been committed.

12. Most of the allegations by Ehrmann are imprecise and unparticularised. But they do include an assertion that others engaged in conduct substantially similar to that which constituted the offences committed by her: ie. the forging and uttering of documents to the end of affecting the content of the electoral roll⁴. Other conduct which is suggested by her affidavit is not conduct which, if proved, would constitute a criminal offence. Only suggestions of criminal conduct are potentially relevant.

13. The allegations relating to Ms Hill would appear to involve allegations of the commission of a criminal offence or offences. Again, care must be taken to distinguish between alleged criminal conduct, as possibly involving official misconduct, and other conduct.

⁴ A criminal offence at least by reason of *Crimes Act* 1914 (Cth) s.67. Even if no criminal offence against the law of Queensland is involved, s.31(4) provides that conduct may be official misconduct for the purposes of this Act “whether the law relevant to the conduct is a law of Queensland or of another jurisdiction”, so that a criminal offence against the laws of the Commonwealth would be a criminal offence for the purposes of s.32.

14. If the conduct complained of would constitute a criminal offence, then it is official misconduct if it is of the types described in paragraphs (a), (b) or (c) of s.32(1). They are as follows:

- 32 (1) Official misconduct is –
- (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; or
 - (c) conduct that involves the misuse by any person of information or material that the person has acquired in or in connection with the discharge of his or her functions or exercise of his or her powers or authority as the holder of an appointment in a unit of public administration, whether the misuse is for the benefit of the person or another person;"

15. I shall return to the type of conduct within paragraph (a) but it is convenient to go first to paragraph (b). Read alone, it refers to conduct "of a person while the person holds or held an appointment in a unit of public administration". In turn, the conduct referred to in sub-paragraphs (i) or (ii) seems to be referable only to conduct of a person who, at the time of the alleged misconduct, held a relevant appointment.

16. Section 31(3) provides that:

“(3) Conduct engaged in by, or in relation to, a person at a time when the person is not the holder of an appointment in a unit of public administration may be official misconduct, if the person becomes the holder of such an appointment.”

It could be suggested that this might enlarge the scope of s.32(1)(b). It is only by reference to the holding of an appointment, at the relevant time, that an assessment could be made as to whether the conduct described in paragraph (b) was conduct which fell short of what was required. To be official misconduct within s.32(1)(b), the conduct must be that of a person then holding an appointment in a unit of public administration.

17. That is not to say that *any* criminal conduct of a person who, coincidentally, holds such an appointment, is official misconduct. There must be a relevant and sufficient connection between the conduct concerned and the appointment held. In particular, not all misconduct by a person who also holds an appointment in a unit of public administration, will necessarily constitute or involve “a breach of the trust placed in the person by reason of his or her holding the appointment”⁵.

18. Paragraph (c) is concerned with misconduct by the misuse of information or material, but it must be information or material which the person has acquired in or in connection with the discharge of his or her functions or the exercise of his or her powers or authority as the holder of an appointment.

⁵ See eg. *Re Mullen* [1995] 2 QdR 608; cf. *Re Watson* [1997] 1 QdR 340.

19. Accordingly, paragraphs (b) and (c) are concerned with the conduct of a person then holding an appointment in a unit of public administration.
20. However paragraph (a) is expressed to refer to the conduct of a person “whether or not the person holds an appointment in a unit of public administration”. A comparison of paragraphs (d) and (e) again reveals that, in certain circumstances, the conduct of a person who is not the present or former holder of an appointment might nevertheless be official misconduct.
21. Consequently, the conduct of a person who is not the prospective, present or former holder of an appointment might be official misconduct if it is of the kind referred to in s.32(1)(a), and constitutes or could constitute a criminal offence. The result is that official misconduct is given a broader meaning than what might be considered its ordinary meaning⁶.
22. Within s.32(1)(a), there is a requirement for a relevant and sufficient nexus between the misconduct and the discharge of functions or exercise of powers or authority of a unit of public administration or of a person holding an appointment in such a unit. The relevant conduct must adversely affect, or be such that it could adversely affect, directly or indirectly, the honest and impartial discharge of such functions or the exercise of such powers or authority. The effect need only be a potential adverse effect, directly or indirectly.

⁶ Under the common law, it was a term used as a descriptive formula for a series of offences which involved the misuse of the powers of public office. See eg. Question of Law Reserved (No. 2 of 1996) (1996) 67 SASR 63; Finn, Official Misconduct (1978) 2 Crim LJ 307.

23. Although s.31(3)⁷ does not affect s.32(1)(b), it is relevant to s.32(1)(a). Especially when regard is had to this provision, it appears that conduct, engaged in before a person becomes the holder of an appointment, might be within s.32(1)(a) if it has a sufficient potential to adversely affect the honest and impartial performance of a person once that person becomes the holder of an appointment.
24. It is not the responsibility of the commission to investigate all misconduct, even criminal conduct, within a political party or any other organisation which is not a unit of public administration. The commission's role exists where that conduct has at least the potential to affect units of public administration or the performance of the functions of those who hold office in them.
25. The ALP has received advice, which it has forwarded to the commission, to the effect that a "fraudulent voting scheme" within a political party could never come within the definition of official misconduct "because it simply does not involve the discharge of the member's⁸ or councillor's functions as such or the exercise of his powers or authority in that office". I disagree. Having regard to s.32(1)(a), (d) and (e), conduct outside the purported discharge of the member's or councillor's functions can be official misconduct, as, by definition, it is when it is the conduct of someone other than the member or councillor. In such cases, consideration of whether that person's criminal conduct might affect, or have affected, the member's honesty or impartiality will usually require an examination of the particular facts and circumstances.

⁷ See paragraph 16 above.

⁸ "Member" being a member of the Legislative Assembly.

Investigation of Official Misconduct

26. The commission is established as a body to, amongst other things, investigate complaints of official misconduct referred to it and to secure to taking of appropriate action in respect of official misconduct⁹. Section 23 provides that the responsibilities of the commission include:

- ...
 - (f) in discharge of such functions in the administration of criminal justice as, in the commission's opinion, are not appropriate to be discharged, or can not be effectively discharged, by the police service or other agencies of the State, undertaking –
 - (i) ...
 - (ii) ...
 - (iii) investigation of official misconduct in units of public administration

Then follows s.25 which authorises the commission to conduct a hearing in relation to any matter relevant to the discharge of its functions or responsibilities.

27. Within the commission, there is established the official misconduct division¹⁰, which “is the investigative unit within the commission”¹¹, and it is the function of this division, subject to directions or orders of the commission:

- “(a) to investigate the incidence of official misconduct generally in the State; and
- (b) ...
- (c) ...
- (d) to investigate cases of –
 - (i) alleged or suspected misconduct by members of the police service; or
 - (ii) alleged or suspected official misconduct by persons holding appointments in other units of public administration;

⁹ s.2(a)(v).

¹⁰ s.19.

¹¹ s.29(1).

that come to its notice from any source, including by complaint or information from an anonymous source; ...”

28. So the commission has a responsibility to investigate official misconduct “in” units of public administration, and a power to conduct a hearing in relation to such an investigation. The official misconduct division is empowered to investigate the incidence of official misconduct generally in the State, but in relation to specific cases of suggested misconduct, it is given the function of the investigation of “alleged or suspected official misconduct by persons holding appointments in ... units of public administration”¹². As discussed earlier, the terms of s.32 could result in conduct engaged in by a person who is not a prospective, present or former holder of an appointment being nevertheless official misconduct, if it has the necessary connection with the performance of another person who is or becomes a holder of an appointment. It seems unlikely that the investigative function of the official misconduct division was not intended to extend to such cases. Again, it would be remarkable if such conduct was not within the commission’s investigative responsibility expressed within s.23(f)(iii), or that s.29 was intended to affect the achievement of an expressed object of the Act, being that the commission investigate complaints of official misconduct referred to it and take appropriate action in respect of official misconduct. There is no apparent reason why the Act would permit the investigation of some but not all official misconduct as defined.

Reasonable Suspicion of Misconduct

29. Whether there is a sufficient connection, between the misconduct and the performance or likely performance of the holder of the appointment, requires an

¹² s.29(3)(d)(ii).

assessment of the facts of the particular case. It is necessary to identify a relevant appointment, if not also in every case the identity of the holder of that appointment, as well as the functions and powers of such a person, to assess the actual or potential effect of the conduct concerned. The issues of fact involved might be able to be resolved only upon the completion of a full investigation, involving a hearing.

Ultimately, the revealed facts might show that there is not the requisite connection between the conduct and the performance of an office holder. A lawful investigation might discover no official misconduct. But the commission's role is to investigate where official misconduct is alleged or suspected: s.29(3)(d). On what seems to me to be a correct approach, the commission investigates suspected official misconduct where there could be a reasonable suspicion. Your instructions ask me to consider whether there is, at present, a reasonable basis for suspecting official misconduct. One question which this involves, having regard to s.32(1)(a), is whether there is reasonable basis for suspecting that the conduct has had or will have the required impact upon the performance of the holder of an appointment.

30. Some guidance as to what is involved in a reasonable suspicion is provided by cases decided in relation to search warrants and in other contexts. In *George v. Rockett* (1990) 170 CLR 104 the High Court was concerned with what constituted reasonable grounds for suspicion for the purposes of the issue of a search warrant¹³. The Court observed¹⁴ that suspicion and belief are different states of mind and that suspicion "in its ordinary meaning is a state of conjecture or surmise where proof is lacking: 'I suspect but cannot prove'"¹⁵ and that "the facts which can reasonably ground a

¹³ Pursuant to the then s.679 of the *Criminal Code*.

¹⁴ At 115.

¹⁵ Citing with approval these words from the speech of Lord Devlin in *Hussien v. Chong Fook Kam* [1970] AC 942 at p.948.

suspicion may be quite insufficient reasonably to ground a belief, yet some factual basis for the suspicion must be shown". The Court cited with approval the following passage from the passage of Kitto J in *Queensland Bacon Pty Ltd v. Rees*¹⁶:

"A suspicion that something exists is more than a mere idle wondering whether it exists or not; it is a positive feeling of actual apprehension or mistrust, amounting to 'a slight opinion, but without sufficient evidence', as Chambers's Dictionary expresses it. Consequently, a reason to suspect that a fact exists is more than a reason to consider or look into the possibility of its existence. The notion which 'reason to suspect' expresses in sub.s.(4) is, I think, of something which in all the circumstances would create in the mind of a reasonable person in the position of the payee an actual apprehension or fear that the situation of the payer is in actual fact that which the sub-section describes – a mistrust of the payer's ability to pay his debts as they become due and of the effect which acceptance of the payment would have as between the payee and the other creditors."

This passage was applied by Ormiston J in *Commissioner of Corporate Affairs v. Guardian Investments Pty Ltd*¹⁷, where his Honour said, in relation to the expression *has reason to suspect that a person has committed an offence* in s.16A of the *Companies (Vic) Code*¹⁸:

"... the word 'suspect' requires a degree of satisfaction, not necessarily amounting to belief, but at least extending beyond mere speculation as to whether an event has occurred or not."

31. A reasonable suspicion could exist although not every reasonable person would hold it: it is sufficient that a reasonable person could hold it¹⁹.

¹⁶ (1966) 115 CLR 266 at 303.

¹⁷ [1984] VR 1019.

¹⁸ At 1025.

¹⁹ See *George v. Rockett* at 112.

32. In cases such as those raised by the present allegations, a reasonable suspicion of official misconduct, by reason of s.32(1)(a), involves a suspicion both as to the occurrence of criminal conduct and the existence of facts and circumstances by which that conduct might affect the holder of the relevant appointment in the discharge of his or her functions. This requires some consideration of the functions of a member of the Legislative Assembly or a councillor in a local government.
33. What then are the functions of a member of the Legislative Assembly? A comprehensive examination of those functions is not required here. Undoubtedly those functions include the participation in parliamentary debate and the advancement of the interests of the member's constituents, as well as the State generally²⁰. Parliament has a critical role as a debating forum, involving the various procedures of general debate, motions of censure, discussions of matters of public importance and the asking of questions. Members are expected to raise matters of public interest both in and out of parliament, as well as to address such issues in the formulation of policy. The fundamental importance of the effectiveness of our electoral laws, including their potential for abuse by conduct such as this conduct, is clearly a matter of proper concern for any member. Suppose a member had progressed to that appointment with the known benefit of conduct such as this: could he or she be adversely affected, at least indirectly, in the honest and impartial discharge of his or her functions in respect of such an issue? Indeed the matters raised by constituents for the member's attention might be the very misconduct of which the member is aware, or at least like conduct.

²⁰ See report on Review of Parliamentary Committees by the Electoral and Administrative Review Commission (October 1992) para. 2.106.

At the same time, the member would know that there is likely to be a continuing problem from the false content of the electoral roll. It seems difficult to see that these would be matters outside the functions of a member of the Legislative Assembly, ie. that the member could ignore them as inevitably quite irrelevant to his or her work. There is a close and real connection between misconduct involving the electoral roll and the functions of an elected member.

34. The role of a councillor is expansive: see *Local Government Acts*.229. It involves a representation of the public interest in matters that relate to local government. The conduct alleged by Ehrmann includes the forging of documents to change the content of the electoral roll. This roll determines the eligibility of voters for local government elections. A councillor who knows that the electoral roll relevant to that local government is false in consequence of this type of conduct, could hardly answer his or her constituents by saying that it was none of the councillor's business. On the contrary, it would be fairly within the functions of the councillor to alert the relevant authorities to the falsity of the electoral roll, for otherwise it could affect the fair and lawful election of councillors.

The Ehrmann Allegations

35. Ehrmann pleaded guilty to 24 counts of forging and 23 counts of uttering Commonwealth electoral enrolment forms. Her purpose in each case was to advance the prospects of herself or others in pre-selection contests within the ALP. At all material times, a party member's entitlement to vote in the selection of candidates for the House of Representatives, the Legislative Assembly and local government, was effectively dependent upon that person being entered on the Commonwealth electoral

roll at an address which corresponded with a branch within the relevant electorate or local government area. Ehrmann's conduct followed a pattern, described by Mr Hanson QC for the Crown, and not disputed by Ehrmann, as follows:

"In 1993 Mrs Ehrmann and a Shane Foster, also a city council alderman and ALP member adopted a plan to stack an electoral division with voters who did not live there so that those names could be used in a preselection ballot in an attempt to secure the endorsement on a particular candidate for the city council election favoured by both of them. Known persons were enrolled without their knowledge and consent at addresses within the electorate, whereas, they, in fact, lived elsewhere. Residential addresses were chosen – residential addresses were chosen which were occupied by people she knew, such as her parents, her children and one particular accommodating party member.

Post office boxes, which she and Foster either already had or took out for the purpose, were utilised in the scheme, as I'll explain in a moment. There were three post office boxes in her name, one in her mother's name, three in the name of Shane Foster and one in the name of Foster's wife. You'll see these forms in a moment and you'll see that there's provision for a residential address and a postal address, and where a postal address is shown on the electoral enrolment form which is different from the residential address, the practice of the electoral office is to send mail for that voter to the postal address, for example, to a post office box rather than to the residential address.

The same practice is followed by the ALP returning officer. The practice was to – in a plebiscite – to utilise the postal address shown on the electoral roll. So that plebiscite ballot papers therefore went to the post office boxes controlled by Ehrmann and Foster. In some cases where ballot papers did go to the residential address on the roll she was, of course, also able to collect them."²¹

36. At least according to the Crown submissions, there were three distinct periods in which this activity was undertaken. The first was in 1993, when the applications for enrolment were "designed to support the pre-selection of a candidate in the local council elections"²². Secondly there were offences in 1994 in anticipation of a pre-selection ballot to follow from what was then an anticipated retirement of a member of the Legislative Assembly. Thirdly, there were offences committed in

²¹ Transcript of hearing before Chief Judge Wolfe, 11 August 2000 pages 6 and 7.

1996, which were said to be for the purpose of securing Ehrmann's pre-selection for a State seat. In late 1996, Ehrmann was selected as the party's candidate to contest Thuringowa.

37. Ehrmann swore an affidavit which was tendered at her sentence hearing, where she swore to the contents of a document written by her which was annexed to that affidavit. As I have mentioned, the relevant allegations are those of conduct which constitutes or could constitute a criminal offence. As best I can distil the allegations of criminal misconduct which are there asserted they are as follows:

- (1) Ehrmann was asked to "take part in a situation, in the Mundingburra Bi-Election (sic) where people voted, using forged enrolments", whereupon she "refused".
- (2) The forged enrolments "did not give me any real advantage in any plebiscite. I won outright without them ... The only advantage was to the A.W.U. The extra votes were used to elect their other candidates".
- (3) Particular individuals who were not named but were referred to as "a prominent local State politician", "another prominent State Member" and "another Party Member" are said to have forged enrolments at various times.

38. Ehrmann's references to "branch stacking" do not necessarily suggest criminal conduct and thereby even the potential for official misconduct.

39. Ehrmann's solicitor, Mr Mark Dyer, also swore an affidavit. He deposed to discussions in a meeting he and Ehrmann had with officers of the Australian Federal Police in April this year. A transcript of that meeting was made by the AFP and has been provided to the commission and briefed to me. Care must be taken in the reading of Mr Dyer's affidavit where he refers to a "general scheme that was followed within the Australia Labor Party in Queensland ... which ... was practiced across the State in a widespread manner", as some of the conduct referred to (at least when regard is had to the transcript of that meeting) could not constitute a criminal offence or amount to official misconduct.
40. As I mentioned, in 1996 Ehrmann was seeking pre-selection for the seat of Thuringowa but, through her counsel, she said that she forged some enrolments so as to place some voters within the electorate of Townsville, the "object of the exercise" being to support a particular candidate in the plebiscite for the selection of the Labor candidate for that seat²³.
41. It is difficult to identify the scope of the Ehrmann allegations, because many of them are general and ambiguous, especially when regard is had to her meeting with the AFP in April this year. It is necessary to distil, if possible, her allegations to something more specific, so that it can be assessed whether there is a factual basis for a reasonable suspicion of official misconduct. In particular, that is necessary to assess whether there could be a reasonable suspicion of an actual or potential impact upon the performance of someone who held a relevant appointment. Some of her allegations have been made more specifically. It is undesirable that I detail them

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Transcript of hearing before Wolfe CJDC p.32.

here, beyond what appears already from the hearing in the District Court, for several reasons. First there is a potential unfairness to the individual concerned, who has not had an opportunity to learn of Ehrmann's assertion, let alone to answer it. I have been informed by the commission that this opinion will be made public. Secondly, in many cases the assertion is ambiguous or else so general as to be potentially misleading, and Ehrmann has refused to provide any detailed explanation except if she is compelled to do so. Thirdly, I am not involved in a process of a fact finding at the end of a completed investigation: my job is to advise whether a further investigation is permitted and warranted. A close and published examination of the present evidence might not only be unfair to individuals concerned, but detrimental to the conduct of a fuller investigation.

42. If there is to be any further investigation, then those undertaking it should be furnished with the information gathered by the commission thus far. If I have overlooked significant matters which are actually revealed by, for example, Ehrmann's discussions with the AFP, then those undertaking any further investigation will have the same material.
43. Ehrmann was charged in May 1998. At the same time, her colleague in several pre-selection campaigns, Shane John Foster, was charged with like offences. Committal proceedings in respect of Ehrmann and Foster were to be heard together in late 1998. At the committal proceedings, Foster said that he would be pleading guilty and provided a statement implicating Ehrmann. Foster was sentenced on 17 March 1999 by Chief Judge Shanahan. Foster and Ehrmann worked closely together in furthering the interests of some candidates for pre-selection, including Ehrmann in her

contest for pre-selection for Thuringowa in late 1996. I have the advantage of information sourced from Foster, which is in material not presently on the public record.

44. In 1997, Mr Andrew Kehoe pleaded guilty in the Townsville Magistrates Court to several counts of forging electoral enrolment forms, that activity occurring in September and October 1996. Mr Kehoe was very actively involved in campaigning for a candidate for pre-selection for the seat of Townsville. The timing of his offences corresponds with that of the pre-selection process. His conduct is relevantly considered in the assessment of whether official misconduct could be reasonably suspected in relation to this pre-selection contest.
45. In my view, having regard to s.32(1)(a) at least, there could be a reasonable suspicion of official misconduct, by conduct constituting a criminal offence or offences affecting the electoral roll, for the purposes of the pre-selection contest for Townsville in 1996.
46. As mentioned, in her affidavit tendered in the District Court, Ehrmann alleged that conduct of the same kind was engaged in to support the ALP candidate in the Mundingburra by-election in 1996. Again, it is inappropriate to refer to any details of this allegation which do not appear on the public record.
47. On the material provided to me, there could be a reasonable suspicion of official misconduct by conduct constituting a criminal offence or offences affecting the electoral roll for the Mundingburra by-election in 1996.

48. Dr Watson, the leader of the Liberal Party in Queensland, has sent to the commission a seven page document which, as he describes it, "purports to be an internal discussion paper produced by the Socialist Left in 1994". The author of the document is not named and nor is it signed. However no issue seems to have arisen thus far as to its authenticity²⁴.
49. The document refers to disputed pre-selections for the wards of East Brisbane and Morningside, in 1993, in which the Socialist Left faction was disputing the outcomes. It alleges the incidence of criminal conduct, at least by the forging of electoral enrolments. Having regard to the very general nature of Ehrmann's allegations of like conduct within the ALP but outside Townsville, it seems to me that these matters fall within the Ehrmann allegations upon which I am asked to advise.
50. Again, I shall not detail the potentially relevant facts and circumstances. In my opinion there could be a reasonable suspicion of official misconduct by criminal conduct affecting the content of the electoral roll, for the purposes of the respective plebiscites in 1993 for the selection of the Labor candidates for the wards of East Brisbane and Morningside.
51. There are some other specific allegations, for which the preliminary inquiries required so that I can advise, are incomplete. It is possible that with more time and more information there might emerge a basis for a reasonable suspicion of official misconduct in some of these matters. Some of them have arisen only within the last

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It was apparently accepted as authentic by Mr Milner, the State Secretary of the ALP: Courier-Mail 22 August 2000.

few days, and in one case, only yesterday. My advice has been sought urgently, and it is undesirable that it be delayed whilst any further information is sought for this advice, especially as there is already a reasonable suspicion of official misconduct in the respects referred to above. As I recommend at the conclusion of this opinion, whoever further investigates those matters should be appointed also to conduct an investigation into such other allegations as give rise to a reasonable suspicion of official misconduct concerning criminal conduct in respect of ALP plebiscites within a defined period. The particular allegations within this category involve conduct at different times, but none of them is earlier than 1993 or later than 1997. There must be some focus upon allegations which, according to their facts and circumstances, might involve official misconduct. As I mentioned, much of what is alleged by Ehrmann as having occurred for many years, by way of “branch stacking”, falls short of an allegation of criminal conduct and still further, official misconduct. The legitimate purposes of the investigation I recommend would not be served by terms of reference which go beyond conduct which is reasonably suspected to be official misconduct. I add that some of the specific allegations within the category mentioned in this paragraph suggest conduct which could constitute a criminal offence, although not by way of forging electoral enrolments.

Jennifer Hill

52. Ms Jennifer Hill is a councillor in the Townsville City Council, and is the endorsed ALP candidate for the Federal seat of Herbert in the next Federal election. The allegations concern Mr John Peterson, who lives in Townsville. The allegations as made by others do not correspond with Mr Peterson’s version of events, at least as he provided to commission officers. According to the allegations of others:

- Ms Hill forged Mr Peterson's signature on an application form to join the ALP.
- Ms Hill forged his signature on a letter dated 2 June 1998 addressed to the then State Secretary of the ALP, requesting that Mr Peterson be excused from having to attend branch meetings due to medical problems.
- Minutes of branch meetings falsely record Mr Peterson's presence.

53. Mr Peterson has been interviewed by officers of the commission. According to what Mr Peterson told them:

- Mr Peterson does not accuse Ms Hill of completing his membership application. He maintains that he did not sign the application but he does not know who did.
- He says that he told Ms Hill of his interest in joining the ALP, and that he had told her that he had completed an application form previously but had not heard anything further as to membership.
- He received the usual letter of acceptance to membership, which enclosed a copy of the application form as purportedly signed by him, and which also enclosed an ALP membership card.
- In fact, he did sign the back of that card, as if intending to assume ALP membership.

- Further he did attend at least two branch meetings of the branch in question, so that minutes of those meetings correctly record his attendance.
- He did sign the letter of 2 June 1998 to the Secretary of the ALP, in which he sought to be excused from attending branch meetings. He says that some but not all of the letter was read to him by Ms Hill before he signed it. I do not understand him to say that he was unable to read it when it was presented for his signature, or that it was subsequently altered with or without his consent. This incident must be seen in the context of his having actually attended branch meetings within the next few months.

54. So as it happened, he effectively assumed ALP membership: he signed his membership card and attended branch meetings. His grievance is that his signature was forged on the application for party membership. He concedes that the signature does resemble his signature but he is adamant that it is not his²⁵. He does not accuse Ms Hill of signing the application form.
55. Quite apart from the factual basis or otherwise for any suspicion of official misconduct, there is apparently no relevant connection with a unit of public administration or an appointment held therein. The alleged forgery is in relation to an internal ALP document. Insofar as the holder of a public office is identified, it is Councillor Hill. The House of Representatives is not a unit of public administration under the Act, so that Ms Hill's candidacy for that office is irrelevant. If Ms Hill did sign Mr Peterson's application form, she did not do so in purported discharge of her

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His letter 30 November 1998 to the then State Secretary of the ALP and others.

functions as a councillor, and I do not see the conduct as being official misconduct pursuant to s.32(1)(b). Nor would I see that conduct as having a relevant and sufficient connection with her work as a councillor to ground a reasonable suspicion of official misconduct by reference to s.32(1)(a). The conduct is of a different kind from that of, for example, Ehrmann, Foster or Kehoe. If Ms Hill did sign the application form, that was conduct to give effect to Mr Peterson's stated intention to become a member of the ALP, which intention corresponded with his subsequent conduct to act as a member. Importantly the conduct of which he complains did not affect the electoral roll.

Matters for Further Investigation

56. To summarise so far, a reasonable suspicion of official misconduct exists in respect of:
- (a) conduct affecting the electoral roll relevant to the conduct in 1996 of a plebiscite for the selection of the Labor candidate for the State electorate of Townsville;
 - (b) conduct affecting the electoral roll for the by-election for the seat of Mundingburra held in 1996;
 - (c) conduct affecting the electoral roll for the purposes of a plebiscite in 1993 for the selection of the Labor candidate for the ward of East Brisbane;
 - (d) conduct affecting the electoral roll for the purposes of a plebiscite in 1993 for the selection of the Labor candidate for the ward of Morningside.

57. I am asked to advise on the nature of the investigation which the commission should conduct. It should be by a hearing of the commission, to be conducted pursuant to s.25.

Open Hearing

58. The next question for my advice is whether “an open hearing should be held for the purpose of such investigation”, having regard to s.90 of the Act.
59. Section 90 relevantly provides as follows:

Hearings closed to the public unless commission otherwise orders

90. (1) A hearing of the commission is to be closed to the public unless the commission orders, whether before or during the hearing, that it be open to the public.
- (2) The commission may order that the hearing be open to the public only if the commission considers –
- (a) the hearing is of an administrative nature; or
 - (b) a closed hearing would be unfair to a person or contrary to the public interest.
- (3) In considering whether a closed hearing would be unfair to a person or contrary to the public interest, the commission must have regard to –
- (a) the subject matter of the hearing; and
 - (b) the nature of the evidence expected to be given.
- (4) ...
- (5) ...
- (6) In this section –
- ‘hearing’ includes part of a hearing.”

60. The section was amended in 1997²⁶. From the Explanatory Memorandum, it appears that the reason for the amendment was that, in accordance with the recommendations by the Parliamentary Committee, it was considered that the potential damage to an individual's reputation from the conduct of a public hearing is so great, that the general rule ought to be that there be private hearings²⁷. The Parliamentary Committee also noted that public hearings were likely to take longer, at greater expense to witnesses and the community, than private hearings²⁸. The present question is whether the commission could consider that a closed hearing would be unfair to a person or contrary to the public interest, having regard to its subject matter and the nature of the evidence expected to be given. A public hearing would be permitted only if the commission was relevantly persuaded by the particular circumstances relating to this hearing.
61. The most important of those circumstances is that the relevant subject matter has already been made public. This subject matter is of fundamental importance to public confidence in the efficacy of the electoral laws, as well as in the holders of appointments in the Legislative Assembly and local governments. That public confidence is already affected by the publicity which has been given to the Ehrmann case and related allegations. In addition, the generality of the Ehrmann allegations, could encourage unfair suspicions and rumours, extending to innocent people, the extent of which might be minimised by an open hearing²⁹.

²⁶ Section 34 of the *Criminal Justice Legislation Amendment Act* 1997, which was assented to on 5 November 1997 and subsequently proclaimed with the exception of this new s.90. Accordingly, s.90 commenced on 6 November 1998, being one year and one day from the assent date: *Acts Interpretation Act* 1954, s.15DA(2).

²⁷ 1997 Explanatory Notes No. 61 p.1581.

²⁸ Report No. 26, p.74.

²⁹ See Report of a Commission on Inquiry pursuant to Orders in Council (report by Mr Fitzgerald QC) para. 1.4.1.

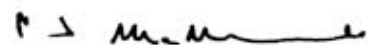
62. Accordingly, it seems to me that the commission could be satisfied of matters within s.90(2) so as to permit the hearing to be held in public. It is a matter for the commission to consider whether the hearing, or any part of it, should be open to the public. The particular circumstances might require part of the hearing to proceed as a closed hearing.

Terms of Reference of Open Inquiry

63. Next I am asked to advise on the terms of reference of any such open hearing. The appropriate terms of reference should correspond with the official misconduct which can be reasonably suspected. That conduct consists of conduct as described in paragraph 56 above, as well as other official misconduct which could be reasonably suspected within the subject matter referred to in paragraph 51 above.
64. I recommend that the commission conduct an investigation into:
- (1) Any alleged official misconduct, by way of conduct which constitutes or could constitute a criminal offence or offences:
 - (a) affecting the electoral roll relevant to the conduct in 1996 of a plebiscite within the Australian Labor Party to select its candidate for the State electorate of Townsville;
 - (b) affecting the electoral roll for the by-election for the seat of Mundingburra held in 1996;

- (c) affecting the electoral roll relevant to the conduct in 1993 of a plebiscite within the Australian Labor Party to select its candidate for the Brisbane City Council ward of East Brisbane;
 - (d) affecting the electoral roll relevant to the conduct in 1993 of a plebiscite within the Australian Labor Party to select its candidate for the Brisbane City Council ward of Morningside.
 - (2) Such other alleged conduct, which constitutes or could constitute a criminal offence, in respect of any plebiscite conducted within the years 1993 to 1997 inclusive for the selection of the candidate of the Australian Labor Party for any electorate of the Legislative Assembly or the position of councillor of any local government within Queensland, in respect of which there could be a reasonable suspicion of official misconduct.
65. I further recommend that those conducting the investigation be authorised to undertake such preliminary investigations as are appropriate to determine whether there is a reasonable suspicion of official misconduct in relation to anything which constitutes or could constitute a criminal offence, in respect of any plebiscite conducted within the years 1993 to 1997 inclusive and as otherwise described in paragraph 64(2) above.

With compliments



P.D. McMURDO QC

Chambers

5 September 2000