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**The Hydra Beast of Western Australian Local Government  
and the Misconduct Risks Faced**

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**1. INTRODUCTION**

The structure of local government in Western Australia is complex. Currently Western Australia has over 140 local government bodies, each headed by a Chief Executive Officer, staffed by multiple public officers and comprised of a council of elected members. The operation of local government within Western Australia is regulated by an Act over 400 pages long<sup>1</sup> as well as numerous pieces of subordinate legislation at both a state level and a local level.<sup>2</sup> The Act is administered by the relevant Minister and Department assisting the Minister.<sup>3</sup> Further to this, the Act creates a Local Government Standards Panel who can receive and determine complaints about council members.<sup>4</sup> In certain situations these complaints can be referred to the State Administrative Tribunal for determination.<sup>5</sup> It is this structure which makes local government in Western Australia analogous to the multi-headed hydra beast of Greek mythology; being that there are multiple participants within local government, each with their own capacity to make decisions which affect a wide array of stakeholders.

Principles of good governance and administration require decision makers, including each local government hydra beast head, to make decisions in the best interests of the public: 'Government is constitutionally obliged to act in the public interest'.<sup>6</sup> Decisions should not only be 'correct and preferable', to use the vernacular of administrative law, but should necessarily be free of any improper motivation on the part of the decision maker. That is, corruption and misconduct should not be present in the making of administrative decisions as this would result in decisions which are not made in the best interests of the public. However, it is this hydra beast structure of local government in Western Australia as well as the complex regulatory scheme within which the hydra beast must operate which has the ability to foster misconduct practices and create misconduct risks within local government decision making. Furthermore, it is within this hydra beast context that Western Australia's 'corruption watchdog', the Corruption and Crime Commission (the CCC), must attempt to monitor corruption and misconduct issues within local government.

This paper will begin by outlining what is meant by the term misconduct and argue that there can be both intentional and unintentional misconduct. It will then examine the complex structure of local government within Western Australia and argue that this structure enlivens the possibility of misconduct risks within local government. It will then move on to examine the development of governmental accountability structures, including those specifically designed to provide

accountability in local government decision making including the Local Government Standards Panel. In particular the jurisdiction and powers of the CCC, with regards to local government matters, will be examined. It will be demonstrated that the complex hydra beast structure of local government within Western Australia makes the monitoring of local government misconduct matters difficult. Ultimately, as a result of the complex structure of local government and the difficulty in monitoring misconduct practices, this paper concludes that misconduct risks and practices are more prevalent in Western Australian local governments than they need to be. Finally, approaches to taming the hydra beast will be explored and it will be concluded that these misconduct risks could be minimised by simplification of local government structure and education regarding the proper use of the hydra beast's power.

## 2. 'MISCONDUCT' DEFINED

In order to discuss the issues of misconduct within local government matters, the term misconduct first needs to be defined. Since this paper will examine the role and jurisdiction of the CCC in monitoring misconduct in local government it is important to examine the definition of misconduct provided in the *Corruption and Crime Commission Act 2003 (WA)* (the CCC Act). This definition is contained in s 4 of the Act as follows:

Misconduct occurs if —

- (a) a public officer corruptly acts or corruptly fails to act in the performance of the functions of the public officer's office or employment;
- (b) a public officer corruptly takes advantage of the public officer's office or employment as a public officer to obtain a benefit for himself or herself or for another person or to cause a detriment to any person;
- (c) a public officer whilst acting or purporting to act in his or her official capacity, commits an offence punishable by 2 or more years' imprisonment; or
- (d) a public officer engages in conduct that —
  - (i) adversely affects, or could adversely affect, directly or indirectly, the honest or impartial performance of the functions of a public authority or public officer whether or not the public officer was acting in their public officer capacity at the time of engaging in the conduct;
  - (ii) constitutes or involves the performance of his or her functions in a manner that is not honest or impartial;
  - (iii) constitutes or involves a breach of the trust placed in the public officer by reason of his or her office or employment as a public officer; or
  - (iv) involves the misuse of information or material that the public officer has acquired in connection with his or her functions as a public officer, whether the misuse is for the benefit of the public officer or the benefit or detriment of another person, and constitutes or could constitute —
    - (v) an offence against the *Statutory Corporations (Liability of Directors) Act 1996* or any other written law; or
    - (vi) a disciplinary offence providing reasonable grounds for the termination of a person's office or employment as a public service officer under the *Public Sector Management Act 1994* (whether or not the public officer to whom the allegation relates is a public service officer or is a person whose office or employment could be terminated on the grounds of such conduct).

Further, s 3 of the CCC Act defines 'serious misconduct' as 'misconduct of a kind described in section 4(a), (b) or (c)'.

As can be seen, s 4 gives a long and somewhat complicated definition of misconduct. The CCC has summarised this s 4 definition of misconduct as follows:

Misconduct occurs when a public officer abuses their authority for personal gain, or to cause detriment to another person, or acts contrary to the public interest.

In its simplest form, misconduct occurs when a public officer acts with dishonesty or a lack of impartiality which could affect their official capacity and which could result in dismissal under the Public Sector Management Act.

Serious misconduct occurs when a public officer:

- corruptly misuses their authority for gain for themselves or others, or to cause detriment to another person;
- or in their official capacity commits an offence punishable by 2 or more years' imprisonment.<sup>7</sup>

So, as per the legislative descriptions, there are two types of misconduct: 'serious misconduct', as defined in s 4(a), (b) and (c), and misconduct which does not fall within the definition of 'serious misconduct', contained in s 4(d) (as the legislation does not give this type of misconduct a name, this paper will refer to it as 's 4(d) misconduct').

However, when one examines scenarios in which misconduct can occur, it becomes important to recognise that there is another distinction between the types of misconduct. This distinction is important to recognise because it will help to identify the ways in which misconduct can occur, and therefore the most effective ways of preventing misconduct. This distinction relates to the *way* in which the misconduct has been committed; this paper argues misconduct can either be intentional or unintentional. Misconduct that can be categorized as intentional misconduct occurs when the public officer has committed the conduct constituting the misconduct with the *intent* of acting with a lack of integrity. Conversely, misconduct that can be categorized as unintentional misconduct occurs when the public officer has committed the conduct constituting the misconduct but *without an intent* to act with a lack of integrity. Although, these types of misconduct – intentional misconduct and unintentional misconduct – are not expressly present in the s 4 definition the distinction is still a real and important one. The implied presence of this distinction between intentional and unintentional misconduct in the s 4 definitions and the importance of these distinctions will be discussed below.

Starting with an examination of s 4(a) and (b) serious misconduct; it is important to note that both sub-s (a) and (b) contain the term 'corruptly'. 'Corruptly' is not defined in the CCC Act and has not yet been the subject of judicial interpretation; however, it has been discussed by the CCC itself. In particular it was stated in one CCC report, based on an examination of relevant case law, that:

'corruptly', in section 4(a) and (b) is not to be equated with 'dishonestly' nor 'for an improper purpose', nor (merely), 'contrary to [their] duty'. For present purposes it is sufficient to state that the Commission takes the law to be that 'corruptly' in section 4(a) and (b) of the Act connotes conduct done deliberately, which is contrary to the duties incumbent upon the public officer by virtue of their office and attended by moral turpitude in the sense explained above.<sup>8</sup>

So, as illustrated by the CCC's examination of the term corruptly, it is taken to include deliberate conduct of a public officer with an element of moral turpitude. In other words, corrupt conduct is that committed with the intent of acting in a way which lacks integrity: that is, intentional misconduct. Therefore, if a local government employee accepted a monetary bribe from a person in return for granting planning approval on an application submitted by that person, this would be likely to be s 4(b) serious misconduct as well as an example of intentional misconduct. This is because the conduct by the local government employee could be classified as using their employment within the local government, specifically their ability to approve planning applications, to obtain a benefit, in the form of money in a way which involves moral turpitude. Further, it is conduct which was intentionally committed with a lack of integrity, as accepting the bribe was done purely so that the employee could enjoy the benefits of the money paid to them by the person seeking the planning approval.

Section 4(c) serious misconduct refers to the commission of an offence punishable by two or more years' imprisonment committed in the course of the public officer's official capacity. Although not all offences which are punishable by two or more years' imprisonment contain an intent element (for

example, manslaughter<sup>9</sup> and committing grievous bodily harm<sup>10</sup>) offences with penalties of two or more years' imprisonment which are more likely to occur in a public officer's official capacity generally *do* contain an intent element, for example, fraud,<sup>11</sup> stealing<sup>12</sup> and corruption.<sup>13</sup> Therefore, generally conduct which satisfies the criteria of s 4(c) will be an example of intentional misconduct.<sup>14</sup> So for example, in the commission of the offence of fraud the public officer must form the intent to defraud, and in doing so will be intending to act with a lack of integrity hence would commit intentional misconduct.

Turning now to s 4(d) misconduct; misconduct which occurs under this provision could be both intentional and unintentional. Furthermore, conduct which ultimately does not amount to misconduct when the full facts are known, often *prima facie* looks like unintentional misconduct and therefore usually must be reported to the CCC by certain persons because there will often be reasonable grounds to suspect misconduct. In other words, because the threshold for establishing unintentional misconduct is much lower than intentional misconduct, it will more frequently appear that unintentional misconduct is occurring and therefore, may require certain public officers to report this apparent unintentional misconduct to the CCC in accordance with s 28 of the CCC Act. This effectively increases the workload of the CCC as the CCC must dedicate resources to properly assessing these allegations. The problems associated with demands on the resources of the CCC will be discussed below in part 4 of this paper.

Section 4(d) misconduct can occur when one of the criteria in s 4(d)(i) to (iv) are established as well as one of the criteria in s 4(d)(v) or (vi). Sub-paragraphs (i), (ii) and (iii) deal with conduct which adversely affects a public officer's partiality, honesty or trustworthiness and sub-para (iv) deals with the misuse of information for the public officer's benefit. There is no indication in any of these provisions that the conduct must be committed in a way which involves an intent to act with a lack of integrity. However, the CCC has interpreted the reference to 'honesty' in these provisions as requiring proof of a state of mind, whereas the reference to 'impartiality' in these provisions does not require proof of state of mind. In one investigation report the CCC has stated:

So far as section 4(d)(i) of the Act is concerned, the notion that the 'honest' performance of a public authority or public officer is, or could be, adversely affected by the conduct of a public officer, imports an element of conduct that is (or may be) 'dishonest'. Similarly, in section 4(d)(ii) conduct which constitutes or involves the performance of the public officer's functions in a manner that is not honest, connotes 'dishonesty' in some form or another. Having regard to the gravity of an opinion of misconduct, the Commission construes these provisions as requiring proof of a state of mind, knowledge or intention which goes beyond mere negligence. Deliberate deceit or falsity or an intent to mislead, for example, would suffice. ...<sup>15</sup>

The CCC concluded that the conduct of the public officer in question in this investigation report did not involve deliberate deceit or falsity or an intent to mislead. However, the CCC concluded that the public officer's conduct amounted to misconduct because the conduct adversely affected the public officer's impartiality, which is also a characteristic of misconduct referred to in s 4(d)(i). In contrast to the 'honest' performance descriptor in s 4(d)(i) the CCC considered that a public officer's conduct could amount to conduct which adversely affects a public officer's impartial performance even if the conduct was merely negligent and not enough to amount to deliberate deceit or an intent to mislead.<sup>16</sup> Therefore, the forms of misconduct described in s 4(d) could be committed in an unintentional way as well as in an intentional way.

An illustration of the way in which s 4(d) misconduct can occur can be found in the CCC's investigation into the conduct of Mr Stephen Lee as Mayor of the City of Cockburn.<sup>17</sup> In 2005 Mr Lee sought to be re-elected to the position of Mayor and began campaigning. In summary the CCC found that a substantial portion of Mr Lee's campaign costs, \$43,500.73, incurred by the engagement of public relations firm Riley Mathewson Public Relations, had been paid by a property developer, Australand. Australand was the developer of a significant and controversial real estate development,

Port Coogee, within the City of Cockburn. Mr Lee failed to declare Australand's payment of his campaign costs, which was effectively a gift, in his annual return as required by the *Local Government Act*. It was the CCC's opinion that this conduct amounted to misconduct, because it:

constituted conduct that could adversely affect the honest or impartial performance of his functions as Mayor of the City of Cockburn because it assisted in concealing the degree of a potential conflict of interest, and constituted or involved the performance of his functions in a manner that was neither honest nor impartial. ... This conduct therefore constitutes misconduct under sections 4(d)(i), (ii) and (vi) of the Act.<sup>18</sup>

As has already been discussed s 4(d) misconduct does not contain an express element of intent on the part of the public officer to commit the misconduct. As such the CCC was not required, and did not expressly, make any findings or give any opinions as to the state of mind of Mr Lee and whether his conduct was intentional.<sup>19</sup> However, one can see that in such an example, that is a council member's failure to comply with the statutory obligation to declare a gift, both intentional and unintentional misconduct could occur. So, the council member may have failed to declare the gift because they were deliberately attempting to hide the existence of the gift. This conduct could amount to intentional misconduct because the council member intentionally acted in a way which lacked integrity. Alternatively, the misconduct may be unintentional as although the council member intentionally did not declare the gift, they may have failed to do so because they were unaware of their statutory obligation to declare the gift.

Such a situation, apparent unintentional misconduct through a failure to declare a gift due to a lack of understanding one's obligations, arose in the City of Bayswater as outlined in another CCC investigation report. Upon the CCC's examination of the City's gifts register for the period of 2000 to 2004 it was noted that very few gifts had been declared by local council employees and council members. Upon consultation with the City about this matter the CCC's opinion was that 'a lack of knowledge by councillors and employees of the City of Bayswater about the legal requirement for them to declare gifts meant that the gift register was not accurately maintained.'<sup>20</sup> Therefore, this is an example of conduct which may well have fulfilled the s 4(d) misconduct criteria – although, in this instance the CCC was of the opinion that 'the material before it does not establish misconduct by any person'<sup>21</sup> – but had occurred not because the public officers were intentionally acting with a lack of integrity, but because the public officers were not fully aware of their obligations. In fact in a follow up review of the City of Bayswater's gift register the CCC found that there had been a significant increase in the number of gifts declared. The CCC's stated the opinion that this 'may be because "relevant persons" had been made more aware of their obligations to make declarations.'<sup>22</sup>

Of course for s 4(d) conduct to amount to misconduct, intentional or unintentional, one of the requirements in s 4(d)(v) or (vi) must be made out. The requirement of s 4(d)(v) is quite straightforward: the conduct must be able to constitute an offence against a written law. This could include offences contained in the Criminal Code, the *Statutory Corporations (Liability of Directors) Act 1996* (WA) (as is expressly stated in this sub-section), Commonwealth legislation or offences contained in the *Local Government Act*<sup>23</sup> to name but a few.

The requirements of s 4(d)(vi) are more complicated than s 4(d)(v). For there to be misconduct, a public officer must commit a disciplinary offence providing reasonable grounds for termination under the *Public Sector Management Act 1994* (WA) (the PSMA). In short, conduct which could lead to termination under the PSMA it must amount to a serious breach of discipline.<sup>24</sup> This is regardless of whether or not the public officer is actually employed under the PSMA; for example, council members are not employed under the PSMA but if a council member were to engage in conduct which, *if* they were employed under the PSMA, could lead to their termination, then this requirement would be established. Importantly the Supreme Court of Western Australia have held that the conduct need only be conduct that *could* amount to termination, stating in *Cox v CCC*.<sup>25</sup>

Accordingly, the jurisdiction of the Commission is not dependant upon a conclusion that the conduct found *would* result in termination of a person's office. Rather, the jurisdiction of the Commission extends to all conduct which *could* constitute reasonable grounds for the termination of a person's office. So, if it is reasonably arguable that the relevant conduct could provide reasonable grounds for termination, the Commission has jurisdiction to investigate and report upon it.<sup>26</sup>

So in the investigation of Mr Lee's conduct in failing to declare the substantial gift received, given by developer Australand the CCC was of the opinion that s 4(d) misconduct was present and that the requirements of s 4(d)(vi) had been made out because:

This conduct could constitute a serious breach of the Public Sector Code of Ethics in that there was a failure to act with integrity in the performance of official duties. It accordingly could constitute a disciplinary offence providing reasonable grounds for the termination of a person's office or employment as a public service officer under the *Public Sector Management Act 1994* ... This conduct therefore constitutes misconduct under sections 4(d)(i), (ii) and (vi) of the Act.<sup>27</sup>

In summary, the above discussion has outlined the operation of the statutory definition of misconduct as outlined in the CCC Act as well as an additional distinction between types of misconduct, being that they can either be intentional or unintentional forms of misconduct. Distinguishing between misconduct that is intentional and unintentional is important: even though this distinction is not expressly made in the legislation itself it is a practical distinction and helps to determine why misconduct occurs and why it may go undetected. In turn this informs our understanding of the methods which need to be employed to prevent and minimise misconduct risks within different areas of the public sector, and in particular the misconduct risks faced by the hydra heads of local government, as will be discussed in more detail below.

### **3. THE HYDRA HEADS – LOCAL GOVERNMENT DECISION MAKERS, THEIR POWERS AND THE MISCONDUCT RISKS FACED**

Local government is a form of administration which affects virtually every member of the Australian public. The general function of a local government, in Western Australia, is to 'provide for the good government of persons in its district.'<sup>28</sup> The specific functions of local governments in Western Australia are vast; the 40 pages which comprise Part 3 of the *Local Government Act 1995* (WA) outlines in more detail the specifics of these functions. As can be seen from an inspection of the provisions in this part of the Act and other relevant pieces of legislation, local governments make decisions which affect the day-to-day lives of its residents. Such decisions include the approval of planning and development applications; decisions regarding the provision of infrastructure including the building of local roads and footpaths; the provision of recreation facilities including parks and swimming pools; the provision of child care and aged care, to name but a few.<sup>29</sup> Therefore, it is in everyone's interest that decisions made by local government are sound decisions free from misconduct on the part of the decision maker.

Local governments are comprised of a number of bodies: an elected council (or 'local council') comprised of elected council members; the administrative body comprised of employees of the local government; and a number of local government committees comprised of council members, employees and others. As can be seen these local government bodies are made up of a number of participants, many of whom have power derived from a complex legislative scheme to make various decisions affecting the administration of local government. These decision makers are the hydra beast heads of local government. The structure of each of these bodies will be examined and it will be argued that the existence of these hydra beast heads in conjunction with a failure to understand the complex, but sometimes silent, legislative and administrative schemes governing local government leads to the creation of intentional and unintentional misconduct risks.

As mentioned one body of local government is the elected council. The elected council is the governing body and is responsible for the performance of the local government's functions. This governing body is headed by a mayor or president<sup>30</sup> and (excluding the mayor or president) is comprised of between 5 to 14 council members.<sup>31</sup> This hydra head has a wide array of powers available to exercise and as such council members face some particular misconduct risks: both intentional and unintentional. Looking at unintentional misconduct risks, it is arguable that one of the most common causes of what would appear to be unintentional misconduct is a public officer's lack of understanding of the powers they are able to utilise and the limits of these powers. A decision maker who does not know the extent of their power is more likely to engage in unintentional misconduct. Therefore, in the City of Bayswater example discussed above the CCC was of the opinion that the cause of the council members' failure to declare gifts was a lack of understanding about these obligations.<sup>32</sup> In the same investigation an examination of primary and annual returns submitted by Bayswater council members between 2000 to 2004 revealed that a number of council members had not declared interests that they had in companies as required by the *Local Government Act*. The CCC's investigation revealed that this was because some council members were confused about the relevant legislative obligations on them to declare such information. The CCC therefore recommended:

In order to clarify the obligation of elected members with respect to primary and annual returns, the City of Bayswater should provide training for new Council members and refresher training for Council members who have held their position for some time as a means of improving knowledge and understanding of those obligations.<sup>33</sup>

The CCC made the same recommendation with regards to the provision of training on the obligations of council members and employees to declare gifts and benefits.<sup>34</sup>

As can be seen by the above recommendations, the CCC recognises that the risk of unintentional misconduct via a lack of understanding of obligations is heightened for newly elected council members. Another associated factor which heightens the unintentional misconduct risks faced by new council members is the lack of pre-existing qualifications required of a council member. Despite the power wielded by a council member there are essentially only two restrictions on who can qualify for election to a local council. That is, the candidate must be an elector of the district in which they are running for election and the candidate must be 18 years or older.<sup>35</sup> There are a handful of factors which may disqualify a person from becoming a council member; however, these restrictions are mainly based on proof of past poor character, such as being found guilty of a serious breach of the local government conduct rules or having been insolvent.<sup>36</sup> As a result virtually anyone can become a council member of at least one local council and wield the power available to such decision makers. This practice has its benefits: it allows for diversity amongst candidates running for a position of a council member. Diversity in candidates is likely to result in a diverse local council. This is then likely to result in well rounded and well represented decisions being made by the local government as whole because a greater spectrum of views can be represented by its diverse members. However, the obvious problem in requiring virtually no qualifications from a candidate is that successful candidates can lack knowledge regarding what will make them a successful and effective council member who is able to exercise their powers within the restraints of the legislation. A decision maker that is unfamiliar with the extent of their powers and the obligations placed upon them is not only more likely to exercise their powers in a faulty way but faces greater misconduct risks, in particular unintentional misconduct risks. Such a council member is more likely to be the member who fails to declare a gift received because they are unlikely to be fully aware of the requirement to declare such a gift.<sup>37</sup>

The administrative body of local government is the structure which supports the operation of the local government. The way in which this body is appointed and the functions of the body are governed largely by the *Local Government Act*.<sup>38</sup> The Act allows for the appointment of a Chief

Executive Officer (CEO) of the local government as well as senior employees and other general employees who are necessary for the performance of the functions of the local government.<sup>39</sup> Although, the way in which the CEO, senior employees and general employees are appointed is outlined in the Act,<sup>40</sup> the *specific* powers to be wielded by these hydra heads are generally not (though there is some provision regarding the powers of the CEO). Further, there are generally no provisions regarding the way in which the administration should conduct itself. That is not to say that self administration of local governments is not desirable; however, the lack of guidance in the way in which all of these components should work together does give rise to misconduct risks. It means that each of the 140 local governments in Western Australia needs to determine the best way in which to administer itself; therefore increasing the misconduct risks 140-fold. Self administration means that local governments are responsible for developing and implementing their own processes and procedures and that they themselves are responsible for ensuring that these policies and procedures are properly followed.

Misconduct risks can easily arise in such instances. The CCC investigation of the City of Bayswater again illustrates such risks. Turfmaster had won a number of tenders to provide turf related services to the City of Bayswater over a number of years;<sup>41</sup> however, the contracts awarded via winning these tenders were limited to certain services. For example, contracts in place between 1997 and 2006 related to the provision of weed control services and contracts in place between 1998 and 2001 related to the supply, application and delivery of turf fertiliser. Notably, these contracts did not contain provision of services such pest control, turf drainage, fertilising (except for the 1998 to 2001 contract) and other turf related services that were required by the City from time to time. In circumstances where the City needed such additional services, the City's Purchasing Policy was required to be followed, which stated:

1. quotations are not required for purchases less than \$100;
2. documented verbal quotations are required for purchases of value of \$100 to \$1,000;
3. written quotations are required for purchases above \$1,000 but below \$50,000; and
4. when seeking quotations a minimum of three (3) quotations are required ...<sup>42</sup>

It was the role of the City's Manager Parks and Gardens to organise the provision of these services for the City when required. The CCC's investigation revealed that during the September 2003 to September 2004 period the City's Manager Parks and Gardens engaged Turfmaster for services not the subject of the existing contracts contrary to the City's Purchasing Policy. The CCC's investigation revealed that during this one year period the Manager engaged Turfmaster on:

- 13 occasions to supply fertiliser at a total cost of \$47,404.85 without obtaining quotes from other suppliers; and
- 48 occasions to supply other services at a total cost of \$105,546.98 without obtaining quotes from other suppliers.<sup>43</sup>

It then fell to the CCC to determine whether an opinion of misconduct should be made against the Manager.

Ultimately the CCC formed the opinion that the conduct of the City's Manager Parks and Gardens, that is the continual breaching of the City's Purchasing Policy, did amount to misconduct; in particular s 4(d)(i), (ii) and (vi) misconduct. The CCC stated that by failing to obtain the relevant quotes this meant that the Manager's conduct was not impartial as '[i]t advantaged Turfmaster over other potential suppliers; it disadvantaged other potential suppliers by denying them the opportunity to tender and get the work. It resulted in Turfmaster repeatedly being treated more favourably as a matter of course.'<sup>44</sup> The CCC noted that the Manager's conduct, although it amounted to misconduct, did not amount to intentional misconduct, stating 'there is no evidence of any corrupt motivation on [the Manger's] part, nor that he was deliberately subverting the City's processes so as to obtain a benefit for himself or Turfmaster.'<sup>45</sup> Instead the investigation revealed that the misconduct was due to what the Manager himself termed 'lazy' and 'sloppy'<sup>46</sup> work practice since engaging Turfmaster was the easiest and most convenient option for the Manager as he was used to

dealing with Turfmaster, as well as the City's failure to implement systems to ensure staff knew the correct procedures and policies.<sup>47</sup> The investigation revealed that the Manager had not been provided with any formal training regarding procedures for tendering and purchasing nor had he come to the City with a background in managing or procurement procedures.<sup>48</sup> Criticism was made of the City's failures in this regard; however, it was the CCC's opinion that deficiencies on the part of the City did not exclude an opinion of misconduct against the Manager.<sup>49</sup> The CCC stated:

The Commission accepts this was the result of poor work practices and record keeping, combined with [the Manager's] careless disregard of his managerial responsibilities. As Manager of Parks and Gardens he was negligent in incurring financial liabilities for the City, without ensuring they were properly incurred and appropriate procedures were followed.<sup>50</sup>

Notably, after the commencement of the CCC's investigation, but prior to the completion of the investigation report, the City of Bayswater made a number of improvements to its administrative procedures which are acknowledged in the CCC's final investigation report.<sup>51</sup>

Although none of the examples canvassed in this section involved what this paper has termed as intentional misconduct, the situations in which this conduct occurred could equally give rise to intentional misconduct risks. Characteristically, a system which is complex and therefore difficult to understand and a system which is not overseen by an external or internal body, such as the Department of Local Government or senior officers of the local government itself, means that those intending to commit misconduct can more easily hide their actions. Although progress has been made in relation to oversight of council members by an external body (the Local Government Standards Panel is discussed below), there is still no formal internal oversight required of the administrative body of each local government.<sup>52</sup> Those seeking to engage in intentional misconduct are safe in the knowledge that their misconduct will likely not be detected because it is possible that no one is looking for it or no one is likely to understand why their conduct amounts to misconduct.

In conclusion the hydra beast nature of the structure of local government coupled with a failure to understand the complex, but sometimes silent, legislative and administrative scheme governing local government leads to significant misconduct risks. In the City of Bayswater it appeared that the failure of council members and local government employees to fully understand their obligations to declare gifts received and to disclose relevant interests was the reason these public officers failed to meet the complicated legislative requirement. Similarly, the City's Manager Parks and Garden's consistent failure to comply with the City's Purchasing Policy was due to a lack of understanding of the policy, but also in this case a lack of diligence and care on his part in determining what his obligations were and to make an effort to comply with them.

#### **4. MONITORING LOCAL GOVERNMENT MISCONDUCT – THE LOCAL GOVERNMENT STANDARDS PANEL, THE CORRUPTION AND CRIME COMMISSION AND PROBLEMS FACED**

The mechanisms for controlling government action have been evolving within Australia since the reception of English law in 1788. Some of the more recent developments have been the establishment of Western Australia's current anti-corruption,<sup>53</sup> the Corruption and Crime Commission (the CCC), via the CCC Act<sup>54</sup> and the establishment of the Local Government Standards Panel via amendments to the *Local Government Act*.<sup>55</sup> Both of these bodies and their effectiveness in monitoring misconduct matters will be discussed in this section and it will be argued that the hydra beast nature of local government heightens the difficulty of these bodies to effectively carry out their functions.

The Local Government Standards Panel was introduced into the local government administrative framework by amendment<sup>56</sup> to the *Local Government Act 1995*. The Standards Panel performs a key

role in the administration of a new regulatory framework of local government. The purpose of this new framework, as described in the explanatory memorandum to the amending Act,<sup>57</sup> is to 'provide a disciplinary framework to deal with individual misconduct by local government council members'.<sup>58</sup> Prior to these amendments the only way in which individual local government council members could be disciplined was to be prosecuted for the limited number of offences prescribed in the *Local Government Act*. Not only is the Standards Panel another hydra beast head of local government, but this new disciplinary framework introduces further hydra heads in the form of a 'complaints officer' for each local government, the State Administrative Tribunal (SAT) and the Department of Local Government Chief Executive Officer (Departmental CEO).<sup>59</sup>

The provisions regulating the operation and role of the Standards Panel and disciplinary framework are found in Part 5, Div 9 of the *Local Government Act*. This part of the Act provides that regulations may prescribe Rules of Conduct which council members are required to observe.<sup>60</sup> The new provisions create a framework for the making of complaints against council members regarding their conduct, the determination of these complaints and the imposition of any relevant penalties. Allegations regarding the conduct of council members take one of three of the following forms:

- Minor breach – This is a contravention of a Rule of Conduct or local law which prescribes that a contravention amounts to a minor breach.<sup>61</sup> Allegations of a minor breach must be made in writing and in the prescribed form<sup>62</sup> and can be initiated by any person<sup>63</sup> or the Complaints Officer of the local government of which the subject council member belongs.<sup>64</sup> These complaints must then be provided to the Standards Panel<sup>65</sup> to hear and determine in accordance with the relevant procedures.<sup>66</sup> Where a minor breach is established against a council member the Standards Panel may order that the council member be publicly censured, apologise publicly and/or undertake training.<sup>67</sup>
- Reoccurring breach – This is a minor breach which has occurred on two or more occasions.<sup>68</sup> When the Standards Panel receives an allegation of a minor breach that if established would amount to a reoccurring breach, the complaint must be referred to the Departmental CEO to determine whether to refer the complaint to the SAT.<sup>69</sup> The punishment for a finding of a reoccurring breach is the same as those available for a serious breach, as outlined below.<sup>70</sup>
- Serious breach – This occurs when a council member has committed an offence under a written law (other than a local law) which requires the offender to be a council member.<sup>71</sup> If a Complaints Officer receives an allegation that appears to reveal a serious breach then the Complaints Officer is required to send the complaint to the Departmental CEO and not the Standards Panel.<sup>72</sup> The Departmental CEO must then determine whether it is appropriate to refer the complaint to the SAT for determination.<sup>73</sup> Should an allegation of a serious breach be received by the SAT then the SAT can apply a range of punishments if a council member is found to have committed a serious breach.<sup>74</sup> These punishments include an order that the council member be publicly censured, apologise, undertake training and/or be suspended or disqualified from holding office as a council member.<sup>75</sup>

The new amendments creating the Standards Panel and Rules of Conduct are certainly steps in the right direction in terms of managing matters involving misconduct. Prior to the introduction of these amendments there was very little the Department of Local Government could do when suspect conduct on the part of a council member was detected. For example, in the City of Cockburn investigation the CCC stated in its 'Opinions and Recommendations' chapter:

Despite the fact that in the Commission's opinion Mr Lee engaged in misconduct on five occasions, the Commission makes no recommendation that DLGRD give consideration to the taking of disciplinary action against Mr Lee. This is because prior to 21 August 2007 there was no legislative mechanism for disciplinary action against an individual council member. The Commission notes that recent amendments to the *Local Government Act 1995* and the *Local Government (Rules of Conduct) Regulations 2007*, which have been operative since 21 August 2007, provide a mechanism to take disciplinary action against individual council members where they do not comply with Rules of Conduct made pursuant to section 5.104 of the *Local Government Act 1995*.<sup>76</sup>

The creation of the Standards Panel and Rules of Conduct have led to much more effective ways in dealing with inappropriate conduct on the part of council members. The methods outlined in the new amendments are not as onerous as having to establish the elements of an offence against a council member, and so can therefore deal with conduct that is less serious than an offence but serious enough to warrant some sort of action against the council member by an oversight body. However, although these new amendments create useful ways of dealing with the undesirable conduct of council members, it has still created some difficulties in the monitoring of local government misconduct matters for the CCC.

The way the CCC operates will now be examined as well as the way that it interacts with the Local Government Standards Panel to monitor local government misconduct matters. One of the main purposes of the CCC is 'to improve continuously the integrity of, and to reduce the incidence of misconduct in, the public sector'.<sup>77</sup> One of the ways the CCC carries out this purpose is through its misconduct function, outlined in s 18 of the CCC Act, which allows the CCC to, amongst other things, receive and initiate allegations of misconduct, investigate or take other action in relation to misconduct, monitor the way in which agencies handle misconduct allegations and make recommendations on the outcomes of investigations.<sup>78</sup>

Allegations of misconduct are generally received by the CCC in two main ways. The first is via s 25 which *allows* any person to report a reasonable suspicion of misconduct to the CCC. In the context of a local government misconduct matter, s 25 allows for a wide array of potential complainants. These complainants could typically include employees of the local government, council members and residents of the local government municipality. None of these people have an obligation to report suspected misconduct to the CCC, but can do so if they wish.

The second way that allegations of misconduct are generally received by the CCC is via s 28. This section *requires* certain persons to notify the CCC of a reasonable suspicion of misconduct. In particular, 'the principal officer of a notifying authority'<sup>79</sup> is obliged to make notifications of a reasonable suspicion of misconduct pursuant to s 28.<sup>80</sup> Section 3 defines the terms 'notifying authority' and 'principal officer of a notifying authority' as follows:

**notifying authority** means —

- (a) a department or organisation as defined in the *Public Sector Management Act 1994*;
- (b) an entity in respect of which a declaration is in effect under section 56(2) of the *Financial Management Act 2006*;
- (c) a statutory authority as defined in the *Financial Management Act 2006*;
- (d) an authority to which the *Parliamentary Commissioner Act 1971* applies;
- (e) a person or body, or holder of an office —
  - (i) under whom or which a public officer holds office or by whom or which a public officer is employed; or
  - (ii) who or which is prescribed for the purposes of this subparagraph,

but does not include the President of the Legislative Council or the Speaker of the Legislative Assembly;

**principal officer of a notifying authority** means —

- (a) in the case of a department or organisation as defined in the *Public Sector Management Act 1994*, the chief executive officer or chief employee of that department or organisation;
- (b) in the case of a notifying authority that is an entity in respect of which a declaration is in effect under section 56(2) of the *Financial Management Act 2006*, the holder of the office that is the subject of that declaration;
- (c) in the case of a contractor and any subcontractor under the relevant contract, the holder of the office specified in the relevant contract to be the principal officer for the purposes of this Act; and
- (d) in any other case —
  - (i) the person specified in the regulations as the principal officer of that notifying authority or a notifying authority of that class; or

- (ii) if no person is specified under subparagraph (i), the person who is the head of that notifying authority, its most senior officer or the person normally entitled to preside at its meetings;

These definitions mean that, arguably, at least three local government hydra heads are required to make notifications to the CCC of a reasonable suspicion of misconduct: the Departmental CEO, the CEO of the local government and the principal officer of the Standards Panel. The Departmental CEO is a principal officer of a notifying authority because they are the CEO of 'a department or organisation as defined in the *Public Sector Management Act 1994*'<sup>81</sup> and a CEO falls within the para (a) definition of 'principal officer of a notifying authority'. A local government and, arguably, the Local Government Standards Panel, are 'an authority to which the *Parliamentary Commissioner Act 1971*' applies to use the para (d) definition of 'notifying authority'.<sup>82</sup> It follows that since local governments are headed by a CEO, as discussed above, the CEO would be the 'principal officer'<sup>83</sup> of the local government, a 'notifying authority'.<sup>84</sup>

Determining the identity of the principal officer of the Standards Panel is more difficult. An examination of the s 3 definition of 'principal officer of a notifying authority' reveals that the principal officer cannot be determined by paras (a) to (c) of this definition as the Standards Panel is neither, respectively, a department or organisation; a s 56(2) entity pursuant to the *Financial Management Act 2006*; or a contractor. Therefore, para (d) must be turned to in order to determine who the principal officer of the Standards Panel is. Paragraph (d)(i) is of no assistance as there are no regulations specifying the principal officer of the Local Government Standards Panel. Therefore, para (d)(ii) provides that the principal officer, for the purposes of the CCC Act, is 'the person who is the head of that notifying authority, its most senior officer or the person normally entitled to preside at its meetings'. Consultation of the *Local Government Act* reveals the following about the constitution of the Standards Panel:

- A standards panel consists of 3 members appointed by the Minister of whom —
  - (a) one person is to be an officer of the Department;
  - (b) one person is to be a person who has experience as a member of a council; and
  - (c) one person is to be a person having relevant legal knowledge.<sup>85</sup>

There is no provision in the *Local Government Act*, nor in any subsidiary legislation, as to who is to head the panel. Although, cl 8(1) of Sch 5.1 provides that '[t]he member appointed under clause 2(a) is to preside at all meetings of the standards panel at which the member is present.' Therefore, according to the statement in para (d)(ii) that the principal officer may be 'the person normally entitled to preside at its meetings', this would mean that the panel member who has experience as a member of a council, the Sch 5.1 cl 2(b) member, would be the principal officer of the standards panel in accordance with the CCC Act. However, interestingly, in the 2008/2009 and 2009/2010 annual reports produced by the Standards Panel it states that the member who is the officer of the Department, the Sch 5.1 cl 2(a) member, is the 'Presiding Member' of the panel suggesting that this member is the principal officer of the Standards Panel.<sup>86</sup> In any event, whoever is the principal officer of the Standards Panel they are required to report a reasonable suspicion of misconduct to the CCC pursuant to s 28 of the CCC Act.

Ultimately the effect of requiring so many parties to report a reasonable suspicion of misconduct to the CCC means that potentially an allegation could be received by the CCC in accordance with s 28 from three different sources: the Departmental CEO, the CEO of the local government and the principal officer of the Standards Panel. Add to this any other person, such as another council member, local government employee or any member of public, may make an allegation to the CCC pursuant to s 25 about this same conduct then this means that the CCC may receive four or more notifications about the same conduct. Although, it is of course better to receive four notifications about suspected misconduct than none, it does create an administrative difficulty within the CCC itself. It means that these notifications may not be recognised as being notifications about the same conduct and many be assessed on more than one occasion. Alternatively, even if they are recognised

as being the same notification it means that four complainants must be communicated with. This of course places stresses on the resources of the CCC and potentially diverts resources away from more productive activities. A real example of this occurring can be seen in the City of Bayswater investigation. The final investigation report into the conduct within the City of Bayswater was published on 13 November 2009 despite the problems within the City first coming to the attention of the CCC's predecessor, the Anti-Corruption Commission, in July 2002. The matter was referred to the CCC in May 2004<sup>87</sup> and although the CCC's investigation and other issues hindering the completion of the CCC's investigation report were largely resolved by mid-2007, the CCC stated that:

By late 2007 circumstances had changed [again]. A new Commissioner had been appointed in June of that year. The Commission was bringing to conclusion a series of substantial investigations (some of which were still ongoing), a number of which had involved high profile public hearings. There were potentially some 12 or more Parliamentary reports which had to be written and tabled in respect of them, in addition to reports on investigations and hearings conducted by the new Commissioner. Also, significant Commission resources were dedicated to the conduct of the Commission inquiry into alleged misconduct by police officers in connection with the investigation of the murder of Mrs Pamela Lawrence (the report on which was tabled in Parliament on 7 October 2008).

Notwithstanding the importance with which the Commission regarded its investigation into public officers at the City of Bayswater, by late 2007 the Commission was compelled to accord other investigations a higher priority.<sup>88</sup>

Factors such as the restraints on resources faced by administrators are real and important considerations to take into account when determining the best way in which to manage misconduct risks. If there is an inability of such a monitoring body to quickly respond to allegations of misconduct then this means that, often, the problems and issues which have led to the creation of these misconduct risks will not be quickly resolved and misconduct risks will continue to exist in the public sector.<sup>89</sup>

## 5. CONCLUSION

This paper has examined the hydra heads of local government and has argued that these hydra heads enliven the misconduct risks faced in local government administration. The hydra heads of local government include the 140 local governments, the CEO and employees of these local governments as well as their elected council members. It is also comprised of the Department of Local Government, the Local Government Standards Panel, as well as the complex and extensive legislation which govern the way in which local government operates in Western Australia. These hydra heads have created significant misconduct risks within Western Australian local government.

Central to this paper's examination of the existence of misconduct risks in local government is the distinction between the types of misconduct: intentional misconduct and unintentional misconduct. It was argued that misconduct as per the *Corruption and Crime Commission Act* definition in s 4 can be committed either with an intent to act with a lack of integrity, intentional misconduct, or without an intent to act with a lack of integrity, unintentional misconduct. This distinction is key to understanding why misconduct risks are more prevalent in a hydra beast system of local government. In a hydra beast system those wishing to commit intentional misconduct can more easily escape detection since their wrongful deeds will be less likely to be recognised in a complex system of administration. Similarly, in a complex system of administration those multiple hydra heads are more likely to commit unintentional misconduct due to an inability to understand the proper extent and operation of their powers and hence are more likely to exercise their powers incorrectly or fail to comply with relevant obligations.

Two bodies responsible for controlling and monitoring local government action were examined: the newly created Local Government Standards Panel and the Corruption and Crime Commission. Although the creation of the Standards Panel is a positive step forward in providing a mechanism for

overseeing the conduct of council members when previously there was no such mechanism, it has also created some practical difficulties for the CCC. In particular it means that the number of allegations received by the CCC are increased because both the local government CEO and the Standards Panel principal officer are required to notify the CCC of the same allegation of a reasonable suspicion of misconduct. This, along with notifications of unintentional misconduct due to a lack of understanding, places significant constraints on the resources of the CCC. This thereby negatively affects the effectiveness of the CCC. Delayed assessments, reviews and investigations on the part of the CCC, such as was the case in the investigation into the City of Bayswater, means that misconduct practices may not be promptly recognised and eliminated.

In conclusion, this paper has established that the hydra beast nature of local government in Western Australia makes misconduct risks more prevalent than they need to be. This then in turn affects every Western Australian as every Western Australian is affected by the operation of local government. Simplification of this hydra structure is required. This would largely eliminate the ability of intentional misconduct to be hidden and would largely eliminate misunderstanding about obligations and powers and therefore this would minimise unintentional misconduct. Otherwise, at the very least, the hydra heads need to receive effective education and training as to how to exercise their powers properly and fulfil their obligations. Until this occurs the hydra beast of local government will not be tamed.

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<sup>1</sup> The *Local Government Act 1995* (WA) (the Act).

<sup>2</sup> Subordinate legislation at a state level includes: *Local Government (Administration) Regulations 1996* (WA); *Local Government Audit Regulations 1996* (WA); *Local Government (Constitution) Regulations 1998* (WA); *Local Government (Financial Management) Regulations 1996* (WA); *Local Government (Functions and General) Regulations 1996* (WA); *Local Government (Rules of Conduct) Regulations 2007* (WA); *Local Government (Uniform Local Provisions) Regulations 1996* (WA). Of course the *Local Government Act 1995* (WA) gives a local government both 'legislative and executive functions' per s 3.4 and s 3.5(1) goes on to provide that '[a] local government may make local laws under this Act prescribing all matters that are required or permitted to be prescribed by a local law, or are necessary or convenient to be so prescribed, for it to perform any of its functions under this Act.'

<sup>3</sup> Currently the relevant Minister is the Hon G M (John) Castrilli MLA, Minister for Local Government; Heritage; Citizenship and Multicultural Interests and the department assisting the Minister is the Department of Local Government.

<sup>4</sup> The term 'council member' is the term used by Part 5, Div 9 of the *Local Government Act 1995* (WA) in the context of complaints about councillors and mayors/presidents and will be used throughout this paper to refer collectively to local government councillors and local government mayors and presidents. Although this term is not expressly defined in the Act it is arguable that the phrase can be regarded as the composite of the terms 'council' and 'member' which are both defined in s 1.4 of the Act:

**1.4. Terms used**

In this Act, unless the contrary intention appears — ...

**council** means the council of a local government; ...

**member**, in relation to the council of a local government, means —

- (a) an elector mayor or president of the local government; or
- (b) a councillor on the council (including a councillor who holds another office under section 2.17(2)(a) or (b) as well as the office of councillor); ...

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**councillor** means a person who holds the office of councillor on a council (including a person who holds another office under section 2.17(2)(a) or (b) as well as the office of councillor); ...

**elector mayor or president** means a mayor or president elected by electors of a district;

...

<sup>5</sup> *Local Government Act 1995* (WA) Part 5, Div 9, in particular ss 5.112, 5.113, 5.116, 5.117, 5.118 and 5.119.

<sup>6</sup> Western Australia, Royal Commission into Commercial Activities of Government and Other Matters, *Report of the Royal Commission into Commercial Activities of Government and Other Matters: Part II* (1992) [3.1.5] (WA Inc Royal Commission Report).

<sup>7</sup> Corruption and Crime Commission, *Frequently Asked Questions*, Corruption and Crime Commission <<http://www.ccc.wa.gov.au/AboutCCC/FAQs/Pages/default.aspx>>. For a more detailed explanation of the s 4 definition of misconduct see Corruption and Crime Commission, *Report on the Investigation into Allegations of Misconduct by Councillors or Employees of the City of Bayswater* (13 November 2009).

<sup>8</sup> Corruption and Crime Commission, *Report on the Investigation of Alleged Misconduct Concerning Officers of the Department of Fisheries* (30 October 2008) [163].

<sup>9</sup> *Criminal Code Act Compilation Act 1913* (WA) s 280 (The Criminal Code).

<sup>10</sup> The Criminal Code s 297.

<sup>11</sup> The Criminal Code s 409.

<sup>12</sup> The Criminal Code s 378.

<sup>13</sup> The Criminal Code s 83.

<sup>14</sup> For those offences which do not contain an intent element these are offences that the legislature has regarded as particularly serious offences and hence the provision in s 4(c) essentially deems them to be serious misconduct.

<sup>15</sup> Corruption and Crime Commission, *Report on the Investigation into Allegations of Misconduct by Councillors or Employees of the City of Bayswater* (13 November 2009) [282].

<sup>16</sup> Corruption and Crime Commission, *Report on the Investigation into Allegations of Misconduct by Councillors or Employees of the City of Bayswater* (13 November 2009) [283].

<sup>17</sup> Corruption and Crime Commission, *Report on the Investigation into Allegations of Misconduct Concerning Mr Stephen Lee, Mayor of the City of Cockburn* (26 September 2008).

<sup>18</sup> Corruption and Crime Commission, *Report on the Investigation into Allegations of Misconduct Concerning Mr Stephen Lee, Mayor of the City of Cockburn* (26 September 2008) [37].

<sup>19</sup> Although the CCC did opine that Mr Lee's failure to declare Australand's gift was misconduct pursuant to s 4(d)(i) and (ii) because it 'constituted conduct that could adversely affect the honest or impartial performance of his functions as Mayor of the City of Cockburn because it assisted in concealing the degree of a potential conflict of interest, and constituted or involved the performance of his functions in a manner that was neither honest nor impartial': Corruption and Crime Commission, *Report on the Investigation into Allegations of Misconduct Concerning Mr Stephen Lee, Mayor of the City of Cockburn* (26 September 2008) [441]. That is, the CCC formed the opinion that Mr Lee did not act honestly and did not act in an impartial way and according to the CCC's definition of 'honestly' as outlined in its *Bayswater Report* (discussed above) a lack of honestly does import a deliberate or deceitful state of mind.

<sup>20</sup> Corruption and Crime Commission, *Report on the Investigation into Allegations of Misconduct by Councillors or Employees of the City of Bayswater* (13 November 2009) [43].

<sup>21</sup> Corruption and Crime Commission, *Report on the Investigation into Allegations of Misconduct by Councillors or Employees of the City of Bayswater* (13 November 2009) [43].

<sup>22</sup> Corruption and Crime Commission, *Report on the Investigation into Allegations of Misconduct by Councillors or Employees of the City of Bayswater* (13 November 2009) [42].

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- <sup>23</sup> For example, *Local Government Act 1995* (WA) s 5.89 'Offence to give false or misleading information', s 5.90 'Offence to publish information in certain cases' and s 5.93 'Improper use of information'.
- <sup>24</sup> The grounds for termination are outlined in s 86(3)(b) of the *Public Sector Management Act 1994* (WA) while the definition of misconduct is contained in s 80 of the same Act. For a full summary on the way in which the disciplinary offence provisions under the PSMA apply see Corruption and Crime Commission, *Report on the Investigation into Allegations of Misconduct by Councillors or Employees of the City of Bayswater* (13 November 2009) [22]-[36].
- <sup>25</sup> *Cox v Corruption and Crime Commission* [2008] WASC 199.
- <sup>26</sup> *Cox v Corruption and Crime Commission* [2008] WASC 199, [64] (Martin CJ) (emphasis added); see also [118] (Steytler J) and [142] (McLure JA, generally agreeing with Martin CJ and Steytler J).
- <sup>27</sup> Corruption and Crime Commission, *Report on the Investigation into Allegations of Misconduct Concerning Mr Stephen Lee, Mayor of the City of Cockburn* (26 September 2008) [37].
- <sup>28</sup> *Local Government Act 1995* (WA) s 3.1(1).
- <sup>29</sup> *Local Government Act 1995* (WA) Part 3; Western Australia Local Government Association, WALGA Website, *About Local Government*, <[http://www.walga.asn.au/about\\_lg](http://www.walga.asn.au/about_lg)>.
- <sup>30</sup> *Local Government Act 1995* (WA) ss 2.6 and 2.7.
- <sup>31</sup> *Local Government Act 1995* (WA) s 2.17.
- <sup>32</sup> Corruption and Crime Commission, *Report on the Investigation into Allegations of Misconduct by Councillors or Employees of the City of Bayswater* (13 November 2009) [43].
- <sup>33</sup> Corruption and Crime Commission, *Report on the Investigation into Allegations of Misconduct by Councillors or Employees of the City of Bayswater* (13 November 2009) [39].
- <sup>34</sup> Corruption and Crime Commission, *Report on the Investigation into Allegations of Misconduct by Councillors or Employees of the City of Bayswater* (13 November 2009) [44].
- <sup>35</sup> *Local Government Act 1995* (WA) s 2.19.
- <sup>36</sup> *Local Government Act 1995* (WA) s 2.19.
- <sup>37</sup> It should be noted that the Department of Local Government does provide training to newly elected council members; however, it is not within the scope of this paper to analyse the effectiveness of this training or its adequacy. The point is, however, that due to the lack of qualifications required by candidates ensuring proper training is provided to them is a very important step in helping to prevent unintentional misconduct on the part of council members.
- <sup>38</sup> *Local Government Act 1995* (WA) Pt 5, Div 4; see also *Local Government (Administration) Regulations 1996* (WA).
- <sup>39</sup> *Local Government Act 1995* (WA) Pt 5, Div 4, in particular ss 5.36 and 5.37; see also *Local Government (Administration) Regulations 1996* (WA).
- <sup>40</sup> Section 5.36 of the Act allows for the local council to appoint a CEO who is suitably qualified for the positions. Section 5.41 then, in summary, provides that the functions of the CEO are to advise the local council in relation to functions of the local government; provide information to the local council to enable decisions to be made; cause local council decisions to be implemented; manage the day-to-day operations of the local government; liaise with the mayor/president regarding the performance of the local government's functions; speak on behalf of the local government with the consent of the mayor/president; ensure proper record management; and perform other such functions as delegated by the local council. So essentially it is the CEO who is responsible for the administration of the local government; that is, to ensure that the local council has the ability to make fully informed decisions and to ensure that these decisions are carried into effect. Sections 5.41(1)(b) and 5.36 also provides that it is the function of the CEO to employ, manage and supervise all other employees and that these employees should be engaged if suitably qualified. Basic principles of employment based on merit and equity apply to all engagements as provide in s 5.40. Section 5.37 allows for the designation of employees as senior employees. The engagement of senior employees must be in accordance with approval by the local council upon the recommendation of the CEO.

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- <sup>41</sup> Notably the CCC also investigated other misconduct allegations arising from the award of these tenders and the management of the subsequent contracts. In particular the conduct of the City of Bayswater’s Director of Technical Services was examined and the CCC formed the opinion that his conduct amounted to misconduct pursuant to s 4(d)(i) and (vi). Also, the conduct of the City’s Deputy City Engineer was investigated and the CCC’s opined he had not engaged in misconduct but had instead made a number of honest mistakes. Corruption and Crime Commission, *Report on the Investigation into Allegations of Misconduct by Councillors or Employees of the City of Bayswater* (13 November 2009) [45]-[79], in particular [65] and [76]-[78].
- <sup>42</sup> Corruption and Crime Commission, *Report on the Investigation into Allegations of Misconduct by Councillors or Employees of the City of Bayswater* (13 November 2009) [47].
- <sup>43</sup> Corruption and Crime Commission, *Report on the Investigation into Allegations of Misconduct by Councillors or Employees of the City of Bayswater* (13 November 2009) [265].
- <sup>44</sup> Corruption and Crime Commission, *Report on the Investigation into Allegations of Misconduct by Councillors or Employees of the City of Bayswater* (13 November 2009) [86].
- <sup>45</sup> Corruption and Crime Commission, *Report on the Investigation into Allegations of Misconduct by Councillors or Employees of the City of Bayswater* (13 November 2009) [85].
- <sup>46</sup> Corruption and Crime Commission, *Report on the Investigation into Allegations of Misconduct by Councillors or Employees of the City of Bayswater* (13 November 2009) [275].
- <sup>47</sup> Corruption and Crime Commission, *Report on the Investigation into Allegations of Misconduct by Councillors or Employees of the City of Bayswater* (13 November 2009) [277].
- <sup>48</sup> Corruption and Crime Commission, *Report on the Investigation into Allegations of Misconduct by Councillors or Employees of the City of Bayswater* (13 November 2009) [276]-[275].
- <sup>49</sup> Corruption and Crime Commission, *Report on the Investigation into Allegations of Misconduct by Councillors or Employees of the City of Bayswater* (13 November 2009) [277].
- <sup>50</sup> Corruption and Crime Commission, *Report on the Investigation into Allegations of Misconduct by Councillors or Employees of the City of Bayswater* (13 November 2009) [85].
- <sup>51</sup> Corruption and Crime Commission, *Report on the Investigation into Allegations of Misconduct by Councillors or Employees of the City of Bayswater* (13 November 2009) [91]-[105].
- <sup>52</sup> That is not to say that local governments do not have effective internal oversight, see for example the City of Bayswater (Corruption and Crime Commission, *Report on the Investigation into Allegations of Misconduct by Councillors or Employees of the City of Bayswater* (13 November 2009) [91]-[105]) it is just that such oversight is not *required*.
- <sup>53</sup> For a brief history of the development of this anti-corruption agency and the downfall of its predecessors see, Commissioner Kevin Hammond, ‘The Corruption and Crime Commission: “Where Is It At”?’ (Speech delivered at the Symposium on Human Rights and the Protection of Innocence Organised by the Institute for Advanced Studies University of Western Australia, Perth, 26 March 2004) (<<http://www.ccc.wa.gov.au/Publications/Reports/Pages/Speeches.aspx>>).
- <sup>54</sup> *Corruption and Crime Commission Act 2003* (WA), commencement date 1 January 2004.
- <sup>55</sup> *Local Government (Official Conduct) Amendment Act 2007* (WA), commencement date 21 October 2007.
- <sup>56</sup> *Local Government (Official Conduct) Amendment Act 2007* (WA).
- <sup>57</sup> *Local Government (Official Conduct) Amendment Bill 2005 Explanatory Memorandum*.
- <sup>58</sup> *Local Government (Official Conduct) Amendment Bill 2005 Explanatory Memorandum*, 1.
- <sup>59</sup> It should be noted that the operation of the Standards Panel is currently undergoing a review by the Department of Local Government as requested by the Minister for Local Government. The terms of reference for the Review include (Department of Local Government, *Review of the Local Government Standards: Terms of Reference* (8 February 2011) <<http://dlg.wa.gov.au/Content/Legislation/UnderReview/StandardsPanel/Default.aspx>>):  
‘To undertake a review of the operation of the Local Government Standards Panel and its supporting legislation to:

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1. Assess whether the original objectives of the disciplinary framework have been achieved.
  2. Examine the effectiveness and efficiency, including timeliness, of the complaints making and resolution processes and operation of the Panel in undertaking its statutory functions.
  3. Identify whether the scope of matters referred to the Panel are appropriate and the risks and benefits of expanding or reducing its scope.
  4. Identify and examine existing and additional commentary made about the operation of the complaints making and resolution processes and the Panel.
  5. Provide options and recommendations on alternative mechanisms to a standards panel being the body responsible for adjudicating on alleged breaches of the rules of conduct and certain local laws.
  6. Provide options and recommendations to improve the operation of the complaints making and resolution processes and the Panel. Where relevant, options and recommendations are to include an estimate of the resource implications if implemented and which organisations would or could contribute to any additional costs.’

As a result of this review there could be impending amendments to the way in which the Standards Panel operates. However, below is an outline into the way in which the Standards Panel currently operates and the potential problems associated with this operation.

<sup>60</sup> *Local Government Act 1995* (WA) s 5.104. The current Rules of Conduct can be found in the *Local Government (Rules of Conduct) Regulations 2007* (WA). Section 5.103 also requires every local government to prepare or adopt a code of conduct to be observed by council members, committee members and employees.

<sup>61</sup> *Local Government Act 1995* (WA) s 5.105(1).

<sup>62</sup> *Local Government Act 1995* (WA) s 5.107(2).

<sup>63</sup> *Local Government Act 1995* (WA) s 5.107(1).

<sup>64</sup> *Local Government Act 1995* (WA) s 5.109.

<sup>65</sup> *Local Government Act 1995* (WA) ss 5.107(3)(c), 5.108(2)(c) and 5.109(1)(c).

<sup>66</sup> *Local Government Act 1995* (WA) s 5.110.

<sup>67</sup> *Local Government Act 1995* (WA) s 5.110(6).

<sup>68</sup> *Local Government Act 1995* (WA) s 5.105(2).

<sup>69</sup> *Local Government Act 1995* (WA) ss 5.111 and 5.112.

<sup>70</sup> *Local Government Act 1995* (WA) ss 5.113 and 5.117.

<sup>71</sup> *Local Government Act 1995* (WA) s 5.105(3).

<sup>72</sup> *Local Government Act 1995* (WA) s 5.115.

<sup>73</sup> *Local Government Act 1995* (WA) s 5.116.

<sup>74</sup> *Local Government Act 1995* (WA) s 5.117.

<sup>75</sup> *Local Government Act 1995* (WA) s 5.117.

<sup>76</sup> *Report on the Investigation into Allegations of Misconduct Concerning Mr Stephen Lee, Mayor of the City of Cockburn* (26 September 2008) [446].

<sup>77</sup> *Corruption and Crime Commission Act 2003* (WA) s 7A(b).

<sup>78</sup> Please note this is not a complete list of the misconduct functions and powers outlined by s 18.

<sup>79</sup> *Corruption and Crime Commission Act 2003* (WA) s 28(1)(c)

<sup>80</sup> Section 28(1) also requires a number of other officers, not strictly relevant in a local government context, to make notifications of a reasonable suspicion of misconduct. These include the Parliamentary Commissioner (that is, the WA Ombudsman), Inspector of Custodial Services and officer who constitutes a notifying authority (pursuant to s 28(1)(a), (b) and (d) respectively).

<sup>81</sup> To quote from the s 3 definition of ‘principal officer of a notifying authority’, para (a), in the CCC Act. Section 35 of the PSMA defines ‘department’ and would include the Department of Local Government.

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- <sup>82</sup> Regarding local governments being a notifying authority by virtue of being ‘an authority to which the *Parliamentary Commissioner Act 1971* applies’, s 4A(1)(a) of the *Parliamentary Commissioner Act* states that an ‘authority’ includes ‘a local government or regional local government’. Regarding the Local Government Standards Panel being a notifying authority by virtue of being ‘an authority to which the *Parliamentary Commissioner Act 1971* applies’, s 4A(1)(c) of the *Parliamentary Commissioner Act* states that an ‘authority’ includes ‘a body ... (ii) established by ... a Minister’ and sub-s (2) then goes on to state that ‘[i]n subsection (1)(c) ... body includes ... [a] panel’. The Local Government Standards Panel is arguably a body, specifically a panel, established by the Minister for Local Government pursuant to s 5.122(1) of the *Local Government Act 1995* (WA).
- <sup>83</sup> Pursuant to para (a) of the s 3 definition of ‘principal officer of a notifying authority’.
- <sup>84</sup> *Local Government Act 1995* (WA) Part 5, Div 4 describes the role of the CEO of the local government, in particular ss 5.36(1) and 5.41.
- <sup>85</sup> *Local Government Act 1995* (WA) Sch 5.1, cl 2.
- <sup>86</sup> Local Government Standards Panel, *Annual Report 2008/2009* (2009, Department of Local Government and Regional Development) 2-3; Local Government Standards Panel, *Annual Report 2009/2010* (Department of Local Government, 2010) 5.
- <sup>87</sup> Corruption and Crime Commission, *Report on the Investigation into Allegations of Misconduct by Councillors or Employees of the City of Bayswater* (13 November 2009) [1].
- <sup>88</sup> Corruption and Crime Commission, *Report on the Investigation into Allegations of Misconduct by Councillors or Employees of the City of Bayswater* (13 November 2009) [12]-[13].
- <sup>89</sup> However, in the case of the City of Bayswater the CCC was confident that despite the delay in the publication of the final investigation report the City had largely dealt with the causes of the misconduct and eliminated many misconduct risks: Corruption and Crime Commission, *Report on the Investigation into Allegations of Misconduct by Councillors or Employees of the City of Bayswater* (13 November 2009) [13].